

**DISTRICT OF COLUMBIA  
OFFICE OF EMPLOYEE APPEALS**

**NOTICE OF PUBLIC MEETING**

The District of Columbia Office of Employee Appeals will hold a meeting on July 13, 2023, at 9:00 a.m. The Board will meet remotely. Below is the agenda for the meeting.

Members of the public are welcome to observe the meeting. In order to attend the meeting, please visit: <https://dcnet.webex.com/dcnet/j.php?MTID=mfe296ca4947991195a2dc80795d34dc8>

Password: board (26274 from phones and video systems)

We recommend logging in ten (10) minutes before the meeting starts. In order to access Webex, laptop or desktop computer users must use Google Chrome, Firefox, or Microsoft Edge Browsers.

Smartphone/Tablets or iPad user must first go to the App Store, download the Webex App (Cisco Webex Meetings), enter the Access Code, and enter your name, email address, and click Join. It is recommended that a laptop or desktop computer be utilized for this platform.

Your computer, tablet, or smartphone's built-in speaker and microphone will be used in the virtual meeting unless you use a headset. Headsets provide better sound quality and privacy.

If you do not have access to the internet, please call-in toll number (US/Canada) 1-650-479-3208, Access code: 2301 139 4648.

Questions about the meeting may be directed to [wynter.clarke@dc.gov](mailto:wynter.clarke@dc.gov).

**Agenda**

D.C. OFFICE OF EMPLOYEE APPEALS ("OEA") BOARD MEETING

Thursday, July 13, 2023, at 9:00 a.m.

Location: Virtual Meeting via Webex

**I. Call to Order**

**II. Ascertainment of Quorum**

**III. Adoption of Agenda**

**IV. Minutes Reviewed from Previous Meeting**

**V. New Business**

**A. Public Comments on Petitions for Review**

**B. Summary of Cases**

- 1. Employee v. Department of Youth Rehabilitation Services, OEA Matter No. 1601-0017-23** – Employee worked as a Youth Development Representative with the D.C. Department of Youth Rehabilitation Services ("Agency"). On December 2, 2022, she received a Final Agency Decision suspending her for fourteen (14) days for violation of District Personnel Manual ("DPM") §§ 1605.4(a), 1607(a)(15), 1607.2(a)(16), 1605.4(d), and 1607.2(d)(1) – conduct prejudicial to the District: assaulting fighting, threatening, attempting to inflict or inflicting bodily harm while on District property or while on duty; use of abusive, offensive, unprofessional, distracting, or otherwise

unacceptable language, gestures, or other conduct; quarreling, creating a disturbance or disruption; or inappropriate horseplay; and failure or refusal to follow instructions: negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions. Employee was subsequently suspended without pay from December 5, 2022, until December 22, 2022.

On December 22, 2022, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”). She asserted that Agency’s adverse action was without merit because it lacked evidence to support its claim. Additionally, Employee contended that she received counseling immediately following her alleged misconduct and reasoned that the suspension action after counseling, constituted double jeopardy. She also argued that Agency did not appropriately apply the *Douglas* factors in response to the proposed discipline. Therefore, she requested back pay and asked that the adverse action be removed from her personnel file.

Agency filed an Answer to the Petition for Appeal on January 19, 2023. As it related to the conduct prejudicial to the District charges, Agency argued that Employee violated DPM § 1607.2 because she was unprofessional by verbally abusing a youth in the care and custody of Agency. Moreover, Agency opined that Employee lacked decorum and deference for her supervisor by using profanity. As for the failure or refusal to follow instructions charge, Agency alleged that pursuant to DPM § 1605.4(d), Employee failed to submit a Staff Incident Notification Form, which was required whenever a reportable incident occurred. Agency disagreed with Employee’s argument that its adverse action constituted double jeopardy. It explained that Agency’s immediate counseling with Employee following the June 15, 2022, incident did not amount to verbal counseling. Lastly, Agency contended that the penalty of a suspension was appropriate based on the Table of Illustrative Actions. Therefore, it requested that OEA uphold its suspension action.

Prior to issuing an Initial Decision, the OEA Administrative Judge (“AJ”) ordered both parties to submit prehearing statements by February 16, 2023. Additionally, both parties were required to appear for a prehearing conference on February 23, 2023. Agency filed a timely statement and appeared at the conference. However, Employee failed to provide a timely submission or appear on February 23, 2023. Consequently, the AJ issued an Order for Good Cause Statement, which directed Employee to respond no later than March 6, 2023. However, the AJ realized that the order was mailed to an incorrect address for Employee. Therefore, he issued a second Order for Good Cause Statement on March 17, 2023. The deadline for Employee to respond was April 7, 2023. According to the AJ, Employee failed to respond by the prescribed deadline.

On April 11, 2023, the AJ issued an Initial Decision. He held that in accordance with OEA Rule 621.3, an AJ has the authority to dismiss a matter for failure to prosecute when a party fails to appear for scheduled proceedings or fails to submit required documents. The AJ provided that Employee failed to appear for the prehearing conference; she did not submit a prehearing statement; and she did not file a response to the AJ’s Order for Statement of Good Cause. Therefore, he concluded that Employee did not exercise the diligence expected of an appellant pursuing an appeal before this Office. Consequently, her Petition for Appeal was dismissed.

Employee filed a Petition for Review on May 4, 2023. She argues that her union representative did timely comply with the AJ’s February 23, 2023, Order for Good Cause Statement. According to Employee, her representative emailed the AJ and Agency’s counsel both her response to the Order for Statement of Good Cause and a prehearing

statement. Employee's representative explains that she missed the prehearing conference because of a death in her family. She concedes that she made filing errors in prosecuting her appeal before OEA and provides that she is now apprised of OEA's requirements for non-electronic filings. However, Employee contends that Agency was not prejudiced by her filing error. Moreover, she argues that a dismissal of Employee's appeal based on a harmless error is an unduly harsh sanction, with an obvious prejudice to her ability to challenge her suspension. Finally, Employee provides that she did not file an additional response to the March 27, 2023, Order for Statement of Good Cause because she already submitted her response on March 6, 2023, in accordance with the original Good Cause Order. Therefore, Employee requests that the matter be remanded for adjudication on the merits.

On June 7, 2023, Agency filed its Opposition to Employee's Petition for Review. It asserts that Employee failed to appear before OEA and failed to file a prehearing statement or a response to the AJ's Order for Statement of Good Cause. It also argues that Employee was aware of the second Order for Statement of Good Cause but failed to submit a response. Agency contends that Employee was required to respond to the AJ's order by mail or hand delivery to avoid dismissal of her appeal. Thus, it believes that the AJ correctly dismissed Employee's appeal for failure to prosecute and asks that the Board deny her Petition for Review.

- 2. Employee v. D.C. Public Schools, OEA Matter No. 2401-0041-21** – Employee worked as a Custodian Supervisor with D.C. Public Schools. On June 4, 2021, Agency notified Employee that his position at Johnson Middle School was being abolished because of a Reduction-in-Force. The effective date of the RIF was July 11, 2021. Employee subsequently filed a Petition for Appeal with the Office of Employee Appeals on August 11, 2021. He argued that the RIF was inconsistent with the law because his name was not on the priority reemployment list. Therefore, Employee requested that Agency rehire him and place him in an equivalent position at any D.C. Public School.

In its Answer and Motion to Dismiss, Agency contended that the RIF was conducted in accordance with all applicable laws. Additionally, it clarified that Employee's appeal was moot because he was rehired as a Custodian at Takoma Elementary School in lieu of separation. As a result, it requested that Employee's appeal be dismissed.

An OEA Administrative Judge was assigned to the matter in November of 2021. The AJ held a prehearing conference on March 4, 2021, to assess the parties' arguments. After concluding that an evidentiary hearing was not warranted, the parties were ordered to submit briefs addressing whether Agency conducted the RIF in accordance with all applicable laws, rules, and regulations.

In its brief, Agency explained that the Chancellor of D.C. Public Schools had the authority to conduct the RIF and establish competitive areas – in this case Johnson Middle School – in accordance with D.C. Code § 1-624.02, § 1-624.03, and Section 5-E, Chapter 15 of the D.C. Municipal Regulations (“DCMR”). It provided that Employee was placed in a competitive group of two RW-5 Custodians at Johnson Middle School. As part of the RIF, the Custodians were rated in four areas: (1) relevant significant contributions, accomplishments, or performance as determined by their IMPACT performance/evaluation score; (2) office or school needs/other contributions or experience; (3) relevant supplemental professional experience; and (4) length of service. Agency went on to provide that after the school principal completed the RIF rubrics, Employee received an overall score of thirty-one, whereas the other Custodian, T.M., received a score of seventy. It noted that in accordance with D.C. Code § 1-624.02(a)(2),

Employee was provided with one round of lateral competition and that his position was eliminated after receiving the lower score within his competitive level.

Agency also contended that it complied with § 1-624.02(a)(3) of the Code because the RIF notice provided that Employee would be given priority for selection into any 2021-2022 D.C. Public Schools vacancies. Regarding job sharing, Agency submitted that it considered alternatives, including reduction of hours but ultimately concluded that those options were not viable because of the school's operation practices. Lastly, Agency stated that Employee was provided with written notice of the RIF as required by D.C. Code § 1-624.02(a)(5). Consequently, it opined that the RIF was conducted in accordance with the governing laws and statutes.

In his brief, Employee contended that the RIF was inconsistent with the law. He argued that Agency failed to prioritize his reemployment after working as a Custodian for more than five years. Employee also believed Agency conducted the RIF unfairly because his position at Johnson Middle School was subsequently filled after he was separated from service. According to Employee, Agency should have offered him an RW-5 Custodian Foreman position at Whittier Education Campus or another school instead of rehiring him at the RW-3 level. Therefore, he requested to be rehired to the appropriate job position and that Agency reimburse him for the difference in back pay and benefits lost as a result of the RIF.

The AJ issued an Initial Decision on February 16, 2023. First, he provided that the instant RIF was conducted pursuant to D.C. Code §§ 1-624.02 and 1-624.03; 5-E DCMR, Chapter 15; and the authority delegated to the Chancellor by Mayor's Order 2007-186 (Aug. 10, 2007). He explained that under the RIF, each school was identified as a separate competitive area and each position title was considered a competitive level. The AJ noted that pursuant to D.C. Code § 1-624.02, a RIF required a prescribed order of separation; one round of lateral competition limited to positions within the employee's competitive level; priority reemployment consideration for employees separated; consideration of job sharing and reduced hours; and appeal rights.

As it related to the lateral competition requirement, the AJ held that Agency complied with D.C. Code § 1-624.02(a)(2) after considering the four identified areas of evaluation, including relevant significant contributions, school needs, relevant supplemental professional experience, and length of service. He opined that Employee failed to provide any credible argument to prove that the competitive level and area in this matter were improperly constructed or scored. Since there were two RW-5 Custodians at Johnson Middle School, and Employee received the lower ranking of the two, the AJ held that Employee was properly provided with one round of lateral competition.

Regarding priority reemployment, the AJ held that Agency acted in accordance with D.C. Code § 1-624.02(a)(3) since Employee was rehired at a different school as an RW-3 Custodian. Because the rehire was part of Employee's job search as a result of the RIF, he concluded that Agency more than satisfied the priority reemployment rights afforded under the Code. Concerning the job sharing and reduced work hours requirement, the AJ considered the affidavit of former school principal, Dwan Jordan, who explained that neither job sharing, nor reduced work hours would correct the budgetary and programmatic concerns that necessitated the RIF. The AJ also relied on the holding in *Johnson v. D.C. Dept. of Health* in which the D.C. Court of Appeals held that when conducting a RIF, an agency may arguably be assumed to have found lesser measures such as job sharing and reduced hours as inadequate to address the need and that OEA's authority to look behind that agency judgment would be open to significant question. In

light of the Court's ruling, the AJ reasoned that it may be assumed, based on Agency's explanation, that job sharing, and reduced hours would not have adequately addressed Agency's needs.

Additionally, the AJ found that Agency provided Employee with proper notice of his appeal rights. He explained that under D.C. Code § 1-624.02(a)(5), Employee was entitled to written notice of at least thirty days prior to the RIF effective date. In this case, the AJ assessed that Agency's initial notice provided less than thirty days' written notice of the impending RIF; however, a supplemental letter was provided to Employee on June 22, 2021, which updated the effective RIF date to July 11, 2021. As a result, the AJ concluded that Agency's failure to initially provide Employee with thirty days' notice was harmless because both notices informed Employee of his right to appeal to the OEA and included the Office's rules and appeal form. Therefore, the AJ held that the RIF was conducted in accordance with all applicable laws, rules, and regulations.

Employee disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on March 20, 2023. He reiterates his previous argument that Agency failed to properly prioritize his reemployment after conducting the RIF based on his tenure and experience as a RW-5 Custodian Supervisor. Employee asserts that he was mistreated and demoted to a RW-3 Custodian position in 2021. He states that Agency issued him a temporary Custodian Foreman badge on July 12, 2021, but he was never officially offered that position even with the requisite experience. In support of his petition, Employee highlights what he believes to be a similar OEA matter in which Agency entered into a settlement agreement to rehire the employee after she was separated from service pursuant to a RIF. Consequently, he requests that Agency rehire him as a Custodian Foreman and reimburse him for any back pay that he could have made as a foreman.

In response, Agency submits that the Initial Decision was based on substantial evidence. It avers that Employee's argument related to his years of service as a Custodian is misplaced. Agency maintains that it did take into consideration Employee's years of service as required by D.C. Code § 1-624.02(a). According to Agency, points were assigned for service years as follows: 10 points for more than 20 years; 5 points for 10-19 years and 1 point for 0-9 years. Based on the former, Employee received one point in this category. Thus, it reasons that the AJ did not err concluding that Employee's length of service was correctly considered. Therefore, Agency requests that Employee's Petition for Review be denied.

- C. Deliberations** – This portion of the meeting will be closed to the public for deliberations in accordance with D.C. Code § 2-575(b)(13).
- D. Open Portion Resumes**
- E. Final Votes on Cases**
- F. Public Comments**

## **VI. Adjournment**

“This meeting is governed by the Open Meetings Act. Please address any questions or complaints arising under this meeting to the Office of Open Government at [opengovoffice@dc.gov](mailto:opengovoffice@dc.gov).”