

**DISTRICT OF COLUMBIA
OFFICE OF EMPLOYEE APPEALS**

NOTICE OF PUBLIC MEETING

The District of Columbia Office of Employee Appeals will hold a meeting on September 7, 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=m8dca5c493801abef4ed6c70cb1392170>

Password: Board (26274 from phones and video systems)

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Questions about the meeting may be directed to wynter.clarke@dc.gov.

Agenda

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

Thursday, September 7, 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 Public Works, OEA Matter No. 1601-0058-22** — Employee worked as a Parking Enforcement Officer with the Department of Public Works ("Agency"). On May 19, 2022, he received a final notice of separation from Agency. The notice provided that on November 23, 2021, Employee submitted a urine sample which tested positive for the presence of cannabinoids, in violation of 6B District of Columbia Municipal Regulations ("DCMR") §§ 435.6 and 1605.4(h). Consequently, Employee was terminated effective May 22, 2022.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on June 17, 2022. He explained that he was in a vehicular accident in his Agency-issued

vehicle. Employee claimed that he avoided colliding with a tractor trailer by hitting the median. He asserted that the Metropolitan Police Department officer on the scene did not cite him for driving under the influence or for reckless driving. Therefore, Employee requested that the adverse action be removed from his personnel file and that he be reinstated to his position. Alternatively, he requested that he be allowed to retire, given his age and years of service.

On August 5, 2022, Agency filed its Answer to Employee's Petition for Appeal. It asserted that Employee's separation was warranted because he failed a post-accident drug test. Agency contended that Employee's marijuana use violated 6B DCMR §§ 1605.4(h) and 428.1, subjecting him to separation for a positive drug test. It also provided that it considered the *Douglas* factors when determining the appropriate discipline. Therefore, Agency requested that Employee's removal action be upheld.

In a post-conference order, the OEA Administrative Judge ("AJ") explained that Employee admitted to testing positive for marijuana while occupying a safety-sensitive position. However, it was Employee's position that removal was too severe of a penalty and that a reasonable suspicion observation did not occur before testing. As a result, the AJ ordered both parties to submit briefs addressing whether the penalty should be upheld under District law.

In its brief, Agency asserted many of the same arguments presented in its Answer to the Petition for Appeal. It explained that Employee was notified in writing that he held a safety-sensitive position, and he was subject to drug and alcohol testing pursuant to 6B DCMR §§ 1605.4(g) and 1605.4(h). Agency further opined that the post-accident drug test followed the testing protocol, and Employee's results revealed the presence of cannabinoids. Moreover, it provided that the penalty for a first occurrence of reporting to or being on duty while under the influence of testing positive for an illegal drug or unauthorized substance, ranged from suspension to removal.

In his brief, Employee argued that Agency failed to conduct a reasonable suspicion observation. Employee explained that three supervisors, who were all certified to conduct reasonable suspicion observations, arrived on the scene, but they failed to perform the observation or complete the reasonable suspicion form. Additionally, he contended that Agency failed to apply progressive discipline and the *Douglas* factors by removing him on the first offense. Finally, Employee cited to Mayor's Order I-2020-18, which provides that a safety-sensitive employee should be suspended for five workdays on the first occurrence of a positive result for marijuana. Therefore, he requested that Agency's termination action be rescinded.

Agency filed a reply brief on November 29, 2022. It argued that it was not required to perform a post-accident and incident, reasonable suspicion observation. Agency asserted that the lack of a completed reasonable observation form had no impact on whether Agency had cause to take the adverse action against Employee, or whether termination was an appropriate penalty under the applicable regulations. It also argued that Employee's assertions related to the Mayor's Order lacked merit. Agency explained that Employee incorrectly cited to language provided in the Random Drug Testing section of the issuance. However, it claimed that Employee's drug test was not random, and it was conducted solely because Employee's Agency-issued vehicle was impaired because of his automobile accident. Moreover, it provided that 6B DCMR § 433.2 makes clear that a post-accident or incident, reasonable suspicion observation may be done if feasible. However, Agency clarified that a post-accident or incident reasonable suspicion

observation is not a prerequisite to post-accident and incident drug and alcohol testing. It contended that it did not have to suspend Employee for a first offense of submitting a positive sample and that it applied the *Douglas* factors before imposing its penalty.

The AJ issued an Initial Decision on February 16, 2023. He first noted that Employee signed documents acknowledging that he held a safety-sensitive position. The AJ found that in accordance with 6B DCMR § 433(b), Employee was subject to mandatory, post-accident drug testing because he was in a motor vehicle accident, involving an Agency vehicle – which was significantly damaged. He further held that Employee admitted to testing positive for marijuana and found that Agency had sufficient cause to terminate Employee. Moreover, he opined that Employee’s assertion that Agency should have conducted a reasonable suspicion observation must fail because he damaged Agency’s vehicle; he was subjected to mandatory post-accident testing; he tested positive for cannabinoids; he admitted to marijuana use; and Agency had cause for his removal because he occupied a safety-sensitive position and tested positive for drugs. Moreover, the AJ determined that removal was in the range of penalties and that Agency appropriately considered the *Douglas* factors. Consequently, the AJ ordered that Agency’s removal action be upheld.

Employee filed a Petition for Review on June 6, 2023. He asserts that although he had an accident while on duty, he was not impaired or under the influence. He, again, argues that Agency failed to conduct a reasonable suspicion observation in accordance with DCMR Chapter 4, Post-Accident and Post-Incident Drug and Alcohol Testing I-2022-8. According to Employee, Agency was required to conduct a reasonable suspicion observation to determine if there was evidence to suggest that he was impaired or under the influence of drugs or alcohol. Additionally, he contends that Agency failed to use progressive discipline and did not apply the *Douglas* factors in making its final decision. As a result, he requests that his termination be rescinded and that a five-day suspension be imposed instead.

Agency filed its Response to Employee’s Petition for Review on August 1, 2023. It provides that Employee was aware that he occupied a safety-sensitive position. Agency further contends that Employee’s drug test was not random, but it was done after an accident. Consequently, it asserts that Employee’s argument regarding the failure to apply progressive discipline lacks merit because his positive drug test rendered him unsuitable. Additionally, it argues that it did consider the *Douglas* factors before imposing its penalty and that removal did not exceed the bounds of reasonableness. Accordingly, Agency requests that Employee’s Petition for Review be denied.

- 2. Employee v. University of the District of Columbia, OEA Matter No. 1601-0043-22** – Employee worked as a Student Program Development Specialist with the University of the District of Columbia (“Agency”). On February 3, 2022, Agency issued a final notice of removal to Employee. It charged her with insubordination; failure or delay in carrying out orders, directions, assignments, instructions, etc.; failure or refusal to follow instructions; failure to meet performance standards; inability to carry out assigned responsibilities or duties; and neglect of duty.

On March 4, 2022, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”). She argued that she worked for Agency for fifty-two years and was never subjected to any disciplinary actions, nor did she receive any negative performance reviews. Employee contended that despite her capably using various systems, Agency engaged in age discrimination by terminating her. Accordingly, she requested that Agency’s final decision be dismissed and that she be reinstated with back pay and

attorney's fees.

In response to Employee's petition, Agency filed a Motion to Dismiss. It provided that OEA lacked jurisdiction to consider discrimination claims. Additionally, Agency filed a response to Employee's Petition for Review on August 31, 2022. It argued that as part of Employee's duties and responsibilities, she was required to demonstrate oral and written skills. However, it explained that she struggled to use the Microsoft Word, Adobe, and PowerPoint programs; had trouble locating and responding to emails; and failed to proofread her emailed communications. According to Agency, Employee's inability to perform her duties came to a head during the COVID-19 pandemic when it pivoted to remote work. To assist Employee with performing her job duties, Agency requested that she complete online training courses. Despite Agency's assistance and extension of deadlines, it claimed that Employee failed to complete the trainings. Consequently, Agency issued a Notice of Proposed Written Reprimand on June 30, 2021. On July 8, 2021, Agency issued a sixty-day PIP, which provided an action plan. Agency provided that it met with Employee five times during the course of the PIP; however, Employee failed to satisfy the terms of the PIP, even with a sixty-day extension. Accordingly, Agency terminated Employee. It is Agency's position that OEA lacked jurisdiction to consider Employee's discrimination claims and that its termination action was taken in accordance with all applicable laws, rules, and regulations. Therefore, it requested that OEA dismiss Employee's Petition for Appeal.

Employee subsequently filed a Motion for Summary Disposition on March 17, 2023. She argued that she was unaware of the PIP extension and that the extension of her PIP for an additional sixty days was thirty days longer than what was permitted by 8-B District of Columbia Municipal Regulations ("DCMR") § 1910.3. Additionally, Employee contended that Agency failed to notify her of the PIP results within fourteen days, as required in 8-B DCMR § 1910.4. Finally, she provided that Agency mailed her Notice of Proposed Termination to the wrong address; that its decision to terminate her was an abuse of discretion; and that it failed to properly weigh the *Dougals* factors.

Agency filed its Opposition to Employee's Motion for Summary Disposition on March 30, 2023. It asserted that it complied with 8-B DCMR § 1910.3. Agency argued that it placed Employee on a sixty-day PIP on July 18, 2021. According to Agency, 8-B DCMR § 1910.3 provided that a PIP may be extended in thirty-day increments up to a maximum of ninety days. It offered that at the conclusion of Employee's initial PIP, it extended the PIP for an additional sixty days. Agency contended that if the 120-day PIP violated the regulation, then the violation was harmless error because it did not harm or prejudice Employee's rights or significantly affect its final decision. As for Employee's arguments that she did not receive a copy of the PIP and was unaware that she was formally on a PIP, Agency provided that it emailed Employee copies of the PIP and discussed the PIP during a meeting with Human Resources and her Union Representative. Moreover, Agency argued that 8-B DCMR § 1910.4 is discretionary and not mandatory because it does not provide a consequence for failure to comply with this provision. Agency provided that its termination action was proper, and it properly weighed the *Douglas* factors. As for Employee's argument that she did not receive the Notice of Proposed Adverse Action, Agency opined that Employee's representative submitted a response to the notice and Employee provided a copy of the notice during discovery. Therefore, it requested that Employee's Motion for Summary Disposition be denied.

The OEA Administrative Judge ("AJ") issued an Initial Decision on June 16, 2023. She provided that in accordance with 8-B DCMR § 1910.3, a PIP may be issued for thirty, sixty, or ninety days, at the sole discretion of the supervisor; additionally, a PIP may be

extended in thirty-day increments up to a maximum of ninety days. Therefore, she determined that Agency had the discretion to select the length of the PIP and that Agency's extension of sixty days was less than the ninety-day maximum. Consequently, she held that Agency did not violate the regulation.

Regarding Employee's argument that Agency failed to notify her of the PIP results within fourteen days, as required in 8-B DCMR § 1910.4, the AJ determined that Agency had to provide Employee with a written determination by November 19, 2021. However, it issued its notice in January of 2022. The AJ opined that as the OEA Board held in *Kyle Quamina v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0055-17, *Opinion and Order on Petition for Review* (April 19, 2019), because 8-B DCMR § 1910.4 provides a time limit but no consequence for failing to adhere to the deadline, the language of the regulation is directory, opposed to mandatory in nature. Thus, Agency's failure to comply was harmless error because it did not cause substantial harm to Employee, and it did not significantly affect Agency's final decision.

Moreover, the AJ held that Agency did have cause to remove Employee. She found that Employee refused to follow her supervisor's instructions; she failed to complete assigned tasks; she did not complete the Microsoft trainings over the 120-day PIP period; and she neglected her duties. The AJ determined that in accordance with 8-B DCMR §1910.7, if an employee fails to improve during the PIP, separation was within the range of penalties. She also determined that Agency adequately considered the *Douglas* factors. As a result, the AJ upheld Agency's termination action.

Employee filed a Petition for Review on July 21, 2023. She requests that the record be reopened for new and material evidence that was not available when the record closed. According to Employee, the evidence shows her efforts to complete the Microsoft Office trainings. She explains that she discovered the evidence on her personal laptop through a forensic examination, and it shows that she completed or made substantial progress on the trainings. Therefore, Employee contends that the AJ's findings were not based on a complete record. Consequently, she requests that the record be reopened; that the Initial Decision be vacated; and that the matter be remanded for further consideration based on the new and material evidence presented.

On August 24, 2023, Agency filed its Answer to Employee's Petition for Review. It contends that the training documents and presentations provided by Employee were not new and were available before the record closed. However, it asserts that even if the documents were new and unavailable before the record closed, it does not change the outcome of the Initial Decision. Agency argues that the training documents actually supports its position that Employee did not complete her assigned trainings. According to Agency, the documents reflect that Employee started to watch five training videos, but they do not show that she completed the courses by taking a test and achieving a test score of at least seventy percent. It opined that the AJ reasonably determined that Employee neglected her duty and did not complete the trainings that she was assigned. Accordingly, Agency requests that Employee's Petition for Review be denied.

- 3. Employee v. Department of Corrections, OEA Matter No. 1601-0034-22** — Employee worked as an Operations Research Analyst with the Department of Corrections ("Agency"). On September 2, 2021, Employee received a fifteen-day Advance Written Notice of Proposed Removal based on charges of failure to meet established performance standards, and negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions. She was also charged with violating Agency's Policy and Procedure, Section 3300.1E -

Employee Code of Ethics and Conduct, Section 10 (Personal Accountability). Specifically, Agency alleged that Employee failed to meet the performance standards as established in a May 24, 2021, Performance Improvement Plan (“PIP”). Agency subsequently conducted an administrative review of the charges, and a Hearing Officer recommended that removal was appropriate in accordance with the Table of Illustrative Actions. Agency issued its final notice of termination to Employee, sustaining the charges and the Hearing Officer’s recommendation. The effective date of her termination was December 3, 2021.

The AJ issued an Initial Decision on May 17, 2023. She first explained that Employee’s PIP, which began on May 24, 2021, could not exceed a total of ninety days, or August 21, 2021, pursuant to DCMR § 1410.3. She provided that § 1405.5 required that Agency issue a written decision to Employee within ten business days outlining whether the PIP requirements were met or failed. The AJ noted that the ten-day time period in this case expired on September 3, 2021, but Employee was on approved leave until at least September 8, 2021. She acknowledged that the written decision stating that Employee failed to meet the PIP requirements was dated September 2, 2021, and was sent by U.S. Postal Service Priority Mail Express.

However, she highlighted the holding in *Aygen v. District of Columbia Office of Employee Appeals*, No. 2009 CA 006528; No. 2009 CA 008063 (D.C. Super. Ct. April 5, 2012) in which the Superior Court for the District of Columbia held that where an employee is not in duty status, the notice of final decision “must be sent to employee’s last known address by courier, or by certified or registered mail, return receipt requested, before the time of the action becomes effective.” In analyzing whether Agency’s notice regarding the PIP result was timely, the AJ determined that Agency failed to provide this Office with any information evidencing proper written notice to Employee prior to September 3, 2021, as required under DCMR § 1405.5. According to the AJ, written notice of the PIP results was not provided to Employee until September 10, 2021, when Employee admitted to receiving the documents after being denied access to the workplace. Moreover, she concluded that pursuant to the holding in *Aygen*, “a dated cover letter, by itself, was insufficient evidence of a mailing date or proof of receipt by an employee.” Thus, the AJ held that the September 2, 2021, date on the PIP notice was inadequate proof of service to Employee under the regulations. Since the time period between August 22, 2021, and September 10, 2021, was thirteen business days, the AJ concluded that Agency violated §1410.5. Further, she opined that Agency’s error was reversible since the mandatory requirement under DCMR § 1410.11 provides that whenever an immediate supervisor or a reviewer fails to issue a written decision within the specified time period as provided in Subsections 1410.5 or 1410.9, the employee shall be deemed to have met the requirements of the PIP.

Next, the AJ held that assuming *arguendo* Agency complied with DCMR §1410.5, it nonetheless violated §1410.3 which states that “a PIP issued to an employee shall last for a period of thirty to ninety days and must: (a) identify the specific performance areas in which the employee is deficient; and (b) provide concrete, measurable action steps the employee can take to improve in those areas.” The AJ assessed that while Agency’s customary practice was to place its employees on automatic ninety-day PIPs, Employee in this case was never informed of the duration of her PIP because it was not included on the notice. Additionally, she determined that during a May 24, 2021, Microsoft TEAMS meeting, Dr. Chakraborty informed Employee that the length of her PIP period would run through the end of FY 2021, approximately forty days beyond the maximum ninety-day time period. However, the AJ acknowledged that Agency subsequently realized its

error and unilaterally ended the evaluation period on August 22, 2021, exactly ninety days from the start of the PIP period, without providing Employee with notice that the PIP would end. Notwithstanding, she concluded that Agency violated DCMR §1410.3 in light of its procedural error.

Finally, the AJ held that Agency violated DCMR §1410.2 by placing Employee on a PIP based on her FY 2020 performance, and not the then-current fiscal year performance (FY 2021). In support thereof, the AJ cited to the Department of Human Resources (“DCHR”) “EPerformance - Frequently Asked Questions (FAQs) Performance Improvement Plan (PIP)” which was located on their website. She provided that according to the FAQ page, a PIP could only be based on the employee’s current performance plan and cannot be extended into the next performance management period. According to the AJ, during the May 24, 2021, TEAMS meeting, Dr. Chakraborty informed Employee that her PIP was implemented to address performance issues from FY 2020 in areas where Employee did not receive a satisfactory rating. Thus, she reasoned that Agency’s failure to address the correct performance period constituted a violation of DCMR §1410.2. The AJ further believed that Employee was not provided with the opportunity to fully perform her assigned tasks pursuant to her FY 2021 performance plan before being placed on the PIP because she had less than two months to meet the requirements after returning from Family Medical Leave Act (“FMLA”) . As a result, she determined that Agency lacked cause to discipline Employee because of its various violations of DCMR § 1410. Consequently, Agency’s termination action was reversed, and Employee was ordered to be reinstated with back pay and benefits lost as a result of the adverse action.

Agency disagreed with the Initial Decision and filed a Petition for Review and a Memorandum in Support of Petition for Review with the OEA Board. It argues that Employee’s Petition for Appeal should have been dismissed because she failed to file an appeal with OEA within thirty days of the effective date of Agency’s termination action, in violation of D.C. Code § 1-606.03(a) and 6B DCMR § 604.2. Alternatively, it suggests that if D.C. Code § 1-606.03(a) is a nonmandatory claims-processing deadline that can be equitably tolled, the AJ should have made a finding of such before considering Employee’s appeal. Agency opines that it was prejudiced after the AJ denied it a reasonable opportunity to engage in discovery. It further submits that the AJ erred by relying on the holding in *Aygen supra* because that Court interpreted an unrelated, former regulation and not the applicable language of DCMR § 1410.5. Agency reasons that unlike the regulation at issue in *Aygen*, the language in § 1410 only refers to the date that the PIP finding was issued, but it makes reference to service, delivery, or an employee’s duty status. Thus, it is Agency’s position that the September 2, 2021, notice to Employee regarding the outcome of her PIP was within the ten-day deadline required under § 1410.5.

Agency also argues that the AJ relied on an undated and unsigned Frequently Asked Question’s page on the DCHR website in concluding that Employee required additional time to improve her work performance before being placed on a PIP. It submits that the AJ failed to rely on a statute, regulation, formal policy, or other binding precedent in support of her conclusion that Agency’s alleged error formed a basis for reversal of the termination action. Thus, Agency reasons that at a minimum, a hearing on this issue could have elicited testimony regarding the nature and author of the FAQ page, and whether Employee relied on it in any way. Accordingly, Agency requests that its Petition for Review be granted.

In response, Employee argues that the AJ properly denied Agency’s Motion to Dismiss the Petition for Appeal in light of circumstances beyond her control, including

government closures due to inclement weather. She contends that the AJ correctly applied binding authority when denying Agency's motion. Employee also submits that the AJ correctly considered the evidence and made a sound decision regarding the implementation of the PIP and the related policies and procedures. According to Employee, Agency was not prejudiced by being denied a meaningful opportunity to engage in discovery, as all relevant evidence was made available during the proceedings before OEA. She also believes that the AJ applied the correct laws and regulations governing PIPs and utilized the proper burden of proof in concluding that Agency failed to establish cause in initiating its termination action. Therefore, Employee believes that the Initial Decision is based on substantial evidence and asks that the Board deny Agency's petition.

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.”