**DISTRICT OF COLUMBIA**
**OFFICE OF EMPLOYEE APPEALS**

**NOTICE OF PUBLIC MEETING**

The District of Columbia Office of Employee Appeals will hold a meeting on January 4, 2024, at 9:30 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=mbaf98912934f09c4112240f5e97f686f

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.

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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, January 4, 2024, at 9:30 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. D.C. Public Schools, OEA Matter No. 1601-0015-20 —** Employee was hired to work as a Teacher with D.C. Public Schools ("Agency/DCPS") in June of 2002. According to Agency, Employee was separated in August of 2009 for performance issues. However, on July 18, 2018, an Arbitrator reversed Agency's termination action and ordered Agency to reinstate Employee. On March 15, 2019, Agency issued a letter to Employee outlining the requirements for reinstatement. The document provided that in accordance with the District of Columbia Municipal Regulations ("DCMR"), Employe was required to obtain a current teaching license from the Office of State Superintendent of Education ("OSSE"). Additionally, he was required to complete a criminal background check, pursuant to the Criminal Background Checks for the Protection of

Children Act of 2004. Employee was also required to submit a negative tuberculosis ("TB") test dated within the past year, and he was required to complete a mandatory drug and alcohol test in accordance with Agency's Mandatory Drug and Alcohol Testing ("MDAT") policy.

However, after several requests for extensions, according to Agency, Employee failed to comply with its reinstatement requirements. Therefore, on October 18, 2019, Agency issued a notice of termination action against Employee. It charged him with violating 5-E DCMR §§ 1401.2(j) – willful disobedience and 1401.2(t) – violation of the rules, or lawful orders of the Board of Education, or any directive of the Superintendent of Schools, issued pursuant to the rules of the Board of Education. As a result, Employee was terminated again, effective November 4, 2019.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on December 2, 2019. He argued that he provided Agency with an x-ray and a doctor's note regarding his treatment for exposure to TB. Employee further asserted that he provided Agency with all of the required information, but he was still removed from his position. Therefore, he requested that he be reinstated to his position.

On January 8, 2020, Agency filed its Answer to Employee's Petition for Appeal. It explained that on May 25, 2019, Employee emailed Agency stating that he had contracted TB. In response, Agency emailed Employee's union outlining the mandatory information needed, including a negative TB or chest x-ray, to ensure that it was safe for Employee to return to the classroom. Agency provided that on August 27, 2019, Employee reported to its Central Office to be fingerprinted. However, when he informed Central Office staff members that he still had active TB and could not produce a negative test, Agency asked Employee to leave the building and, again, requested documentation outlining that it was safe for him to return. According to Agency, Employee presented a doctor's note dated August 27, 2019, which provided that Employee was "under . . . care for exposure to TB." Agency contended that Employee's doctor's note was not sufficient, and therefore, requested documentation, like a chest x-ray. However, it contended that Employee did not produce sufficient, requisite documentation, including a negative TB test. As a result, it terminated Employee.

Prior to the evidentiary hearing being held in this matter, the OEA Administrative Judge ("AJ") ordered both parties to submit legal briefs addressing whether Agency's adverse action was taken for cause, and if so, whether the penalty was appropriate given the circumstances. Agency provided that it received a copy of a diagnostic radiology report related to Employee's chest x-ray on September 20, 2019. However, it explained that the document did not indicate whether it was safe for Employee to return to work. It claimed that over one year later, on October 23, 2020, it finally received the requested information from Employee. Agency contended that OEA is tasked with reviewing whether the penalty it imposed was reasonable and if it considered the relevant factors. It opined that termination was reasonable and requested that its action should be upheld.

Employee filed his brief on December 21, 2020. He argued that when he was wrongfully removed on August 15, 2009, he had a current teaching license; a background clearance; and negative test results for drugs, alcohol, and TB. As for the adverse action taken against him, Employee asserted that Agency failed to provide specific dates for the willful disobedience charge. Moreover, he contended that his attempt to follow Agency's directive by going to its Central Office negates its claim that he engaged in willful disobedience. He also opined that Agency failed to offer any specific rules, orders, or directives to prove that he violated 5-E DCMR § 1401.2(t). Employee argued that

Agency abused its discretion and acted arbitrarily and capriciously when imposing its penalty. Additionally, he claimed that Agency failed to consider any relevant factors before terminating him. Therefore, Employee requested a summary disposition with an order for back pay and benefits.

After conducting an evidentiary hearing, the AJ issued an Initial Decision on September 13, 2023. On the issue of whether Employee was in Agency's employ, the AJ held that Agency's rebuttal witness, Yara Tanner, testified that Employee was on administrative leave with pay status when he was removed in November of 2019. The AJ noted that he could not find any precedent where administrative leave with pay was provided to anyone who was not employed by the District government. Accordingly, he ruled that Employee was reinstated in April of 2019, when he was placed on the administrative leave pay status and started to receive biweekly paychecks. Additionally, the AJ held that Employee complied with Agency's request to provide a chest x-ray, as it related to the TB testing requirement. As for Employee's background check, the AJ opined that Agency prevented Employee from completing the fingerprinting and should have communicated with Employee how he could have accomplished securing his background check, even with its concerns related to Employee's suspicion of TB.

As it related to Employee's license to teach, the AJ held that Agency should have provided him with a provisional license. The AJ noted that Employee's license lapsed because of the length of the arbitration process, but he reasoned that Agency could have simply searched Employee's former personnel file to find his original licensing documents. Finally, he held that Agency failed to provide authorization for Employee to schedule a drug test, which prevented him from efficiently completing his drug testing requirement. Consequently, the AJ ordered that Agency's termination action be reversed; that Agency reinstate Employee; and that Agency reimburse Employee all pay and benefits lost as a result of his removal.

On October 13, 2023, Agency filed a Petition for Review. It argues that the AJ's decision was not based on substantial evidence and did not address all findings of material facts raised in the appeal. Agency asserts that it was within its right to request additional information after receiving the x-ray to ensure that it was safe for Employee to return to work. It further contends that the AJ improperly placed the burden on Agency to ensure that Employee was licensed to teach. According to Agency, Employee was required to complete his own licensing application through OSSE but did not. Agency, again, asserts that Employee was not an employee in accordance with D.C. Code § 1-603.01(7) and notes that payments made to Employee were for back payment and not salary payments. It posits that Employee also failed to complete drug testing. Therefore, Agency requests that this Board dismiss Employee's petition or remand the matter to the AJ for further consideration.

Employee filed his response to Agency's Petition for Review on November 14, 2023. He maintains that he submitted a chest x-ray and agrees with the AJ's assessment that he provided Agency with what it requested. Employee asserts that the AJ correctly held that his lack of licensure should not have barred him from employment since he submitted his licensure paperwork when he was initially hired with Agency. Additionally, he contends that he was an employee because he was reinstated by the Arbitrator and was compensated while being on administrative leave with pay. Employee argues that he did not complete the drug testing because when he was initially sent the link to schedule the appointment, he had not yet signed Agency's reinstatement letter. He asserts that Agency did not send another link to schedule drug testing after the initial link expired. Therefore, he requests that the Initial Decision be upheld.

2. **Employee v. Department of Transportation, OEA Matter No. 1601-0037-21—** Employee worked as an Engineering Technician ("ET") with the Department of Transportation's ("Agency") Public Space Regulation Division ("PSRD"). On May 10, 2021, Agency issued an Advance Written Notice of Proposed Adverse Suspension. The ten-day suspension notice charged Employee with "failure or refusal to follow instructions: negligence, including the failure to comply with rules, regulations, written procedures, or proper supervisory instructions." He was also charged with "conduct prejudicial to the government: use of abusive, offensive, unprofessional, distracting, or otherwise unacceptable language, gestures, or other conduct, quarreling; creating a disturbance or disruption; or inappropriate horseplay." The charges stemmed from Employee's alleged failure to follow written supervisory instructions as well as his failure to meet Agency's policies related to the approval of several public space permit applications in the District. Additionally, the charges were predicated upon Employee's use of unprofessional email responses when communicating with both his supervisor and Agency customers who sought clarification on pending permit applications. On July 9, 2021, Agency issued its Notice of Final Decision, sustaining both charges. Employee served his suspension from July 12, 2021, through July 26, 2021.

   The AJ issued an Initial Decision on September 6, 2023. With respect to Charge No. 1, the AJ held that under DPM §§ 1607.2(d)(1) and 1605.4(d), a charge of failure to follow instructions includes the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions. Regarding the specification of "Negligent Customer Service and Failure to Meet Department Responsiveness," the AJ held that Agency met its burden of proof. She concluded that Employee failed to provide adequate customer service to contractor who expressed his frustration when he attempted to contact Employee about a permit application that was locked due to nonpayment. The AJ noted that it was unnecessary to determine whether Employee's January 11, 2021, communications to the contractor conformed to Agency's policy for returning calls and emails since Employee failed to respond to the customer and did not offer a compelling reason for failing to do so. She also concluded that Employee failed to comply with directives from his supervisor, Tenbrook.

   Concerning the specification of "Negligent Customer Service, Lack of Accountability, and Deficient Goal Attainment," the AJ explained that Employee failed to process permits related to the 2021 Presidential Inauguration after being assigned to the Presidential Inauguration Committee ("PIC") by memorandum dated August 10, 2020. According to the AJ, Employee's failure to process the applications resulted in the permits being escalated to Public Space Manager, Elliot Garrett ("Garrett"), on January 8, 2021, who processed the applications without issue. She assessed that Employee did not contradict Agency's argument that the applications were not complicated and stated that Employee lacked a reasonable explanation as to why he did not respond to either of Program Support Supervisor Courtney Williams' ("Williams") January 8, 2021, directives requesting updates on the status of the assigned applications. The AJ agreed that the Covid-19 Public Health Emergency, as well as the January 6, 2021, insurrection, could have negatively impacted Employee's ability to process the applications. However, she noted that even if the permit applications were assigned on December 30, 2021, as alleged by Employee, he still had at least three days to complete the priority assignments prior to January 6, 2021. The AJ also disagreed with Employee's argument that it was improper for Agency to indicate that he failed to attain assigned goals related to the 2021 Inauguration since those goals were not included in his performance evaluation plan as required by the DPM. She reasoned that the position description for an ET required

Employee to process permitting applications, including those for the 2021 inauguration, and to interact with individuals in the public and private sectors during that process.

The AJ went on to discuss Employee's contention that he previously submitted supporting evidence of his challenges to Agency's charges by email after filing a Petition for Appeal with OEA. However, she deduced that no such documentation existed; neither Employee nor his representative requested additional time to obtain the information via discovery or subpoena; and Employee had seventeen months to present the purported evidence to either the Deciding Official or to OEA. Additionally, the AJ found Employee's argument that the email threads presented by Agency lacked authenticity and completeness to be without merit. She opined that Employee had the opportunity to investigate the accuracy of the emails during the discovery process, but if he did so, those efforts did not result in any evidence to support his claims. The AJ also found Employee's assertion that he responded to emails by telephone to be unpersuasive. She explained that while a record of the purported calls would not appear in the Transportation Online Permitting System ("TOPS") program, Employee could have introduced evidence of their existence but did not.

Regarding the third specification, "Negligence in Customer Service and Failure to Follow Supervisory Instructions," the AJ concluded that Employee failed to update a permit for a customer from City Permit after being directed to do so by his supervisor, which almost caused the application to lapse. As it related to the last specification, "Failure to Follow Supervisory Instruction, Negligent Customer Service, and Lack of Accountability," she held that Employee failed to provide adequate customer service to two separate contractors on December 17, 2020, and January 8, 2021, respectively. As a result, the AJ concluded that Agency met its burden of proof with respect to Charge No. 1 because Employee failed to respond to directives from his supervisors regarding PIC applications; failed to respond to inquiries from customers on pending applications; and offered no compelling explanation as to why he failed to process the PIC applications. Therefore, she held that Employee's conduct violated DPM §§ 1607.2(d)(1) and 1605.4(d).

The AJ also concluded that Charge No. 2 – conduct prejudicial to the District – was taken for cause. She explained that the language Employee used in emails to customer Mitchell was inappropriate, unprofessional, and did not reflect well on Agency or the District government. According to the AJ, Employee knew that his position as an ET required him to maintain professional and productive relationships with customers. However, the record demonstrated that instead of communicating to Mitchell what errors were made on the pending permit application in an amicable manner, Employee chose to add the names of individuals who retained Mitchell's services to emails in an effort to chastise her in a negative and demeaning manner. The AJ expounded that Employee treated his supervisor, Tenbrook, with disrespect; ignored her supervisory instructions; and created a negative work environment. She took note that Employee received counseling for his disrespectful conduct towards Tenbrook. Further, the AJ highlighted that Agency produced evidence that it implored other methods to work with Employee to improve his performance issues. As a result, she concluded that Employee's misconduct fit within the parameters of DPM §1605.4(a) and DPM §1607.2(a)(16).

Regarding witness veracity, the AJ concluded that Agency's witnesses provided credible and reliable testimony. Conversely, while the AJ found Employee to be knowledgeable and articulate, she nonetheless deemed his testimony to be counterfactual because he had no supporting documentary or testimonial evidence to support his assertions. She noted that Employee was afforded the time and opportunity to obtain supporting documentation

after claiming that it existed but failed to do so. Because neither Employee nor his representative requested assistance in obtaining the alleged supporting documentation, the AJ surmised that the evidence likely did not exist.

The AJ further opined that there was no evidence in the record to support Employee's claims of retaliation or bias other than his bare assertions. She believed that the penalty of a ten-day suspension was both permissible and appropriate based on the Table of Illustrative Actions, an assessment of the relevant *Douglas* factors, as well as the holding in *Stokes v. District of Columbia*, 502 A. 2d 1006 (D.C. 1985). As a result, the AJ held that Employee's suspension was taken in accordance with all applicable regulations.

Employee filed a Petition for Review with the OEA Board on October 11, 2023. He first argues that new and material evidence is now available that, despite due diligence, was not available when the record closed. Specifically, Employee proffers that he has been able to locate information relative to the TOPS program to support his position that the permits relied upon by Agency were not issued or assigned to him in December of 2020, as the AJ was inclined to believe. According to Employee, the new evidence establishes that the final versions of the permit applications were not received by him until January 15, 2021, which means that he did not have weeks in which to complete the required tasks. Employee opines that the AJ overlooked integral evidence to support her rulings; provided undue weight to the testimony of Agency's witnesses; and failed to sufficiently articulate with specificity what grounds were used to determine that Employee was not credible. Additionally, he contends that neither Charge No. 1, nor Charge No. 2 are supported by the record. As a result, Employee asks that the Board grant his Petition for Review.

**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."