

**DISTRICT OF COLUMBIA
OFFICE OF EMPLOYEE APPEALS**

NOTICE OF PUBLIC MEETING

The District of Columbia Office of Employee Appeals will hold a meeting on March 7, 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=me9f7723e58000dec87cda0e2b62b1987>

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, March 7, 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. 1601-0044-23** — Employee worked as a Teacher with D.C. Public Schools ("Agency"). On April 6, 2023, Agency issued its notice of termination on Employee. Agency charged Employee with 5-E District of Columbia Municipal Regulation ("DCMR") section 1401.2(v) – other conduct during and outside of duty hours that would affect adversely the employee's or the agency's ability to perform effectively. Specifically, Employee was accused of purchasing a cell phone for a student; tracking the cell phone's location; and

communicating with the student inappropriately.

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on May 31, 2023. In his petition, Employee explained that he filed this appeal in addition to his grievance filed by his union because his grievance was denied on May 19, 2023. Employee argued that Agency abused its administrative power by deliberately withholding its investigation report which contained material evidence. Additionally, he conceded that he purchased a cell phone for a student, but he provided that he was unaware that doing so would result in an infraction. Employee argued that he did not track the phone’s location and opined that Agency failed to conduct a forensic examination of the phone to determine the accuracy of the allegation. Finally, he attested that he never had inappropriate communication with a student. As a result, Employee requested that he be reinstated to his position.

On June 8, 2023, Agency filed its answer and a motion to dismiss the petition. It contended that Employee was hired in December of 2022. However, on February 8, 2023, it issued a notice of pending investigation to Employee. Agency provided that it concluded its investigation on March 16, 2023, and it issued its notice of termination to Employee on April 6, 2023. According to Agency, Employee’s union filed a Step 1, Stage 3 grievance on May 19, 2023, and that while the grievance was still pending, Employee filed his Petition for Appeal with OEA on May 28, 2023. Agency argued that pursuant to D.C. Code § 1-616.52, Employee could file a grievance or an appeal with OEA but not both. It contended that because Employee elected to grieve his termination first, he was precluded from filing an appeal with OEA. Moreover, Agency explained that Employee was still within his probationary period with Agency, and pursuant to District Personnel Manual (“DPM”) § 814, he could not appeal a termination that occurred during his probationary period. Agency provided that OEA lacked jurisdiction over probationary employees; therefore, Employee’s petition should be dismissed.

The OEA Administrative Judge (“AJ”) issued an order requesting that Employee submit a brief on OEA’s jurisdiction over his appeal. On June 21, 2023, Employee filed a brief which outlined several of the same arguments raised in his Petition for Appeal. He also provided that his grievance was filed but rejected with prejudice because it was allegedly untimely filed. Employee noted that his grievance was not pending, as Agency alleged in its answer to his petition. He further argued that OEA has jurisdiction over whistleblower matters and highlighted his exposure of civil rights abuses and violations against Agency.

Agency filed a Sur Reply on July 14, 2023. It asserted that Employee’s grievance was filed timely and was still pending when he filed his Petition for Appeal with OEA. It, again, argued that Employee’s grievance was filed first, and as a result, Employee was precluded from filing an appeal with OEA. Employee filed a Sur Response to Agency’s Sur Reply highlighting that Agency only conceded that his grievance was timely filed because he filed an OEA appeal with evidence.

On September 13, 2023, the AJ issued an Initial Decision. He held that pursuant to DPM § 814.3, an employee’s termination during a probationary period is not appealable to OEA. The AJ noted that Employee admitted in his Petition for Appeal that he worked for Agency for less than one year prior to his termination. Therefore, because he was serving in his probationary status when he was removed from service, the AJ ruled that Employee was not allowed to appeal his removal to OEA. Moreover, the AJ opined that in accordance with D.C. Code §§ 1-616.52(e) and (f), because Employee chose to first grieve Agency’s action, this prevents him from subsequently appealing the action to

OEA. As a result, Employee's appeal was dismissed.

Employee disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on October 18, 2023. In his petition, he argues that because his grievance was denied by Agency, he had no other means of redress except to file an appeal with OEA. He contends that the ruling in the Initial Decision stripped him of his constitutional and civil rights. Thus, he requests that OEA review his appeal.

On February 5, 2024, Agency filed its response to Employee's Petition for Review. It asserts that the Initial Decision was based on substantial evidence. Agency contends that it provided evidence that Employee timely filed his grievance, which it provides is still pending. It opines that because Employee's grievance was filed before his appeal before OEA, this appeal must be denied.

- 2. Employee v. University of the District of Columbia, OEA Matter No. 1601-0006-21** — Employee worked as a Police Officer with the University of the District of Columbia's ("Agency") Office of Public Safety and Emergency Management ("OPSEM"). On November 2, 2020, Agency issued a Notice of Proposed Adverse Action (Termination), charging Employee with willfully providing false, fraudulent, misleading or harmful statements; refusal or failure to give oral or written statements of testimony in connection with an injury; insubordination – willful and/or deliberate refusal to carry out orders; failure to comply with instructions; and unauthorized possession/inappropriate removal of University property or another person's personal property.

The notice proposed Employee's termination based on his act of falsely filing a workers' compensation claim with the D.C. Public Sector Workers' Compensation Program ("PSWCP"). Specifically, Agency alleged that on June 7, 2020, Employee reported that he sustained an injury to his toe while patrolling Building #38 of the Architectural Research Institute ("ARI"). However, a subsequent investigation into Employee's claims revealed that he did not fracture his toe while on duty and that Employee's key badge card never accessed Building # 38 on June 7, 2020. According to Agency, Employee could not answer inquiries as to how he was able to access an unauthorized and inaccessible area where the injury allegedly occurred, and Agency never gave Employee a directive to access the ARI suite. Agency subsequently notified Employee that his official termination date was December 17, 2020.

The AJ issued an Initial Decision on September 18, 2023. First, he held that Agency met its burden of proof with respect to the charges levied against Employee. The AJ explained that Employee was insubordinate when he failed to submit reports required of a campus police officer, which also evidenced a failure to comply with Agency instructions and policies. According to the AJ, Employee also failed to cooperate with an official investigation when he did not respond to a request for additional information from Agency's Director of Compliance and Risk Management about his workers' compensation claim. Additionally, he held that Employee filed a fraudulent compensation claim because his claim was for a non-compensable injury that did not occur during the course of employment. As a result, the AJ concluded that Employee was guilty of misrepresentation, falsification, or concealment of material facts or records in connection with an official matter, in addition to knowingly and willfully reporting false or misleading information or purposefully omitting material facts, to any supervisor. However, the AJ ruled that Agency did not meet its burden of proof in establishing the specification of unauthorized removal of property of others since it could not specify what property was removed by Employee.

The AJ ruled that Agency did not violate D.C. Code § 5-1031, which provides that, absent a tolling exception, corrective or adverse actions must be commenced within ninety days after an agency knew or should have known of the act or occurrence allegedly constituting cause. According to the AJ, Agency did not know that Employee possibly filed a false compensation claim until August 6, 2020, when ORM issued its Notice of Determination finding that Employee was not injured during the scope of employment. He clarified that while the PSWCP issued its notice denying Employee's compensation claim on July 24, 2020, Agency was not provided with its findings until after it requested such on August 4, 2020, and again on August 6, 2020. Consequently, because Agency's November 2, 2020, Notice of Proposed Adverse Action was issued within ninety days after the date on which Agency knew of the conduct allegedly constituting cause, the AJ concluded that there was no violation of D.C. Code § 5-1031.

Concerning Employee's arguments related to due process, the AJ assessed that Employee could not now argue before OEA that he was entitled to a post-termination conference since it was his union who scheduled the meeting, but subsequently cancelled it. Moreover, he concluded that Agency complied with the notice requirements of District Personnel Manual ("DPM") § 1618.2, which provides that advance written notices of proposed adverse actions must include the type of proposed adverse action; the nature of the action; the specific performance or conduct at issue; how the employee's performance fails to meet appropriate standards; and the name and contact information of the deciding official or anticipated hearing officer. The AJ also held that Agency complied with DPM § 1618.3, which affords employees the right to review any material upon which the proposed action is based; prepare a written response to the notice; and the right to an administrative review in the case of removal. Consequently, he ruled that Employee was properly apprised of the charges levied against him and was afforded a meaningful opportunity to respond.

As it related to Employee's claims of retaliation, the AJ ruled that there was insufficient evidence in the record to support a finding that he was engaged in a protected activity by opposing unlawful employment practices under the DCHRA. Thus, he found Employee's argument that he was terminated in retaliation for filing a complaint with OIG to be without merit. The AJ further concluded that Agency performed a reasonable assessment of the relevant *Douglas* factors. Lastly, he held that termination was a permissible penalty under the Table of Illustrative Actions. As a result, the AJ concluded that the adverse action was taken for cause and that termination was an appropriate penalty under the circumstances.

Employee disagreed with the AJ's findings and filed a Petition for Review with the OEA Board on October 23, 2023. He argues that the Initial Decision was not ripe for issuance because he moved for summary disposition under OEA Rule 618.1 based on procedural and due process arguments, not substantive arguments. According to Employee, if after reviewing his motion, the AJ determined *sua sponte* Agency's position merited summary disposition, he was required to provide notice and give Employee an opportunity to provide arguments in response to Agency's claims. Therefore, he asserts that the AJ erred because there are several material issues of fact in dispute; Agency is not entitled to a decision as a matter of law; and the Petition for Appeal clearly states a claim upon which relief can be granted.

Employee also claims that the AJ erred in concluding that Agency did not violate the 90-day rule. In support thereof, he notes that the AJ improperly utilized D.C. Code § 5-1031 in his analysis, instead of applying the ninety-day rule provided in 8B DCMR § 1502.3, which applies to University of the District of Columbia police officers. Employee

reiterates his previous argument that Agency should have known of the conduct allegedly constituting cause as early as June 12, 2020, when Smith expressed concerns that Employee possibly committed workers' compensation fraud. He also opines that the ninety-day period specified in 8B DCMR § 1502.3 is a mandatory provision and contends that Agency's violation of such constitutes a reversible error.

Regarding due process, Employee asserts that the AJ applied the incorrect regulations to his analysis, namely DPM Section 1618, which outlines what is required to be contained in an agency's advance notice of proposed adverse action. Instead, he submits that the AJ should have determined whether Agency's advance notice complied with 8B DCMR § 1500 *et seq.*, which applies to employees of the Board of Trustees of the University of the District of Columbia. Employee, therefore, maintains that Agency violated his due process rights because the advance notice failed to comply with the applicable regulations. In light of the above, Employee requests that the Board reverse the termination action. Alternatively, he asks that matter be remanded to the AJ for adjudication of the substantive merits.

In its response, Agency argues that the issuance of the Initial Decision was appropriate because Employee's Motion for Summary Judgment was not solely limited to alleged procedural violations. It highlights that Employee's motion contained arguments relative to retaliation and whether he actually committed workers' compensation fraud. Thus, it reasons that Employee was not entitled to an evidentiary hearing since he had an opportunity to address, and reply to, the substantive arguments at issue in this matter.

Next, Agency maintains that there is substantial evidence in the record to support a finding that Employee's termination was proper. It contends that the record reflects that Employee was not injured at the location and time identified in his statements and that he was not acting within the scope of employment at the time of the injury. Consequently, Agency opines that its investigation, in conjunction with ORM's determination, demonstrates that Employee filed a false workers' compensation claim. Additionally, it posits that managerial discretion was properly invoked in selecting the penalty, noting that termination was warranted based on an analysis of the *Douglas* factors and the Table of Penalties for Disciplinary and Adverse Actions.

Concerning the 90-day rule, Agency concedes that the AJ erroneously utilized D.C. Code § 5-1031, instead of 8B DCMR § 1502.3(a). However, it highlights that the AJ's conclusion regarding whether Agency violated the ninety-day period for commencing adverse actions is the same under both the Code and the regulations. Agency agrees with the AJ's identification of August 6, 2020, as the proper anchor date for purposes of calculating the ninety-day time period. Thus, it believes that the issuance of the advance notice of termination was timely. Alternatively, Agency states that even if it did not comply with 8B DCMR § 1502.3, the error was harmless. Lastly, it posits that Employee's arguments that he was denied due process should be rejected outright because he is raising them for the first time on Petition for Review. Consequently, Agency asks that Employee's petition 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.”