

**DISTRICT OF COLUMBIA
OFFICE OF EMPLOYEE APPEALS**

NOTICE OF PUBLIC MEETING

The District of Columbia Office of Employee Appeals will hold a meeting on November 16, 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=m6e60cb8e7481e30eb634db603d276d24>

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, November 16, 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. Office of the Chief Technology Officer, OEA Matter No. 1601-0083-22**
– Employee worked as an Information Technology Specialist for the Office of the Chief Technology Officer ("Agency"). On August 31, 2022, Agency issued a final notice of separation removing Employee from his position. Employee was charged with falsifying time entries, in violation of 6-B District of Columbia Municipal Regulations ("DCMR") §§ 1607.2(c)(1) – knowing submission of (or causing or allowing the submission of) falsely stated time logs, leave forms, travel or purchase vouchers, payroll, loan, or other

fiscal document(s) and 1607.2(b)(2) – misrepresentation, falsification, or concealment of material facts or records in connection with an official matter, including investigations. Agency alleged that Employee falsified time logs by submitting entries for hours not worked between August 4, 2021, and February 11, 2022, which resulted in the overpayment of \$53,391.66 to him in wages. Additionally, it alleged that during its investigation into the overpayment, Employee provided conflicting answers and refused to answer questions related to the overpayment of funds. Consequently, Employee was terminated effective September 2, 2022.

On September 30, 2022, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”). He asserted that he did not knowingly or intentionally submit false time logs. Employee contended that he was unaware that PeopleSoft was automatically inputting his time. He claimed that he and several of his colleagues, including his supervisor, were unaware of the automatic update in PeopleSoft. Further, Employee argued that he did not notice the overpayment because his paychecks were directly deposited into his bank account. As it related to his refusal to answer questions, Employee contended that it was only after investigators badgered him and asked the same questions to which he had already provided an answer. Thus, it was Employee’s position that he did not misrepresent, falsify, or conceal any material facts or records related to Agency’s investigation. Additionally, he argued that Agency failed to follow the progressive discipline guidelines provided under 6-B DCMR § 1607.2. As a result, he requested that the termination action be rescinded and that he be reinstated to his previous position.

Agency filed an Answer to the Petition for Appeal on October 31, 2022. It provided that Employee admitted that he manually input his time for days he reported to work in-person, which was a direct violation of its Exception Time Reporting (“ETR”) policy. Moreover, Agency asserted that Employee received ETR training and was aware that manually entering his regular hours constituted a violation of its policy and that his actions could have resulted in an overpayment of wages. Agency also argued that Employee misrepresented, falsified, or concealed material facts during an official investigation. Moreover, it contended that based on the Table of Illustrative Actions in 6-B DCMR § 1607.2, removal was appropriate given Employee’s conduct. Agency explained that it considered the *Douglas* factors when selecting the penalty of removal. Therefore, it requested that the Petition for Appeal be dismissed.

The Administrative Judge (“AJ”) issued an Initial Decision on July 18, 2023. She held that Employee accurately submitted his time manually into the PeopleSoft system, which was approved by his supervisor. The AJ noted that PeopleSoft automatically recorded the time for the same period that Employee submitted his time; thereby, prompting the payroll system to consider the additional time entered by Employee as overtime pay. Moreover, she determined that although Employee’s lengthy history of complying with the ETR policy proved that he was aware of how to accurately report the time, Agency failed to consider the impact that the Covid-19 Public Health Emergency had on its time recording policy. The AJ explained that Agency submitted a document dated March 10, 2022, approximately seven months after Employee returned to work in August of 2021, to support its assertion that Employee was placed on notice of its time entry policy. Thus, she reasoned that Agency failed to prove that Employee knowingly submitted, or allowed the submission of, falsified time logs into the payroll system. Furthermore, the AJ held that Employee did not misrepresent, falsify, or conceal material facts or records in connection with Agency’s investigation. According to the AJ, Employee maintained his offer to repay the overpayment with one \$25,000 installment, followed by smaller

installments. Consequently, she concluded that Agency lacked cause to terminate Employee. As a result, she ordered that Employee be reinstated and that Agency reimburse Employee all back and benefits lost, less the overpayment amount of \$53,391.66.

Agency disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on August 23, 2023. It argues that the AJ did not issue her Initial Decision within 120 business days, in accordance with OEA Rule § 604.1. Agency opines that because the AJ violated the mandatory deadline, this Board should find the Initial Decision is without legal effect and uphold its termination action. Furthermore, it contends that the AJ's decision regarding its misrepresentation and falsification charges are based on an erroneous interpretation of the regulations and its policy. It claims that its ETR policy remained the same throughout, and after, the pandemic. It further maintains that employees were required to use PeopleSoft to manually enter time when working out of the office and could not enter time for hours worked in the office. Thus, Agency argues that the AJ incorrectly determined that Employee accurately submitted his time manually; that Agency failed to consider the impact of the pandemic on its ETR policy; and that Agency did not meet its burden of proof to establish that Employee knowingly submitted false time logs. Accordingly, Agency requests that the Board grant its petition because the Initial Decision was issued past the mandatory deadline; the AJ's conclusions of law are unsupported by the record; and the decision was based on an erroneous interpretation of OEA's regulations and Agency's policies.

On September 27, 2023, Employee filed a Response to Agency's Petition for Review. He argues that Agency's Petition for Review was untimely filed. Employee explains that pursuant to the mandatory language of 6-B DCMR § 637.2, any party may file a Petition for Review of an Initial Decision with the Board within thirty-five calendar days of the issuance of the Initial Decision. He contends that Agency's petition was filed one day late. Employee also proffers that counter to Agency's argument, the 120 business-day rule for adjudicating an OEA matter is discretionary. Furthermore, Employee argues that Agency failed to account for the fact that this matter was in mediation in December of 2022 and was not assigned to the AJ until January of 2023. Additionally, he opines that the AJ correctly determined that Agency failed to offer proof of Employee's intent to falsify his time logs. Employee argues that the AJ took judicial notice that all District employees were required to use the time reporting code "STTW" while teleworking during the Covid-19 Public Health Emergency, which represented a change in policy for reporting time prior to the pandemic. Finally, he contends that Agency lacked proof that Employee offered inconsistent statements or concealed evidence during its investigation. Therefore, Employee requests that Agency's Petition for Review be denied.

- 2. Employee v. Department of Consumer and Regulatory Affairs, OEA Matter No. 1601-0017-21** – Employee worked as an Elevator Inspector with the Department of Consumer and Regulatory Affairs ("Agency"). On October 30, 2020, Agency issued a Notice of Proposed Removal charging Employee with unauthorized absence for five workdays or more, in violation of Chapter 6-B, Sections 1607.2(f)(2) and 1607.2(f)(4) of the D.C. Municipal Regulations ("DCMR"). The charge stemmed from Employee's failure to apprise Agency of the status of his disability and inability to return to work because of a medical condition dating back to 2019. On February 10, 2021, Agency issued a Final Notice of Removal, sustaining the charge against Employee. The effective date of his termination was February 13, 2021.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on March 11, 2021. He argued that Agency's termination action was improper because he

was not able to perform the functions of his position because of his disability. Employee contended that Agency failed to properly address his disability and did not provide a reasonable accommodation for him. Additionally, he asserted that Agency misclassified his position of record that was used as a basis for the removal action. As a result, Employee asked that the termination action be reversed.

Agency filed its answer on June 14, 2021. It contended that OEA lacked jurisdiction to determine whether Employee's disability was the basis for the termination action because the D.C. Office of Human Rights was the proper venue to adjudicate those claims. Agency also posited that while Employee correctly identified his position as an Elevator Inspector and not a Housing Inspector, the error was not utilized as a basis for his removal. Therefore, it requested that Employee's appeal be dismissed.

After holding an evidentiary hearing, the AJ issued an Initial Decision on April 18, 2023. In determining whether Employee was disciplined for cause for unauthorized absences, the AJ first provided that this Office has consistently held that when an employee offers a legitimate excuse, such as illness, for being absent without leave, the absence is justified and therefore excusable. She confirmed that it was undisputed that Employee was absent from work during the relevant time period, of September 14, 2020, to October 30, 2020, while under the medical care of Dr. Kevin Griffiths ("Dr. Griffiths"). The AJ concluded that Employee was medically incapacitated during this period. She considered the testimony of Dr. Griffiths, who attested that Employee was under his care for end-stage renal disease while undergoing dialysis treatment during the AWOL period. According to the AJ, Dr. Griffiths credibly testified that Employee's position as an Elevator Inspector required him to stand on his feet for long periods of time, which is something most dialysis patients could not do. Moreover, according to Dr. Griffiths, Employee continued his dialysis regimen for four days a week during the period in which he was charged with being AWOL; Employee experienced weakness and fatigue from the medical treatments; and Employee's condition was so debilitating that it prevented him from performing his assigned duties during the relevant time period.

The AJ went on to explain that Agency was apprised on multiple occasions about Employee's medical condition, dating back to January of 2017, when he first applied for leave under the Family Medical Leave Act ("FMLA"). She opined that Agency could have contacted Dr. Griffiths to clarify his July 2020 doctors' note regarding Employee's ongoing medical care if it had additional questions pertaining to Employee's return-to-work date. Based on a review of the record, the AJ reasoned that Agency did not meet its burden of proof in establishing a charge of AWOL since Employee offered a legitimate medical excuse during that time period. Because Employee's absences were deemed excusable, the AJ concluded that Employee's removal was improper. Consequently, the termination action was reversed, and Agency was ordered to reinstate Employee with back pay and benefits.

Agency disagreed with the Initial Decision and filed Petition for Review with the OEA Board on May 23, 2023. Agency also filed a Motion for Extension of Time requesting additional time to file a Memorandum in Support of the Petition for Review. On June 22, 2023, the parties filed a Joint Motion to Stay OEA Proceedings, indicating that they began settlement negotiations. However, on August 9, 2023, Employee filed a praecipe withdrawing the motion, stating that the negotiations had failed between the parties. Thereafter, on September 8, 2023, Agency filed a Praecipe Withdrawing Petition for Review. Agency's filing requests to withdraw its petition before the Board and provides that Employee will be reinstated with back pay and benefits in accordance with the AJ's April 18, 2023, Initial Decision.

3. **Employee v. D.C. Fire and Emergency Services, OEA Matter No. 1601-0056-22** – Employee worked as a Paramedic with the Department of Fire & Emergency Services (“Agency”). On December 30, 2021, Agency served Employee with a Notice of Proposed Action: (“NPA”) Termination, charging her with failure or refusal to follow instructions, in violation of District Personnel Manual (“DPM”) §§ 1605.4(d) and 1607.2(d)(2) and neglect of duty, in violation of DPM §§ 1605.4(e) and 1607.2(e). The charges stemmed from Employee’s failure to provide the necessary medical documentation to Agency for a Fitness for Duty (“FFD”) assessment after being on medical leave for over one year. A Hearing Officer conducted an administrative review of the proposed charges and issued a Report and Recommendation finding that the termination action was supported by a preponderance of the evidence. On May 13, 2022, Agency issued its final notice, sustaining the charges against Employee. The effective date of her termination was May 20, 2022.

The AJ issued an Initial Decision on June 22, 2023. With respect to DPM § 1605.4(d), the AJ provided that a charge of failure/refusal to follow instructions includes the deliberate or malicious refusal to comply with rules, regulations, written procedures, or proper supervisory instructions. The AJ explained that under DPM § 1605.4(e), a charge of neglect of duty includes instances of failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position and/or the failure to perform assigned tasks or duties. According to the AJ, Agency’s Order Book provided that if an employee was not in full duty status for thirty days or more, he or she was required to submit to a Fitness for Duty physical at the discretion of the MSO. She provided that contrary to Employee’s assertion that her discipline should have been governed by Chapter 20 of the DPM and DCHR Issuance I-2021-13, Article XI of the Order Book clearly provided that the PFC was responsible for medical evaluations of uniformed operational Emergency Medical Technicians (“EMT”) and paramedics. Thus, the AJ concluded that Article XI governed the instant termination action. Further, she stated that the record was clear that Employee refused to provide the necessary medical documentation after several requests from Agency, which was a prerequisite to returning to duty as a paramedic.

Additionally, the AJ clarified that it was evident from the record that Dr. Olusola Malomo from the PFC provided Employee with the correct medical form to forward to Dr. Passarelli, which evidenced that she was placed on notice of the nature of what was required to be medically cleared to return to work. In the alternative, she suggested that even if Employee’s FFD evaluation was governed by Chapter 20 of the DPM, the charges were nonetheless supported by the record because Employee refused to provide documentation from her physician to fulfill the request from Agency. As such, the AJ concluded that Employee failed to carry out the duties as would be expected of a reasonable paramedic in her position when she refused to submit the necessary medical documentation to the PFC. Therefore, the AJ held that Agency established cause to discipline Employee given the nature of her position as a paramedic, as well as the need to ensure the safety of Agency employees and the public.

Next, the AJ determined that Agency did not violate D.C. Code § 5-1031, which prohibits agencies from initiating adverse actions against members of the Fire & Emergency Medical Services more than ninety days, not including Saturdays, Sundays, or legal holidays, after the date Agency knew, or should have known, of the act or occurrence allegedly constituting cause. She agreed with Agency’s assessment that the holding in *Employee v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0037-20, *Opinion & Order on Petition for Review* (February 24, 2022), was applicable because

the OEA Board held that the 90-day rule should not be applied with “rigidity” in instances where an agency waited to give an employee time to comply with instructions on several different occasions. The AJ noted that in this case, Employee was provided with instructions to submit the correct medical documentation to the PFC on at least five occasions, as well as an opportunity to comply.

The AJ emphasized that Employee’s previous counsel was granted an extension of time to submit the corrected forms after indicating that she would comply with the PFC’s request. Thus, she posited that the ninety-day period was not triggered under D.C. Code § 5-1031 until October 2, 2021, after Employee failed to submit the appropriate medical documentation to the PFC. The AJ reasoned that this date was a fair and practical trigger date since Agency demonstrated that it held out expectations for Employee’s compliance in light of her ongoing communication and subsequent request for an extension of time to comply. Since the ninety-day clock began running on October 2, 2021, and the NPA was issued to Employee on December 30, 2021, the AJ concluded that that Agency did not violate the 90-day rule. Finally, she opined that the penalty of termination was appropriate based on the DPM’s 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 Agency’s termination action was taken in accordance with all applicable regulations.

Employee disagreed and filed a Petition for Review with the OEA Board on July 24, 2023. She contends that the Initial Decision was based on an erroneous interpretation of regulations. Employee asserts that Agency did not meet its burden of proof in this matter because the Order Book articles are not applicable to civilian employees and do not contain a Table of Penalties associated with the various causes of action. According to Employee, Agency failed to produce evidence which established a legitimate reason for imposing discipline. She avers that because the Order Book does not apply to her position as a paramedic, she was unable to ascertain which charges should have been levied against her had Agency utilized the correct regulations.

Next, Employee argues that the AJ failed to address all issues of law, which constitutes a harmful procedural error. She submits that she was harmed because Agency’s findings were not based on substantial evidence and because the MSO never ordered the FFD examination as a prerequisite for returning to duty. Employee also opines that her due process rights were violated because Agency failed to provide notice to her regarding the FFD evaluation, a copy of Issuance I-2021-13, or a meaningful opportunity to respond to the charges. She avers that the Hearing Officer’s analysis modified the NPA by altering the Order Book violations to new violations articulated under Sections 1605 and 1607 of the DPM; however, the officer failed to include the corresponding penalties in her Report and Recommendation. Similarly, Employee takes issue with the Final Agency Notice, asserting that the deciding official added two new charges to the decision. Thus, it is her position that the proposed notice and final decision failed to adequately identify the charges underlying the instant adverse action. Finally, Employee submits that Agency violated the 90-day rule when it issued the NPA and maintains that Agency’s *Douglas* factor analysis was inaccurate.

In response, Agency reiterates that Employee’s termination was appropriate and necessary given the circumstances. It states that as a paramedic, Employee was required to abide by the Order Book, which includes the FFD assessment at the discretion of the MSO. Agency maintains that it properly analyzed and outlined the relevant *Douglas* factors in the NPA. It further reasons that termination is consistent with the Table of Illustrative Actions based on charges of failure/refusal to follow instructions and neglect

of duty, both of which serve as independent grounds for removal. Agency disagrees with Employee's argument that the charges were added mid-way through the disciplinary process, pointing out that both violations were referenced in the NPA and the Final Agency Decision, with the proper citation to the updated 2019 DPM regulations. According to Agency, Employee had an opportunity to contest each of the charges before the Hearing Officer as well as the AJ. Finally, it posits that the AJ correctly concluded that there was no ninety-day violation. Therefore, Agency believes that the Initial Decision is supported by substantial evidence, and it requests 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.”