**DISTRICT OF COLUMBIA**

**OFFICE OF EMPLOYEE APPEALS**

**NOTICE OF PUBLIC MEETING**

The District of Columbia Office of Employee Appeals will hold a meeting on May 30, 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:

Password: Board (26274 from phones and video systems)

<https://dcnet.webex.com/dcnet/j.php?MTID=m96998b98aedd8ddb3103c3f1d17f80fe>

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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, May 30, 2024, at 9:30 a.m.

Location: Virtual Meeting via Webex

1. **Call to Order**
2. **Ascertainment of Quorum**
3. **Adoption of Agenda**
4. **Minutes Reviewed from Previous Meeting**

1. **New Business**
	1. **Public Comments on Motion for Interlocutory Appeal**
	2. **Public Comments on Petitions for Review**
	3. **Summary of Motion for Interlocutory Appeal**
		1. ***Employee v. D.C. Fire & Emergency Medical Services*, OEA Matter No. 1601-0040-21R24 –** Employee worked as a Firefighter/Emergency Medical Technician (“FF/EMT”) with the Department of Fire and Emergency Services (“Agency”). On August 7, 2020, Agency issued a Proposed Notice of Adverse Action, charging Employee with neglect of duty; unreasonable failure to give assistance to the public; and violation of Agency consent/refusal of care policy. The first charge alleged that Employee neglected her duties as a FF/EMT and unreasonably failed to aid a member of the public during an emergency call. The second charge asserted that she violated the Pre-Hospital Treatment Protocols by failing to properly document the Electronic Patient Care Report (“ePCR”) for the incident. Her termination became effective on July 31, 2021.

The OEA Administrative Judge (“AJ”) issued an Initial Decision on September 7, 2022. The AJ held that the Trial Board met its burden of proof in establishing that Charge No 1., Specification No. 1 was supported by substantial evidence. As it related to Charge No. 2, Specification No. 1, the AJ acknowledged that Employee pleaded guilty to this charge and specification during the Trial Board Hearing. As a result, she held that Charge No. 2 was supported by substantial evidence. However, the AJ concluded that Agency utilized the incorrect version of the District Personnel Manual (“DPM”) in administering its adverse action. She ruled that Agency erred in relying on the 2012 iteration of DPM, instead of the 2017 version of the regulations, which were in effect at the time of the adverse action. As a result, the AJ held that Agency’s failure to utilize the correct regulations constituted a harmful procedural error. Therefore, Agency’s termination action was reversed.

Agency sought judicial review of the Board’s decision in the Superior Court of the District of Columbia. It argued that the Initial Decision should be reversed or remanded because the AJ: (1) incorrectly based her decision on an issue raised sua sponte without briefing from the parties; (2) based her conclusions of law on an argument that was waived by Employee before the Trial Board; (3) erred in determining that the Trial Board committed a harmful procedural error by applying the wrong version of the DPM; (4) erroneously held that Employee’s actions at issue were reasonable; and (5) erred by failing to address Agency’s argument that OEA was estopped from ordering Employee’s reinstatement. After ordering briefs and holding oral arguments, Superior Court issued a February 16, 2023, Order Vacating the Initial Decision of the Office of Employee Appeals and Remanding the Case.

Relying on the holding in *Smith v. United States*, 2023 D.C. App. LEXIS 345, \*20-22 (D.C. December 21, 2023), the Court noted that neither party cited to a statute, rule, or judicial decision which required the OEA AJ to provide Agency an opportunity to be heard prior to reversing an adverse action. However, it reasoned that a better practice in the spirit of judicial fairness is to “provide a party against which an adverse ruling is contemplated reasonable notice and an opportunity to be heard on the issue.” As a result, the matter was remanded to OEA for reconsideration on at “least two issues following full briefing and argument – and, if necessary, the presentation of evidence – by the parties: (1) the propriety of [Agency’s] application of the 2012 DPM – rather than the 2017 DPM – to its determination whether [Employee’s] conduct was subject to discipline, and (2) whether Employee waived her right to challenge her discipline…by failing to raise the issue before the Trial Board.”

The AJ subsequently issued a February 26, 2024, order directing the parties to address the following: 1) the propriety of Agency’s application of the 2012 DPM – rather than the 2017 DPM – to its determination of whether Employee’s conduct was subject to discipline, and (2) whether Employee waived her right to challenge her discipline on the ground that her conduct was not subject to discipline by failing to raise the issue before the Trial Board. On March 5, 2024, Employee filed a Motion for Leave to Conduct Limited Discovery and to Stay the Briefing Schedule. Her motion requested the opportunity to propound discovery requests upon Agency and the International Fire Fighters, Local 36, AFL-CIO MCW Union (“Local 36”). Agency filed an opposition to Employee’s motion, arguing that discovery is not permitted in matters covered by *Pinkard v. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2006)*.* According to Agency, the February 16, 2024, remand order from Superior Court only directed the AJ to elicit additional briefing, and if necessary, the presentation of additional evidence on the issue of waiver and the application of the 2012 DPM. Thus, it submitted that the AJ’s remand order exceeded the scope of the Court’s directives.

On March 20, 2024, the AJ issued an order granting Employee’s Motion for Leave to Conduct Limited Discovery and subsequently held a status conference on March 26, 2024. On the same day, the AJ directed Agency to submit the Collective Bargaining Agreement (“CBA”) with Local 36 that was in effect at the time Employee’s termination action was initiated. On April 12, 2024, Agency filed a Notice Responsive to March 26, 2024, Order. It reiterated its previous position that OEA may not compel discovery or reopen the record in a matter governed by *Pinkard*; however, Agency conceded that this Office is permitted to take judicial notice of facts not subject to reasonable dispute.

On April 18, 2024, the AJ issued an order granting Employee’s request for limited discovery and directed the parties to address several issues outlined in the Superior Court’s remand order. The order acknowledged receipt of the CBA between Agency and Local 36 which was executed in September of 2018. The order also granted limited discovery to Employee to ascertain whether Agency and Local 36 were engaged in impacts and effects bargaining of the 2017 DPM at the time of the current adverse action.

On April 30, 2024, Agency filed a Motion for Certification of Interlocutory Appeal to the OEA Board and Request for Stay of Proceedings. According to Agency, the AJ’s remand order granting Employee’s request for leave to conduct discovery unlawfully opens this matter up for discovery, as well as a broad ranging evidentiary proceeding into bargaining between Agency and Local 36. It asserts that the AJ’s directives to engage in discovery or to present new documentary evidence on remand are precluded by the holding in *Pinkard* as well as the CBA. Agency opines that nothing within the Court’s remand order directed OEA to allow discovery. Instead, it posits that the AJ is limited to ordering direct briefing on the questions presented by Superior Court and any other question consistent with the remand order. Additionally, Agency reasons that the AJ’s broad ranging inquiry into bargaining between the parties exceeds this Office’s limited role under *Pinkard* and OEA’s subject matter authority.

It further believes that the Board should direct that briefing proceed on the issue of waiver first because a tribunal should not address complex issues of first impression when a matter can be decided on well-established law. Consequently, Agency requests that the AJ’s briefing order be vacated with instructions to: (1) bar the consideration of any evidence not presented to the Trial Board and (2) limit the consideration of issues to those presented in the Court’s remand order or by the parties. On May 2, 2024, the AJ issued an order granting Agency’s motion and certified the matter to the OEA Board for Consideration.

* 1. **Summary of Cases**
1. ***Employee v. Department of Transportation*, OEA Matter No. 1601-0049-20 –** Employee worked as a Transportation Engineer with the District of Columbia Department of Transportation (“Agency”). On May 26, 2020, Agency issued a final notice of removal to Employee. It charged Employee with performance deficits – failure to meet established performance standards, pursuant to District Personnel Manual (“DPM”) §§ 1605.4(m) and 1607.2(m) and neglect of duty – failure to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks or duties; failure to assist the public; undue delay in completing assigned tasks or duties; or careless work habits, pursuant to DPM §§ 1605.4(e) and 1607.2(e). The causes of action stemmed from a sixty-day Performance Improvement Plan (“PIP”).

On June 29, 2020, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”). She claimed that Agency placed her on a PIP in retaliation after she filed a complaint with the Equal Employment Opportunity (“EEO”). She argued that Agency’s PIP process was deficient and explained that she performed her duties in accordance with the requirements of her position description. Employee provided that she was not provided with clear goals for the PIP. As a result, she requested that she be reinstated to her position.

Agency filed its Answer to Employee’s Petition for Appeal on September 21, 2020. It argued that its termination action was based on Employee’s failure to meet the required standards of the PIP. Agency asserted that Employee neglected her duties by failing to carry out her official duties or responsibilities as expected of a reasonable person in her position; her delays negatively impacted her productivity and led to customer complaints; she was untimely in responding to tasks; and her work lacked clarity. Additionally, Agency contended that Employee’s performance deficiencies adversely impacted the Public Space Plan Review and Permit Application process; it undermined the construction work in public spaces; and it impeded the progress of Agency’s customers. Consequently, it implemented the PIP to address Employee’s performance deficiencies in three Core Competencies and two S.M.A.R.T goals. It contended that because Employee failed to meet the requirements of the PIP, it had cause for disciplinary action. Agency opined that it considered the *Douglas* factors before reaching its decision to terminate Employee. Therefore, it requested that Employee’s termination be upheld.

After holding a two-day evidentiary hearing and receiving written closing arguments, the OEA Administrative Judge (“AJ”) issued an Initial Decision on September 27, 2023. She held that Agency complied with the requirements for implementing a PIP, in accordance with DPM § 1410. Moreover, she found that Agency established cause for Employee’s failure to meet the performance standards and neglect of duty. The AJ noted that Agency provided emails from its clients about Employee’s deficiencies during the sixty-day PIP. Additionally, it submitted documentation showing that Employee did not meet the quality of review SMART goals. The AJ relied on testimony from Dr. Petrosian who outlined Employee’s failure to submit timely applications. She reasoned that removal was within the range of penalties for a first offense for neglect of duty and performance deficits; thus, Agency could impose termination as a penalty. She also determined that Agency adequately considered the *Douglas* factors. As a result, the AJ upheld Agency’s termination action.

Employee makes many of the same arguments in her Petition for Review that she presented to the AJ. She also argues that the AJ’s decision was based on an erroneous interpretation of statute, regulation, or policy and that the findings of the Initial Decision were not based on substantial evidence. Employee contends that progressive discipline is not optional and was not applied in the instant matter. According to Employee, Agency failed to provide any rationale for foregoing counseling or other forms of progressive discipline. As a result, she requests that the Board reverse the Initial Decision; that the disciplinary action be removed from her personnel record; and that she be reinstated with back pay and benefits.

1. ***Employee v. Department of Public Works*, OEA Matter No. 1601-0023-22AF23** – Employee worked as a Heavy Mobile Equipment Mechanic Supervisor at the Department of Public Works (“Agency”). On October 26, 2021, Agency issued a Notice of Final Decision on Proposed Removal which provided that Employee was suspended for thirty days, pursuant to District Personnel Manual (“DPM”) § 1607. According to Agency, Employee was charged with failure or refusal to follow instructions, in accordance with DPM §§1607.2(d)(1) and (d)(2) and safety and health violations, pursuant to DPM § 1607.2(i)(4). However, Agency failed to process Employee’s suspension.

Accordingly, the Office of Employee Appeals’ (“OEA”) Administrative Judge (“AJ”) ordered Agency to submit documentation or other personnel records related to its final notice, Employee’s administrative leave, and the procedural administration of the adverse action. In its brief, Agency asserted that Employee did not serve his suspension and instead remained on paid administrative leave through December 1, 2021. It explained that the Covid-19 Public Health Emergency caused significant disruptions in the District and during this period, it failed to process Employee’s suspension or place the final notice in his personnel file. Thus, it contended that Employee suffered no harm that would entitle him to a remedy.

In his response, Employee argued that due to Agency’s error, he served a suspension but remained on paid administrative leave until December 1, 2021. He conceded that he received his regular pay during this period. However, he contended that he lived under the threat of unpaid leave because of Agency’s notice on final decision. Employee also requested that Agency’s action be removed from his personnel file.

On June 15, 2023, the AJ issued an Initial Decision. She opined that Agency committed numerous administrative processing errors and held that Agency lacked cause for the adverse action. The AJ determined that while the final decision imposed a thirty-day suspension against Employee, he never served the suspension. She held that Employee was on administrative leave prior to the effective date of the suspension, and Employee conceded that he received his full salary during the suspension period. Thus, she found that the issue of the thirty-day suspension without pay was moot. As it related to Employee’s personnel file, the AJ found that Agency’s assertion that the adverse action was not part of Employee's personnel file was made in good faith. Therefore, she held that his request that the action be removed from his personnel file was also moot. The AJ ordered that Agency’s action of suspending Employee be reversed and that Agency confirm that this action is not part of Employee’s personnel record.

Employee filed a Motion for Attorney’s Fees on August 18, 2023. In his motion, he explained that he was the prevailing party in the matter and an award of attorney’s fees and costs were warranted in the interest of justice. Accordingly, Employee requested $46,237.85 in attorney fees, representing 47.8 hours of service performed by his attorneys before OEA.

In response to the motion, Agency argued that an award of attorney’s fees was not appropriate because Employee was not the prevailing party because the thirty-day suspension without pay and his request for relief were moot. It further reasoned that an award of fees was not warranted in the interest of justice. However, Agency submitted that if fees are awarded, they should be reduced by $6,411.80 for duplicative work and for work conducted on unrelated matters not before OEA.

The AJ issued an Addendum Decision on Attorney’s Fees on January 3, 2024. She found that Employee was the prevailing party. The AJ also found that Agency was in violation of *Allen* factor 4, gross procedural error which prolonged the proceeding or severely prejudiced the employee. She explained that while Agency’s action may not have caused severe prejudice or prolonged the proceeding, it was a procedural error on Agency’s part that warranted an award of attorney fees in the interest of justice.

As it related to attorney fees, the AJ opined that Employee’s request for fees was unreasonable. She determined that the number of hours expended was excessive given the degree of difficulty and the amount of time required in comparison to experienced attorneys who have appeared before OEA. Additionally, the AJ found that the fees requested included work performed prior to the filing of the OEA Petition for Appeal and a supplemental motion to Employee’s original motion on attorney’s fees. Thus, she denied these fees. Further, the AJ highlighted that there were no complex legal arguments made by either party; there was no evidentiary hearing conducted; and the delays in adjudication were because of Employee. As a result, she ordered Agency to pay $12,349.30 in attorney fees.

Agency disagreed with the decision and filed a Petition for Review with the OEA Board on February 7, 2024. Agency asserts that an award of attorney’s fees is required when the appellant is the prevailing party, and where payment is warranted in the interest of justice. It is Agency’s position that the AJ erroneously determined that attorney’s fees should be awarded in the interest of justice. Specifically, it argues that it did not violate *Allen* factor 4, as the AJ contended. According to Agency, this factor required gross procedural error that prolonged the processing or severely prejudiced the employee. However, it opines that the AJ held that its procedural error did not severely prejudice Employee or prolong the proceedings. Thus, according to Agency, the AJ’s finding was erroneous.

Furthermore, Agency argues that Employee never served the suspension, and he never lost wages because he was paid in full during the suspension period. It contends that the only relief Employee obtained was the acknowledgment that it did not have cause to take the adverse action against him. Agency opines that this is nominal relief that according to the holding in *Phillippa Mezile v. D.C. Department on Disability Services*, OEA Matter No. 2401-0158-09AF17 (June 14, 2017), would not warrant attorney’s fees because the fees would be unreasonable and unwarranted in the interest of justice. Consequently, it requests that the Board reverse the Addendum Decision on Attorney Fees.

Employee filed a response to Agency’s Petition for Review on March 13, 2024. He asserts that the AJ’s decision is based on substantial evidence and that the fees are reasonable. Employee maintains that he is the prevailing party and is entitled to attorney’s fees in the interest of justice. Employee, again, argues that Agency violated the second *Allen* factor. Further, Employee contends that Agency did not contest the fees requested by Employee. Therefore, it requests that the Addendum Decision on Attorney Fees be upheld.

1. ***Employee v. Metropolitan Police Department*, OEA Matter No. 1601-0081-13R16-R18-R22–**The AJ issued a Third Initial Decision on Remand on September 25, 2023. First, he explained that on April 21, 2023, the District of Columbia Council repealed the 90-day provision previously encapsulated within D.C. Code § 5-1031 in accordance with the Comprehensive Policing and Justice Reform Amendment Act of 2022 (“Reform Act”) and made the repeal retroactive to "any matter pending, before any court or adjudicatory body.” The AJ noted that the repeal of the 90-day provision, specifically applicable to members of the Metropolitan Police Department, also retroactively applied to cases pending before OEA. He disagreed with Employee’s argument that the Reform Act did not compel this Office to do anything because there is a presumption against statutory retroactivity based upon the inherent unfairness of imposing new burdens on people after the fact. Highlighting the holding in *Employee v. D.C. Metropolitan Police Department et. al*., Case No. 19-CV-1266 (D.C. 2023), the AJ provided that the Court of Appeals has made its position clear that the ninety-day provision related to retroactivity did not compel specific results under the old law, but rather directed courts to apply newly enacted legislation to pending civil cases. Since Employee’s appeal was pending before OEA when the Reform Act became law, the AJ concluded that Employee’s argument that Agency violated the repealed provisions of the 90-day rule was no longer valid. Consequently, he upheld Agency’s termination action.

Employee filed a Petition for Review with the OEA Board on November 18, 2023. His sole argument is that it is unconstitutional to retroactively apply the Reform Act to his appeal that has been pending before OEA for over ten years because it violates the tenants of due process. Thus, Employee asks this Board to not ignore longstanding precedent and assess whether Agency violated D.C. Code § 5-1031 based on the law that existed when the alleged misconduct occurred. Because he maintains that Agency violated the 90-day rule, Employee request that Agency’s termination action be overturned.

In response, Agency contends that OEA is precluded from considering whether the Reform Act is constitutional. It further opines that the AJ properly applied binding precedent governing the retroactivity of the Reform Act’s provisions related to the 90-day rule. Consequently, it requests that the Third Initial Decision on Remand be upheld.

1. ***Employee v. Department of Corrections*, OEA Matter No. 1601-0025-23 –** Employee worked as a Correctional Officer with the Department of Corrections (“Agency”). On December 19, 2022, Agency issued a notice to Employee which proposed placing him on enforced leave beginning December 28, 2022. The action was taken based on Agency’s receipt of an “Affidavit in Support of Criminal Complaint and Arrest Warrant” which charged Employee with wire fraud under 18 U.S.C. § 1343. The charges stemmed from Employee’s alleged act of embezzling over $10,000 from the Fraternal Order of the Police – Department of Corrections Labor Committee (“FOP”), while serving as the entity’s chairman. Employee filed a response to the proposed notice on December 21, 2022, opposing his placement on enforced leave. On December 28, 2022, Agency issued its final decision. As a result, Employee was placed on enforced leave effective December 28, 2022.

The AJ issued an Initial Decision on July 27, 2023. She agreed with Agency’s position that placing Employee on enforced leave was warranted following his arrest and charges for wire fraud. The AJ explained that Employee was arrested and charged by the U.S. Attorney’s Office of the District of Columbia (“USAO”) for violating 18 U.S.C. § 1343. She provided that 6-B DCMR § 1617.3 authorizes an agency to place an employee on enforced leave if he or she has been indicted on, arrested for, charged with, or convicted of a felony. According to the AJ, the record clearly established that Employee was arrested and charged with wire fraud under 18 U.S.C. § 1343, which constitutes a felony. She disagreed with Employee’s argument that the charge was related to a workers’ compensation claim because the claim was dismissed with prejudice by the Office of Administrative Hearings on May 8, 2023. Since Employee’s conduct violated 6-B DCMR § 1617.3, the AJ concluded that Agency’s enforced leave action was conducted in accordance with all applicable rules and regulations. As a result, Employee’s placement on enforced leave was upheld.

Employee subsequently filed a Petition for Review with the OEA Board on November 15, 2023. He submits that Agency erred because he did not receive a copy of its Sur-Reply Brief until October 5, 2023, the same day it was filed with OEA. Thus, Employee asserts that Agency’s brief is considered new evidence to which he was denied a meaningful opportunity to respond. Additionally, he maintains that Agency should not have placed him on enforced leave because he was in inactive duty status as result of his workers’ compensation appeal. Employee claims that he had no knowledge of the dismissal of his claim in May of 2023. Notwithstanding, he maintains that the Initial Decision erroneously held that he could be placed on enforced leave and requests that his petition be granted.

In response, Agency highlights that a copy of its sur-reply was mailed to Employee on October 5, 2023. Furthermore, Agency questions the effect, if any, of its Sur-Reply Brief on the resolution of this appeal because from a substantive standpoint, Agency’s filing solely aimed to reiterate its position that Employee’s appeal of the denial of his workers’ compensation claim had little to no impact on the criminal indictment for wire fraud. Agency agrees with the AJ’s assessment that because Employee was charged with a felony, it had the authority to administer the enforced leave action in accordance with 6-B DCMR §§ 1617.3. Therefore, it considers the Initial Decision to be based on substantial evidence.

* 1. **Deliberations** – This portion of the meeting will be closed to the public for deliberations

in accordance with D.C. Official Code § 2-575(b)(13).

* 1. **Open Portion Resumes**
	2. **Final Votes on Motion for Interlocutory Appeal**
	3. **Final Votes on Cases**
	4. **Public Comments**
1. **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.”