**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 12, 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=m8c3e59177bf67450dba44166f53f30eb>

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, September 12, 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 Petitions for Review**
	2. **Summary of Cases**
		1. **Employee v. D.C. Public Schools, OEA Matter No. 1601-0015-20AF24 –** 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, according to Agency, after several requests for extensions, Employee failed to comply with its reinstatement requirements. Therefore, on October 18, 2019, Agency issued a notice of termination action to 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.

After conducting an evidentiary hearing, the AJ issued an Initial Decision on September 13, 2023. He 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. Employee filed his response to Agency’s Petition for Review on November 14, 2023. Ultimately, the Board upheld the Initial Decision and found that Agency terminated Employee because he failed to complete four onboarding requirements. However, it held that Agency prevented Employee from completing three of the four requirements. The Board found that although there was one requirement that Employee could have completed, Agency failed to offer a range of penalties to determine the reasonableness of its termination action. Furthermore, it ruled that Agency did not provide any evidence that it considered relevant factors before terminating Employee. As a result, the Board upheld the Initial Decision and denied Agency’s Petition for Review. Accordingly, Employee was to be reinstated with back pay and benefits, as outlined in the Initial Decision.

Agency did not file an appeal of the OEA Board’s Opinion and Order. Subsequently, on February 2, 2024, Employee’s Counsel filed a Motion for Attorney’s Fees alleging that Employee was the prevailing party and that an award for attorney’s fees should be awarded in the interest of justice. Accordingly, his counsel requested an award of $72,510.20 plus $2,500 under the *Laffey* Matrix or $55,154 plus $2,500 under the *Fitzpatrick* Matrix.

In response to Employee’s motion on attorney’s fees, Agency filed a Motion for a Hearing on Employee’s Obligation to Mitigate Damages. The motion did not address Employee’s Counsel’s motion for attorney’s fees. It instead focused on Employee’s obligation to mitigate damages for an award of back pay.

On February 15, 2024, the AJ issued an Order Regarding Employee’s Motion for Attorney’s Fees and Costs. The order requested that Employee’s Counsel address if Employee completed Agency’s required onboarding procedures; if Employee was reinstated to his last position of record or a similar position; and if there were any other compliance related complaints to be resolved to ensure that Employee’s motion for attorney’s fees was ripe for adjudication. The order further provided that if the answers to any of the aforementioned questions was negative, then returning Employee to his status quo was incomplete and would require the investment of additional resources that Employee’s counsel may add to his fee invoice.

In response to Agency’s motion for a hearing on mitigating damages, Employee argued that the motion should be denied because the issue of mitigation of damages is moot. He contended that the mitigation of damages is an affirmative defense which can be waived, and that Agency waived this defense by waiting to raise it after the case concluded. Employee further argued that Agency unlawfully refused to comply with the Initial Decision and that its filing of the motion for mitigation is in bad faith to avoid paying Employee as ordered.

As for the AJ’s order related to his Counsel’s motion for attorney’s fees, Employee argued that the status of his onboarding was not relevant to the request for attorney’s fees. He went on to note that Agency refused to conduct a back pay and benefits analysis despite the order in the Initial Decision. Consequently, it requested that the AJ order Employee’s immediate reinstatement; that back pay, and benefits be paid within ten (10) days; and that his attorney’s fee petition be granted and paid immediately.

On March 4, 2024, the AJ issued an Addendum Decision on Attorney’s Fees and found that Employee was the prevailing party in this case. However, he opined that Employee has not been reinstated and has not received the back pay that he is owed. The AJ found that the process of reinstating Employee and having him receive back pay would require additional legal resourcing that would become part of the evolving attorney’s fee petition. Therefore, he ruled that the motion for attorney’s fees was premature, and it was dismissed without prejudice for resubmission.

Employee’s Counsel filed a Petition for Review on April 1, 2024. He argues that he should not be denied attorney’s fees because Agency refuses to implement OEA’s decision. Employee’s Counsel contends that the AJ’s Addendum Decision punishes him for Agency’s wrongdoing of not reinstating Employee with back pay and benefits. Therefore, he requests that the Addendum Decision on Attorney’s Fees be reversed.

Agency filed its response to Employee’s petition on May 1, 2024. It argues that Employee’s request for attorney’s fees is premature. It is Agency’s position that the AJ still needs to resolve the issue of backpay and Employee’s duty to mitigate before considering the petition for attorney’s fees. Accordingly, it requests that the petition be denied.

There were several subsequent filings related to the compliance matter filed by both parties. However, on August 26, 2024, Employee’s counsel filed a notice withdrawing his representation of Employee in this matter, effective immediately. His counsel provided that Employee terminated his firm from representing him, and Employee will continue in this matter as a *pro se* litigant.

* + 1. **Employee v.** **D.C. Public Schools, OEA Matter No. 1601-0070-22 –** Employee worked as a Teacher with D.C. Public Schools (“Agency”). On July 1, 2023, Employee received notice that he would be terminated from his position under IMPACT, Agency’s performance effectiveness system. The notice informed Employee that he was being separated after receiving a final IMPACT score of “Ineffective” for the 2021-2022 school year. In accordance with IMPACT, employees who receive a score of “Ineffective” are subject to removal. Consequently, Agency notified Employee that he would be terminated effective July 30, 2022.

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on August 1, 2022. He argued that his termination was unwarranted and requested that he be reinstated to his position of record. Agency filed its Answer to the petition on August 26, 2022, asserting that it properly followed the IMPACT process. It explained that Employee was evaluated during Cycles 1 and 2 of the 2021-2022 school year and participated in post-evaluation conferences after each assessment. Thus, according to Agency, Employee was subject to removal because he received a final IMPACT score of “Ineffective.” As a result, it requested that the termination action be upheld.

An OEA Administrative Judge (“AJ”) was assigned to the matter in September of 2022. After conducting a prehearing conference, the AJ determined that the issues presented by the parties warranted an evidentiary hearing. Thereafter, a hearing was held on February 16, 2022, wherein both Employee and Agency presented documentary and testimonial evidence in support of their positions.

The AJ issued an Initial Decision on March 18, 2022. First, he provided that under Chapter 5E, Sections 1306.1 and 1306.2 of the D.C. Municipal Regulations (“DCMR”), each employee was required to be evaluated under IMPACT by an appropriate supervisor and rated annually based on procedures established by the Superintendent. He explained that pursuant to 5E DCMR § 1401.2, OEA’s review of Agency’s adverse action was limited to determining whether Employee was terminated for “just cause” and whether Agency followed all IMPACT procedures.

Next, the AJ provided that under the IMPACT guidelines, teachers were required to have three assessment cycles during the 2021-2022 school year: an informal first assessment, a second assessment cycle (“Cycle 1”), and a third assessment cycle (“Cycle 2”). The AJ stated that each assessment was required to be followed by a post-observation conference with the evaluator within fifteen days. As it related to the 2021-2022 school year, the AJ determined that: (1) Employee’s informal observation occurred on December 15, 2021; (2) the Cycle 1 observation and post-evaluation conference occurred on March 14, 2022, and March 28, 2022, respectively; and (3) the Cycle 2 observation and post-evaluation conference occurred on May 18, 2022, and June 1, 2022, respectively. Based on the IMPACT scoring rubric, Employee received a final rating of “Ineffective.”

Citing the holding in *Shaibu v. District of Columbia Public Schools*, Case No. 2012 CA 003606 P(MPA)(D.C. Super. Ct. June 29, 2013), the AJ noted that despite his disagreements with the final IMPACT score and evaluation notes, Employee failed to sufficiently refute the factual observations made by his evaluator, Assistant Principal Tiffany Goodman (“Goodman”). He ruled that Goodman, Agency’s witness, provided consistent and credible testimony as it related to Employee’s IMPACT evaluation for the 2021-2022 school year. The AJ also noted that evaluators retain broad discretion in ranking their teachers. Therefore, he deemed Employee’s disagreements with the comments contained within his assessments to be unpersuasive. Because Employee received a final IMPACT rating of “Ineffective,” the AJ held that Agency properly terminated him in accordance with the relevant regulations.

Employee filed a Petition for Review with the OEA Board on April 22, 2024. He argues that the Initial Decision was not based on substantial evidence; the decision did not address all material issues of law and fact; and new and material evidence is now available that, despite due diligence, was not available when the record closed. According to Employee, the AJ’s rulings were arbitrary, capricious, and made in bad faith, which infringed upon his First Amendment right to free speech. Employee also disagrees with the AJ’s conclusions related to the witnesses’ credibility determinations, as well as his findings concerning the assessment of each IMPACT component. Relying on the holding in *Shaibu*, he submits that the circumstances surrounding the Cycle 1 and Cycle 2 observations, specifically regarding the misalignment of the comments with the actual scores, exhibits a factual basis to controvert the statements contained within his IMPACT evaluation. Employee further believes that his termination was retaliatory in nature, and he maintains that Goodman abused her discretion in evaluating him. Consequently, he requests that the Initial Decision be reversed.

Agency filed its response on May 1, 2024. It asserts that the Initial Decision was based on substantial evidence and states that it followed all IMPACT procedures in assessing Employee’s work performance. Agency opines that Employee’s petition to the Board only seeks to relitigate issues which have already been duly considered and decided by the AJ. It further reasons that the AJ’s credibility determinations were rational considering the evidence presented. Concerning Employee’s argument related to new and material evidence, Agency provides that Employee’s emails and attachment of a summer paycheck have no bearing on the disposition of this matter. It also questions why Employee failed to expound upon why this purported new evidence was not produced at the evidentiary hearing, as he was represented by counsel at the time.

Lastly, Agency disagrees with Employee’s contention that the AJ failed to address all material issues of fact in the Initial Decision. It maintains that the Petition for Review fails to raise an argument that the IMPACT guidelines were not followed; Employee never testified during direct testimony that he was retaliated against for engaging in protected speech; and the Initial Decision properly addressed the issue that was raised at the hearing: whether Agency had just cause to terminate Employee. Consequently, it requests that the Initial Decision be upheld.

On July 15, 2024, Employee filed a Motion to Compel the Release of Freedom of Information Act (“FOIA”) Email Documents. His filing asserts that Agency failed to release certain emails to him in a timely manner that would have provided clarity for his arguments related to the termination action, namely his IMPACT accessor’s alleged false testimony under oath. Employee subsequently filed a Motion to Consider Additional Evidence Which was Previously Unavailable. As it relates to the purported evidence, Employee claims that the newly submitted emails establish that Goodman fabricated testimony during the OEA evidentiary hearing which proves that his due process rights were infringed upon. As a result, he requests that this Board reverse the Initial Decision in light of the AJ’s erroneous findings related to his IMPACT assessment.

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

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

* 1. **Open Portion Resumes**
	2. **Final Votes on Cases**
	3. **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.”