Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 1601-0063-15
DEVONTA SIMMONS,	)	
Employee	)	
	)	Date of Issuance: September 30, 2015
v.	)	
	)	
D.C. DEPARTMENT OF TRANSPORTATION,	)	
Agency	)	
	)	
	)	
	)	Arien P. Cannon, Esq.
	)	Administrative Judge

Gina Walton, Employee Representative
Michael F. O'Connell, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Devonta Simmons ("Employee") filed a Petition for Appeal with the Office of Employee Appeals on April 24, 2015, challenging the District Department of Transportation's ("Agency") decision to remove him from his position as a Traffic Control Officer, Career Service. Employee was terminated for a "positive Breathalyzer test result," pursuant to 6-B DCMR §§ 3907.1(b) and 1603.3(i). The effective date of Employee's termination was close of business on April 13, 2015.

I was assigned this matter on July 13, 2015. Two separate Answers were filed in this matter; one on May 26, 2015, and another on May 27, 2015.[1] Agency filed a Motion for Summary Disposition on June 29, 2015. A Prehearing/Status Conference was convened on August 31, 2015. At the Prehearing/Status Conference, Employee's main contention was that Agency violated his due process rights by failing to provide him an Advance Written Notice of

[1] Employee was a Traffic Control Officer for the District Department of Transportation ("DDOT"). However, the District Department of Human Resources ("DCHR") administers Drug and Alcohol Testing for employees covered under the Child and Youth, Safety and Health Omnibus Amendment Act ("CYSHA"). Both, DDOT and DCHR, filed separate Answers to Employee's Petition for Appeal. The content in both Answers are similar.

Removal. Subsequent to the Prehearing Conference, Agency was afforded an opportunity to supplement the record regarding its mailing of the Advance Written Notice to Employee. Agency submitted its supplemental filing on September 2, 2015. Employee submitted his response to Agency's supplement filing on September 28, 2015. Based upon the submissions by the parties, I determined that an Evidentiary Hearing is not warranted. The record is now closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

Whether Agency violated Employee's Due Process rights.

BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.[2] "Preponderance of the evidence" shall mean:

> That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.[3]

FINDINGS OF FACT, ANALYSIS, AND CONCLUSION

The facts surrounding Employee's removal are not disputed. Employee was removed for a confirmed positive Breathalyzer test result. As stated in Employee's Opposition to Agency's Motion for Summary Disposition, the only relevant issue in this matter is whether Agency properly served Employee with the advance notice of proposed removal as required by the Due Process Clause of the Constitution.

The U.S. Supreme Court has held that "the root requirement" of the Due Process Clause requires "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest."[4] This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment.[5] Affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays.[6]

---

[2] 59 DCR 2129 (March 16, 2012).
[3] OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).
[4] *See Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532 (1985) (citing *Boddie v. Connecticut,* 401 U.S. 371 (1971)).
[5] *Board of Regents v. Roth,* 408 U.S. 564 (1972).
[6] *Loudermill*, 470 U.S. 532.

The pre-termination "hearing," though necessary, need not be elaborate.[7] "[T]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings."[8] The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.[9] Here, as with most adverse actions taken by District government agencies against its employees, and in accordance with Section 1608 of the District Personnel Manual ("DPM"), Agency was required to provide Employee with a fifteen (15) day *advance written notice* of the charges levied against him. Section 1608.2 of the DPM sets forth enumerated requirements that the Advance Written Notice should afford Employee, including the right to prepare a written response to the charges against him and the right to an administrative review by a hearing officer. These rights satisfy the due process requirements in which Employee was entitled. In an Answer filed by DDOT, it includes a photocopy of a certified mail receipt for an Advance Written Notice of Proposed Removal purportedly sent to Employee on or around February 25, 2015.[10] The photocopy is not postmarked and there is no indication that it was actually sent by Agency or received by Employee. The tracking number listed on the certified mail receipt is "7008 3230 0002 6788 7872." A search on the tracking option on the USPS website states that "[t]he Postal Service could not locate the tracking information for your request."[11]

6-B DCMR § 1608.7 provides that if an employee is not in a duty status, i.e. at work, the notice of proposed action shall be sent to the employee's last known address by courier, or by certified or registered mail, return receipt requested. Here, Employee was placed on administrative leave effective January 20, 2015, pending an investigation.[12] Employee does not contend that the advance written notice was sent to an incorrect address; rather he asserts that Agency never issued him the advance written notice and deprived him of his right to respond to the charges against him. The certified mail receipt provided by DDOT only includes Employee's name and address. Furthermore, there are no markings on the receipt which indicates the postage was paid for. The fact that the Postal Service cannot provide any tracking information for the number listed on the certified mail receipt calls into question Agency's assertions that it actually provided Employee an advance written notice of the proposed action against him.

Additionally, the Revised Hearing Officer's Report/Decision indicates that the Hearing Officer "read and considered the written response submitted by employee."[13] However, in Agency's (DDOT) Motion for Summary Disposition, it states that "Employee did not submit a response to the proposed removal…"[14] These two contradictory statements contained in the record further calls into question whether Employee actually received an advance written notice

---

[7] *See Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532 (1985) (citing *Boddie v. Connecticut,* 401 U.S. 371 (1971)).
[8] *Loudermill*, 470 U.S. 532.
[9] *Id.*
[10] *See* Answer filed by DDOT, Tab 9 (May 26, 2015).
[11] *See* Employee's Motion in Opposition to Agency's Motion for Summary Disposition, Attachment (July 9, 2015).
[12] *See* Agency Answer, Exhibit 5 (May 26, 2015).
[13] *See* Answer filed by DCHR, Tab 13 at 3 (May 27, 2015).
[14] *See* Agency's Motion for Summary Disposition, at 2. (June 29, 2015).

and whether he was provided an opportunity to respond to the charges against him. The record is devoid of any written response submitted by Employee prior to the effective date of his termination regarding the charges against him

Based on the evidence in the record, I find that Agency has not satisfied its burden that it did in fact provide Employee an Advance Notice of Proposed Removal. Thus, I find that Agency violated Employee's due process rights by failing to provide him such advance notice. Agency's failure to send Employee an advance written notice, and afford him the opportunity to respond to the charges, deprived Employee of his Due Process rights. The lack of information on the certified mail receipt, the lack of information for the tracking number on the certified mail receipt, and the contradictory statements regarding a written response submitted by Employee, all call into question the veracity of Agency's assertion that it afforded Employee an opportunity to respond to the charges against him. Given the seriousness of a due process violation, the "violation is not subject to the harmless error test."[15] Consequently, because Agency violated Employee's due process rights, the removal must be reversed and Employee must be afforded a "new constitutionally correct removal procedure."[16]

ORDER

Accordingly, it is hereby **ORDERED** that:

1. Agency's termination of Employee is **REVERSED**; and
2. Agency shall reinstate Employee to the same or comparable position prior to his termination;
3. Agency shall immediately reimburse Employee all back-pay and benefits lost as a result of his removal; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge

[15] *Ward v. U.S. Postal Service*, 634 F.3d 1274 (Fed. Cir. 2011) (citing *Stone v. FDIC*, 179 F.3d 1368 (Fed. Cir. 1999)).
[16] *Ward*, 634, F.3d at 1279-1280.