

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:	)	
	)	
CYNTHIA MILLER-CARRETTE,	)	OEA Matter No. 1601-0173-11
Employee	)	
	)	Date of Issuance: October 29, 2013
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
_____	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Cynthia Miller-Carrette (“Employee”) worked as a Teacher with the D.C. Public Schools (“Agency”). On July 15, 2011, Agency issued a notice to Employee informing her that she was terminated due to her performance ratings of “Minimally Effective” under its IMPACT performance assessment system. The effective date of the termination was August 12, 2011.<sup>1</sup>

On August 15, 2011, Employee challenged the termination by filing a Petition for Appeal with the Office of Employee Appeals (“OEA”). She argued that there was an unequal comparison of her IMPACT performance ratings for the 2009-2010 and 2010-2011 school years. Therefore, she requested reinstatement to her position.<sup>2</sup>

Agency explained in its Answer to the Petition for Appeal that Employee was assessed based on the subjects she taught during the 2009-2010 and 2010-2011 school years. It claimed

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<sup>1</sup> *Petition for Appeal*, p. 7 (August 15, 2011).

<sup>2</sup> *Id.*, 3-5.

that for both school years, she was rated as “Minimally Effective” on her final performance ratings. Agency explained that pursuant to its IMPACT procedures, employees who received “Minimally Effective” performance ratings for two consecutive years were subject to termination. Therefore, it believed that its termination action was proper.<sup>3</sup>

The OEA Administrative Judge (“AJ”) held a Status Conference and subsequently issued a Post Status Conference Order which required the parties to submit briefs.<sup>4</sup> Agency’s brief was due on or before August 14, 2013, and Employee’s brief was due on or before August 28, 2013. Because Agency failed to comply with the order, on August 19, 2013, the AJ issued an Order for Statement of Good Cause requiring it to submit the brief, along with a statement of good cause for its failure to respond to the Post Status Conference Order.<sup>5</sup>

Thereafter on August 30, 2013, Agency Representative, Sara White, sent the AJ an email which explained that she was “. . . just seeing [the AJ’s] order for statement of good cause” and “[did] not have [the] July 24, 2013 Order.”<sup>6</sup> Ms. White provided that she would be able to submit the brief and good cause statement by that Tuesday, September 3, 2013. The AJ replied to the email and granted the request to have the documents filed by September 3, 2013. However, Agency did not file its brief or Statement of Good Cause.

The Initial Decision was issued on September 6, 2013. The AJ found that because Agency failed to comply with her orders, it failed to defend its termination action. She found that Agency violated OEA Rule 621.<sup>7</sup> As a result, Agency’s termination action was reversed,

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<sup>3</sup> *District of Columbia Public Schools’ Answer to Employee’s Petition for Appeal*, p. 2-5 (September 15, 2011).

<sup>4</sup> The parties were instructed to address whether Agency followed the District’s statutes, regulations, and laws when it terminated Employee; to summarize the IMPACT process; and to determine whether Employee was a union member. *Post Status Conference Order* (July 24, 2013).

<sup>5</sup> *Order for Statement of Good Cause* (August 19, 2013).

<sup>6</sup> *Email from Sarah White, Esq., Agency Representative* (August 30, 2013).

<sup>7</sup> The AJ explained that both of her orders warned Agency that failure to comply could result in sanctions, including dismissal.

and it was ordered to reinstate Employee and reimburse her all back pay and benefits.<sup>8</sup>

Agency filed a Petition for Review with the OEA Board on October 4, 2013. It submits that new and material evidence is available that was not available when the record closed. Agency Representative, Sara White, explains that on September 1, 2013, she learned that her brother died.<sup>9</sup> Ms. White explains that when the Initial Decision was issued, the AJ was not aware of this information or that she left the Washington, D.C. area. Agency states that extenuating circumstances caused a delay in defending its action. Therefore, it requests that the OEA Board grant the Petition for Review, overturn the Initial Decision, and remand the matter to the AJ for a determination on the merits of the case.<sup>10</sup>

Agency has provided sufficient evidence that its representative was unavailable due to the sudden death of a close family member. While this Board recognizes the AJ's authority to dismiss appeals for failure to defend under OEA rule 621.3, we are confident that if she was aware of the circumstances before issuing the Initial Decision, the AJ would have granted an extension in this matter. In *Murphy v. A.A. Beiro Construction Co. et al.*, 679 A.2d 1039, 1044 (D.C. App. 1996), the District of Columbia Court of Appeals held that "decisions on the merits of a case are preferred whenever possible, and where there is any doubt, it should be resolved in favor of trial."<sup>11</sup> This Board believes that in the interest of justice and fairness, this matter must be REMANDED to the Administrative Judge to consider the merits of Employee's appeal.

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<sup>8</sup> *Initial Decision* (September 6, 2013).

<sup>9</sup> Ms. White states that she did not return to the office until September 9, 2013. She alleges that upon her return to the office, she realized the deadline was missed.

<sup>10</sup> *District of Columbia Public Schools' Petition for Review*, p. 2-3 (October 4, 2013).

<sup>11</sup> The OEA Board also followed this holding in *Diane Gustus v. Office of Chief Financial Officer*, OEA Matter No. 1601-0025-08, Opinion and Order on Petition for Review (December 21, 2009) and *Jerelyn Jones v. D.C. Public Schools*, OEA Matter No. 2401-0053-10, Opinion and Order on Petition for Review (April 30, 2013).

**ORDER**

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **GRANTED**. This matter is **REMANDED** to the Administrative Judge to consider the case on its merits.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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A. Gilbert Douglass

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.