THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JOE JONES	)	OEA Matter No. 1601-0001-10
Employee	)	
	)	Date of Issuance: February 5, 2013
	)	
D.C. PUBLIC SCHOOLS,	)	
DEPARTMENT OF TRANSPORTATION	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Joe Jones ("Employee") worked as an Operations Assistant with the D.C. Public Schools, Department of Transportation ("Agency"). On September 21, 2009, Employee received a letter of his proposed termination from his position due to negligent performance of duties.[1] The letter went on to provide that Employee had the right to review any non-privileged documents related to the proposed action. Finally, it concluded by explaining that "unless the proposed adverse action is reversed or amended by administrative review, the effective date of [Employee's] termination [would] be Wednesday, October 7, 2009."[2]

Thereafter, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). He explained that while covering another employee's station, he was in charge of

[1] Agency alleged that Employee failed to dispatch a bus route which resulted in a child not being transported to school.
[2] *Petition for Appeal,* p. 5-6 (October 1, 2009).

scheduling and dispatching buses that were "hot routes."[3] Employee argued that on the day in question, he was informed that routes 526, 533, 579, 610, 641, 650, 654, and 689 were hot routes for the day. He claimed that later in the day, he received a call inquiring about why route 514 was not included in the hot routes. He contended that he was unaware that route 514 was on the list of hot routes, and he did not receive any documentation providing such. Employee explained that at that point he was provided with a choice by Director Pettigrew to be terminated or demoted to a bus attendant.[4]

On November 12, 2009, Agency filed its response to Employee's Petition for Appeal. It explained that routes were locations where Bus Drivers traveled to pick up students to be transported to school sites. Agency claimed that Employee failed to dispatch a Bus Operator to route 514, and as a result, a student was not transported to their school. Because Agency believed the evidence proved Employee's misconduct, it requested that OEA uphold its action against Employee.[5]

Before the OEA Administrative Judge ("AJ") issued her decision, she ordered Agency to provide its final notice of termination or its argument in support of its decision that the proposed notice of removal was sufficient to serve as the final agency decision.[6] Agency responded by arguing that the notice provided to Employee was sufficient because it offered him the right to respond and provided an effective termination date if the proposed decision was not reversed. Because the decision was not reversed or amended, the letter served as a final decision.[7]

The AJ issued her Initial Decision on November 2, 2011. She held that agencies are

[3] According to Employee, hot routes were those that presented problems in the past. Therefore, those routes were staffed by both bus drivers and bus attendants.
[4] *Petition for Appeal*, p. 7-8 (October 1, 2009).
[5] *Agency's Answer to Employee's Petition for Appeal* (November 12, 2009).
[6] *Order Requesting Final Agency Decision* (June 23, 2011).
[7] It should be noted that Agency conceded that "the letter did not provide Employee with any appeal rights following the effective date of his termination." *Agency's Response to June 23, 2011 Order* (July 19, 2011).

required to issue a final written decision that not only informs the employee of the final action taken, but it also provides employees with their appeal rights. The AJ found Agency's argument, that its notice of proposed action could serve as its final agency decision, to be weak. Specifically, she ruled that the notice omitted any information regarding Employee's appeal rights. She held that there was no statutory or regulatory basis upon which Agency could rely to combine a proposed and final notice. Moreover, she determined that Agency violated D.C. Official Code §1-606.04(e) and OEA Rule 605.1, which require agencies to provide substantive and procedural information related to disciplinary action taken against an employee. Finally, she opined that because Agency failed to provide a final decision to Employee, he was unaware of the factors used by Agency in reaching its final decision. Because the notice requirements are mandatory, the AJ ordered that Employee be reinstated to his position with back pay and benefits.[8]

Agency disagreed with the AJ's decision and filed a Petition for Review with the OEA Board on December 6, 2011. It contends that the Initial Decision was not supported by substantial evidence because the proposed notice complied with the statutory requirements of both a proposed and final notice. Agency argues that notice provided to Employee contained the reason for his termination; his right to be represented; his right to respond to the notice; his right to review the material used to support his termination; and his effective date of termination. It went on to provide that although it omitted Employee's appeal rights, this was not prejudicial to Employee because he filed a timely appeal with OEA.[9] According to Agency, because Employee was not harmed by its failure to include his appeal rights, the AJ should not have

[8] *Initial Decision* (November 2, 2011).
[9] Agency relied on the Supreme Court decision of *Shinseki v. Sanders*. 556 U.S. 369 (2009), to bolster its argument that its failure to provide appeal rights was not prejudicial to Employee.

reversed its action against Employee.[10]

ADVANCED NOTICE

After reviewing District Personnel Manual ("DPM") Chapter 16, it is clear that there are two, distinct steps required when an adverse action is taken against a District government employee. The preliminary phase requires that an advanced notice be provided to employees. DPM § 1608.1 (a) provides that "except in the case of a summary suspension action pursuant to § 1615 or a summary removal action pursuant to § 1616, an employee against whom corrective or adverse action is proposed shall have the right to an advance written notice . . . of fifteen (15) days." Further, Section 1608.2 provides the following:

> The advance written notice shall inform the employee of the following:
>
> (a) The action that is proposed and the cause for the action;
> (b) The specific reasons for the proposed action;
> (c) The right to prepare a written response, including affidavits and other documentation, within six (6) days of receipt of the advance written notice;
> (d) The person to whom the written response or any request is to be presented;
> (e) The right to review any material upon which the proposed action is based;
> (f) In the case of a proposed adverse action only, the right to be represented by an attorney or other representative;
> (g) The right to an administrative review by a hearing officer appointed by the agency head, as provided in § 1612.1, when the proposed action is a removal; and
> (h) The right to a written decision.[11]

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[10] *Agency's Petition for Review,* p. 4-6 (December 6, 2011).

[11] Similarly, D.C. Official Code § 1-606.04 (b)-(e) provides:

> (b) The personnel authority shall provide for 15 days advance notice in writing stating the specific reasons for the proposed action prior to an adverse action against an employee for cause that results in removal, a reduction in grade, or a suspension of 10 days or more. This provision may be waived by the agency head if the employee's conduct threatens the integrity of government operations, constitutes an immediate hazard to the agency, to other employees of the government, or to the employee, or to the public health, safety, or welfare.
>
> (c) The personnel authority shall provide that any employee whose removal from service, reduction in grade, or suspension of 10 days or more is proposed, or whose removal is effected pursuant to § 1-616.51(5) have the following rights:
>
> (1) To review any material upon which the proposal or action is based;
>
> (2) To prepare a written response to the notice provided in subsection (b) of this section, including

In its advanced notice, Agency explained that the cause taken against Employee was negligent performance of duties for his failure to dispatch a route. Agency provided the specific reasons why it believed Employee failed to perform his duties. Additionally, it properly informed Employee of his right to reply, in writing, to the charges; that he could review material relied upon for the charge; that an administrative review of the termination could be conducted; the person to whom he could submit his response; and that he could be represented in his response to the notice. However, Agency failed to adhere to one of the most important requirements of the regulation – the right to a written decision. Instead, Agency explained that "unless the proposed adverse action is reversed or amended by administrative review, the effective date of [Employee's] termination [was] Wednesday, October 7, 2009." This is not the equivalent of a written decision.

DPM § 1608.2 and D.C. Official Code § 1-606.04(e) are both mandatory in nature.[12] Both compel Agency to comply with Employee's right to a written decision. Agency concedes this point in its Petition for Review where is provides that "when an agency actually decides to terminate an employee, the agency 'shall provide the employee with a written decision following the [administrative] review . . . and shall advise each employee of his or her right to appeal . . .

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affidavits and other documentation;
(3) To be represented by an attorney or other representative; and
(4) To be heard, as provided in subsection (d) of this section in the case of a removal.
(d) The personnel authority shall provide an administrative review by a hearing officer appointed by the agency head of a proposed removal action or a removal action pursuant to § 1-616.51(5) including the employee's response, if any, and may provide for an adversary hearing and the confrontation of witnesses.
(e) The personnel authority shall provide the employee with a written decision following the review provided in subsection (d) of this section, and shall advise each employee of his or her right to appeal to the Office as provided in this subchapter.

[12] The *Shinseki v. Sanders*. 556 U.S. 369 (2009), matter is distinguishable from the current case because it dealt with the statutory authority provided to Veterans Affairs and how Veterans Affairs went beyond its statutory requirement and established its own special framework for notice errors. *Id.* at 401. This is not the case in the current matter. The OEA AJ has simply applied the statutory requirements to the facts of this case; she has not created a separate framework for notice errors.

.'"[13] The record is void of Agency's written decision following its administrative review. An agency cannot disregard this requirement when conducting a removal action against an employee and claim that the Employee is not prejudiced by its inaction. This Board believes that the prejudice faced by Employee was not harmless. Employee was deprived of the opportunity for an adversary hearing and the confrontation of witnesses because there was no evidence of an administrative review, as provided in D.C. Official Code § 1-606.04(d). This is not only extremely prejudicial, but it is indeed harmful to Employee because it impairs his ability to adequately defend himself against the action taken by Agency. Furthermore, because a written decision was not provided by Agency, it is not clear that a hearing officer conducted an administrative review of the matter.[14] Therefore, Agency's advanced written notice violated the requirements for adverse action claims.

FINAL AGENCY DECISION

After administrative review of the proposed removal action against an employee, the second step is for the agency to issue a final agency decision. DPM § 1613.1 provides that "the deciding official, after considering the employee's response and the report and recommendation of the hearing officer pursuant to § 1612, when applicable, shall issue a final decision." Section 1613.2 highlights that "the deciding official shall either sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice, but in no event shall he or she increase the penalty." Finally, DPM §1614.1 provides that:

> The employee shall be given a notice of final decision in writing, dated

[13] *Petition for Review*, p. 4 (December 6, 2011).

[14] DPM §§1612.1 *et al.* provides the requirements for administrative review. DPM 1612.1 highlights that "the personnel authority shall provide for an administrative review of a proposed removal action against an employee." DPM §1612.10 provides that "after conducting the administrative review, the hearing officer shall make a written report and recommendation to the deciding official, and shall provide a copy to the employee."

> and signed by the deciding official, informing him or her of all of the following:
> (a) Which of the reasons in the notice of proposed corrective or adverse action have been sustained and which have not been sustained, or which of the reasons have been dismissed with or without prejudice;
> (b) Whether the penalty proposed in the notice is sustained, reduced, or dismissed with or without prejudice;
> (c) When the final decision results in a corrective action, the employee's right to grieve the decision as provided in § 1617;
> (d) When the final decision results in an adverse action, the right to appeal to the Office of Employee Appeals as provided in § 1618. The notice shall have attached to it a copy of the OEA appeal form; and
> (e) The effective date of the action.

Likewise, D.C. Official Code § 1-606.03 (a) states that

> An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.

Thus, in accordance with the DPM and D.C. Official Code, Employee was entitled to receive a separate notice of final decision from Agency. Assuming arguendo that this Board allowed Agency's proposed notice to serve as its advanced and final decisions, Agency still only partially complied with DPM § 1608.2 and did not attempt to comply with DPM §§ 1613.1, 1613.2, or 1614.1. It unilaterally relieved itself of providing Employee with a final written decision of its proposed action. There was no final decision from the deciding official in this matter. As previously mentioned, it is not clear that Agency even used a deciding official in this case. There was no final determination of the outcome of the charges against Employee, and he was not provided his appeal rights to OEA.

Had Agency attempted to comply with DPM §§ 1613.1, 1613.2, 1614.1, and D.C. Official Code § 1-606.03, it would have realized that it also violated the mandatory language of OEA Rule 605.1. This Rule provides that

> When an agency issues a final decision to an employee on a matter appealable to the Office, the agency shall at the same time provide the employee with:
>
> (a) Notice of the Employee's right to appeal to the Office;
> (b) A copy of the rules of the Office;
> (c) A copy of the appeal form of the Office;
> (d) Notice of applicable rights to appeal under a negotiated review procedure; and
> (e) Notice of the right to representation by a lawyer or other representative authorized by the rules.

Employee received none of the required documents as outlined above. The OEA Board held in *Paul Dame v. Department of Corrections*, OEA Matter No. 1601-0043-03, *Opinion and Order on Petition for Review*, (February 27, 2007), that a final agency decision is required for this office to consider an Employee's Petition for Appeal. Thus, it is critical that agencies deliver a copy of its final decision to employees. Based on the numerous violations of mandatory statutory and regulatory requirements, this Board must uphold the Initial Decision and deny Agency's Petition for Review.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **DENIED**.

FOR THE BOARD:

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William Persina, Chair

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Vera M. Abbott

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Sheree L. Price

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.