THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ILBAY OZBAY, Employee	OEA Matter No. 1601-0073-09R11
D.C. DEPARTMENT OF TRANSPORTATION, Agency	Date of Issuance: October 28, 2014

OPINION AND ORDER
ON REMAND

This case was previously decided by the Office of Employee Appeals' ("OEA") Board. Ilbay Ozbay ("Employee") worked as a Civil Engineer with the Department of Transportation ("Agency"). After receiving an unsatisfactory performance rating for the period of April 1, 2007 through March 31, 2008, Agency issued a Letter of Warning to Employee that informed him that he failed to meet the minimum requirements for his position. Employee was given 90 days to improve his performance, but he failed to do so. As a result, on November 18, 2008, Agency issued a notice of final decision to Employee informing him that he was removed from his position due to his unsatisfactory work performance.[1]

In Employee's Petition for Appeal, he argued that he performed his duties in a satisfactory manner and requested that he be reinstated to his position.[2] In response, Agency

[1] *Agency's Answer to Employee's Petition for Appeal* (April 17, 2009).
[2] *Petition for Appeal,* p. 3 (January 22, 2009).

contended that the Letter of Warning outlined specific areas where Employee needed improvement. Despite its efforts to assist Employee with reaching his goals, Agency asserted that he still failed to perform his duties satisfactorily.

After conducting an evidentiary hearing on the matter, the OEA Administrative Judge ("AJ") issued his Initial Decision on March 18, 2011. First, the AJ held that Agency had cause to remove Employee, explaining that Agency witnesses provided credible testimony regarding Employee's failure to complete many of his significant tasks. The AJ determined that in accordance with Chapter 14, Sections 1414.2-1414.5 of the D.C. Personnel Manual ("DPM"), Agency followed the appropriate steps to remove Employee for an unsatisfactory performance rating. He also found that the Letter of Warning was properly served to Employee, along with a Performance Improvement Plan. As a result, Agency's removal of Employee was upheld. [3]

Employee disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on April 27, 2011. He argued that because the Letter of Warning was not signed by him or his supervisor, it could not serve as basis for a valid notice. He further provided that Agency did not prove that it utilized progressive discipline prior to terminating him. Therefore, Employee believed that the Initial Decision was not supported by substantial evidence.[4]

On July 23, 2012, the Board issued its Opinion and Order on the Petition for Review. It found that the AJ utilized the incorrect regulation in reaching his conclusion that Agency had cause to remove Employee. The Board explained that the AJ used the Performance Management Program system ("PMP"), which was created on July 7, 2000; however, he should have used the Performance Evaluation System ("PES"), which was previously created on December 31, 1979. The Board provided that employees who were under the PES were required to follow Part II of

[3] *Initial Decision,* p. 10-11 (March 18, 2011).
[4] *Employee Petition for Review* (April 27, 2011).

Chapter 14 of the DPM.[5] Thus, it remanded the matter to the AJ to determine whether a different outcome would result using the PES system and its applicable regulation.[6]

With regard to the Letter of Warning, the Board noted that while the PMP system did not discuss the Letter of Warning, the PES system did. The Board provided that there were specific instructions for providing a valid Letter of Warning under the PES system.[7] As a result, it ruled that the AJ needed to determine whether Agency failed to follow the Letter of Warning instructions, and if Agency did, then the AJ must have also determined if Part II, DPM Chapter 14, Subpart 2.5(G) applied.[8]

Lastly, because the documents submitted by Agency in support of the unsatisfactory rating were outside of the rating period, the Board held that the AJ needed to consider if there was sufficient evidence to uphold Agency's decision. The Board explained that in light of Part II, DPM Chapter 14, Subparts 2.5(B), 1.5(A), and 1.8(3), if the documents could not be used, then the AJ must determine whether the witness testimony was enough to establish that there was substantial evidence proving that Employee's work performance was unsatisfactory. Accordingly, the Petition for Review was granted, and the matter was remanded for a determination based on Part II of Chapter 14 of the DPM.[9]

On remand, the AJ reviewed the applicable regulation and the Letter of Warning procedures. He found, *inter alia*, that Agency's Letter of Warning did not fully match the performance rating period; that a discrepancy existed as to whether Agency provided assistance to Employee to improve his performance; that the Letter of Warning was unsigned and undated;

---

[5] The Board explained that although the PMP was in place during Employee's rating period, the PMP system did not apply to him.
[6] *Opinion and Order on Petition for Review*, p. 4-5 (July 23, 2012).
[7] The Letter of Warning requirements are pursuant to Part II, DPM Chapter 14, Subpart 2.5(D), (E)(1), and Subpart 1.10(1). The Board determined that it was necessary to read the subparts in conjunction with the DPM Instructions for Completing the Letter of Warning Template.
[8] *Id.*, 5-7.
[9] *Id.*, 7-8.

and that the record did not contain a copy of the Letter of Warning. Thus, the AJ ruled that Agency failed to establish that it served Employee with a valid Letter of Warning. Therefore, in accordance with Part II, DPM Chapter 14, Subpart 2.5(G), the AJ held that Employee's official rating for that period should have been satisfactory. Accordingly, Agency's action was vacated, and it was ordered to reinstate Employee with back-pay and benefits.[10]

On July 3, 2013, Agency filed a Petition for Review of the Amended Initial Decision on Remand. Agency argues that the decision was based on an erroneous interpretation of statute, regulation, or policy, and it failed to address all issues and law properly raised on appeal. Agency claims that the decision failed to consider OEA's rule on harmless error. It is Agency's position that its lack of conformity with the instructions for the Letter of Warning was harmless procedural error. Therefore, Agency requests that the AJ's remand decision be reversed, or in the alternative, remanded for further consideration of OEA Rule 631.3.[11]

Employee filed an Answer to Agency's Petition for Review on August 7, 2013. He contends that Agency waived its argument regarding harmless error when it failed to preserve the issue before the AJ. Further, Employee argues that harmful error did not exist in this case because he was prejudiced by Agency's failure to sign and issue the Letter of Warning to him. Because he did not have the Letter of Warning, he could not grieve Agency's decision. It is Employee's position that if he was provided a signed Letter of Warning, he would not have been terminated because he would have been on notice of the need of Agency's desire for him to

[10] *Amended Initial Decision on Remand from the OEA Board,* p. 8-11 (June 4, 2013).
[11] *Agency's Petition for Review of Amended Initial Decision* (July 3, 2013). Thereafter, Employee filed Petition for Attorney's Fees, arguing that he was the prevailing party and requested his fee request of $16,248.00. *Employee's Petition for Attorney's Fees* (July 3, 2013). Agency filed an opposition to the Petition, stating that it must be denied because the AJ's decision was not final. *Agency's Opposition to Employee's Petition for Attorney's Fees* (July 22, 2013).

improve his performance or face termination. As a result, Employee requests that the Board affirm the Amended Initial Decision on Remand.[12]

As Employee asserts this Board cannot address the merits of Agency's Petition for Review. Agency raises issues on appeal that were not presented to the Administrative Judge for consideration. In accordance with OEA Rule 633.4, "any . . . legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board." Agency had numerous opportunities to present its harmless procedural error argument to the AJ, but it chose not to. This Board has held in numerous cases that an argument is waived if it was not raised on appeal before the AJ.[13]

Similarly, the D.C. Court of Appeals has held that "it is a well-established principle of appellate review that arguments not made at trial may not be raised for the first time on appeal." *District of Columbia Metropolitan Police Department v. Stanley*, 942 A.2d 1172 (D.C. 2008). Additionally, the Court has held that any arguments are waived where a party never attempted to reopen the record to introduce any evidence supporting their argument before the issuance of an OEA Initial Decision. *Brown v. Watts*, 993 A.2d 529 (D.C. 2010) and *Davidson v. D.C. Office of Employee Appeals*, 886 A.2d 70 (D.C. 2005). Thus, because the procedural error argument is the only one raised on Petition for Review, we cannot consider it on its merits. Accordingly, we

[12] *Employee's Answer to Agency's Petition for Review,* p. 2-6 (August 7, 2013). Employee subsequently filed a Petition to Expedite Agency's Petition for Review on November 15, 2013.

[13] *Sharon Jeffries v. D.C. Retirement Board,* OEA Matter No. 2401-0073-11, Opinion and Order on Petition for Review (July 24, 2014); *Latonya Lewis v. D.C. Public Schools,* OEA Matter No. 1601- 0046-08, Opinion and Order on Petition for Review (April 15, 2014); *Markia Jackson v. D.C. Public Schools*, OEA Matter No. 2401-0138-10, Opinion and Order on Petition for Review (August 2, 2013); *Darlene Redding v. Department of Public Works*, OEA Matter No. 1601-0112-08R11, Opinion and Order on Petition for Review (April 30, 2013); *Dominick Stewart v. D.C. Public Schools*, OEA Matter No. 2401-0214-09, Opinion and Order on Petition for Review (June 4, 2012); *Calvin Braithwaite v. D.C. Public Schools*, OEA Matter No. 2401-0159-04, Opinion and Order on Petition for Review (September 3, 2008); *Collins Thompson v. D.C. Fire and EMS*, OEA Matter No. 1601-0219-04, Opinion and Order on Petition for Review (November 13, 2008); and *Beverly Gurara v. Department of Transportation*, OEA Matter No. 1601-0080-09, Opinion and Order on Petition for Review (December 12, 2011).

must deny Agency's petition.[14]

[14] It should be noted that in light of Part II, DPM Chapter 14, Subpart 2.5(G), it was unnecessary for the AJ to offer an analysis on harmless procedural error. The regulation specifically provides that if "the procedures . . . are not followed precisely . . . the employee's rating with automatically become satisfactory." The plain language of the regulation leaves no option for the AJ to determine if the error was harmless or not.

ORDER

Accordingly, it is hereby ordered that Agency's Petition for Review is denied. Agency is ordered to reinstate Employee to his position with back pay and benefits within thirty calendar days from the date this decision becomes final. Evidence documenting Agency's compliance shall be provided to the OEA General Counsel's Office.

FOR THE BOARD:

_____
William Persina, Chair

_____
Sheree L. Price, Vice Chair

_____
Vera M. Abbott

_____
A. Gilbert Douglass

_____
Patricia Hobson Wilson

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.