

Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals’ website. 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:)	
)	
EMPLOYEE ¹)	
)	OEA Matter No. 1601-0015-21
v.)	
)	Date of Issuance: June 17, 2021
DISTRICT OF COLUMBIA)	
DEPARTMENT OF FORENSIC SCIENCES,)	
Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Crime Scene Forensic Scientist with the Department of Forensic Sciences (“Agency”). On January 26, 2021, Agency issued a Notice of Final Decision informing Employee that he would be removed from his position. He was charged with inability to carry out assigned duties and discriminatory practices, in violation of 6B District of Columbia Municipal Regulations (“DCMR”) §§ 1607.2(n) and 1607.2(j)(3). Consequently, he was terminated from employment effective January 30, 2021.²

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on February 23, 2021. He asserted that Agency lacked substantial evidence for the charges imposed.

¹ Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

² *Petition for Appeal*, p. 6 (February 23, 2021).

Additionally, Employee argued that Agency failed to consider the factors provided in *Douglas v. Veterans Administration*, 5 MPSR 280 (1981).³ Therefore, he requested that he be reinstated and receive back pay.⁴

On April 8, 2021, Agency filed an Answer to Employee's Petition for Appeal. Agency contended that the charges against Employee were based on a social media post and statements made during a subsequent disciplinary interview, where he expressed his belief that non-white, non-male individuals are inefficiently held accountable by the criminal justice system. It was Agency's position that it could not entrust Employee as a witness in its cases after he expressed such beliefs and bias. It asserted that its removal action complied with the law and that it considered all twelve *Douglas* factors before imposing a penalty. Accordingly, it requested that Employee's Petition for Appeal be denied.⁵

On May 13, 2021, the OEA Administrative Judge ("AJ") issued an Order of Show Cause

³ The standard for assessing the appropriateness of a penalty was established by the Merit Systems Protection Board ("MSPB") in *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981). The Douglas factors provide that an agency should consider the following when determining the penalty of adverse action matters:

- 1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- 3) the employee's past disciplinary record;
- 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
- 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- 7) consistency of the penalty with any applicable agency table of penalties;
- 8) the notoriety of the offense or its impact upon the reputation of the agency;
- 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- 10) potential for the employee's rehabilitation;
- 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

⁴ *Id.*, 2-5.

⁵ *Agency's Answer to Employee's Petition for Appeal*, p. 2-5 (April 8, 2021).

to Agency. In the order, he explained that OEA sent Agency a letter, dated March 9, 2021, informing it of Employee's appeal. The letter provided that pursuant to OEA Rule 607.2, Agency was required to file an Answer within thirty (30) calendar days of service of the Petition for Appeal. Thus, Agency's answer was due on or before April 8, 2021. Therefore, the AJ ordered Agency to submit a statement of good cause for failing to submit a timely Answer to Employee's Petition for Appeal.⁶

After receiving no response to the Show Cause order, the AJ issued his Initial Decision on May 27, 2021. The AJ ruled that Agency's failure to submit an Answer to Employee's Petition for Appeal or respond to the Order to Show Cause constituted a failure to defend its decision of separating Employee from service. Consequently, he reversed Agency's termination action and ordered that it reinstate Employee with back pay and benefits lost as a result of his removal.⁷

On June 4, 2021, Agency filed a Petition for Review. It asserts that it timely filed its Answer to the Petition for Appeal and Designation of Agency Representative form via email to OEA's Office Manager, Gabrielle Smith-Barrow. It further submits that Ms. Smith-Barrow immediately confirmed receipt of the documents via email. Therefore, it is Agency's position that the Show Cause Order and Initial Decision were issued in error, and the matter should be remanded to the AJ to decide the case on the merits.⁸

This Board has historically relied on *Murphy v. A.A. Beiro Construction Co. et al.*, 679 A.2d 1039, 1044 (D.C. 1996), where the District of Columbia Court of Appeals held that "decisions on the merits of a case are preferred whenever possible" Agency offered proof

⁶ *Show Cause Order* (May 13, 2021).

⁷ *Initial Decision*, p. 1-3 (May 27, 2021).

⁸ *Agency Petition for Review of Initial Decision*, p. 1 (June 4, 2021).

⁹ *Diane Gustus v. Office of Chief Financial Officer*, OEA Matter No. 1601-0025-08, *Opinion and Order on Petition for Review* (December 21, 2009); *Jerelyn Jones v. D.C. Public Schools*, OEA Matter No. 2401-0053-10, *Opinion and Order on Petition for Review* (April 30, 2013); *Cynthia Miller-Carrette v. D.C. Public Schools*, OEA Matter No. 1601-0173-11, *Opinion and Order on Petition for Review* (October 29, 2013); *Carmen Faulkner v. D.C. Public Schools*,

that it filed its Answer to Employee's Petition for Appeal with the OEA Office Manager. Because Agency's response was not properly forwarded by the Office Manager to the Administrative Judge in this matter, the AJ issued a Show Cause Order and Initial Decision. Given the error committed by OEA's Office Manager, we believe that the AJ's ruling – premised on sanctions – is not proper in this case. Thus, in the interest of justice, we must remand this matter to the Administrative Judge to consider the merits of the appeal.

OEA Matter No. 1601-0135-15R16, *Opinion and Order on Petition for Review* (March 29, 2016); *Carl Mecca v. Office of the Chief Technology Officer*, OEA Matter No. 2401-0094-17, *Opinion and Order on Petition for Review* (September 4, 2018); and *Khaled Falah v. Office of the Chief Technology Officer*, OEA Matter No. 2401-0093-17, *Opinion and Order on Petition for Review* (September 4, 2018).

ORDER

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

FOR THE BOARD:

Clarence Labor, Jr., Chair

Patricia Hobson Wilson

Jelani Freeman

Peter Rosenstein

Dionna Maria Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.