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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	
EMPLOYEE <sup>1</sup>	)	
	)	
v.	)	OEA Matter No.: 1601-0021-21
	)	
	)	Date of Issuance: June 30, 2022
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Employee worked as an Investigator with D.C. Public Schools (“Agency”). On March 12, 2021, Agency issued Employee a Notice of Termination based on his failure to improve his performance under a Performance Improvement Plan (“PIP”). Employee was previously placed on PIPs from April 13, 2020, through June 12, 2020, and June 15, 2020, through September 15, 2020. The effective date of his termination was March 26, 2021.

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on April 6, 2021. He argued that Agency terminated him without cause. Employee also contended that he was placed on a PIP in retaliation for filing a complaint for harassment. As a result, he

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

requested to be reinstated with back pay and benefits.<sup>2</sup> In its answer, Agency stated that it was justified in its decision to terminate Employee after he failed to meet the requirements of the PIPs. It explained that Employee was deficient in his assigned tasks and duties. Thus, it believed that Employee was properly terminated in accordance with D.C. Municipal Regulation (“DCMR”) Section 1410.4.<sup>3</sup>

An OEA Administrative Judge (“AJ”) was assigned to the matter in October of 2021. A prehearing conference was held on December 16, 2021, during which the parties were ordered to address the issue of jurisdiction based on Employee’s representation that he filed a claim against Agency for violation of the D.C. Whistle Blower Protection Act (“DCWBPA”).<sup>4</sup> In his brief, Employee submitted that OEA could exercise jurisdiction over his appeal because the cause of action related to the DCWBPA was a separate cause of action from the claims before this Office. He noted that the WBPA claim was filed in the Superior Court for the District of Columbia (“Superior Court”) prior to Agency’s termination action. Consequently, he maintained that OEA was permitted to address his claims of wrongful termination.<sup>5</sup>

In response, Agency filed a Motion to Dismiss and opposition to Employee’s brief in support of jurisdiction. It stated that Employee’s offer letter specifically provided that his appointment as an Investigator was at-will, and therefore, he could be terminated for any reason or no reason at all. Since OEA does not have the authority to adjudicate at-will employees, Agency reasoned that Employee’s appeal was required to be dismissed for lack of jurisdiction. Alternatively, Agency suggested that if the AJ ruled that Employee was not at-will at the time of

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<sup>2</sup> *Petition for Appeal* (April 6, 2021).

<sup>3</sup> *Agency Answer to Petition for Appeal* (June 26, 2021).

<sup>4</sup> *Order on Jurisdiction* (December 17, 2021).

<sup>5</sup> *Employee’s Brief in Support of Jurisdiction* (January 24, 2022); and *Employee’s Opposition to Agency’s Motion to Dismiss* (January 24, 2022).

his termination, Superior Court maintained original jurisdiction over claims arising under the DCWBPA. Because Employee's claims before Superior Court were related to Agency's alleged retaliatory acts of placing him on a PIP, Agency opined that any arguments arising thereunder should be addressed in that venue. Lastly, it provided that pursuant to D.C. Code § 1.608.01a, also known as the Public Education Personnel Reform Act, nontenure employees are required to be given fifteen days' notice of their separation and must have received at least one evaluation within the preceding six months, a minimum of thirty days prior to the issuance of the separation notice. According to Agency, Employee received adequate notice under § 1-608.01a. Therefore, it averred that Employee was properly terminated.<sup>6</sup>

The AJ issued an Initial Decision on April 19, 2022. As it related to the issue of jurisdiction, he held that Employee filed a complaint under the DCWBPA prior to the effective date of his termination; therefore, he determined that Employee's appeal before OEA constituted a separate and distinct matter. Thus, Employee was not precluded from prosecuting his appeal before this Office. Regarding whether Employee was considered at-will at the time of termination, the AJ explained that under D.C. Code § 1-608.01a, an employee serving under the Educational Service with Agency, who is not an "excluded employee," may be terminated after the completion of their probationary period if certain conditions are met. Since Employee's transfer to the position as an Investigator in the Educational Service occurred in 2014, the AJ concluded that he was considered at-will at the time of Agency's termination action. He explained that under D.C. Code § 1-608.01a(b)(2)(C)(ii), following the conclusion of a probationary period, an employee may be terminated at the discretion of the Mayor, provided that he or she has been given a fifteen-day separation notice and has had at least one evaluation within the preceding six months, a minimum

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<sup>6</sup> *Agency's Motion to Dismiss* (January 14, 2022); and *Agency's Opposition to Employee's Motion on Jurisdiction* (January 18, 2022).

of thirty days prior to the issuance of the separation notice. According to the AJ, it was uncontroverted that Employee completed his probationary period. It was also uncontested that Employee was provided with notice on March 12, 2021, that his termination would become effective on March 26, 2021. While the notice fell one day short of the fifteen-day requirement under § 1-608.01a(b)(2)(C)(ii), the AJ held that the error was harmless because the fifteenth day was not a business day.<sup>7</sup>

However, concerning the evaluation requirement, the AJ found that Agency failed to produce evidence that Employee was provided with at least one evaluation within six months preceding the termination action. He noted that the latest documentation in Employee's personnel record with any semblance of an evaluation was his June 15, 2020, PIP, which occurred approximately nine months prior to the effective date of his termination. Because Agency failed to comply with the evaluation requirement as provided under § 1-608.01a(b)(2)(C)(ii), the AJ held that Employee's termination was improper. As a result, Agency's adverse action was reversed, and Employee was ordered to be reinstated with back pay and benefits lost as a result of his separation.<sup>8</sup>

Agency disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on April 28, 2022. It contests the AJ's conclusion that Employee was not evaluated within six months of his separation and contends that the Initial Decision was not based on substantial evidence. Attached to its petition is a document titled "Manager Assessment" which reflects a submission date of May 19, 2020. According to Agency, the assessment identified areas where Employee could improve his performance. Thus, it opines that it complied with D.C. Code § 1-608.01a. Consequently, Agency asks the Board to overrule the Initial Decision and enter an order

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<sup>7</sup> *Initial Decision* (April 19, 2022).

<sup>8</sup> *Id.*

dismissing Employee's appeal. Alternatively, it suggests that the matter be remanded to the AJ to address the issue of whether Agency completed an evaluation prior to Employee's separation.<sup>9</sup>

On April 28, 2022, Employee filed his response. Regarding the document that was originally attached to Agency's Petition for Review, Employee argues that the total time between May 19, 2020, when Agency purportedly completed the manager assessment, and March 12, 2021, the date Agency issued its notice of termination, was more than six months, which nonetheless violates § 1-608.01a. Additionally, Employee does not consent that the submitted document was an actual evaluation. He maintains his position that the AJ's conclusion that Agency failed to comply with the applicable statutory provisions is supported by the record.<sup>10</sup>

On April 29, 2022, Agency filed a Supplement to its Petition for Review. It reiterates that Employee was properly separated in accordance with all applicable laws and contends that the AJ erred by reinstating Employee without the benefit of an evidentiary hearing. Attached to its supplement is an additional document titled "Manager Assessment." The document reflects a submission date of December 22, 2020. Agency reasons that the assessment constitutes an evaluation within the meaning of § 1-608.01a(b)(2)(C)(ii) and states that it was completed within six months of Employee's termination. Therefore, it again posits that Employee's termination was proper.<sup>11</sup>

Employee also filed a Motion to Strike, stating that Agency's submitted record did not contain the alleged December 2020 manager assessment that was attached to its supplement. He notes that Agency has failed to argue that the alleged manager assessment represented new and material evidence that, despite due diligence, was not available when the record was closed.

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<sup>9</sup> *Petition for Review* (April 29, 2022).

<sup>10</sup> *Employee's Response to Petition for Review* (April 28, 2022).

<sup>11</sup> *Agency's Supplement to its Petition for Review* (April 29, 2022).

Employee believes that Agency was privy to this information prior to the closing of the record but failed to produce the document to the AJ. Accordingly, he asks that Agency's Supplement to its Petition for Review be stricken from the record.<sup>12</sup> In response, Agency states that Employee's motion should be dismissed and indicates that it would have presented the alleged December 2020 assessment as evidence if the matter had gone to a hearing.<sup>13</sup>

### Discussion

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides: The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:

- (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
- (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
- (c) The findings of the Administrative Judge are not based on substantial evidence; or
- (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

Additionally, this Board must determine whether the AJ's findings were based on substantial evidence in the record. The Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.<sup>14</sup>

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<sup>12</sup> *Employee's Motion to Strike Agency's Supplement to its Petition for Review* (April 29, 2022); and *Employee's Reply to Agency's Opposition to Employee's Motion to Strike* (May 4, 2022).

<sup>13</sup> *Agency's Opposition to Employee's Motion to Strike* (May 5, 2022).

<sup>14</sup> *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

Germane to this appeal is whether Agency adhered to D.C. Code § 1-608.01a(b)(2)(C).

The applicable provisions provide the following:

(C)(i) A person employed within the Educational Service in DCPS, or the Office of the State Superintendent of Education who is not an Excluded Employee, shall be a probationary employee for one year from his or her date of hire (“probationary period”) and may be terminated without notice or evaluation.

(ii) Following the probationary period, an employee may be terminated, at the discretion of the Mayor; provided, that the employee has been provided a 15-day separation notice and has had at least one evaluation within the preceding 6 months, a minimum of 30 days prior to the issuance of the separation notice.

It is undisputed that Employee’s position as an Investigator was not excluded and was within the Educational Service at the time he was terminated. Further, Employee completed his probationary period in April of 2014, when he was converted from Career Service to Educational Service.<sup>15</sup> Agency’s primary argument is that the AJ erred in concluding that Employee was not subject to at least one evaluation within the preceding six months of his termination. In support thereof, Agency points to the document included with its Supplemental Petition for Review titled “Manager Assessment” which reflects that it was submitted on December 22, 2020.<sup>16</sup> However, Agency’s purported assessment was not submitted prior to the AJ closing the record. Agency has failed to expound upon why it failed to produce this document prior to filing its Petition for Review with the Board and has not explained if it was unavailable despite due diligence in locating such. Notwithstanding, to properly develop the administrative record and to determine whether Agency adhered to D.C. Code § 1-608.01a(b)(2)(C)(ii), this Board is inclined to remand the matter to the AJ to consider Agency’s newly produced assessment. The alleged evaluation is material to the

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<sup>15</sup> *Agency’s Motion to Dismiss*, Exhibit 1 (January 18, 2022). Employee maintained his position as an Investigator until the time of his termination.

<sup>16</sup> *Petition for Review*, Exhibit 1 (April 29, 2022).

disposition of this appeal. We do note that Employee does not consent that the document is in fact an evaluation for purposes of § 1-608.01a(b)(2)(C)(ii). Thus, it is imperative that the AJ resolve this issue on remand. Based on the foregoing, this Board cannot currently determine if the Initial Decision is based on substantial evidence. For this reason, we must remand the matter to the AJ for further consideration.

**ORDER**

Accordingly, it is hereby **ORDERED** that this matter is **REMANDED** to the Administrative Judge for further consideration.

**FOR THE BOARD:**

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Clarence Labor, Jr., Chair

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Patricia Hobson Wilson

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Jelani Freeman

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Peter Rosenstein

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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.