No. 20-CV-482

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

OFFICE OF THE ATTORNEY GENERAL
FOR THE DISTRICT OF COLUMBIA,
APPELLANT,

V.

DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS, *et al.*,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE OFFICE OF THE ATTORNEY GENERAL FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF THE ISSUES

1. A District of Columbia regulation provides that if a District agency fails to issue a written decision as to whether an employee passed a performance improvement plan ("PIP") within ten days of the PIP's end, the employee shall be deemed to have passed the PIP. The first issue presented is:

Whether an employee on a PIP can waive the ten-day deadline for a written decision and agree to extend that deadline to allow her to submit a written defense of her performance on the PIP before the agency issues its decision, and whether the employee here did so.

2. Another District regulation provides that a notice of an employee's proposed removal shall inform the employee of "the specific performance or conduct at issue," without requiring that the notice cite to any of the specific "causes" for removal listed in the regulations. The second issue presented is:

Whether the agency gave the employee adequate notice of the specific performance or conduct leading to her removal where the notice stated that the employee was being removed for failing to satisfy her PIP, regardless of whether that failure is characterized as a performance deficiency, neglect of duty, or failure to meet performance standards, and whether, if there was any error, it was harmless.

STATEMENT OF THE CASE

The District of Columbia Office of the Attorney General ("OAG") terminated Rachel George's employment in 2016 because her work was deficient and she had failed to improve her performance after being placed on a PIP. An Administrative Judge ("AJ") with the D.C. Office of Employee Appeals ("OEA") vacated the termination in October 2018, Joint Appendix ("JA") 585; the full OEA Board affirmed the AJ's decision in July 2019, JA 623; and the Superior Court affirmed the OEA Board's decision on July 2, 2020, JA 655. OAG timely noted this appeal on July 30, 2020. JA 663.

STATEMENT OF FACTS

1. Regulatory Framework.

A. The PIP process.

A PIP "is a performance management tool designed to offer" an employee "an opportunity to demonstrate improvement in his or her performance." 6-B DCMR § 1410.2 (56 D.C. Reg. 6993, 7000-01 (Aug. 28, 2009)).[1] A PIP "shall: (a) [i]dentify the specific performance areas in which the employee is deficient; and (b) [p]rovide concrete, measurable action steps the employee needs to take to improve in those areas." *Id.* § 1410.3. A supervisor has ten calendar days from the end of a PIP to

[1] The District amended the PIP regulation in 2019 in ways not pertinent here. 66 D.C. Reg. 5866 (May 10, 2019).

advise the employee in writing whether she has satisfied the PIP's requirements. *Id.* § 1410.5. The regulations specify that, "if no written decision is issued within the specified time period, the employee is deemed to have satisfied the PIP requirements." *Id.* § 1410.6. If the employee fails the PIP, the supervisor "shall issue a written decision to the employee" for a reassignment, reduction in grade, or removal. *Id.* § 1410.5(b).

B. Cause for termination.

Under the District's personnel system, disciplinary action against an employee "may only be taken for cause" and only after "written notice of the grounds on which the action is proposed to be taken." D.C. Code § 1-616.51(1), (3). The implementing regulations in effect at the time relevant here provide that an employee may not be terminated or otherwise disciplined "without cause, as defined in this chapter." 6-B DCMR § 1602.1 (2016).[2] "Cause" is defined as "a reason that is neither arbitrary nor capricious, such as misconduct or performance deficits, which warrants administrative action, including corrective and adverse actions." *Id.* § 1699.1. "The classes of conduct and performance deficits outlined in [Section] 1605 constitute causes for corrective and adverse action." *Id.*

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[2] These regulations took effect February 5, 2016, between the time of George's PIP and her proposed termination. 63 D.C. Reg. 1265 (Feb. 5, 2016).

Section 1605, in turn, specifies that "[t]aking a corrective or adverse action against an employee is appropriate when the employee fails to or cannot meet identifiable conduct or performance standards, which adversely affects the efficiency or integrity of government service." *Id.* § 1605.2. "Whether an employee fails to meet performance standards shall be determined by application of the provisions set forth in Chapter 14," *id.* § 1605.3, which is the PIP process described above, *see supra* pp. 2-3.

Section 1605.4 also sets forth a list of "classes of conduct and performance deficits constitut[ing] cause" for adverse action, including "[n]eglect of duty" and "[f]ailure to meet performance standards," but it specifies that the listed causes are "not exhaustive." *Id.* § 1605.4(e), (m).

C. The selection of penalty.

When an adverse action is required based on an employee's failure "to meet performance or conduct standards . . . a supervisor or manager must determine the appropriate action based on the circumstances." 6-B DCMR § 1607.1. The manager should consider all the relevant factors in 6-B DCMR § 1606.2, such as the nature and seriousness of the offense, the consistency of the penalty with those imposed in similar circumstances, and the potential for the employee's rehabilitation.

The regulations include a table of "illustrative actions" for particular causes for discipline "as a guide to assist managers in determining the appropriate agency

action." *Id.* § 1607.2. A manager may deviate from the penalties outlined in the table after balancing all the relevant factors in Section 1606.2. *Id.* The suggested range of penalty for a first offense of neglect of duty is counseling to removal. *Id.* § 1607.2(e). The suggested penalty for a first offense of failure to meet performance standards is a reassignment, reduction in grade, or removal. *Id.* § 1607.2(m).

D. Notice of termination.

As to notice, the regulations provide that an agency contemplating an adverse action "shall provide the employee a notice of proposed action." *Id.* § 1618.1. "The notice of the proposed action shall inform the employee of . . . the specific performance or conduct at issue" and how "the employee's performance or conduct fails to meet appropriate standards." *Id.* § 1618.2. Nowhere in the regulations is it specified that only enumerated charges in Section 1605.4 are actionable; indeed, that would be inconsistent with Section 1604.5's express direction that its list is "not exhaustive." Along with the notice, the agency should provide the employee any "material upon which the notice of proposed action is based, and which is necessary to support the reasons given in the notice." *Id.* § 1618.5.

After the agency serves the notice of proposed action and the employee is given an opportunity to respond, an independent hearing officer submits a written report and recommendation to the agency head. *Id.* § 1622.5. The agency then reviews all of the materials and issues a final agency decision. *Id.* § 1623. That

decision shall "[s]uccinctly enumerate each independent cause for which corrective or adverse action is being taken; [but] specifications shall not be used in any formal decision." *Id.* § 1623.4(b).[3] There is no requirement that the final agency decision cite to a specific cause contained in the non-exhaustive list of causes in Section 1605.4.

E. Harmless error rule.

The OEA has a harmless error rule for its review of agency decisions. "Notwithstanding any other provision of these rules, the [OEA] shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless." 6-B DCMR § 631.3. Harmless error means "an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action." *Id.*

2. Factual Background.

A. George works as a Support Enforcement Specialist.

Rachel George was a Support Enforcement Specialist in OAG's Child Support Services Division ("CSSD"). A Support Enforcement Specialist's duties include processing cases to establish paternity and obtain child support for children

[3] Similar provisions about the notice were included in the earlier version of the regulations at 6-B DCMR § 1608 (2015).

who live in the District of Columbia and for children in other jurisdictions when the non-custodial parent lives in the District. JA 95-97. A Support Enforcement Specialist manages a caseload of non-routine, complex cases, and is responsible for the full range of actions needed to establish paternity and obtain child support in each case. JA 95-97. Duties include scheduling and conducting interviews with custodial parents as well as interviewing parents who walk in seeking assistance, communicating with other states about cases and obtaining necessary documents from those states, and preparing court pleadings to establish paternity and obtain support. JA 95-97. The CSSD litigation division then reviews and files those pleadings in the Superior Court. JA 95-97. A Support Enforcement Specialist's failure to perform her duties properly will result in a child not receiving child support. JA 97.

While George's performance had initially been satisfactory, her supervisors became concerned in 2015 that her work was deficient and she was not properly processing cases. JA 5-7, 537, 621. They provided her with counseling and training, but considered those measures unsuccessful. JA 537, 621.[4]

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[4] Some of George's pleadings reference an earlier proposed suspension that is not at issue here. In January 2015, OAG proposed to suspend George for one day for refusing a directive from her manager to conduct a customer interview. JA 98. The Attorney General found that there was adequate evidence to support that suspension, but rescinded the discipline to allow George an opportunity "to

B. George's supervisors put her on a PIP.

On November 17, 2015, OAG issued George a 30-day PIP. JA 8. The PIP stated that George's job performance had failed "to meet the minimum requirements of the position" and provided her "an opportunity to improve job performance" in the specified areas of customer service and accountability. JA 8. The PIP required George to perform certain tasks, including "interview[ing] customers and complet[ing] their interstate petitions accurately and in a timely manner." JA 8. It also required her to accurately and timely process cases from an assigned caseload, including reviewing and processing "10-15 cases from [an] assigned task list daily," inputting relevant information into CSSD's database, and then "provid[ing] documentation of cases processed to [her] supervisor daily." JA 8. The PIP explained that OAG would measure George's performance by reviewing the case records and customer interview logs as well as her daily list of processed cases. JA 8. And it stated that if George failed to improve her job performance during the PIP period, she could be subject to reassignment, demotion, or removal. JA 8.

George's assigned list of cases for the first three days of the PIP (ranging from 9 to 14 cases a day) required such tasks as scheduling an interview with the client-parent and entering the interview on the calendar, contacting another state to obtain

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demonstrate that [she would] focus on the needs of District of Columbia residents." JA 99. But OAG warned her at the time that the failure to live up to that expectation could "result in future discipline." JA 99.

information on the case, reviewing and updating the status of the case in CSSD's database, and/or updating the appropriate coding in a case. JA 13-21. OAG considered the assigned work to be typical for a Support Enforcement Specialist. JA. 155.

During the PIP, George's supervisors monitored her progress, met with her weekly, and advised her weekly that she was not properly managing her assigned cases or otherwise fulfilling the requirements of the PIP. JA 8, 36-40. While the PIP was scheduled to end December 18, 2015, OAG extended it to December 30 to allow George a full 30 days to improve her performance, given that she had been on approved leave, she had had problems with her computer, and the office had moved. JA 40, 133, 594. George's supervisors orally advised her on the last day of her PIP, December 30, 2015, that she had failed to meet its requirements. JA 40. George thought that her supervisors were not accounting for all of her work during the PIP period and asked to meet with then-OAG Chief of Staff Kim Whatley. JA 40-41.

C. George agrees to an extended deadline for the PIP decision so she can submit information demonstrating that she satisfied the PIP.

The meeting with George, her union representatives, her supervisors, and Chief of Staff Whatley took place within ten days of the end of the PIP, on January 7, 2016. JA 40-41, 134. At the meeting, George questioned the amount of work that her supervisors had credited her with completing under the PIP. JA 41. Given this dispute, everyone at that meeting—including George—agreed to a timeline whereby

George's supervisors would provide a written report by January 19 detailing her performance deficiencies under the PIP, and George would then have until January 27 to respond and identify any additional work she had performed on the cases. JA 40-41, 247, 356-57, 594, 597, 618. OAG management would then review those submissions and make a final decision regarding George's performance. JA 34, 134, 594.

On January 19, George's supervisors provided George and Chief of Staff Whatley with a memorandum and spreadsheet detailing the limited work that George had performed during the PIP period and explaining why she had failed to satisfy the PIP's requirements. JA 22. On January 27, George wrote a letter to the Attorney General contending that she had been treated unfairly, although she did not in any detail refute her supervisors' description of her inadequate performance under the PIP. JA 30.

D. OAG concludes that George failed the PIP and proposes to remove her.

On February 24, 2016, OAG issued George a notice informing her that she had failed to satisfy the PIP and proposing to remove her based on that failure. JA 34. The notice of proposed removal stated that the "cause" for removal was George's "failure to satisfactorily perform one or more duties of [her] position and any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations." JA 34. More specifically, the notice

explained that her removal was "based on [her] failure to successfully perform under the PIP." JA 34. OAG thoroughly detailed George's failure under the PIP, including her failure to schedule and conduct interviews with custodial parents for cases on the assigned task list or otherwise process her cases and record her activity with appropriate notes and codes in the database. JA 35-42. OAG attached to the notice spreadsheets listing her limited work on her assigned cases. JA 50-94.

The notice of proposed removal detailed how George's supervisors had considered the factors listed in 6-B DCMR § 1606.2 when deciding that removal was the appropriate penalty, including: the nature and seriousness of her offense (her failure to do her work properly "seriously impaired the ability of the Child Support Services Division to achieve the goals of establishing paternity and obtaining child support orders"), JA 43; her earlier discipline (including an admonition and a one-day suspension, for which she was granted a reprieve from the Attorney General, *see supra* n.4); and their determination that there was no potential for her rehabilitation given the opportunities she had already had to improve her performance, JA 43-47.

E. George seeks review with an impartial hearing officer.

George sought review of her proposed termination with a designated hearing officer in accordance with 6-B DCMR § 1622. JA 114. The designated hearing officer for George's case was the General Counsel of the D.C. Department of Public Works. JA 113. The hearing officer issued her report and recommendation in April

2016, upholding the proposed removal. JA 114. She concluded that George had "squandered the opportunity provided by the PIP" to improve her performance and that the penalty of termination was appropriate under the circumstances. JA 122. The hearing officer noted that OAG had characterized the reason for George's termination as "an[] on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: failure to perform one of more of the duties of your position," but stated that she was reviewing it as a "neglect of duty" for purposes of assessing the penalty under the table of penalties. JA 144 & n.1.[5]

The hearing officer rejected George's argument that her removal was invalid because OAG had not issued the final written decision that she had failed her PIP within ten days of the end of the PIP. JA 121. As she explained, George had "requested the opportunity . . . to challenge" her supervisor's determination that she had failed the PIP, and OAG "accommodated that request." JA 121. George's termination was therefore not "null and void" under the ten-day rule given that OAG had "accomodat[ed] her request that was outside of the process." JA 121.

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[5] In so doing, the hearing officer cited an outdated version of the regulations, 6-B DCMR § 1603.3(f)(3); *see* 55 D.C. Reg. 1775 (Feb. 22, 2008), not the revised version, 6-B DCMR § 1605.4(e). The listed causes in the former regulation were not exclusive but included a catchall provision for "[a]ny other on-duty or employment related reason for corrective action that is not arbitrary or capricious." 6-B DCMR § 1603.3(g) (2015).

F. OAG terminates George.

On April 20, 2016, OAG issued its final decision, which advised George that her proposed termination was being sustained for the reasons stated in the notice of proposed adverse action and the hearing officer's recommendation. JA 125.

3. The OEA Proceedings.

A. Initial filings and evidentiary hearing.

George appealed to the OEA, claiming that she had been terminated without cause and that the penalty was unreasonable. JA 127-28. She also claimed that she was a whistleblower and had been retaliated against. JA 128. OAG filed an answer denying all charges. JA 132. Several months later, George moved to amend her appeal to include the allegation that she must be deemed to have satisfied her PIP pursuant to 6-B DCMR § 1410.5 because OAG had not issued a written decision within ten days of the end of the PIP. JA 138. George claimed that "she did not consent to any extension of any deadlines." JA 138.

An OEA Administrative Judge ("AJ") held an evidentiary hearing, where George was represented by counsel, to address whether OAG had cause to take adverse action against George, whether OAG had followed all appropriate laws and regulations in doing so, and whether termination was the appropriate penalty. JA 141, 144. OAG presented evidence establishing that it had cause to terminate George based on her failing the PIP and that termination was an appropriate penalty.

JA 164-370 (transcript), 587-91 (AJ's summary of testimony). George testified to the contrary that there was no cause for her termination. JA 592-93.

At the hearing, OAG presented evidence that George had agreed to an extended timeline for the written decision on the PIP. Specifically, at the January 7, 2016 meeting with Chief of Staff Whatley, held at George's request, both George and her union representatives agreed that management would submit a chart of her work, George would then have the opportunity to fill out a column on the chart to assure that she received credit for all of her work during the PIP period, and then management would make a final decision about her PIP performance. JA 247 (Chief of Staff Whatley's testimony that union officials agreed to extended time); 356-57 (CSSD supervisor Belinda Tilley's testimony that George was present at the meeting and "all parties agreed" to submit additional information on set dates regarding George's PIP performance). George did not contradict that testimony. *See* JA 507 (George's testimony that she requested and attended the January meeting where Chief of Staff Whatley suggested the further exchange of documents).

At the OEA hearing, George's supervisor testified that she had not considered a penalty lesser than termination in light of George's inability to do her work under the PIP, the importance of that work to children in the District and other states, and management's lack of hope that there would be any change in George's performance going forward. JA 361-63.

B. Closing arguments.

At the conclusion of the hearing, the AJ directed the parties to file written closing arguments. He directed both parties to "address the [District Personnel Manual ("DPM")] code section to which the termination was levied under," because the notice of termination did not include "the specific DPM number." JA 515-16.[6]

George's written closing (by counsel) acknowledged that her termination was "built entirely" on her failing the PIP and that OAG did not charge George "with any deficiencies other than failure to complete the PIP to the Agency's satisfaction." JA 569. Counsel cited 6-B DCMR § 1601.7, which sets forth the policy that an agency can issue an adverse action "when an employee does not meet or violates established performance or conduct standards." JA 568. Counsel went on to argue that it was unfair to conclude that George had been unproductive under the PIP considering her technology problems and the office's move, and that her supervisors did not understand how demanding and time-consuming her assignments under the PIP had been. JA 571-75. Counsel raised no issue about the timing of the decision that George had failed the PIP or the adequacy of the notice of the cause for her termination.

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[6] The DPM contains the District's personnel regulations. *See e.g. Dep't of Pub. Works v. Colbert*, 874 A.2d 353, 356 (D.C. 2005).

George also filed a pro se closing statement. JA 521. Her filing presented a lengthy recitation of grievances including alleged unfair treatment, a conspiracy to terminate her employment, and criminal fraud committed by coworkers, all without reference to the evidentiary record. JA 521-35. She complained in general terms about "illegal and improper employment and labor practices" at CSSD. JA 534. She argued that her alleged failure under the PIP did not justify her termination: "There was no [n]eglect of duty or refusal to follow instructions from the employee's part during [the] PIP or before [the] PIP," and she "was thorough in analyzing the facts, system and processing he[r] cases." JA 534 (bold text modified). George also claimed that "dysfunctional" computers and printers and other technology problems had kept her from performing her duties under the PIP. JA 534. She contended that OAG had imposed the PIP to discourage her from taking leave under the federal Family and Medical Leave Act, and that her termination had violated her rights under that Act. JA 26-27. For these reasons, the "final decision to terminate her was issued without a cause." JA 534. Like her counsel, however, George did not challenge the timing of the decision that she failed the PIP, nor did she argue that OAG was required to cite to a specific charge for her proposed termination or that she could not prepare a proper defense without such a specification.

In its written closing, OAG again explained that it had terminated George "based on her failure to satisfy the requirements of the PIP." JA 539. OAG detailed

the record evidence establishing George's lack of productivity and failure to complete assignments under the PIP. JA 539-47, 551-52, 564. For the first time, it suggested that "failure to meet performance standards" under 6-B DCMR § 1605.4(m) (of the amended regulations) "is a cause that supports an adverse action," and noted that an agency may impose a penalty of reassignment, reduction in grade, or removal for the failure to meet established performance standards under 6-B DCMR § 1607.2(m). JA 566. OAG further explained that the agency had considered all the relevant factors and decided that removal was the appropriate penalty. JA 42, 566-67.

C. The AJ's initial decision.

The AJ issued an initial decision reversing the termination. JA 585. Rather than address the issues concerning the merits of the termination decision raised by the parties, the AJ instead concluded that, regardless of how George had performed under the PIP, she had to be deemed to have satisfied the PIP because OAG had not issued its written decision within ten days of the end of the PIP. JA 598-99 (citing 6-B DCMR §§ 1410.5, 1410.6). The AJ noted the evidence that George and OAG had mutually agreed to extend the time for the written PIP decision to allow George to assure that she was being given appropriate credit for the work she had completed. JA 598-99. But the AJ deemed the ten-day requirement to be mandatory, regardless

of any agreement between the parties to extend it. JA 599. Accordingly, the AJ concluded that OAG lacked cause to terminate George. JA 599.

Further, although George had not raised any issue concerning the substance of OAG's notice of her proposed termination or any inability to defend herself against the essential charge that she had failed her PIP, the AJ held in the alternative that the termination was flawed because OAG had been inconsistent about the specific provision of Section 1605 underlying the termination. JA 599-600. The AJ faulted OAG for not "cit[ing] with specificity the DPM provision under which the adverse action penalty was considered." JA 599. The AJ observed that the advance notice had stated that George's proposed termination was based on her failure to "satisfactorily perform one or more of the duties of [her] position and any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations," JA 599 (emphasis omitted), which the independent hearing officer had characterized as neglect of duty, JA 599-600. But in its closing argument, OAG had cited 6-B DCMR § 1607.2(m), the provision setting forth suggested penalties for failure to meet performance standards. JA 600. The AJ concluded that the different provisions had "different penalty implications for first offenses" (even though termination was the appropriate maximum penalty for both), and therefore the penalty of termination was "not appropriate." JA 600.

D. The OEA Board's decision.

OAG appealed to the full OEA Board. JA 603. It argued that the ten-day rule did not apply considering that OAG had accommodated *George's* own request for an opportunity to challenge the initial determination that she had failed the PIP, and that any violation was harmless error. JA 610-11. OAG also argued that the notice of proposed termination and the final notice were adequate because they were clear that George's termination was based on her failing the PIP. JA 611-12. Further, OAG maintained that the AJ should have deferred to OAG's determination on the appropriate penalty, which was within the range allowed by law, regardless of the precise characterization of the misconduct. JA 611-12. And if there were any question about the range of penalties, the AJ should have remanded the case to OAG for further consideration of the penalty rather than simply reinstating George with back benefits. JA 611-12.

The OEA Board affirmed, agreeing with the AJ that Section 1410.5 created a mandatory obligation for OAG to issue a written decision within ten days of the end of the PIP regardless of George's request for additional time to respond, and that OAG's failure to meet that obligation meant that George had to be deemed to have passed her PIP. JA 623, 629-31. The OEA also agreed that OAG's notice of proposed termination did not cite the charge with sufficient specificity, and the facts could be construed as either neglect of duty or failure to meet performance standards,

which carry a different range of lower (although not higher) penalties. JA 631-33. The Board reasoned that "[e]mployees can only be expected to defend against the charges actually levied against them." JA 633 (citing *Off. of D.C. Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994)). In the Board's view, even though she never raised the issue, George "may not have been able to adequately defend against the charges because of the Agency's lack of clarity with respect to the legal basis on which its termination action was predicated." JA 633.

4. The Superior Court Affirms.

OAG appealed the OEA's decision to the Superior Court, JA 643, which affirmed, JA 655. The court concluded that "OAG's Advance Notice failed to identify the charges underlying Ms. George's proposed termination, and therefore deprived Ms. George of the notice to which she is entitled, as well as an opportunity to adequately defend herself." JA 659-60. "OAG's failure to provide Ms. George with adequate notice of the charges underlying her proposed termination prevented her from knowing 'the allegations . . . she w[ould] be required to refute or the acts . . . she w[ould] have to justify, thereby [depriving her of] a fair opportunity to oppose the proposed removal.'" JA 661 (quoting *Frost*, 638 A.2d at 662) (insertions and omissions by Superior Court). Because this issue formed the basis of the Superior Court's decision, it did not address OAG's argument that the OEA had erred in concluding that George had not waived the ten-day rule. JA 660.

STANDARD OF REVIEW

Although this is an appeal from the Superior Court's judgment upholding the OEA's decision, this Court reviews the OEA's decision "precisely the same as in administrative" appeals that come directly to the Court. *Butler v. Metro. Police Dep't*, 240 A.3d 829, 835 (D.C. 2020) (internal quotation marks omitted). The Court is "confined strictly to the administrative record" and will affirm if the OEA's decision "is supported by substantial evidence in the record and otherwise in accordance with law." *Miller v. D.C. Off. of Emp. Appeals*, 237 A.3d 123, 126 (D.C. 2020). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Jahr v. D.C. Off. of Emp. Appeals*, 19 A.3d 334, 340 (D.C. 2011) (internal quotation marks omitted). The Court will reverse where the OEA's action is "arbitrary, capricious, or an abuse of discretion." *Butler*, 240 A.3d at 825.

This Court reviews de novo "[q]uestions of law, including questions regarding the interpretation of a statute or regulation." *Miller*, 237 A.3d at 126-27. While the Court generally defers to the OEA's interpretation of the District's personnel regulations that it administers, *id.*, it will not defer to an interpretation that "is unreasonable in light of the prevailing law, inconsistent with the statute [or regulation], or plainly erroneous," *Frost*, 638 A.2d at 666. That is because the Court is not "required to stand aside and affirm an administrative determination which

reflects a misconception of the relevant law or a faulty application of the law." *Rodriguez v. D.C. Off. of Emp. Appeals*, 145 A.3d 1005, 1009 (D.C. 2016) (internal quotation marks omitted). The Court will thus reverse where the OEA's application of a statute or regulation "is incorrect as a matter of law, and, therefore, unreasonable." *D.C. Off. of Hum. Rts. v. D.C. Dep't of Corr.*, 40 A.3d 917, 923 (D.C. 2012).

SUMMARY OF ARGUMENT

1. The OEA erred as a matter of law by vacating George's termination based on a supposed violation of the ten-day rule for written PIP decisions. Although the rule imposes a mandatory duty on government officials for the benefit of employees, that rule is subject to waiver by employees. It is well settled under cases from both the Supreme Court and this Court that individuals have the power to waive their regulatory, statutory, and even constitutional rights.

George plainly waived the ten-day rule here. The uncontroverted evidence at the OEA hearing reveals that, within ten days of the end of the PIP, OAG accommodated *her* request for a meeting with the Chief of Staff to challenge the initial oral decision that she had failed the PIP. George then agreed at that meeting to a schedule beyond the ten-day period whereby she and OAG would exchange information before OAG issued a written decision on the PIP.

2. The OEA also erred as a matter of law by sua sponte vacating George's removal based on its view that the notice of termination was inadequate. OAG was always explicit in its notices to George and its filings at the OEA that it was terminating George because she had failed her PIP. And it is undisputed that failing a PIP is cause to terminate an employee since "cause" for an adverse action is defined as any reason that is neither arbitrary nor capricious, such as a performance deficit, that warrants administrative action.

There was no deficiency in the proposed and final notices OAG gave George about her removal. The regulation requires only notice of the specific performance or conduct at issue and how the employee's performance or conduct fails to meet appropriate standards. The notices to George amply provided her with that information. They informed her that her removal was based on her PIP failure, explained in detail precisely how she had failed her PIP, and also explained that her deficient work performance interfered with OAG's mission to obtain child support for children. George was thus aware of precisely the conduct that led her termination. The regulations do not require that the notices cite to a specific provision of Section 1605.4's non-exhaustive list of "cause," and OEA's and the Superior Court's contrary conclusions would read the express "not exhaustive" language out of the regulation.

Given that the initial notice need only state "the specific performance or conduct at issue," 6-B DCMR § 1618.2(c), and the final notice "shall not" include "specifications" of cause, *id*. § 1623.4(b), neither the independent hearing examiner's characterization of the reason for termination as "neglect of duty" nor OAG's post-termination suggestion before the OEA that the reason for termination was "failure to meet performance standards" can defeat the sufficiency of notices. The initial notice adequately informed George that she was being terminated "based on [her] failure to successfully perform under the PIP," JA 34, and that is cause for termination whether it is understood as "performance deficiency" under Section 1605.3, "neglect of duty" under Section 1605.4(e), or "failing to meet performance standards" under Section 1605.4(m).

If a specific reference to Section 1605.4 were required—and it is not—any error in failing to include it in the advance notice was harmless. George was fully aware that the basis for her proposed termination was that she had failed her PIP, and at no point has she argued that her ability to mount a defense was in any way compromised.

Nor does it matter that the suggested range of low-end penalties varies for neglect of duty and failure to meet performance standards. OAG was not bound by any of the illustrative penalties in the regulations. An agency may determine the appropriate action based on all the circumstances, including factors set forth in the

regulations, and OAG explicitly did so here. And any error in not acknowledging the different low-end illustrative penalties was harmless because OAG chose, and was justified in choosing, the maximum penalty of removal. Finally, even if there were harmful error in the selection of penalty, the OEA should have remanded the matter for OAG to properly exercise its discretion to select an appropriate penalty. The remedy was not for the OEA to vacate George's removal altogether.

ARGUMENT

I. The OEA Erred As A Matter of Law By Vacating George's Termination Based On The Ten-Day Rule Because George Was Allowed To And Did Waive That Rule.

Under 6-B DCMR § 1410.5 and .6, an agency shall "advise the employee in writing whether the employee met or failed to meet the requirements of the PIP" within ten days of the end of the PIP, and the consequence for failure to do so is that the employee "is deemed to have satisfied the PIP requirements." This ten-day requirement imposes a mandatory duty on government officials because it provides a specific consequence for failure to comply with the provision. *See Rodriguez*, 145 A.3d at 1012 n.10.[7]

But employees can waive mandatory rights. It is well settled that individuals have the power to waive their regulatory, statutory, and even constitutional rights.

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[7] Another case pending in this Court also involves application of the ten-day deadline for PIP decisions, though not the precise issue raised here. *D.C. Dep't of Health v. Stanback*, No. 20-CV-655 (argued October 1, 2021).

See United States v. Mezzanatto, 513 U.S. 196, 200-01 (1995). As the Supreme Court has explained, "[r]ather than deeming waiver [of a right] presumptively unavailable absent some sort of express enabling clause, we instead have adhered to the opposite presumption," and a "party may waive any provision, either of a contract or of a statute, intended for his benefit." *Id.* at 200-01. Indeed, even the "most basic rights of criminal defendants are . . . subject to waiver." *Id.* at 201. "[A]bsent some affirmative indication of [the legislature's] intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." *Id.* at 201 (citing *Evans v. Jeff D.*, 475 U.S. 717, 730-32 (1986) (explaining that a "prevailing party in [a] civil-rights action may waive its statutory eligibility for attorney's fees")).

This Court has also held that an individual may waive mandatory rights. *See, e.g.*, *Crawford v. United States*, 932 A.2d 1147, 1157 (D.C. 2007) (holding that a defendant can waive his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and his right under court rule to prompt presentment to a judicial officer); *Christian v. United States*, 394 A.2d 1, 35 (D.C. 1978) (holding that a prisoner can waive statutory rights under the Interstate Agreement on Detainers Act simply by failing to raise the claim at an opportune time, despite mandatory language in the Act that an indictment "shall" be dismissed with prejudice when the government violates the Act's provisions); *Diamond Hous. Corp. v. Robinson*, 257

A.2d 492, 493-94 (D.C. 1969) (holding that a tenant waived her statutory right of 30 days' notice to quit by signing a lease that provided that she waived that right if she failed to pay agreed-upon rent, despite her claim that she did not understand what "notice to quit" meant). Only where a regulation or statute explicitly limits waiver do ordinary waiver rules not apply. *See Sims v. District of Columbia*, 933 A.2d 305, 311 (D.C. 2007) (finding no waiver of certain career service rights where the regulation specifically required that waiver of those rights must be in writing).

Under this long-standing rule, an employee can waive the District's regulatory requirement that managers issue a written decision within ten days of the end of a PIP. To be sure, the OEA was correct that the regulation is mandatory, not directory, for the District because it requires that an official "shall" issue a written decision within ten days and specifies a consequence for failing to do so. 6-B DCMR §§ 1410.5, 1410.6. But there is no reason why an employee cannot waive that right just like any other regulatory, statutory, or constitutional right that exists for her own benefit. There is no provision in the PIP regulation that an employee cannot waive the ten-day timeline for written decisions, nor is there any limitation on waiver (for instance, that a waiver must be in writing). *Cf. Sims*, 933 A.2d at 311. The OEA thus erred as a matter of law by failing to recognize that an employee may waive the ten-day rule.

There can be no doubt that George plainly waived the ten-day rule here. The undisputed evidence at the OEA hearing showed that she requested a meeting with OAG's Chief of Staff to challenge the initial oral decision that she had failed the PIP and that meeting took place within ten days of the end of her PIP. JA 247, 356-57, 507. At that meeting, George and her union officials explicitly agreed to a schedule whereby her supervisors would submit a chart by a specific date beyond the ten-day timeframe showing the limited work she had performed on her assigned cases, George would then submit a response on a specific date thereafter, and only then would OAG issue a final written decision as to whether she had satisfied the PIP. *See* JA 247 (Chief of Staff Whatley's testimony that union officials agreed to extended time); JA 356-57 (CSSD supervisor Tilley's testimony that George was present at the meeting and "all parties agreed" to submit additional information on set dates regarding her PIP performance). George never contradicted that testimony at the fact-finding hearing. Indeed, she conceded both that she had requested the meeting and that she had timely submitted her response in accordance with the schedule agreed to at the meeting. JA 507, 511. Indeed, George had all but abandoned the ten-day issue after initially raising it in her amended petition for appeal; she did not press the issue at the hearing or in her two closing statements (one through counsel and one pro se).

In short, the OEA erred as a matter of law by failing to recognize both that an employee can waive the ten-day rule for written PIP decisions and that the undisputed evidence established that George had waived that rule in her case. There was no basis to vacate George's termination under the ten-day rule.

II. The OEA Erred As A Matter of Law By Sua Sponte Vacating George's Termination Based On An Alleged Inadequacy In The Notice Of Termination.

OAG was explicit in its notice of proposed removal that it was terminating George because she had failed her PIP, and it relied on that reasoning in its final decision. Failing the PIP was a performance deficit that constituted cause for her termination. The notices thus adequately informed George of the charge and the reasons OAG concluded that termination was the appropriate penalty, and it allowed her to mount a vigorous defense both within OAG and before the OEA. That is all the regulations require. What is more, George never contended that she did not have adequate notice of the charge against her or that OAG had failed to consider the proper range of penalties until the AJ raised these issues sua sponte at the evidentiary hearing. That alone shows that any potential error was harmless and that the OEA erred as a matter of law by reinstating George on this basis. But if there was a prejudicial error in OAG's consideration of the proper range of penalties, the remedy was to remand to ensure that OAG had properly exercised its discretion to select an appropriate penalty.

A. Failing a PIP is cause for adverse action, and George was provided with adequate notice that she failed her PIP.

To begin, there can be no question that OAG had cause to terminate George for failing her PIP. This is true whether the PIP failure is characterized as a performance deficiency, a neglect of duty, or a failure to meet performance standards. George has never claimed otherwise, nor could she.

As explained, both the personnel statute and regulations provide that disciplinary action "may only be taken for cause." D.C. Code § 1-616.51(1); 6-B DCMR § 1602.1 ("No employee may be . . . removed without cause, as defined in this chapter"). 6-B DCMR § 1605 sets forth "[t]he classes of conduct and performance deficits [that] constitute causes for corrective and adverse action." 6-B DCMR § 1699.1. Section 1605 expressly states that "[t]aking a corrective or adverse action against an employee is appropriate when the employee fails to or cannot meet identifiable conduct or performance standards, which adversely affects the efficiency or integrity of government service" after "an inquiry into any apparent misconduct or performance deficiency," *id.* § 1605.2, and that the PIP process is how the employing agency determines whether an employee has met performance standards, *id.* § 1605.3. The regulation then goes on to list a non-exhaustive list of conduct and deficits that constitute cause, including "[n]eglect of duty" and "[f]ailure to meet performance standards." 6-B DCMR § 1605.4(e), (m).

Here, OAG's notices plainly stated cause to terminate George under these standards. Failing a PIP constitutes a performance deficit within the definition of cause because a PIP identifies a performance deficiency—"specific performance areas in which the employee is deficient"—and sets forth how the employee is to improve her performance. *Id.* § 1410.3. It is neither "arbitrary nor capricious" to terminate an employee for failing to improve her deficient performance after receiving an opportunity to do so under a PIP. *Id.* § 1699.1.

B. OAG gave George adequate notice of the cause for her termination.

Next, George received adequate notice that she was being terminated because she failed her PIP. The regulation requires only that the "notice of the proposed action shall inform the employee of . . . the specific performance or conduct at issue" and how "the employee's performance or conduct fails to meet appropriate standards." 6-B DCMR § 1618.2. There is no requirement anywhere in the regulations that requires OAG to cite a specific regulation or any specific portion of Section 1605, such as a neglect of duty or failure to meet performance standards.

Federal case law confirms this rule.[8] Under the federal personnel system, where the agency must give an employee notice "stating the specific reasons for the proposed action," the notice need only "apprise the employee of the nature of the

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[8] "The interpretation by a federal appellate court of a related federal statute can be helpful" in interpreting similar issues before the OEA. *Raphael v. Okyiri*, 740 A.2d 935, 946 n.15 (D.C. 1999).

charges in sufficient detail to allow the employee to make an informed reply." *Brook v. Corrado*, 999 F.2d 523, 526 (Fed. Cir. 1993). For example, in *Sokoloff v. United States*, 4 Cl. Ct. 140 (1983), the court found a termination notice adequate where it advised the employee (1) that "[y]ou have repeatedly failed to follow supervisory instructions," and provided examples and dates on which the employee failed to do what management directed, and (2) that "the quality of . . . [your] work was unacceptable and inadequate in key areas," followed by five examples of poor-quality work. *Id.* at 144. The notice was deemed sufficiently detailed to allow the employee an opportunity to refute the allegations and was therefore a valid notice.

Here, OAG's notice of proposed removal amply informed George of the specific performance or conduct at issue and how her performance failed to meet appropriate standards. The notice stated that the "cause" for George's proposed removal was her "failure to satisfactorily perform one or more duties of [her] position and any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations." JA 34. More specifically, the notice explained that her removal was "based on [her] failure to successfully perform under the PIP." JA 34. OAG thoroughly detailed how George had failed her PIP by failing to schedule and conduct interviews with custodial parents and otherwise process her cases and record her activity in CSSD's database. JA 35-42. Moreover, the proposed notice informed George that her deficient work performance

interfered with government operations because it "seriously impaired the ability of the Child Support Services Division to achieve the goals of establishing paternity and obtaining child support orders." JA 43.[9]

Contrary to the OEA's and the Superior Court's views, OAG's notice of proposed removal did not have to label George's failure to satisfactorily perform her duties with either "neglect of duty" or "failure to meet performance standards" under 6-B DCMR § 1605.4 (although failing the PIP could be characterized as either) because the notice otherwise set forth cause under 6-B DCMR §§ 1605.2 and 1699.1.[10] And nothing more was required in the notice of the final agency decision, which shall "[s]uccinctly enumerate each independent cause for which corrective or adverse action is being taken; [and] specifications shall not be used in any final written decision." *Id.* § 1623.4(b). The final notice here referenced the notice of

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[9] With the notice, an agency should also provide the employee any "material upon which the notice of proposed action is based, and which is necessary to support the reasons given in the notice." 6-B DCMR § 1618.5. OAG did that here by attaching to the notice spreadsheets listing George's limited work on her assigned cases. *See* JA 50-94.

[10] As noted, Section 1605.4 is expressly "not exhaustive" in listing "classes of conduct and performance deficits [that] constitute cause and warrant corrective or adverse action." 6-B DCMR § 1605.4. If the OEA and the Superior Court were correct that an employing agency always had to cite to a specific cause in Section 1605.4, that would read the words "not exhaustive" out of the regulation. *1836 S St. Tenants Ass'n, Inc. v. Est. of B. Battle*, 965 A.2d 832, 838 (D.C. 2009) (explaining that the Court should not construe a statute so as to "render part of the statute a nullity").

proposed removal, confirming for George that she was being terminated for failing her PIP.

C. Alternatively, any error in the notices of termination was harmless or, at most, warranted a remand to OAG.

Because George was on notice that she was being terminated because she had failed her PIP, any error in failing to specify a specific cause in Section 1605.4 was harmless. *See* 6-B DCMR § 631.3 (OEA "shall not reverse an agency's action for error in the application of its . . . regulations . . . if the agency can demonstrate that the error was harmless," meaning that the error "did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action."). The OEA Board's conclusions to the contrary were in error.

1. The independent hearing officer's reference to "neglect of duty" and OAG's post-OEA-hearing suggestion of "failure to meet performance standards" as bases for termination were, at most, harmless error.

After George sought review of OAG's notice of proposed termination before an independent hearing officer, the hearing officer issued a report and recommendation in favor of termination. JA 114. In that report, the hearing officer characterized the PIP failure as a "neglect of duty." JA 114, 122, 124. In upholding George's termination, OAG referenced the hearing officer's decision, JA 125, and OAG later included it as an attachment to its answer at the OEA. JA 599-600. But

in post-hearing briefing before the OEA, OAG stated that George had failed to perform under her PIP and "'[f]ailure to meet performance standards' is a cause that supports an adverse action" under 6-B DCMR § 1605.4(m). JA 539, 566. In the OEA Board's view, this created a fatal inconsistency that undermined the validity of the notices of removal. JA 599-60. Not so. Both the independent hearing officer and OAG's characterizations were fully consistent with the initial notice of proposed removal, which stated that the cause for removal was George's "failure to satisfactorily perform one or more" duties—specifically, her "failure to successfully perform under the PIP." JA 34. They were also fully consistent with George's understanding that the case was "built entirely" on her failing her PIP, and that OAG could terminate her under 6-B DCMR § 1601.7 for violating established performance standards. JA 568-69. George had an ample opportunity to respond to that charge at the OEA hearing, and never claimed otherwise.

In concluding otherwise, both the OEA and the Superior Court cited *Frost*, 638 A.2d 657, but that case does not control here. There, the specification of details in the agency's notice charged the employee with the "mutilation" and "alteration" of government computers, but the agency tried to establish its case by showing *different* misconduct: the employee's "willful concealment" of computer code. *Id.* at 663. This Court reasoned that the employee "was never informed that the charge leveled against him was 'willful concealment'; therefore, he could not have been

expected to prepare to defend against such a claim." *Id.* Here, by contrast, George was consistently informed of the essential specification that she had failed her PIP regardless of whether the PIP failure is characterized as a performance deficit, neglect of duty, or failure to meet performance standards, and she raised a vigorous defense to that charge both within OAG and before the OEA.

The other cases on which the OEA relied also provide no support for its decision. *See* JA 633. For example, in *Johnston v. Government Printing Office*, 5 MSPR 354 (1981), the Merit Systems Protection Board considered whether a notice charged the employee with two different counts of misconduct involving different factual specifications—notoriously disgraceful conduct (asking an employee to lie and threatening to slash his tires) and fraud (submission of a false claim). *Id.* at 357. The Board held that it could not sustain an action removing an employee "on the basis of charges that could have been levied but were not." *Id.* Here, there has always been only one factual charge: that George failed her PIP. OAG consistently and adequately levied that charge against her.

Likewise, in *Sefton v. D.C. Fire and Emergency SVCS*, OEA Matter No. 1601-0109-13 (Aug. 18, 2014), an OEA administrative judge overturned one specific charge against an employee because the employee had been charged with malfeasance, but the evidence showed only neglect of duty, not malfeasance. Op. at 16-17. Here, by contrast, George's PIP failure amply establishes a performance

deficit, neglect of duty, or failure to meet performance standards, and George does not claim otherwise. That is because a PIP failure constitutes an adequate ground for termination even if it does not fit within one of the specified bases in the regulation. *See* 6-B DCMR §§ 1605.2, 1605.3.

Finally, *D.C. Department of Corrections v. Teamsters Union Local No. 246*, 554 A.2d 319 (D.C. 1989), is not to the contrary. There, the Court upheld an arbitration award reversing a correctional officer's termination for "conviction of simple assault" because such a conviction was not one of the exclusive causes for termination listed in the since-repealed D.C. Code § 1-617.1(d), and there was no "catch-all provision" in the statute "permitting adverse actions for any other reason." *Id.* at 324. Here, there is no dispute that failing the PIP amounted to a performance deficit establishing cause for termination under the definition in 6-B DCMR § 1699.1.

In any event, any error in the hearing officer's adding a reference to "neglect of duty" in her report and recommendation, or in OAG's post-hearing suggestion that the PIP failure could be a "failure to meet performance standards" was harmless. Throughout the termination process in this case, everyone understood that the basis for George's removal was her failure to perform her job duties as documented by her PIP failure. Even though the internal hearing officer referred to neglect of duty, the hearing officer herself understood that the essential cause for removal was that

George had "fail[ed] to satisfactorily perform one or more duties of her position" by failing her PIP, which interfered with the efficiency and integrity of government operations. JA 115.

What is more, George herself never claimed that OAG's final notice referencing the hearing officer's characterization of the cause as neglect of duty confused her as to the basis for her termination or prevented her from mounting a vigorous defense at the OEA to the essential charge that she had failed her PIP. George never claimed that she did not understand the basis for her termination or that she could not defend herself due to any inadequacy in the notice. Indeed, when the AJ directed the parties to address in their closing arguments the precise regulation underlying the termination, George acknowledged that her termination was "built entirely" on her failing her PIP and that OAG could terminate her on that basis under 6-B DCMR § 1601.7, which sets forth the policy that an agency can issue an adverse action "when an employee does not meet or violates established performance or conduct standards." JA 568-69. The fact that an independent hearing officer fleetingly referred to George's failure to meet performance standards as "neglect of duty" did not affect her defense in any way.[11]

[11] And, of course, OAG's *post-hearing* characterization could not have affected George's ability to present a defense at the OEA hearing.

2. The difference in initial—but not ultimate—penalties for "neglect of duty" and "failure to meet performance standards" is immaterial and, at the most, would require remand to OAG.

Similarly, it is of no concern that the suggested range of *initial* penalties varies for neglect of duty and failure to meet performance standards because OAG was not bound by any suggested penalty. The suggested range of penalty for a first offense of neglect of duty is counseling to removal. 6-B DCMR § 1607.2(e). The suggested penalty for a first offense of failure to meet performance standards is a reassignment, reduction in grade, or removal. *Id.* § 1607.2(m). But those are only "illustrative actions" and are "only [to] be used as a guide to assist managers in determining the appropriate Agency action." *Id.* § 1607.2 A supervisor must determine the appropriate action based on all the circumstances. *Id* § 1607.1. Indeed, under Section 1607.2, a manager is free to deviate from the illustrative penalties after considering all the relevant factors in Section 1606.2, such as the nature and seriousness of the offense, the employee's prior disciplinary record, and the potential for the employee's rehabilitation.

Here, OAG expressly considered all the factors in Section 1606.2 when deciding that termination was the only appropriate penalty for George's PIP failure. JA 43-47. And George never raised any claim that OAG failed to consider the proper range of penalties, only that termination was not justified. The OEA erred as a matter

of law by concluding that OAG was somehow bound to a range of penalties depending on the characterization of the charge.

In any event, any error is harmless. *See* 6-B DCMR § 631.3. OAG selected the maximum illustrative penalty (removal) for both neglect of duty and failure to meet performance standards after considering all relevant factors. OAG did not consider any less severe penalty under either standard, whether counseling, a reassignment, or a reduction in grade. And, again, George never objected that she did not have adequate notice of the charge and never claimed that either OAG or she did not understand the range of potential penalties. She argued only that termination was an excessive penalty. JA 128.

Finally, if there was a prejudicial error in OAG not expressly recognizing the different range of illustrative low-end penalties, the remedy was to remand for OAG to ensure that it had properly exercised its discretion to select an appropriate penalty. The remedy was not for the OEA to vacate George's removal altogether. *See Love v. D.C. Off. of Emp. Appeals*, 90 A.3d 412, 414, 425 (D.C. 2014) (remanding case for further proceedings to determine appropriate penalty based on consideration of proper factors).

* * *

For the foregoing reasons, the Court should reverse the decision of the Superior Court with directions to remand to the OEA to vacate its decision. The AJ

should then decide whether OAG established at the hearing that George failed her PIP. If so, the OEA should affirm the termination.

CONCLUSION

The Court should reverse the decision of the Superior Court and remand for the OEA to vacate its decision and address George's substantive challenge to the merits of her termination.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that I have reviewed Super. Ct. Civ. R. 5.2 and this Court's June 17, 2021 order and that this brief complies with the applicable requirements of those provisions.

/s/ Mary L. Wilson
MARY L. WILSON

CERTIFICATE OF SERVICE

I certify that on November 1, 2021, this brief and the joint appendix were served through this Court's electronic filing system to:

Lasheka Brown

Rachel George

/s/ Mary L. Wilson
MARY L. WILSON