No. 24-CV-0922

District of Columbia Court of Appeals

District of Columbia Retirement Board,

Appellant,

v.

Office of Employee Appeals, *et al.*,

Appellees.

On Appeal from the
Superior Court of the District of Columbia

No. 2023-CAB-005159
(The Honorable Jonathan H. Pittman)

APPELLANT DCRB'S OPENING BRIEF

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RULE 28(a)(2) STATEMENT

District of Columbia Retirement Board *(agency in OEA proceedings; petitioner in the Superior Court; appellant in the Court of Appeals):* Miguel Eaton, Eric Dreiband, William Coglianese, William Strench (Jones Day).

Office of Employee Appeals *(respondent in Superior Court; appellee in the Court of Appeals):* Lasheka Brown (general counsel, Office of Employee Appeals).

Erie Sampson *(employee in OEA proceedings; intervenor in the Superior Court; appellee in the Court of Appeals):* Donna Williams Rucker and Michael Goldstein (Tully Rinckey, PLLC).

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STATEMENT OF JURISDICTION

The District of Columbia Retirement Board ("DCRB") appeals from the Superior Court's order remanding this case to the Office of Employee Appeals ("OEA"). For the reasons set forth below, that remand was based on a "clear error of law" and is therefore a final order that this Court has jurisdiction to review under D.C. Code § 11-721(a)(1).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

OEA ordered DCRB to reinstate its former general counsel, Erie Sampson, based on a procedural rule that applies to Career Service employees. But under unambiguous provisions of the D.C. Code, Sampson is a member of the Senior Executive Attorney Service—not the Career Service—and so is not subject to OEA jurisdiction or protections. The Superior Court nevertheless remanded for OEA to make factual findings on this legal question. The issues presented for review are:

1. Does this Court have jurisdiction over this appeal under the "clear error of law" exception to the finality requirement?

2. Did the Superior Court commit a clear error of law in remanding to OEA to resolve "factual disputes," when the D.C. Code unambiguously establishes that—based on Sampson's undisputed employment position—OEA lacks jurisdiction?

STATEMENT OF THE CASE

After Appellant DCRB removed Appellee Erie Sampson from her position as DCRB's General Counsel, she filed a petition with Appellee OEA. OEA held that DCRB violated a rule requiring agencies to take disciplinary action against Career Service employees within 90 days of learning of the basis for that action and ordered DCRB to reinstate Sampson as General Counsel.

DCRB petitioned for review of OEA's decision in the Superior Court. Sampson intervened to defend the decision; OEA declined to file a brief. The Superior Court addressed only DCRB's argument that OEA lacked jurisdiction on the ground that DCRB's general counsel is, as a matter of law, a member of the Senior Executive Attorney Service rather than the Career Service—such that Sampson's position is not subject to Career Service protections and OEA review. The court held that Sampson's classification is "potentially dispositive in this matter," but remanded to OEA to resolve that issue in the first instance.

DCRB then filed a notice of appeal in this Court, challenging the Superior Court's decision to remand the case instead of setting OEA's ruling aside for lack of jurisdiction. This Court issued a show-cause order questioning whether the decision below was final and appealable. This Court subsequently discharged the order and instructed the parties to address that issue in their briefs.

STATEMENT OF FACTS

A. DCRB and Its General Counsel

DCRB is an "independent agency" of the District of Columbia government. D.C. Code § 1-711(a). It is charged by law with "serv[ing] the interests of the District's Police Officers, Firefighters, Teachers and their Survivors by prudently investing [pension] Fund assets and delivering accurate and timely benefit payments with excellent member service." D.C. Retirement Board, *About Us: DCRB Mission Statement*, *available at* dcrb.dc.gov/page/about-dcrb; *see also* D.C. Code § 1-715(a) (requiring DCRB to "manage and invest [the retirement fund] assets in accordance with this chapter").

A twelve-member Board of Trustees ("the Board") governs the fund. The Board has exclusive authority, within the bounds set by the D.C. Code, to manage and control the pension fund's assets and to pay benefits. D.C. Code § 1-711(b)(1)(A). DCRB also employs a full-time Executive Director who reports directly to the Board. JA123–24.[1] Several senior executives, in turn, report to the Executive Director, including (as relevant here) the General Counsel. *Id.*

The General Counsel is DCRB's chief legal and ethics officer. JA203. This individual is charged with duties that are key to carrying out DCRB's mission.

[1] Citations to "JA[#]" refer to the Joint Appendix filed concurrently with this brief.

The General Counsel supervises DCRB's investment ethics and risk-compliance processes; represents DCRB in all legal matters; provides legal advice to the Board, the Executive Director, and other staff; and ensures DCRB's compliance with all applicable laws, regulations, and rules. *Id.* The role includes a specific responsibility to "keep the Board apprised of specific ethical/legal risks and governmental investigations affecting DCRB and its investment advisors." JA219. The General Counsel also manages DCRB's legal department, supervises external legal counsel, and negotiates and drafts contracts for DCRB. JA203.

Sampson became DCRB's General Counsel in 2008. JA99.

B. Sampson's Misconduct and Termination

In September 2021, allegations surfaced that Sampson had withheld important information from the Board. Early that month, J.P. Balestrieri took over as DCRB's new Executive Director. JA227. A few weeks into his tenure, an employee who reported to Sampson met with Balestrieri and raised serious concerns regarding Sampson's conduct. JA227–28. The employee asserted that Sampson had learned that a previous Executive Director had asked one of DCRB's fund managers for help finding a paid board seat after she retired from DCRB—an effort to secure a lucrative personal favor from a fund manager that would have created a clear conflict of interest on the Executive Director's part. JA214. Yet, the employee asserted, Sampson never disclosed this information

to the Board, even as it was considering a new $75-million investment with the fund manager. JA215–16. If true, this allegation would mean Sampson had flagrantly violated her duty to keep the Board apprised of legal and ethical considerations relevant to its investment decisions, compromising DCRB's ability to carry out its duties to its beneficiaries.

These were, however, only allegations. The employee had not provided any supporting proof. JA210. And Balestrieri, only a few weeks into the job, had no independent basis for assessing the veracity of the employee's claims. Nor had he heard from Sampson about these allegations.

As such, Balestrieri concluded that the allegations required an investigation. He placed Sampson on paid administrative leave and commissioned an independent investigator. JA228. The investigator interviewed the relevant parties, including Sampson herself. JA208–09. In that interview, Sampson confirmed the basic allegations against her. JA 217–18. Not only that, but she explained that she had reported the conflict of interest to the District's Office of the Inspector General—but *not* to her superiors or the Board, in violation of her duties as General Counsel. *Id.* And she informed the investigator of still other misconduct that she knew of—again involving DCRB investment managers—but that she never disclosed to the Board. *Id.*

The investigation thus revealed that, as the investigator's report stated, Sampson had failed to disclose "several important legal and ethical matters facing DCRB." JA222. After receiving the report, Balestrieri concluded that he did not have confidence in Sampson's ability to serve as General Counsel. He sent her a notice of proposed removal from her position in April 2023. JA161–64.

C. The Proceedings Below

Proceeding under the (erroneous, as explained below) assumption that she was entitled to the heightened tenure protections and procedural rights reserved for career civil servants, Sampson appealed her proposed termination to a hearing officer. JA134. She argued that, by waiting to investigate her alleged misconduct before firing her, DCRB had violated Career Service employees' protection under the "90-day rule." JA137–38. That rule requires an agency to take disciplinary action against an employee (if at all) within 90 days of when it "knew or should have known" about the employee's misconduct. D.C. Mun. Regs. subt. 6-B § 1602.3(a). The hearing officer rejected this argument and found Sampson to have waived any other challenge to her termination. JA140–41, 144–45. Balestrieri then made Sampson's removal final. JA117–22.

Sampson appealed to OEA, challenging the hearing officer's application of the 90-day rule (and also trying to raise new contentions). JA109–14. Treating Sampson as a Career Service employee, OEA concluded that DCRB *had*

violated the 90-day rule, and on that basis ordered DCRB to reinstate her as its General Counsel. JA230–33. It reasoned that DCRB "knew of the actions that supported the current adverse action" in September 2021 (when Balestrieri heard a single employee's unverified allegation against Sampson) and that DCRB's failure to fire her within 90 days of that meeting (during which time DCRB was investigating the allegations) meant it was barred from removing her. JA231.

DCRB timely petitioned for review of that decision in the Superior Court. JA6; *see* D.C. Code § 1-606.03(d) (granting jurisdiction over OEA orders). Its lead argument was that OEA never should have heard Sampson's case because it has no jurisdiction over an employee holding Sampson's position. JA24–27. DCRB explained that the D.C. Code expressly makes all general counsels of independent agencies—including DCRB—members of the "Senior Executive Attorney Service." JA26. And DCRB further showed that, under the D.C. Code, Senior Executive Attorneys serve at will—and so are *not* entitled to Career Service protections and procedures, including OEA review and the 90-day rule. JA24–25; *see Grant v. District of Columbia*, 908 A.2d 1173, 1178 (D.C. 2006) (explaining that the CMPA "provide[s] procedural protections" only to "Career Service employees" and not at-will employees).[2]

[2] DCRB also argued that, if Sampson was a Career Service employee, it had satisfied the 90-day rule.

Sampson, for her part, agreed that DCRB was free to "raise [this] jurisdictional challenge." JA50. And she did not dispute that, if she had been a Senior Executive Attorney, there would be no OEA jurisdiction. *Id.*[3] But Sampson largely eschewed any attempt at rebutting DCRB's argument that, under the D.C. Code, her position as the general counsel of an independent agency was defined as a Senior Executive Attorney position. Instead, she argued that DCRB had the authority to reclassify her as a Career Service employee and had done so by treating her as such. JA49–50, 59–75.

The Superior Court addressed only Sampson's employment classification, because it was "potentially dispositive." JA108. The court thus walked through the relevant statutory definitions. JA106. And it recognized those provisions as establishing that, if Sampson was a Senior Executive Attorney, "she would not have the same rights and procedural protections as a Career Service employee, and OEA would not have jurisdiction over this matter." JA106 (quoting D.C. Code § 1-698.53(b)).

Despite acknowledging the statutory definitions that govern Senior Executive Attorney status, the Superior Court declined to say how those statutes applied to Sampson's undisputed position as the general counsel of an independent

[3] Sampson intervened in the Superior Court proceedings to defend OEA's decision. OEA submitted a "statement in lieu of [a] brief," in which it said that it was simply "rely[ing] on the final decision in the matter." JA36.

agency. Instead, the court recounted Sampson's argument that her status as a Career Service employee was established by "her official personnel records," and that DCRB's conduct in earlier proceedings reflected a belief that she was a Career Service Employee. JA107. In light of those arguments, the court concluded that determining Sampson's status "requires the resolution of certain factual disputes, including those raised by [Sampson] in this Court." *Id.* And because OEA had made no factual findings on this issue, the court held that it "must return this issue to OEA." JA107–08. It thus remanded for OEA to determine "(1) whether [Sampson's] status was Career Service, Legal Service, or Senior Executive Attorney Service at the time DCRB commenced its removal action against her; and (2) whether OEA has subject-matter jurisdiction to hear [Sampson's] appeal." JA108.

D. Proceedings in This Court

DCRB timely appealed. On October 16, 2024, this Court ordered DCRB to "show cause why this appeal should not be dismissed for having been taken from a non-final, non-appealable order." Oct. 16, 2024 Show Cause Order. DCRB explained that, although remand orders are usually not immediately appealable, this Court has recognized an exception where the Superior Court "committed a clear error of law in ordering a remand." *Warner v. D.C. Dep't of Emp. Servs.*, 587 A.2d 1091, 1093–94 (D.C. 1991). Although this Court did not

call for a submission from Sampson, she put in a response of her own. In contending that the decision below was not final, she acknowledged the "clear error of law" exception, without offering any argument as to why it would not apply here. *See* Nov. 6, 2024 Response to Appellant's Response to Order to Show Cause.[4]

On December 9, this Court discharged the show-cause order. The Court ordered the parties to address in their briefs "the 'clear error of law' finality exception, including what it means for a legal error to be 'clear,' and whether this court should later dismiss this appeal unless [DCRB] shows in briefing that the trial court's remand order was not simply erroneous but predicated on a 'clear error of law.'" Dec. 9, 2024 Order Discharging Show Cause Order.

[4] Sampson also argued that DCRB had not met the requirements for a permissive appeal—but DCRB is not pursuing a permissive appeal.

SUMMARY OF THE ARGUMENT

This Court has jurisdiction to hear this appeal because the Superior Court's order remanding to OEA was based on a clear error of law. Although orders remanding cases for further proceedings are presumptively non-final and not immediately appealable, this Court has long recognized an exception to this rule when the remand was based on a clear error of law.

This Court has not clearly articulated what the "clear error of law" standard requires. But past uses of the phrase, along with the context underlying the exception, show that this Court's jurisdiction extends to reversing remand orders that were unambiguously based on a legal error—the same standard that this Court applies when reviewing a ruling for abuse of discretion. In contrast, the plain-error standard—which was employed in one case that this Court cited when discharging the show-cause order—is not a suitable analog for the "clear error of law" exception. The demanding plain-error standard is driven by the interest in encouraging parties to timely raise their legal arguments before the trial court in the first instance. Those concerns are not implicated when assessing whether a remand order was legally erroneous.

Under the "clear error of law" standard, the Court has jurisdiction—and should vacate the decision—because OEA unambiguously lacked jurisdiction. The Superior Court recognized that, if Sampson was a Senior Executive

Attorney, OEA had no jurisdiction over her appeal. In nevertheless remanding to OEA on the premise that Sampson's factual contentions could affect that determination, the Superior Court committed a clear error of law.

After all, this case is controlled—and resolved—by unambiguous statutory provisions. The D.C. Code defines the Senior Executive Attorney Service to include *all* general counsels of independent agencies. D.C. Code § 1-608.51(3)(C). And no one disputes that Sampson was DCRB's General Counsel and that DCRB is an independent agency. Thus, clear statutory definitions, applied to undisputed facts, leave no room for OEA jurisdiction.

The Superior Court reached a different result only by crediting Sampson's argument that factual contentions about how DCRB characterized her status (in paperwork and litigation statements) could somehow convert her from a Senior Executive Attorney Service member to a Career Service member. That is clearly wrong. This Court has held that such facts cannot displace the statutory classifications of District employees. *Hoage v. Bd. of Trs. of the Univ. of the District of Columbia*, 714 A.2d 776 (D.C. 1998). By assuming otherwise, the Superior Court clearly erred. This Court should thus vacate that order and remand for the Superior Court to, in turn, vacate OEA's decision for lack of jurisdiction. (If, however, the Court concludes that the Superior Court did *not* commit a clear error of law, it would lack jurisdiction and so should dismiss the appeal.)

STANDARD OF REVIEW

As no court has addressed the issue in the case, the Court must determine its own jurisdiction in the first instance. *See, e.g.*, *Kubichek v. Unlimited Biking Wash., D.C., LLC*, 330 A.3d 1007, 1010 (D.C. 2025). The question whether OEA had subject-matter jurisdiction is a question of law and thus reviewed *de novo*. *Upson v. Wallace*, 3 A.3d 1148, 1154–55 (D.C. 2010).

ARGUMENT

I. This Court has jurisdiction under the "clear error of law" exception.

Although orders remanding cases to agencies generally are not final, this Court has applied an exception when a remand order was based on a "clear error of law." This Court has not clearly defined what this exception requires, but precedent instructs that it should be the same kind of legal error that would require this Court to reverse a trial court's exercise of discretion.

A. Review of an order remanding a case to an administrative agency is immediately reviewable when that order reflects a clear error of law.

This Court has jurisdiction over "final orders and judgments of the Superior Court of the District of Columbia." D.C. Code § 11-721(a)(1). Although an order remanding a case to an administrative agency "[o]rdinarily … is not a final order," this Court has recognized several exceptions to this rule. *Warner*, 587 A.2d at 1093. Relevant here, the Court has considered a remand order "final"

when "the agency has committed a clear error of law in ordering a remand." *Id.* Sampson agrees. *See* Nov. 6, 2024 Response to Appellant's Response to Order to Show Cause at 7–8.

This is no mere theoretical exception. The Court relied on it in reaching the merits of a Superior Court order remanding for administrative proceedings. *D.C. Pub. Emp. Relations Bd. v. Fraternal Order of Police*, 987 A.2d 1205, 1206 n.1 (D.C. 2010). And this Court has repeatedly reached the merits of remand orders without explanation, apparently relying on this exception implicitly. *See District of Columbia v. Fremeau*, 869 A.2d 711, 712 (D.C. 2005) (reversing a remand to OEA); *Off. of the D.C. Controller v. Frost*, 638 A.2d 657, 658 (D.C. 1994) (same); *Am. Fed'n of State, Cnty., & Mun. Emps. Local 2087 v. Univ. of the District of Columbia*, 166 A.3d 967, 72 n.9 (D.C. 2017) (discharging a show-cause order predicated on the non-finality of the remand decision).

This "clear error of law" exception makes perfect sense in light of the reasons behind the finality rule. That rule prevents "piecemeal review" of administrative decisions, in favor of reviewing an entire decision at once. *Wash. Metro. Area Transit Auth. v. Dir., Off. of Workers' Comp.*, 824 F.2d 94, 95 (D.C. Cir. 1987). But when an order remanding a case to an agency rests on a clear error of law, considerations of judicial economy favor *immediate* review—not waiting for the agency to rehear the case and issue a decision that launches a fresh appeal. If a

remand invites an agency to make legally *irrelevant* factual findings, the inevitable outcome is another appeal challenging that error of law. And the reviewing court would not benefit from any legal determinations made by the agency, which would be reviewed *de novo* regardless. *Smith v. D.C. Dep't of Emp. Servs.*, 934 A.2d 428, 431 (D.C. 2007). Accordingly, when the Superior Court remands to an agency based on a clear error of law, this Court can and should review that remand order immediately.

When discharging its show-cause order, this Court also asked the parties to address "whether this court should later dismiss this appeal unless appellant shows in briefing that the trial court's remand order was not simply erroneous but predicated on a 'clear error of law.'" If this Court concludes that the decision below was either correct or not based on a "clear error of law," it would lack jurisdiction. "[T]he only function remaining to the court" would thus be "announcing" its lack of jurisdiction "and dismissing the cause." *Sum-Slaughter v. Fin. Indus. Regul. Auth., Inc.*, 320 A.3d 313, 321 (D.C. 2024).

B. A remand order is based on a "clear error of law" when the order is unambiguously based on a legal error.

In its discharge order, this Court directed the parties to brief "what it means for a legal error to be 'clear'" and cited a decision applying the "plain error" standard, suggesting that standard as a possible gloss. As the discharge order suggests, this Court has not specifically articulated what it takes for an

error justifying review of a remand order to be "clear." But decisions of this Court and other courts indicate that the "clear error of law" exception is satisfied when a remand order is unambiguously premised on an error of law, meaning that the decision to remand clearly fell outside the tribunal's discretion. By contrast, although the Court in its discharge order cited a decision involving the plain-error standard, that standard is not a useful analog for the "clear error of law" exception.

1. This Court's applications of the "clear error of law" exception, along with the reasons for this exception, show that a legal error is sufficiently "clear" when it unambiguously was the basis of the remand—that is, where it is readily apparent that the lower court remanded only because of that legal error.

The phrase "clear error of law" is best understood as the legal prong of the test that courts use in abuse-of-discretion review, where the phrase appears frequently. This Court has explained that it "cannot ... sustain a discretionary ruling based on a clear error of law." *Wright v. United States*, 508 A.2d 915, 920 n.3 (D.C. 1986). Other courts have similarly looked for a "clear error of law" when reviewing discretionary decisions. *See, e.g.*, *Fisher v. Ford Motor Co.*, 224 F.3d 570, 575 (6th Cir. 2000) ("The district court's implicit rejection of [one party's] argument did not involve a clear error of law, and hence there was no abuse of discretion."); *Triebwasser & Katz v. AT&T*, 535 F.2d 1356, 1358 (2d Cir. 1976)

(applying the "clear mistake of law" standard to review of a preliminary injunction). Similarly, this Court applies a abuse-of-discretion standard to review of ordinary agency actions (*D.C. Off. of Human Rts. v. D.C. Dep't of Corrs.*, 40 A.3d 917, 923 (D.C. 2012)), and has at times framed its inquiry as assessing whether the agency decision was "clearly erroneous as a matter of law" (*Gibson v. D.C. Pub. Emp. Rels. Bd.*, 785 A.2d 1238, 1241 (D.C. 2001)).

It follows from this association between the phrase "clear error of law" and abuse-of-discretion review that the required legal error is one found by the reviewing court upon de novo consideration. As this Court recently reiterated, "[t]he abuse-of-discretion standard includes review—generally described as de novo review—to determine that the discretion was not guided by erroneous legal conclusions." *Welch v. United States*, 319 A.3d 971, 975 (D.C. 2024) (cleaned up); *accord United States v. Oruche*, 484 F.3d 590, 595 (D.C. Cir. 2007) ("Generally, this court reviews the district court's grant of a new trial for abuse of discretion. However, when confronted with a 'purely legal question,' our review is de novo.").

Thus, in applying the "clear error of law" exception to the finality requirement, the question is whether, on a de novo review of the Superior Court's decision, that court unmistakably based its remand order on a legal error.

2. In discharging its show-cause order, this Court cited a decision involving "plain error" review. Dec. 9, 2024 Order Discharging Order to Show Cause at 1 (citing *Walker* v. *United States,* 201 A.3d 586, 594 (D.C. 2019)). But this Court has not applied the plain-error standard in any case reviewing a remand order. For good reason: The procedural values that undergird that standard are not implicated in an appeal like this one.

The "plain error" standard applies when a party fails to object to a ruling at trial, but then cites it as an error meriting reversal on appeal. *See e.g.*, *Chew v. United States*, 314 A.3d 80, 83 (D.C. 2024). In that scenario, the question is whether "the error is so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *Williams v. United States*, 130 A.3d 343, 347 (D.C. 2016) (cleaned up).

Overcoming plain-error review "is difficult, 'as it should be.'" *Puckett v. United States*, 556 U.S. 129, 135 (2009) (cleaned up). The reason is simple: "If a litigant believes that an error has occurred (to his detriment) during a ... judicial proceeding, he must object in order to preserve the issue." *Id.* at 134. The trial court, after all, is "in the best position to determine the relevant facts and adjudicate the dispute"—and, if an error has indeed occurred, to "correct or avoid the mistake so that it cannot possibly affect the ultimate outcome." *Id.* Limiting appellate review of unraised objections thus "serves to induce the timely raising

of claims and objections, which gives the district court the opportunity to consider and resolve them." *Id.* This limitation also "prevents a litigant from 'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." *Id.* (cleaned up).

These important interests—in ensuring that litigants raise arguments and objections with the trial court—explain why plain-error relief is available only when the error is sufficiently "egregious and obvious." *Williams*, 130 A.3d at 347 (cleaned up). This is a high bar: This Court hesitates to find a point of law "obvious" when it is "subject to reasonable dispute" (*Williams v. United States*, 210 A.3d 734, 743 (D.C. 2019)) and has not been settled by binding precedent. (*Walker*, 201 A.3d at 594). And even where the relevant law is clear, this Court *still* avoids disturbing the result of a trial unless the appellant can show that the unraised error was prejudicial and "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Walker*, 201 A.3d at 594.

This Court has never applied the exacting plain-error standard when considering the "clear error of law" exception to finality. That is unsurprising. Allowing a legally erroneous remand to an agency to stand, simply because it is not "egregious" enough to make the trial court "derelict" in its ruling (*Williams*, 130 A.3d at 347), does not advance the interests underlying the plain-error standard: deterring sandbagging and giving the lower court an opportunity to correct

errors in real time. This appeal is a perfect example. DCRB seeks reversal of the Superior Court's decision on precisely the grounds it urged below: that the D.C. Code made Sampson a Senior Executive Attorney as a matter of law, regardless of the factual contentions that she raised. DCRB thus is not attempting to evade its obligation to "timely rais[e] [its] claims and objections" with the lower court. *Puckett*, 556 U.S. at 134. Nor would reviewing the Superior Court's decision be at odds with that court's role in "consider[ing] and resolv[ing]" such claims. *Id.*

Accordingly, plain-error review is not a useful analog here. Instead, so long as a remand order is unambiguously the result of a legal error, this Court has jurisdiction to correct that error and prevent a pointless remand. As explained below, this case presents that very scenario.

II. The Superior Court committed a clear error of law in remanding to OEA for factfinding, because D.C. law unequivocally establishes that Sampson was a Senior Executive Attorney outside OEA's jurisdiction.

Under unambiguous provisions of the D.C. Code, Sampson—like all other general counsels of independent agencies—was a member of the Senior Executive Attorney Service. OEA therefore had no jurisdiction over this dispute. Sampson is wrong in claiming that any disputed factual issues could change that result: Given the undisputed fact of her job title, no facts she could muster could trump the plain text of the D.C. Code. The Superior Court thus committed a clear error of law in remanding to OEA for factfinding on this legal question.

A. The D.C. Code unambiguously makes all general counsels of independent agencies—including Sampson—Senior Executive Attorneys not subject to OEA jurisdiction.

Resolving Sampson's employment status turns on one undisputed fact: She was the General Counsel of DCRB. D.C. law makes the general counsels of independent agencies, like DCRB, members of the Senior Executive Attorney Service—and thus beyond OEA's jurisdiction.

1. The Comprehensive Merit Personnel Act of 1978, as amended, creates several categories of District employees, with different rights and responsibilities. As relevant here, D.C. law distinguishes the "Legal Service" (and its components) from the "Career Service." Career Service status comes with a slew of procedural rights. Chief among them: "[A]n employee in the Career Service generally cannot be fired, demoted, or suspended without cause." *Burton v. Off. of Emp. Appeals*, 30 A.3d 789, 792 (D.C. 2011). And OEA exists to enforce those tenure protections. D.C. Mun. Regs. subt. 6-B § 604.1. For example, OEA administers the "90-day" rule restricting District employers' right to fire Career Service employees—the rule that served as the basis for OEA's decision reversing Sampson's termination. *Id.* § 1602.3.

But the Career Service is distinct from—and wholly excludes—the Legal Service. The D.C. Code says so plainly: "[T]he Career Service … shall include all persons appointed to positions in the District government, *except persons*

appointed to positions in the Excepted, Executive, Educational, Management Supervisory, or *Legal Service*." D.C. Code § 1-608.01 (emphases added). The Career Service therefore also does not include the Senior Executive Attorney Service, which "is established as part of the Legal Service." *Id.* § 1-608.53(a). Members of the Senior Executive Attorney Service "are accountable and responsible for the effectiveness and productivity of employees under their supervision." *Id.* § 1-608.53(a). Because of this important role, unlike an appointment to the Career Service, "an appointment to the Senior Executive Attorney Service shall be at-will employment," unless the statute creating a particular position dictates otherwise. *Id.* § 1-608.53(b).

The D.C. Code specifically identifies positions that belong to the Senior Executive Attorney Service. Among other employees, the term "'Senior Executive Attorney Service position' means ... [a]ny attorney who is a General Counsel employed by an independent agency, except attorneys employed by the Chief Financial Officer." *Id.* § 1-608.51(3)(C). By law, DCRB is one such "independent agency of the government of the District of Columbia." *Id.* § 1-711(a).

2. Applying these statutes to the undisputed facts makes it clear that Sampson's case never should have reached OEA. Sampson agrees (as she must) that she was DCRB's General Counsel at the time of her suspension and termination. *See* JA53 ("Ms. Sampson ... served as DCRB General Counsel from

September 8, 2008, until her illegal termination on July 15, 2022); *see also* JA99 ("Employee was employed as General Counsel and Chief Ethics Officer for DCRB from September 8, 2008, until July 15, 2022, when the DCRB terminated her employment."). Sampson also agrees that, as § 1-711(a) says, DCRB is an independent agency. *See* JA65 ("As DCRB notes, it is an independent agency under the D.C. Code."). As the general counsel of an independent agency, Sampson was a member of the Senior Executive Attorney Service—as a matter of law. D.C. Code § 1-608.51(3)(C).

It is equally plain that, as a matter of law, Senior Executive Attorneys like Sampson are neither subject to OEA's jurisdiction nor insulated by the procedural protections that OEA administers. The Comprehensive Merit Personnel Act and OEA review "provide procedural protections" only "to career Service employees"—and not to at-will employees or any D.C. government attorneys. *Grant*, 908 A.2d at 1178; *see also Sanyal v. OCTO*, OEA No. J-0070-08, at *3 (Jan. 25, 2010) ("OEA has consistently held that it lacks jurisdiction over at-will employees."). The Comprehensive Merit Personnel Act's personnel-protection measures—including the 90-day rule that OEA held required Sampson's

reinstatement—expressly do *not* apply to "[a]ttorneys in the Legal or Senior Executive Attorney Service."[5] D.C. Mun. Regs. subt. 6-B § 1600.2(e).

Indeed, the D.C. Code makes clear twice over that the general counsels of independent agencies, as Senior Executive Attorneys, are not subject to OEA processes. Members of the Senior Executive Attorney Service are "subject to discipline or termination at-will" unless another statute says otherwise. D.C. Mun. Regs. subt. 6-B § 3614.2; D.C. Code § 1-608.53(a)–(b). And general counsels of independent agencies are again singled out: The D.C. Code provides that a "Senior Executive Attorney employed by an independent agency shall serve at the pleasure of the agency head" unless (again) some other statute provides otherwise. D.C. Code § 1-608.53(f). This all makes perfect sense: The attorney-client relationship is by nature voluntary, and a client should not be forced to rely on an attorney whom it does not want to represent its interests. *See* Restatement (Third) of the Law Governing Lawyers § 14 cmt. b (Am. L. Inst. 2000) ("A client ordinarily should not be forced to put important legal matters into the hands of another or to accept unwanted legal services."); *Udall v. Littell*, 366 F.2d 668, 675 n.23 (D.C. Cir. 1966) (explaining that courts likely lack equitable

[5] Some members of the Legal Service are entitled to *different* tenure protections and review procedures—but those regulations apply only to "a Legal Service attorney *other than a Senior Executive Attorney*" and are irrelevant here. D.C. Code § 1-608.56(a) (emphasis added).

authority to order someone to accept an attorney's counsel, as "[t]he relationship of attorney and client is such as to require perfect confidence between the parties").

3. Sampson argued to the Superior Court that DCRB's administrative authority over its internal affairs somehow gave it the authority to ignore the statutes laid out above and make her a member of the Career Service. *See* JA67–69. She is wrong. True enough, DCRB has the authority to "establish classification and compensation policy" for its staff. D.C. Code § 1-711(k). But this authority exists to regulate pay and benefits—not to negate the express provisions of the D.C. Code that govern OEA's jurisdiction. Proving the point, the very same provision makes clear that when DCRB exercises its classification authority, it must do so "subject to Chapter 6 of Title 1" of the D.C. Code—the chapter that defines general counsels of independent agencies as Senior Executive Attorneys. *Id.* § 1-711(g)(2)(A); *see id.* § 1-608.51(3)(C). And regardless, DCRB has never issued any regulations or other policies purporting to disturb the statutory classification of general counsels of independent agencies as Senior Executive Attorneys. Nor *could* DCRB do so: It has no authority to contradict or amend D.C. statutes. Instead, DCRB has used that authority only to create salary and performance evaluation processes. *See* D.C. Mun. Regs. §§ 7-1802, 7-1806.2.

B. Remanding to OEA was based on a clear error of law because no disputed fact about Sampson's employment could alter her classification and thus create OEA jurisdiction.

The Superior Court agreed that, if Sampson was a Senior Executive Attorney, the case would be over. JA106. It nevertheless remanded to OEA to resolve "certain factual disputes"—though it did not clearly identify those disputes, saying only that they "includ[ed] those raised by [Sampson] in th[at] Court." JA107. Sampson argued that DCRB's Human Resources paperwork called her a Career Service employee and that DCRB had made statements in earlier proceedings implying that she was a Career Service employee. *See* JA59–64. But those factual contentions cannot change the unambiguous meaning of D.C. law. The decision below was clearly wrong, as a matter of law, because it presumed that those factual findings could make a difference.

This Court recognized as much in *Hoage v. Board of Trustees of the University of the District of Columbia*, 714 A.2d 776 (D.C. 1998). There, an employee argued that he was part of the Career Service and entitled to the associated rights and protections, but the university responded that D.C. law made him a member of the separate Educational Service. *Id.* at 780. The Superior Court interpreted the statutory definition of "educational employee" to mean that Hoage's undisputed duties and role placed him in the Educational Service, not the Career Service. *Id.* at 779. On appeal, Hoage argued that the court should have considered

personnel forms that marked him as a member of the Career Service. *Id.* at 780–81. And he was right about what the forms said; this Court acknowledged that those forms "indicat[ed] that [he] was a career employee." *Id.* at 781. But that did not matter: This Court held that the correct determination of Hoage's status depended not on what the forms said, but "on the reasons why Hoage could not, *as a matter of law*, have been in the Career Service." *Id.* (emphasis added). Because Hoage's duties brought him within the Educational Service, his employer could not make him a member of the Career Service simply by saying as much in personnel forms.

The decision in *Clayton v. District of Columbia* came out the same way. 117 F. Supp. 3d 68 (D.D.C. 2015). The plaintiff there argued that a District agency violated her due-process rights when it reclassified her from the Career Service to the at-will Management Supervisory Service. In Clayton's view, she was still a member of the Career Service—and had a contractual right to that status—because her hiring paperwork said so, and because she had not gone through a formal reclassification process. *Id.* at 75. The court, however rejected that position. It held that the D.C. Code foreclosed Clayton's factual argument by providing that "'*any*' employee of the District 'whose functions include responsibility for project management and supervision of staff and the achievement of the project's overall goals and objectives' '*shall*' be in the Management Supervisory

Service.'" *Id.* (quoting D.C. Code §§ 1-609.52, 1-614.11(5)). Whatever Clayton's hiring paperwork said, "she could not legally remain in the Career Service while in her position as Director of the Governmental Operations Division." *Id.* And any supposed "contractual" classification reflected in her paperwork was irrelevant: "[S]uch an agreement in contravention of D.C. law would be unenforceable." *Id.*

Against this backdrop, the factual points that the Superior Court remanded for OEA to consider—and any findings OEA could make based on that evidence—would make no legal difference. The plain meaning of the D.C. Code, applied to Sampson's undisputed role as DCRB's General Counsel, means that she was an at-will member of the Senior Executive Attorney Service—not the Career Service. These definitions—not the paperwork by which she was fired and recorded in DCRB's databases, nor any statements by DCRB about her status—establish her position as a matter of law. Indeed, even if Sampson's factual positions were correct, any attempt by DCRB at treating her as anything other than what D.C. law made her—a member of the Senior Executive Attorney Service—"would be unenforceable." *Id.* In ruling that it was necessary to resolve Sampson's factual contentions to determine whether OEA had jurisdiction, the Superior Court committed a clear error of law.

CONCLUSION

This Court should hold that OEA lacked jurisdiction, vacate the Superior Court's decision, and remand to the Superior Court with instructions to vacate OEA's decision for lack of jurisdiction.

April 14, 2025

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on April 14, 2025, I filed the foregoing Brief of Appellant DCRB with the Court via the District of Columbia Court of Appeals electronic filing and service system (EFS), causing the document to be served on all counsel of record.

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