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 REPLY BRIEF

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INTRODUCTION

Sampson agrees with DCRB as to the threshold question here: Did the Superior Court, in remanding this case to the Office of Employee Appeals for resolution of factual disputes, commit a "clear error of law"? If so, this Court has jurisdiction over that erroneous order and can reverse it. And although Sampson tries defending the Superior Court's conclusion, her arguments all fail.

On jurisdiction, Sampson agrees with DCRB that this appeal is permissible if the remand order was based on an unambiguous and obvious legal error. She tries raising the bar by insisting that the error must be (1) based on the facts of the case and (2) grounded in some prior decision identifying the error. But clear errors *of law* do not turn on a *factual* inquiry—particularly when the Court is assessing its jurisdiction as a threshold matter. And this Court has never suggested that an otherwise clear legal error can be ignored if it has not previously been specifically called out. The question is simply whether the Superior Court's remand order was based on an obvious and dispositive legal error.

It was. On the merits, Sampson never denies that an unambiguous provision of the D.C. Code (§ 1-608.51(3)(C)) defines her position—DCRB's General Counsel—as belonging to the Senior Executive Attorney Service. She contends that *another* statute gave DCRB authority to place her in any other Service—but that statute (D.C. Code § 1-711) is expressly made subject to the Chapter of the

D.C. Code that contains § 1-608.51(3)(C). Sampson fares no better with her arguments from (uninformative) legislative history and (inapplicable) regulations—none of which could trump an unambiguous statute even if they *did* support her position (they do not).

Stepping away from the statutory text altogether, Sampson asks this Court to determine as a matter of *fact* that DCRB treated her as a member of the Career Service, as if this could create subject-matter jurisdiction. But appellate factfinding has no place in assessing whether the Superior Court committed a clear error *of law*—and in any event, this Court has recognized that facts cannot override the Service to which the D.C. Code assigns a position. Sampson also contends that DCRB should be judicially estopped from challenging jurisdiction—but this Court cannot grant OEA subject-matter jurisdiction by estoppel, particularly when Sampson conceded below that DCRB is free to raise its jurisdictional argument. And her estoppel argument fails in any event. Finally, Sampson's naked policy arguments cannot cure the legal deficiencies in her positions.

Because the D.C. Code unequivocally makes Sampson's former position part of the Senior Executive Attorney Service, the Superior Court committed a clear error of law in remanding to OEA for fact-finding. This Court should reverse and hold that, because Sampson was a Senior Executive Attorney as a matter of law, OEA had no subject-matter jurisdiction here.

ARGUMENT

I. This Court has jurisdiction if the Superior Court's order was unambiguously the result of a legal error.

The parties agree that, if the Superior Court committed a "clear error of law" in remanding to OEA, this Court has jurisdiction to correct that error. DCRB Br. 13–14 (discussing *Warner v. D.C. Dep't of Emp. Servs.*, 587 A.2d 1091, 1093 (D.C. 1991)); Sampson Br. 5–6. That exception makes perfect sense. As DCRB explained, and as Sampson never disputes, a remand that invites an agency to make legally *irrelevant* findings will inevitably result in an appeal challenging that legal error—so the more efficient course is to correct the error *before* the pointless agency proceedings. DCRB Br. 14–15. Sampson also agrees with DCRB on the *degree* of error required: DCRB says it must be "unambiguous" (*id.* at 16), while she says "obvious" or "clear" (Sampson Br. 12, 17, 18, 20).

Those points of agreement frame the question here: Was the Superior Court's decision below, remanding to OEA for fact-finding on the question of subject-matter jurisdiction, obviously based on a legal error? And as explained below, the answer is plainly yes, as unambiguous provisions of the D.C. Code establish that Sampson was a member of the Senior Executive Attorney Service as a matter of law, and therefore outside OEA's jurisdiction. *Infra* § II.

Sampson tries to escape this conclusion by grafting additional requirements onto the "clear error of law" standard—namely, that the error must be

based on the "factual record and determinations made" below, and that there must be some "other, prior cases" already establishing that the ruling was "clear error." Sampson Br. 18. She does not identify any decision holding that either requirement is part of the "clear error of law" exception to finality, and instead purports to derive them from a winding recitation of various decisions—many from plainly distinguishable contexts.[1] Neither supposed requirement would make sense here, and—unsurprisingly—neither finds support in the caselaw.

First, a "clear error of law" is—by definition—not one that is "[b]ased on the [f]acts of [e]ach [c]ase." Sampson Br. 12. Sampson extracts this supposed rule not from decisions involving the "clear error of law" exception to finality, but from cases where courts applied the distinct "clearly erroneous" standard to review factfinding. *Id.* at 14, 16, 17–18.[2] Those cases thus did not involve the key requirement that the clear error be one "of law."

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[1] For example, she cites (at 15) *Republic of Venezuela v. Philip Morris Inc.*, 287 F.3d 192 (D.C. Cir. 2002), a mandamus case concerning a federal court's obligation to "remand" to state court if it lacks subject-matter jurisdiction. 287 F.3d at 194. That remedy is distinct from remand to a lower court or agency, and has no bearing here.

[2] *See Occidental Petro. Corp. v. SEC*, 873 F.2d 325, 340 (D.C. Cir. 1989) (applying "clear error" standard "with respect to the particularized factual findings that underlay the district court's determination"); *Latif v. Obama*, 677 F.3d 1175, 1178 (D.C. Cir. 2011) (reviewing "district court's 'specific factual determinations' for clear error"); *Berger v. Iron Workers Reinforced Rodmen, Loc. 201*, 170 F.3d 1111, 1119 (D.C. Cir. 1999) (reviewing special master's fact-findings). Sampson does discuss a pair of Pennsylvania "clear error of law" remand

More to the point, it is nonsensical to say that a clear error *of law* entails a *fact*-based inquiry. The entire question, in assessing whether the "clear error of law" exception applies, is whether there is a basis for deviating from the normal rule that remands to administrative agencies are not final and appealable orders. *Warner*, 587 A.2d at 1093. The point is to head off *irrelevant*—not merely incorrect—fact-findings by agencies or lower courts. DCRB Br. 14–15. If the Court must engage in fact-finding every time the standard is invoked, the exception would swallow the rule and turn the "clear error of law" analysis into a full-blown—and fact-laden—merits inquiry.

This case itself demonstrates the absurdity of Sampson's position. As she recognizes, the Superior Court *made no factual findings* for this Court to review; it remanded to OEA for that purpose. Sampson Br. 19; JA107–08. It would thus make no sense to turn to cases where the court was reviewing, for example, "the district court's 'specific factual determinations'" to assess whether a "clear error of law" was made. *Latif*, 677 F.3d at 1177 (cited at Sampson Br. 17–18); *see also Anderson v. City of Bessemer City*, 470 U.S. 564, 571 (1985) (addressing review of

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cases, but the lower tribunal in one case had committed a *legal* error by not recognizing the limits of its own authority to review factual findings (*Bethlehem Mines Corp. v. Workmen's Compensation Appeal Bd.*, 404 A.2d 1360, 1361 (Pa. Commw. Ct. 1978)), and the court in the other found no *legal* error in a ruling on whether to grant a rehearing (*Workmen's Comp. Appeal Bd. v. Calder Mfg. Co.*, 346 A.2d 834, 834–35 (Pa. Commw. Ct. 1975)).

district court's factual findings); *Berger*, 170 F.3d at 1119 (reviewing special master's factual findings). Instead, the question is simply whether the Superior Court's conclusion—again, that the application of unambiguous statutory provisions requires factfinding—was obviously based on a legal error.[3]

Second, Sampson is similarly wrong in claiming that an error can be "clear" only if it has been specifically addressed by "other, prior cases." Sampson Br. 18, 19–20. She draws this requirement from decisions applying "plain-error" review. *Id.* at 19–20. But she nowhere responds to—much less contests—DCRB's explanation that the procedural values that require narrowly limiting plain-error review do not translate to the "clear error of law" inquiry. DCRB Br. 18–20. When a litigant raises on appeal an argument not raised below, the reason for requiring on-point precedent before reversing in that party's

[3] Sampson at one point claims that the Superior Court made no "*legal*[] determination of any kind from which [DCRB] appeals." Sampson Br. 18–19. But that is clearly false: As she recognizes elsewhere, DCRB is challenging the Superior Court's decision to "remand[] the jurisdictional controversy to the OEA." Sampson Br. 5–6. And although Sampson claims that courts "have inherent authority" to "have the case heard in whichever venue they determine is warranted to help them" resolve a jurisdictional question (*id.* at 19), her cited decisions support no such rule. She cites only (1) a standard articulation of the inapplicable plain-error standard (*Walker v. United States*, 201 A.3d 586, 594 (D.C. 2019)); and (2) a decision merely stating the "clear error of law" exception, without elucidating it—let alone in the way Sampson claims (*D.C. Pub. Emps. Rels. Bd. v. Fraternal Order of Police*, 987 A.2d 1205, 1206 n.1 (D.C. 2010)). Regardless, it is obviously improper to remand for resolution of factual disputes if the disputed facts are *legally irrelevant*.

favor is straightforward: This ensures that parties have a clear incentive to "timely rais[e] [their] claims and objections" before the trial court and not to "sandbag[]." *Puckett v. United States*, 556 U.S. 129, 134 (2009) (cleaned up); DCRB Br. 18–20. Courts do not break new ground on the basis of arguments not even presented to the lower court.

Those concerns are not implicated when a court remands to an agency on legally erroneous grounds. In such circumstances, judicial economy would be *harmed*—not helped—by allowing a needless remand followed by an inevitable appeal. Proving the point, DCRB's argument here is the very same argument it made below: that there is no subject-matter jurisdiction as a matter of law, regardless of any factual contentions that Sampson asserts.[4]

In short, the question here is simply whether the Superior Court's remand decision was based on an obvious legal error. As explained below, it was.

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[4] Sampson also cites a decision resolving a motion for reconsideration, which requires "new facts or clear errors of law." Sampson Br. 16 (quoting *Carter v. WMATA*, 503 F.3d 143, 145 n.2 (D.C. Cir. 2007)). She never actually connects this caselaw to her proffered interpretation of "clear error of law," and reconsideration decisions are inapposite for the same reasons as plain-error decisions: Reconsideration is "an extraordinary measure," and courts do not allow parties to "relitigate old matters, or to raise arguments or present evidence that could have been raised" earlier." *Leidos, Inc. v. Hellenic Rep.*, 881 F.3d 213, 217 (D.C. Cir. 2018) (cleaned up). But here, DCRB made its argument to the Superior Court, and asks this Court's to correct that court's legally erroneous resolution of its argument.

II. The Superior Court committed a clear error of law by remanding for factfinding, because the D.C. Code unequivocally establishes that Sampson was a Senior Executive Attorney, as a matter of law.

Turning to the merits, Sampson does not dispute that, if she was a member of the Senior Executive Attorney Service, then she was *not* a member of the Career Service and so her removal was not subject to OEA jurisdiction. *See* Sampson Br. 6–7 (arguing only that she was *not* a Senior Executive Attorney). And unambiguous provisions of the D.C. Code resolve that question in DCRB's favor, establishing that Sampson was indeed a Senior Executive Attorney as a matter of law—regardless of the factual contentions that she raised in the Superior Court and re-raises here. Sampson mostly tries shifting the focus *away* from the plain statutory text. Her arguments all fail.

A. The D.C. Code unambiguously establishes that Sampson was a Senior Executive Attorney.

1. The key provision here is simple and unambiguous: "*Any* attorney who is a General Counsel employed by an independent agency" holds a "Senior Executive Attorney Service position." D.C. Code § 1-608.51(3)(C) (emphasis added). And Sampson concedes (as she must) that DCRB is "an independent agency of the District of Columbia." Sampson Br. 7; *see* D.C. Code § 1-711(a). Section 1-608.51(3)(C) thus refutes Sampson's insistence that "[n]othing under District law mandates automatic ... SEAS classification for attorneys employed by DCRB." Sampson Br. 26. That is *exactly* what § 1-608.51(3)(C) does for the

position Sampson held as DCRB's General Counsel. And that means that, as a Senior Executive Attorney, she served "at the pleasure of the agency head" and had no removal protections, including OEA review. D.C. Code § 1-608.53(f); *accord id.* § 1-608.53(b) ("[A]n appointment to the Senior Executive Attorney Service shall be at will employment …."); *see generally* DCRB Br. 23–25.

2. Sampson does not offer some alternative construction of § 1-608.51(3)(C) that would somehow mean the General Counsel of DCRB—again, an independent agency—is *not* a Senior Executive Attorney. Instead, her primary contention is that a *different* statute overrides § 1-608.51(3)(C), and authorizes DCRB to recategorize its General Counsel as a member of the Career Service. Sampson Br. 26–28. She is wrong.

Sampson's argument rests on DCRB's organic statute, § 1-711. Subsection (g)(2)(A) of that statute states that "the Board may appoint any staff it considers necessary to carry out the responsibilities under this chapter." That provision then sets forth an overarching rule for such staff: "Except as provided under subsection (k) of this section, staff appointed by the Board shall be subject to Chapter 6 of Title 1." And Chapter 6 of Title 1—to which all appointed DCRB staff are "subject"—includes § 1-608.51(3)(C), the provision making DCRB's General Counsel an at-will Senior Executive Attorney. *See Dingwall v. D.C. Water & Sewer Auth.*, 800 A.2d 686, 687 (D.C. 2002) ("[A]n entity is subject to a particular

legal regime when it is regulated by, or made answerable under, that regime ...." (quoting *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 547 (D.C. Cir. 2002)). So unless "subsection (k)" provides otherwise, § 1-711(g)(2)(A) *reinforces* that Sampson was a Senior Executive Attorney.

Subsection (k) does not provide otherwise. That provision's opening sentence expressly lays out the exception that § 1-711(g)(2)(A) previews: "Staff appointed by the Board pursuant to subsection (g)(2) of this section shall not be subject to the provisions of *subchapter XI* of Chapter 6." D.C. Code § 1-711(k). That subchapter does not include the statute that defines the Senior Executive Attorney Service (which is instead part of subchapter VIII-B). Instead, subchapter XI governs the "classification of all positions in the Career, Educational, Legal, Excepted, and the Management Supervisory Services" into "classes and grades." *Id.* § 1-611.01(a)(1). This exception thus does nothing to change the rule, set forth in § 1-608.51(3)(C), that DCRB's General Counsel is a member of the Senior Executive Attorney Service.

Sampson's argument to the contrary rests on § 1-711(k)'s next sentence, which says that "The Board shall have exclusive authority to establish classification and compensation policy for staff appointed by the Board, provided that staff shall not be paid at a rate greater than the highest level authorized for non-union workers in the District Service schedule." In Sampson's telling, this means

DCRB was free to designate her as a Career Service member. Sampson Br. 26–27. But that reading is directly at odds with § 1-711(g)(2)(A)'s plain statement that DCRB staff "shall be subject to Chapter 6 of Title 1." And because subsection (k)'s first sentence *expressly* states the limited exception to Chapter 6's applicability (for "the provisions of subchapter XI"), the Court cannot read its second sentence as *silently* carving out an additional exception (for § 1-608.51, or for the provisions of subchapter VIII-B more broadly). "Where [the legislature] explicitly enumerates certain exceptions ... additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Sharps v. United States*, 246 A.3d 1141, 1149 (D.C. 2021) (citation omitted)).[5]

3. Sampson's only other argument on the statutory text is an assertion that § 1-608.51's definition of "Senior Executive Attorney Service position," because it is set forth "[f]or the purposes of this subchapter," is limited to "attorneys already appointed to the Legal Service." Sampson Br. 24; *see also id.* at 25

[5] In fact, the exception in subsection (k) belies Sampson's assertion (at 27–28) that DCRB reads its authority to "establish classification and compensation policy" out of the D.C. Code. The provisions subject to this exception, in Subchapter XI of Chapter 6, govern classification "in" the enumerated Services created by the D.C. Code. D.C. Code § 1-611.01(a). These "[c]lassification systems" are not the Service categories created by the CMPA (e.g., Career, Legal), but agency-created classes that do not exist until they are "published in the District of Columbia Register." D.C. Code § 1-611.01(c). This shows that "classification" for purposes of the CMPA is not limited to sorting employees into the statutory Services, as Sampson assumes.

n.5 (arguing that an attorney must "first … be hired within the Legal Service before she can be appointed … [to] the Senior Executive Attorney Service"). That is doubly wrong. For one thing, that definition plainly states that the general counsels of independent agencies simply *are* members of the Senior Executive Attorney Service, without some preceding appointment to the Legal Service. D.C. Code § 1-608.51(3)(C). Indeed, the Senior Executive Attorney Service "is established as part of the Legal Service," so the idea of a separate appointment makes no sense. *Id.* § 1-608.53(a). For another (and as explained above), DCRB's organic statute—the very statute on which Sampson centers her position—expressly incorporates Chapter 6, which includes § 1-608.51. *See id.* § 1-711(g)(2)(A) ("[S]taff appointed by the Board shall be subject to Chapter 6 of Title 1.") So applying the definition set forth in § 1-608.51 to Sampson does not require a "broader application … to employees appointed to and classified under distinct and separate authority." Sampson Br. 24. Instead, recognizing DCRB's General Counsel as a Senior Executive Attorney keeps the statutes in harmony.

B. Sampson cannot override the unambiguous statute with arguments from legislative history or regulations.

Sampson's lead argument for concluding that she was in fact a Career Service employee is not an argument from statutory text at all. Instead, she centers her position on legislative history. Sampson Br. 21–23. But that gets statutory interpretation precisely backwards: Where, as here, the plain meaning of the

D.C. Code is unambiguous, this Court "ha[s] no occasion to examine the statute's legislative history for guidance." *See Hammond v. United States*, 77 A.3d 964, 967 (D.C. 2013) (cleaned up). But even if the Court were to consider Sampson's invocation of legislative history, it does nothing to disturb the straightforward application of § 1-608.51(3)(C). All that Sampson offers is an account of the creation of the Comprehensive Merit Personnel Act (which includes § 1-608.51), the Legal Service, and the DCRB. Sampson Br. 22–23. In doing so, she cites the statutory provisions she discusses elsewhere—filtered through her misreading of those provisions—and then simply insists that this disproves that DCRB's "general counsels were automatically members of the Legal Service and SEAS" because the D.C. Council has not revised the statutes. Sampson Br. 23. But Sampson is wrong on the statutes (*supra* § I), and narrating their enactment history does nothing to change that fact. This question-begging argument fails.

It gets no better for Sampson when she turns from legislative history to regulations. Sampson Br. 25–26. First, she notes that the District has issued regulations that "appl[y] to all attorneys appointed to the Legal Service who are employed by the Office of the Attorney General for the District of Columbia, the Mayor's Office of Legal Counsel, or a subordinate agency." *Id.* at 25 (quoting D.C. Mun. Reg. 6-B § 3600.1). She then notes that "[i]ndependent agencies like DCRB do not fall within those entities." *Id.* So what? The D.C. Code itself

establishes that the general counsels of independent agencies are members of the Senior Executive Attorney Service (D.C. Code § 1-608.51(3)(C)), so there is no need for regulations to "extend the Legal Service to independent agencies" (Sampson Br. 25). And even if Sampson could point to some regulation purporting to override that provision (which she does not do), any such regulation would be void. *See Anderson v. William J. Davis, Inc.*, 553 A.2d 648, 650 n.6 (D.C. 1989) ("To the extent that the regulation may be inconsistent with [the governing statute], the statute must prevail over the regulation.").

Sampson then cites a provision—within the same set of regulations—requiring certain covered attorneys to be notified of their appointment to the Senior Executive Attorney Service, and says she received no such notice. Sampson Br. 26 (discussing D.C. Mun. Reg. 6-B § 3601.6). But given that *none* of those regulations applies to independent agencies (as she recognizes just one page earlier), no notice was required. So regulations do not salvage her position, either.

C. Sampson's attempts to sidestep the plain statutory text fail.

Sampson spends most of her merits argument trying to convince the Court to simply ignore that the D.C. Code plainly establishes that she is not subject to OEA jurisdiction. To that end, she deploys irrelevant factual contentions, claims that DCRB should be judicially estopped from challenging jurisdiction, and invokes vague policy considerations. These non-textual arguments all fail.

1. Sampson's factual arguments are neither properly before the Court nor legally relevant.

Start with Sampson's argument that, as a matter of fact, DCRB treated her as a member of the Career Service rather than the Senior Executive Attorney Service. Those factual arguments fail for two independent reasons.

As an initial matter, Sampson's factual arguments are not properly before the Court. Again, the parties agree that the only question before this Court is whether the Superior Court committed a clear error of law in remanding to OEA for factfinding. And as explained above, that inquiry is definitionally legal, not factual. If the Court concludes that the remand order was not obviously based on a *legal* error, the "clear error of law" exception to finality does not apply and the Court lacks jurisdiction. DCRB Br. 15. What the Court could *not* do in that circumstance is nevertheless exercise appellate jurisdiction and "make the determination of OEA's jurisdiction in the first instance" (Sampson Br. 21), by resolving factual disputes that the Superior Court expressly did not resolve below (DCRB Br. 8–9; JA107–08).

Even if there were a way for this Court to consider Sampson's fact-based arguments, they cannot help her. She invokes personnel forms, filings from earlier in these proceedings, entries on websites, the "Peoplesoft" HR system, communications between herself and DCRB, and a screenshot (not in the administrative record) from a D.C. government website addressing general counsels of

other independent agencies. Sampson Br. 29–36. But none of that supposedly "key evidence" (*id.* 30) can trump District law, which made Sampson a member of the Senior Executive Attorney Service. As DCRB showed, this Court said as much in *Hoage v. Board of Trustees of the University of the District of Columbia*, where the Court held that an employee's duties made him, "as a matter of law," a member of the Educational Service rather than the Career Service—regardless of the fact that his employer's personnel forms "indicat[ed] that [he] was a career employee." 714 A.2d 776, 780–81 (D.C. 1998) (discussed at DCRB Br. 26–27). Sampson tries distinguishing *Hoage* on the grounds that there was "conflicting documentary evidence" as to the employee's status. Sampson Br. 29. That misses the point: As this Court made clear, the question was not what the forms said, but whether the employee's duties brought him "within the Career Service as a matter of law." 714 A.2d at 780. In other words, the facts of his position trumped any personnel forms. And here, the analysis is even simpler because Sampson's status does not turn on any evaluation of her duties, but instead on the straightforward application of § 1-608.51(3)(C).

Sampson similarly has no answer to *Clayton v. District of Columbia*, where the district court held that "an agreement" granting an employee Career Service protections "in contravention of D.C. law would be unenforceable." 117 F. Supp. 3d 68, 75 (D.D.C. 2015) (discussed at DCRB Br. 27–28). She says *Clayton*

is distinguishable because it "involved a mandatory statutory classification scheme" that left "the agency no discretion to classify its employees" in conflict with D.C. law. Sampson Br. 28. But that's not a distinction at all: D.C. law similarly provides a "mandatory statutory classification scheme" that "explicitly" makes all general counsels of independent agencies members of the Senior Executive Attorney Service. D.C. Code § 1-608.51(3)(C). So Sampson just confirms that *Clayton* forecloses her fact-driven attempt at overriding the D.C. Code.

2. Sampson's waived judicial-estoppel argument cannot overcome a lack of jurisdiction and fails on its own terms.

Sampson also tries heading off DCRB's jurisdictional argument altogether, by contending (near the back of her brief) that DCRB should be judicially estopped from arguing that OEA lacked jurisdiction here. Sampson Br. 37–40. But this argument is not properly before the Court, either—for two reasons.

First, a party cannot be estopped from demonstrating an absence of subject-matter jurisdiction. As this Court has held, "[p]arties cannot waive subject matter jurisdiction by their conduct *or confer it* … by consent." *Chase v. Pub. Def. Serv.*, 956 A.2d 67, 75 (D.C. 2008). In other words, "there can be no estoppel" of challenges to subject-matter jurisdiction. *Id.* A litigant cannot expand OEA's subject-matter jurisdiction through arguments. *See Dist. Intown Props., Ltd. v. D.C. Dep't of Consumer & Regul. Affairs*, 680 A2d 1373, 1379 (D.C. 1996) ("The

purported exercise of jurisdiction beyond that conferred upon the agency by the legislature is *ultra vires* and a nullity.").

Second, even if subject-matter jurisdiction somehow could be grounded in estoppel, *Sampson* cannot make that argument here: She not only failed to raise judicial estoppel below, but *conceded* that DCRB was free to make its jurisdictional argument, saying about that argument: "[A] party can raise a jurisdictional challenge at any time during a legal proceeding." JA50. She should not now be permitted to advance an argument that she conceded and waived below. *See Spellman v. Am. Sec. Bank, N.A.*, 504 A.2d 1119, 1126 (D.C. 1986) ("A basic rule of appellate procedure is that a party may not raise on appeal issues which he failed to raise below.").

Even if Sampson could overcome these two independent hurdles, her judicial-estoppel argument fails on its own terms. The argument centers on a whistleblower lawsuit that she filed against DCRB in connection with her termination. In her telling, DCRB secured dismissal of certain claims on the grounds that Sampson was required to "exhaust administrative remedies with OEA." Sampson Br. 38. But Sampson brushes over the fact that the claims in question failed wholly apart from the question of administrative exhaustion. As the Superior Court explained, DCRB had separately advanced "substantial arguments" that Sampson "does not state a claim … upon which relief can be

granted," including on the grounds that Sampson lacked standing to make certain allegations, had not plausibly alleged key facts, and had otherwise failed to state her claims. Op. at 18, *Sampson v. District of Columbia Retirement Board*, No. 2021-CA-004942-B (D.C. Super. Ct. Apr. 27, 2022). Sampson, however, entirely ignored those arguments and "respond[ed] only to DCRB's" exhaustion argument. *Id.* The court "therefore treat[ed] as conceded DCRB's substantive arguments concerning these claims." *Id.*

With the record corrected, Sampson's judicial-estoppel argument falls apart. Judicial estoppel exists to prevent a party from "deriv[ing] an unfair advantage or impos[ing] an unfair detriment on the opposing party." *Mason v. United States*, 956 A.2d 63, 66 (D.C. 2008) (citation omitted). But given that—as the Superior Court made clear—Sampson's whistleblower claims would have been dismissed wholly apart from OEA exhaustion, she cannot show that DCRB has secured any "unfair advantage." *Id.* Thus, *even if* Sampson could establish subject-matter jurisdiction via judicial estoppel, and *even if* she had not waived her estoppel argument, that argument simply does not work.

3. Sampson's policy arguments do not help her.

That leaves Sampson's closing invocation of "Due Process, Public Policy, and Equity." Sampson Br. 40–42. None of these policy considerations authorizes this Court to ignore the plain meaning of the D.C. Code. *See United States ex*

rel. Schutte v. Supervalu Inc., 598 U.S. 739, 757–58 (2023) ("Nor do we need to address any of the parties' policy arguments, which cannot supersede the clear statutory text." (cleaned up)). In any event, these arguments all rest on Sampson's flawed legal arguments, and thus fail. She charges DCRB with "gamesmanship" by invoking OEA procedures in the whistleblower case and in earlier proceedings below (Sampson Br. 40–41)—but that is simply a rehash of her invalid estoppel argument. She accuses DCRB of "[r]etroactive re-classification" (Sampson Br. 41)—but that is just another iteration of her incorrect argument that facts could somehow trump what § 1-608.51(3)(C) says. She insists that DCRB is "abandon[ing]" its "classification authority" (*id.*)—but that ignores that the D.C. Code does not *give* DCRB authority to treat its General Counsel as anything other than a member of the Senior Executive Attorney Service. And she says that a finding of no jurisdiction would "penaliz[e] her "(*id.* at 42)—but such arguments cannot create jurisdiction.

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.

June 11, 2025

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on June 11, 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.

June 11, 2025

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