No. 23-CV-552

DISTRICT OF COLUMBIA
COURT OF APPEALS

FRANSWELLO RUSSELL,
Appellant,

v.

D.C. DEPARTMENT OF PUBLIC WORKS, *ET AL.*
Appellees.

Appeal from the Superior Court for the District of Columbia
Civil Division
Honorable Ebony M. Scott

BRIEF OF APPELLANT FRANSWELLO RUSSELL

Jonathan H. Levy (D.C. Bar No. 449274)
Legal Aid DC
1331 H Street NW
Washington, D.C. 20005
Tel: (202) 661-5966
Fax: (202) 727-2132

Kwaku A. Akowuah (D.C. Bar No. 992575)
Claire Homsher* (D.C. Bar No. 9000339)
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Tel: (202) 736-8000
Fax: (202) 736-8711

* Attorney designated for oral argument.

RULE 28(a)(2)(A) STATEMENT

The parties to this appeal are Franswello Russell (the Appellant) and the D.C. Department of Public Works and the District of Columbia Office of Employee Appeals (the Appellees). Ms. Russell was represented at the Superior Court by Raymond R. Jones and at the administrative level by Theresa A. Cusick. The D.C. Department of Public Works was represented at the Superior Court and at the administrative level by Bradford Seamon Jr. The District of Columbia Office of Employee Appeals was represented at the Superior Court by Lasheka Brown.

There were no intervenors or amici curiae at trial, and, to date, there are none on appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Franswello Russell worked as a parking enforcement officer for the District of Columbia Department of Public Works (the "Department") for twelve years before she was terminated, effective January 3, 2020. Ms. Russell has a documented history of significant personal problems for which she was receiving professional care and has been the victim of domestic abuse. To help address these conditions, she was approved for a medical marijuana card in January 2019. In August 2019, she was selected for a random drug test at work, and tested positive for marijuana. Following the Department's administrative determinations that give rise to this appeal, the Department terminated Ms. Russell, rejecting her arguments that termination was too harsh a punishment under her circumstances.

Her circumstances included that (i) she had never previously tested positive for marijuana or any other controlled substance, (ii) she was using marijuana for medical purposes, (iii) Mayor Bowser issued an Executive Order before she was terminated directing that first-time marijuana infractions generally should not result in termination, even for "safety-sensitive" positions, which a parking enforcement officer was considered to be, and (iv) Ms. Russell had a clean disciplinary record for the entire applicable lookback period of three years. Further, Ms. Russell contended that other parking enforcement officers in similar circumstances had received lighter punishments, like temporary suspension or reassignment, rather than termination.

Before taking any adverse action, the Department was required by law to rationally and conscientiously weigh, in full, the individualized circumstances particular to Ms. Russell and her positive marijuana test under the twelve factors articulated in *Douglas v. Veterans Admin.*, 5 M.S.P.B. 313, 330, 5 M.S.P.R. 280, 303 (1981) and the District of Columbia Municipal Regulations (the "Regulations") to determine the most appropriate response to her infraction. *See* 6B DCMR § 1606. The Department's *Douglas* analysis failed to rationally or conscientiously weigh those factors.

Multiple parts of the Department's analysis fail to apply the actual facts of Ms. Russell's case and instead rest on generalities having nothing to do with her individual circumstances. For example, the Department's analysis repeatedly emphasizes that it is intolerable for District employees in "safety-sensitive" positions to attempt to perform their duties "while under the influence" of marijuana or other controlled substances. But Ms. Russell is not accused of having reported for work under the influence, and no evidence in the record suggests she did. The evidence shows only that she was selected for testing at random—*not* on suspicion of intoxication, as workplace rules also allowed—and that there were traceable levels of THC in her body at the time. That is nothing like showing up for work under the influence.

Other parts of the analysis are simply illogical and the Department's consideration of the factor does not answer the question the factor poses. As just one example, the Department's treatment of *Douglas* factor 8, which asks whether the employee's conduct had an impact on the public notoriety of the employer, did not consider whether the public was aware of Ms. Russell's positive marijuana test—and unsurprisingly, nothing in the record suggests that the public knew about Ms. Russell's marijuana test result.

And when, in response to the Department's *Douglas* analysis, Ms. Russell explained that she was suffering from personal problems for which she had sought professional care and had been a domestic abuse victim, the Department failed to consider these facts to be mitigating circumstances despite the fact the Regulations require departments to consider whether the employee had "personal problems." 6B DCMR § 1606.2.

The Department's failure to perform a proper *Douglas* analysis is crucial because the Department had before it more than one permissible option for responding to Ms. Russell's positive marijuana test. As the Office of Employee Appeals ("OEA") recognized, the controlling Regulations did not require termination after a safety-sensitive employee tested positive for marijuana on a

random drug test. *See, e.g.*, 6B DCMR § 435.9; *id.* § 1607.[1] Instead, the Regulations encouraged departments to take a gradual approach to discipline, leaving termination as the most severe sanction typically applicable for repeat offenses. *See id*. § 6B DCMR § 1600.1 (noting the Regulations establish "a *progressive* approach for addressing District of Columbia government employee performance and conduct deficits." (emphasis added).

This progressive approach, and the requirement for an individualized review to determine the appropriate action, is also reflected in a September 2019 Mayor's Order, which was issued explicitly to address the District's changing, more lenient attitude toward cannabis use and to direct agencies to employ the progressive discipline policies already in the Regulations. In response to the Mayor's Order, which was issued before the Department conducted its *Douglas* analysis in this case, the relevant Regulations were amended in September 2020 to clarify this progressive-discipline approach. They now provide that:

> a safety sensitive employee who randomly tests positive for cannabis with no additional evidence of impairment will generally be subject to the following: (a) First offense: the employee shall be summarily subject to a five (5) day suspension without pay, shall re-

[1] Unless otherwise noted, the Regulations cited in this brief refer to the Regulations in effect in 2019.

> acknowledge the applicable drug and alcohol policy, and shall undergo a follow-up drug test immediately upon returning from the suspension; however, the employee may elect and shall be granted up to 40 hours of annual leave, compensatory time, or leave without pay to delay the follow-up drug test.

6B DCMR § 429.2 (2020).

Although the OEA recognized that termination was not required even under the pre-amendment Regulations, it failed to critically examine the Department's *Douglas* analysis to determine whether the Department had conducted the rational, conscientious, and individualized analysis required by law. And the OEA also summarily dismissed Ms. Russell's disparate treatment claim that another similarly situated employee had not ultimately been terminated for the same conduct. In doing so, the OEA abused its discretion and acted arbitrarily and capriciously and in a manner that did not accord with law. Thus, Ms. Russell respectfully requests the Court reverse the decision of the Superior Court, vacate the decision of the OEA, and remand to the OEA for further proceedings.

JURISDICTIONAL STATEMENT

This appeal is from a final order of judgment that disposed of the parties' claims. D.C. Code § 11-721(a)(1).

ISSUES PRESENTED

Whether the OEA abused its discretion, acted in an arbitrary and capricious fashion, or acted in a manner not in accordance with law by:

(1) Failing to examine whether the Department rationally and conscientiously analyzed the factors under *Douglas v. Veterans Admin.*, 5 M.S.P.B. 313, 330, 5 M.S.P.R. 280, 303 (1981) and 6B DCMR § 1606 where the record showed:

a. Factor 3 – "Past Corrective or Adverse Actions." The Department acknowledged that Ms. Russell had no prior disciplinary infractions within the relevant lookback period. But the Department failed to explain its conclusion that the *absence* of prior disciplinary infractions was a "neutral" rather than "mitigating" circumstance;

b. Factor 5 - "Confidence in Employee." The Department appeared to conclude that it could have no confidence in an employee who was "working under the influence of controlled substances." The Department did not explain what that conclusion had to do with Ms. Russell. Ms. Russell did submit a positive marijuana test, but there is no evidence that she was "under the influence" at work. Rather, the evidence is that she used marijuana for medical purposes and accordingly had traceable marijuana in her system on the day she

was randomly selected for a test. The Department's factor 5 analysis does not address that factual circumstance;

c. Factor 6 - "Consistency of Action." The Department asserted that a sanction of termination would be consistent with how other similarly situated employees had been treated. But the Department did not introduce any evidence to support that assertion when Ms. Russell alleged at least one similarly situated employee had not been terminated;

d. Factor 8 - "Impact of Agency Reputation/Notoriety." The Department's factor 8 analysis did not engage with the pertinent question—whether her conduct brought negative *publicity* to the Department. Nor does the record contain any evidence that the public knew of Ms. Russell's positive marijuana test result or would have focused any particular attention on such information at a time when the District was taking a more lenient approach to cannabis use in general and the Mayor was declaring that employees who test positive for cannabis use should, in general, be punished less sternly for first-time violations;

e. Factor 10 - "Potential for Employee's Rehabilitation." The Department's factor 10 analysis also failed to engage with the

pertinent question. The Department declared it irrelevant whether Ms. Russell would commit the same infraction again because the Department cannot tolerate employees coming to work intoxicated. But factor 10 does not address the severity of the conduct, and the Department cannot rationally address the question it does ask—will the employee recidivate—by answering a different one. Further, there is simply no record evidence that Ms. Russell ever went to work while intoxicated; and

f. Factor 12 – whether "lesser action could deter similar future conduct by the employee." The Department's factor 12 analysis was internally inconsistent because it *admitted* that a less severe adverse action might be sufficient to deter future infractions but then switched tracks and addressed a different question: whether a lesser sanction would be appropriate "considering the nature of the position." The Department failed to meaningfully address the correct question and thus avoided the natural implication of its own concession. A lesser punishment was warranted because a lesser punishment would have been sufficient to ensure Ms. Russell's compliance with workplace standards.

(2) Failing to conclude the AJ should have held an evidentiary hearing on Ms. Russell's disparate treatment claim.

STATEMENT OF FACTS

I. Factual Circumstances Surrounding Ms. Russell's Single Positive Cannabis Test and the Department's Decision to Terminate Her Employment.

Franswello Russell served as a parking enforcement officer with the D.C. Department of Public Works from August 1, 2007 to January 3, 2020. App. at 6; *id*. at 26. Her duties included patrolling the streets "on foot or in a vehicle" to cite illegally parked vehicles and enforce parking regulations. *Id*. at 1. Parking enforcement officer was not a safety-sensitive position when Ms. Russell was hired, but was redesignated as such in 2018. *See id*. at 9. The notification Ms. Russell received when her position became a safety-sensitive one stated that she was subject to random drug testing and that an employee who received a positive drug test "will be subject to termination." *Id*. Again, the Regulations' progressive-discipline approach means being "subject" to termination does not equal automatic termination. *See* 6B DCMR § 1600.1.

Also in 2018, Ms. Russell began seeking professional care for significant, personal problems. App. at 15; *id*. at 12. In January 2019, her doctor referred Ms. Russell to Confident Care Medical, LLC for evaluation for a medical marijuana card because of those problems, which was caused at least in part because Ms. Russell is

a domestic violence victim. *Id*. Ms. Russell was then approved for a medical marijuana card but her financial circumstances prevented her from obtaining a marijuana card at that time. *Id*. at 16; *id*. at 11.

Approximately eight months later, on August 8, 2019, Ms. Russell was selected and submitted a urine sample for a random drug test. *Id*. at 13. The test yielded a positive result for marijuana. *Id*. at 14. Two weeks later, Ms. Russell was finally able to obtain the medical marijuana card that she had first been approved to receive in January 2019. *Id*. at 10.

Shortly thereafter, Mayor Muriel Bowser signed Mayor's Order 2019-081 titled "Cannabis Policy Guidance and Procedure." App. 110–19. A primary purpose of the Mayor's Order was "[t]o update and clarify the responsibilities of District government agencies in conforming to laws, in setting rules, in communicating such rules and laws to their employees, and in establishing practices and appropriate discipline to enforce such laws and rules relating to cannabis use, while allowing employees maximum freedom to use cannabis in ways that are legal under District law…." *Id*. at 110. The Order emphasized the high cost to both agencies and employees of losing a job due to a positive drug test, the District's respect for the use of medical marijuana for treatment of various conditions, and the ability of employees to use marijuana outside of the work day. *Id*. at 110–11.

With respect to employees holding safety-sensitive positions like Ms. Russell, the Order made two complementary points. First, the Order recognized that employees who hold safety-sensitive positions "may" be subject to separation from employment because of cannabis use. Second, and importantly, the Order reminded agencies to "consider alternatives to separation" for this same class of employees who hold safety-sensitive positions, as the "District government believes in progressive discipline for all but the most serious offenses." *Id*. at 111, 117.

To implement the Order, the DC Department of Human Resources promulgated a Notice of Emergency and Proposed Rulemaking to amend the District of Columbia Municipal Regulations. 67 D.C. Reg. 005383, Notice of Emergency and Proposed Rulemaking (May 22, 2020). The amendments became effective September 11, 2020. The amended § 429 now provides that safety sensitive employees who test positive for marijuana during a random drug test generally should receive a five-day suspension for their first offense. 6B DCMR § 429 (2020). Termination is generally reserved for second offenses, although even in the event of a second positive test, termination is not required. Instead, § 429 provides that "the employee shall be deemed unsuitable for continued employment in a safety sensitive position for at least one (1) year and shall be demoted, reassigned, or transferred to a non-safety sensitive position, or summarily separated from employment." *Id*.

Shortly after the Mayor's Order was issued, the Department served Ms. Russell a Notice of Proposed Separation. App. at 17. The Notice of Proposed Separation, citing 6B DCMR §§ 435.6 and 1605.4(h), stated that her position was a covered position subject to drug and alcohol screening and that "whenever an employee occupies such a position and tests positive for an illicit drug or alcohol, he or she is deemed 'unsuitable' for the position[,] and, accordingly, is separated from the covered position." *Id*. at 17.

The Notice of Proposed Separation was accompanied by the Proposing Official's Rationale Worksheet ("Rationale Worksheet"), which included the Department's *Douglas* analysis. *Id*. at 19. Under prevailing law, the Department was required to rationally and conscientiously consider these *Douglas* factors as to the particularized circumstances surrounding Ms. Russell's infraction, including potentially mitigating or aggravating circumstances. *See Stokes v. Dist. of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985) (quoting *Douglas,* 5 M.S.B.P. at 327).

Ms. Russell responded twice to the Notice of Proposed Separation, both times arguing that she should receive a suspension for her first infraction, rather than immediate termination. App. at 24–25. She explained the circumstances surrounding her referral for medical marijuana, including her significant personal struggles and that she was a domestic abuse victim. App. at 24; *id.* at 26.

A hearing officer then reviewed the Notice of Proposed Separation, Ms. Russell's responses, and other supporting documents. *Id*. at 25. The hearing officer issued a Report and Recommendation ("The Report"), which recommended that Ms. Russell be terminated. *Id*. at 29.

Like the Rationale Worksheet, the Report stated that a positive marijuana test result was in violation of 6B DCMR §§ 435.6 and 1605.4(h), and that separation was within the range of penalties set forth in the applicable Table of Illustrative Actions. *Id*. at 25; *id*. at 29. The hearing officer focused on the general assumption that safety-sensitive employees could theoretically harm themselves or others if such employees perform their jobs under the influence of controlled substances. *Id*. at 28 ("Ms. Russell's core responsibilities are such that her position was designated as safety-sensitive – a position with duties that, if performed under the influence of drugs or alcohol, might cause a lapse of attention, which in turn, could result in dire consequences for persons or property."). And it suggested the mitigating circumstances Ms. Russell described in her responses were not actually mitigating. *Id*. Indeed, in its OEA filings, the Department explicitly stated Ms. Russell's "medical marijuana use was not actually mitigating." *Id*. at 54.

On December 31, 2019, Ms. Russell was served with a Notice of Separation. *Id*. at 30-31. In the Notice, the Department summarily stated that the conclusions outlined in the Notice of Proposed Separation and the Report had been accepted. *Id*.

at 30. The Department again concluded that Ms. Russell would be terminated for a positive marijuana test result pursuant to 6B DCMR §§ 435.6 and 1605.4(h). *Id*. On January 3, 2020, after more than 12 years of service, Ms. Russell was terminated for her first ever positive drug test, for cannabis. *Id*.

II. Additional Regulatory Background

A. Drug and Alcohol Testing

The Regulations provide for three different types of drug testing. First, "[a]ll District employees . . . are subject to . . . drug and alcohol testing when there is a reasonable suspicion that the employee, while on duty, is impaired or otherwise under the influence of a drug or alcohol." 6B DCMR § 431.1.[2] A "reasonable suspicion" can be established if, for example, the employee is witnessed using drugs or alcohol on duty, displays physical symptoms consistent with drug or alcohol use, or engages in erratic or atypical behavior consistent with drug or alcohol use. *Id*. § 431.5.

Second, all District employees are subject to drug and alcohol testing after certain accidents or incidents, including on-the-job injury or loss of human life or

[2] The regulations cited here are those in effect when Ms. Russell was selected for a random drug test. They have since been renumbered so that § 431 pertains to random drug testing, § 432 to reasonable suspicion testing, and § 433 to post-accident or incident testing.

damage to property, moving traffic violations while operating government vehicles, and certain motor vehicle accidents. 6B DCMR § 432.1.

Finally, safety-sensitive employees are also subject to random drug and alcohol testing. 6B DCMR § 430. Employees are placed in a pool and are "randomly selected in a manner consistent with accepted industry practice." *Id.* § 430.4. Ms. Russell's marijuana test occurred under § 430—not because of reasonable suspicion or post-accident or incident. *See* App. at 27 ("On August 8, 2019, Ms. Russell was randomly selected to report for drug testing.").

B. Adverse Actions

In its paperwork, the Department listed 6B DCMR §§ 428.1, 435.6 and 1605.4(h) as the bases for Ms. Russell's termination.

Section 428.1 provides that if an employee receives a positive drug or alcohol test result, "there shall be cause to separate an employee from a covered position." 6B DCMR § 428.1. Similarly, § 435.6 provides that a positive drug test constitutes cause under Chapter 16. On the other hand, Chapter 16 in general "establishes a *progressive* approach for addressing District of Columbia government employee performance and conduct deficits." 6B DCMR § 1600.1 (emphasis added). In turn, § 1605.4 lists a number of "conduct and performance deficits [that] constitute cause and warrant corrective or adverse action," including a positive drug test. These provisions provide that corrective or adverse action is appropriate under certain

circumstances but, consistent with the District's policy that departments take a progressive, or graduated approach to discipline, the Regulations do not mandate removal as such corrective or adverse action.[3] Section 1606 provides the District's adoption of the *Douglas* factors and mandates that "[f]or all corrective and adverse actions" employers demonstrate each of the twelve factors was considered to determine the appropriate action. 6B DCMR § 1606.2. The analysis required by the regulations is required to be holistic. "All of these factors shall be considered and balanced to arrive at the appropriate remedy. While not all of these factors may be deemed relevant, consideration should be given to each factor based on the circumstances." *Id.* § 1606.3.

With respect to safety-sensitive employees, "personnel authority may terminate his or employment . . . [or] [i]nstead of terminating the employee, the personnel authority may reassign the employee to a position for which he or she is qualified and suitable." *Id.* § 435.9.

[3] Section 1605 also requires the agency to consider the individual circumstances of the employee conduct before instituting corrective or adverse action. 6B DCMR § 1605.2 ("Before initiating such action, management shall conduct an inquiry into any apparent misconduct or performance deficiency . . . to ensure the objective consideration of all relevant facts and aspects of the situation.").

III. Procedural History

A. The OEA Proceedings

On January 27, 2020, Ms. Russell timely filed a Petition for Appeal with the OEA, arguing that the Department had failed to correctly apply the *Douglas* factors, including by not adequately considering mitigating circumstances or the sufficiency of any lesser punishment. App. at 32–35; *id*. at 57–64. She also asserted a separate disparate treatment claim, alleging that another parking enforcement officer had been reassigned to a walking route following a positive marijuana test. *Id*. at 32-35; *id*. at 37; *id*. at 59.

Ms. Russell's appeal was heard first by an administrative law judge ("AJ"). The AJ's initial decision upheld Ms. Russell's termination. The AJ's decision largely echoed the Department's reasoning that termination was proper because Ms. Russell occupied a safety-sensitive position. *See id*. at 67-72. The AJ did not significantly engage with Ms. Russell's argument that the Department did not properly consider the *Douglas* factors, noting only (erroneously) that the Department might not have known about her personal problems. *Id*. at 69. The AJ's speculation on that point is refuted by the record, which shows unambiguously that Ms. Russell submitted documentation to the Department substantiating the professional care she had received for those problems. *Id*. at 69; *id*. at 15; *id*. at 12. The AJ similarly summarily dismissed Ms. Russell's disparate treatment claim, concluding she failed

to plead a prima facie case of disparate treatment, and declined to hold an evidentiary hearing on the issue. *Id*. at 65; *id*. at 70-71.

Ms. Russell then filed a Petition for Review with the OEA. *Id*. at 76-90. The OEA upheld the AJ's Initial Decision. *Id*. at 91-101. In its 18-page opinion, the OEA dedicated only four sentences to the Department's *Douglas* analysis. *Id*. at 91-92. That brief passage of the OEA's opinion states:

> The AJ also held that Agency did not abuse its discretion by removing Employee as evidenced in its consideration of the *Douglas* factors. The record is replete with documents which show that the *Douglas* factors were weighed by Agency before imposing its penalty of removal. Agency went through each factor and determined if it was aggravating, neutral, or mitigating, and it also provided its rational[e] for its decision. Furthermore, the Board agrees with the AJ's suggestion that Employee's mere disagreement in how Agency analyzed the *Douglas* factors does not negate that it adequately considered the factors prior to imposing its penalty.
> *Id*.

Id. at 102-103; *id*. at 107. The OEA did not discuss Ms. Russell's disparate treatment claim.

B. The Superior Court Proceedings

Ms. Russell then filed a timely Petition for Review of Agency Order or Decision with the Superior Court.[4] *Id*. at 76. She again argued that the Department

[4] Ms. Russell, who was unrepresented at the time, first filed a Complaint for Specific Performance with the Superior Court. AR 260–263 (Compl.). This complaint was subsequently dismissed. That dismissal order is not a subject of the present appeal.

had failed to conduct a proper review of the *Douglas* factors and raised her disparate treatment claim. AR 168-175 (Br. in Support of Pet for Review).

On June 22, 2023, the Superior Court denied the Petition, without significantly addressing the Department's *Douglas* factor analysis. *See* AR 87-96 (Order Denying Pet. for Review). The Superior Court primarily addressed the applicability of the Mayor's Order to the Department's decision to terminate Ms. Russell and Ms. Russell's disparate treatment claim. AR 91-95 (Order Denying Pet. for Review at 5-9). The Superior Court did appear to advert briefly to the *Douglas* factors, stating that, so long as the Agency "considered certain factors," it had the authority under the Mayor's Order to terminate a safety sensitive employee who could "cause serious injury or loss of life if under the influence of or impaired by drugs or alcohol." AR 92 (Order Denying Pet. for Review at 6). And the Superior Court found that Ms. Russell failed to plead a prima facie disparate treatment claim and the AJ was not required to hold an evidentiary hearing on the claim. *See* AR 93-95 (Order Denying Pet. for Review at 7-9).

On June 30, 2023, Ms. Russell timely appealed to this Court. AR 49-52 (Notice of Appeal).

STANDARD OF REVIEW

This Court reviews agency decisions on appeal from the Superior Court as if the administrative decision had come to this Court directly. *Sium v. Office of State*

Superintendent of Educ., 218 A.3d 228, 232 (D.C. 2019) ("Thus, in the final analysis, confining ourselves strictly to the administrative record, we review the OEA's decision, not the decision of the Superior Court.") (quoting *Stevens v. Dist. of Columbia Dep't of Health*, 150 A.3d 307, 311–12 (D.C. 2016)).

This Court reviews OEA decisions to ensure they are not arbitrary and capricious, based on an abuse of discretion, or not in accordance with law. It 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. Dist. of Columbia Off. of Emp. Appeals*, 145 A.3d 1005, 1009 (D.C. 2016) (quoting *Teamsters Local Union 1714 v. Public Emp. Relations Bd*., 579 A.2d 706, 709 (D.C. 1990)).

When the OEA reviews the severity of a penalty imposed on an employee, it must ensure that the employer "did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness." *Stokes v. Dist. of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985) (quoting *Douglas,* 5 M.S.B.P. at 332-333)). "For an OEA decision to pass muster, the agency 'must state findings of fact on each material contested factual issue; those findings must be supported by substantial evidence in the agency record; and [its] conclusions of law must follow rationally from its findings.'" *Sium*, 218 A.3d at 234 (quoting *Rodriguez*, 145 A.3d at 1009).

SUMMARY OF ARGUMENT

This Court's precedents hold that the OEA abuses its discretion or acts not in accordance with the law when (1) it does not state findings of fact on each material contested factual issue supported by substantial evidence in the agency record, and (2) when conclusions of law do not follow rationally from its findings. *Rodriguez*, 145 A.3d at 1009. The OEA abused its discretion and acted not in accordance with the law here for two reasons.

First, the OEA erred and abused its discretion by failing to conduct the necessary review of the Department's decision to terminate, and in particular the Department's analysis of the *Douglas* factors. The OEA limited itself to considering whether there was evidence the Department had examined the *Douglas* factors. Concluding that the Department had considered those factors, the OEA held that it could not substitute its judgment for the Department's. App. at 102–103. It is true that the OEA may not simply discard the Department's view in favor of the OEA's preferred resolution. But neither may the OEA set aside its obligation to ensure that the Department's conclusion rests upon a proper analysis of the *Douglas* factors—that is, an analysis that conscientiously and rationally addresses the twelve distinct considerations that *Douglas* calls out as relevant to the adverse action decision, and that addresses those considerations in light of the individualized evidence pertinent to the employee. *See Douglas*, 5 M.S.P.B. at 330 (noting the analysis stems from

"the fundamental requirement that agencies exercise responsible judgment in each case, based on rather specific, individual considerations, rather than acting automatically on the basis of generalizations unrelated to the individual situation"); 6B DCMR § 1606.3 (requiring employers to consider "each [*Douglas*] factor based on the circumstances"). There is no substantial evidence in the agency record that the Department did so; to the contrary, the evidence shows the Department's *Douglas* analysis was irrational and failed to conscientiously consider each factor. Thus, the OEA abused its discretion and erred by upholding the Department's decision to terminate Ms. Russell.

Second, the OEA failed to recognize that Ms. Russell had pleaded a prima facie claim for disparate treatment, or at the very least, that the AJ should have held an evidentiary hearing on the issue. The OEA has previously relaxed the requirements for pleading a prima facie disparate treatment claim where the claim could be dispositive of whether the adverse action was reasonable under *Douglas* factor 6, as in the case here. *Barbusin v. Dept. of Gen. Servs*., OEA Matter No. 1601-0077-15, at 11. And for that reason, the AJ abused his discretion by failing to hold an evidentiary hearing on the claim.

The OEA was required to examine whether the Department rationally and conscientiously considered the *Douglas* factors. Thus, this Court should conclude the OEA Board acted in an arbitrary and capricious fashion and in a manner not in

accordance with law. Because this Court is not required to "affirm an administrative determination which reflects a misconception of the relevant law or a faulty application of the law," it should vacate the OEA's decision. *Rodriguez*, 145 A.3d at 1009.

ARGUMENT

I. The OEA Failed to Critically Examine the Department's Deeply Flawed *Douglas* Analysis.

Over forty years ago, the Merit Systems Protection Board established the individualized framework government departments should apply to determinations of adverse employee action. *See Douglas,* 5 M.S.P.B. 313 at 330. Although the *Douglas* factors grant departments discretion, they also channel and constrain that discretion. The aim is to safeguard "the fundamental requirement that [departments] exercise responsible judgment in each case, based on rather specific, individual considerations, rather than acting automatically on the basis of generalizations unrelated to the individual situation." *Id*. The District of Columbia has adopted the *Douglas* factors in its Regulations and requires its departments to consider each factor when determining appropriate action. 6B DCMR § 1606. Specifically, the Regulations provide that "[a]ll of these factors shall be considered and balanced to arrive at the appropriate remedy. While not all of these factors may be deemed relevant, consideration should be given to each factor based on the circumstances." *Id*. § 1606.3. Under *Douglas*, an employer has an obligation to "conscientiously"

consider all of the factors in weighing an adverse action determination. *Stokes*, 502 A.2d. at 1011 (quoting *Douglas*, 5 M.S.P.B. at 332).

Rather than engage with whether the Department complied with its obligations under *Douglas* and the Regulations, the OEA focused on whether removal was within the acceptable range of penalties under the Regulations. To the extent the Department had believed the applicable Regulations required termination, *see* App. at 22 ("Employees in safety sensitive positions who test positive for controlled substances are subject to removal from their covered positions."), the OEA made clear that termination is not a required sanction for a first-time positive marijuana test result, but merely a permissible one. *Id*. at 101–102.

Once it recognized, correctly, that termination was not required, the OEA should have then examined whether the Department conscientiously analyzed the *Douglas* factors to determine which penalty would be most appropriate in light of Ms. Russell's individualized circumstances. Rather than doing so, the OEA concluded in a summary, four sentence explanation of this pivotal issue that the Department had considered the *Douglas* factors and thus met its burden, and the OEA could not substitute its judgment for the Department's. *Id*. at 102–103.

The OEA's key error was to stop at asking whether the Department considered the *Douglas* factors. The OEA had a further obligation to ensure that the Department "did conscientiously consider the relevant factors and did strike a responsible

balance within tolerable limits of reasonableness." *Stokes*, 502 A.2d at 1011 (quoting *Douglas*, 5 M.S.P.B. at 332). The Department did not, and the OEA acted not in accordance with the law and abused its discretion by failing to conduct that examination and by failing to make essentially any findings of fact or conclusions of law on this point. *See Sium*, 218 A.3d at 234 (OEA "must state findings of fact on each material contested factual issue; those findings must be supported by substantial evidence in the agency record; and [its] conclusions of law must follow rationally from its findings" (quoting *Rodriguez*, 145 A.3d at 1009)).

A. The Department Failed to Rationally and Conscientiously Analyze the *Douglas* Factors in the Rationale Worksheet.

The Department was required to conduct a conscientious, individualized analysis of Ms. Russell's circumstances under *Douglas* and 6B DCMR § 1606. The purpose of this analysis is to determine the appropriate action based on an employee's particular circumstances. *See Douglas*, 5 M.S.P.B. at 330; 6 B DCMR § 1606.2. Here, the Department failed to properly consider the *Douglas* factors in multiple respects.

1. The Department failed to conclude Ms. Russell's lack of prior disciplinary action was mitigating under factor 3.

The Department's conclusion that factor 3 was "neutral" is divorced from the logical meaning of the term and the purpose of factor 3. *See* App. at 20. Factor 3, "Past Corrective or Adverse Actions," requires the Department to consider any

corrective or adverse actions taken against the employee in the previous three years. *Id*. The Department conceded that "Ms. Russell didn't have any corrective or adverse actions within the past three (3) years." *Id*. But despite this conclusion, the Department determined this factor was "neutral," rather than "mitigating." *Id*.

The Rationale Worksheet defines "neutral" as "neither a contributing nor detracting factor; applicable." *Id*. at 19. Or in other words, "neutral" means the factor, "has had no impact . . . in the formulation of your decision." *Id*. The Department did not explain how the lack of prior infractions could have had no impact in its analysis under factor 3, as was its burden to do. *Douglas*, 5 M.S.P.B. at 333–34. The absence of an explanation is glaring here because it is hard to imagine how the Department viewed the fact Ms. Russell had received no corrective or adverse actions in the three years preceding the positive marijuana test as being anything other than a "mitigating" factor, indicating that the adverse action should be "less severe, intense." App. at 19. *See Parsons v. U.S. Dept. of Air Force*, 707 F.2d 1406, 1412 (D.C. Cir. 1983) (remanding in part because the Air Force failed to take into account that the employee had received only one other disciplinary action in his ten years of service when considering the proper penalty under the *Douglas* factors); *Douglas*, 5 M.S.P.B. at 303 (noting agencies had specifically been counseled that disciplinary action should be tailored to the seriousness of the offense, especially considering "an employee who has a previous record of completely

satisfactory service"). Indeed, if a lack of disciplinary action during the relevant time period is not mitigating, under the Department's logic, factor 3 could never be mitigating. That is contrary to the purpose of the *Douglas* analysis. But because the OEA looked only at whether the Department performed a *Douglas* analysis and not whether it did so rationally or conscientiously, it did not require the Department to explain that conclusion. Its failure to do so was an abuse of discretion and not in accordance with the law.

2. The Department's factor 5 analysis failed to consider the actual circumstances of Ms. Russell's positive marijuana test, instead relying on assumptions and generalizations.

Factor 5 concerns the Department's "Confidence in Employee," and particularly whether the conduct at issue impacts the employee's ability to do a job, or undermines confidence in such ability or in upholding the agency's mission. App. at 21.

The Department concluded the second two considerations were present here, and the factor was "aggravating," as shown below.

5. Confidence in Employee

☐ Conduct impacts employee's ability to do a job (e.g. cannot do job while AWOL)

☒ Conduct undermines confidence in employee's ability to do job (e.g. timekeeping submitted a fraudulent time for self)

☒ Conduct undermines confidence in employee's ability to uphold agency mission

This factor is **AGGRAVATING.**

Employees serving in safety sensitive positions who are working while under the influence of controlled substances may cause harm to themselves or others. This conduct impacts the employee's ability to do their job and may potentially impact the operations of the agency.

Id.

But the Department's factor 5 analysis repeatedly failed to follow *Douglas*'s and the Regulations' mandates that it assess the proper sanctions based on the employee's specific circumstances, instead grounding its analysis in generic observations and a mistaken presumption that Ms. Russell was under the influence of marijuana at work.[5]

There is no record evidence to support that Ms. Russell ever performed her job while under the influence of marijuana. Indeed, Ms. Russell was randomly selected for a urine analysis that produced a positive result for marijuana. App. at 30; *Id*. at 14. She was *not* drug tested because of a reasonable suspicion that she was "impaired or otherwise under the influence" while on duty. 6B DCMR § 431.1. The results of Ms. Russell's urine analysis do not indicate whether she was impaired at the time she was tested—let alone at any time when she was working— and the Department has never alleged that she was. Thus, the Department's factor 5 analysis

[5] The analysis for Factor 1 follows suit, noting "Mr. [sic] Russell's core duties and responsibilities are such that *if* performed under the influence of drugs or alcohol could lead to" theoretical harms. App. at 20 (emphasis added). Further, the Department's misgendering of Ms. Russell is further evidence it failed to undertake a conscientious analysis and consider Ms. Russell's individual circumstances.

is inconsistent with the record and the OEA's approval of the Department's decision to terminate is not based on substantial evidence. *See Sium*, 218 A.3d at 234.

Further, the Department's analysis considers the conduct of hypothetical employees who perform their duties under the influence of marijuana rather than Ms. Russell. Because the Department's analysis fails to consider Ms. Russell's circumstances, the analysis has no bearing on whether Ms. Russell should be terminated for her conduct. *See Douglas*, 5 M.S.P.B at 303 (reiterating the "fundamental requirement that agencies exercise responsible judgment in each case, based on rather specific, individual considerations, rather than acting automatically on the basis of generalizations unrelated to the individual situation.").

3. The Department failed to meet its burden to establish facts supporting factor 6.

Factor 6 requires the Department to consider the "Consistency of Action." The Department responded by asserting that "the proposed action is consistent with that applied to other employees in safety sensitive positions across the District government." App. at 21. But Ms. Russell raised in her petition to the OEA that that was not true. *Id*. at 32–35. She explicitly stated that "District government policy provides for reassignment to a non-safety sensitive position, which was offered to at least one other DPW employee but not me." *Id*. The AJ considered her statement only as a separate disparate treatment claim and, for reasons discussed below, improperly dismissed that claim. *Id*. at 70–71. But regardless of whether Ms.

Russell properly asserted a separate disparate treatment claim, it was an abuse of discretion and not in accordance with the law for the AJ, and then the OEA, to disregard her factor 6 argument that the Agency had in fact treated similarly situated employees differently.

When conducting a *Douglas* analysis, it is "clear that the ultimate burden is upon the agency to persuade the [OEA] of the appropriateness of the penalty imposed. . . . The deference to which the agency's managerial discretion may entitle its choice of penalty cannot have the effect of shifting to the [employee] the burden of proving that the penalty is unlawful, when it is the agency's obligation to present all evidence necessary to support each element of its decision." *Douglas*, 5 M.S.P.B. at 333–34. The Department failed to carry its burden because it presented no evidence to support its conclusion under factor 6. The OEA should have found this insufficient.

Indeed, other courts have concluded that administrative consideration of even just a few comparative cases is insufficient. *See Torres v. Dept. of Homeland Sec.*, 88 F.4th 1379, 1384 (Fed. Cir. 2023) ("[T]he arbitrator should have provided a more fulsome review, including a presentation of substantial evidence, to justify his determination that *Douglas* factor 6 weighed against Mr. Torres."). Especially as Ms. Russell raised that the Department's assertion under factor 6 was incorrect, the OEA should have required the Department to meet its burden to "present all evidence

necessary to support each element of its decision." *Douglas*, 5 M.S.P.B. at 334; *see also Barbusin v. Dept. of Gen. Servs*., OEA Matter No. 1601-0077-15, at 12–13 (concluding remand for further consideration of disparate treatment claim was particularly appropriate because *Douglas* factor 6 "may be a dispositive in determining whether Employee's suspension was reasonable under the circumstances").[6] The OEA's failure to do so here was error and an abuse of discretion.

4. The Department's factor 8 analysis did not engage with the questions the factor poses or with Ms. Russell as an individual.

Factor 8 contemplates the "Impact of Agency Reputation/ Notoriety" of the employee's actions, and again, the Department found this factor "aggravating":

8. Impact on Agency Reputation / Notoriety

The mission of the Department of Public Works is to provide environmentally healthy municipal services that are cost effective and ecologically sound. This mission is realized by ensureing parking is available for our residents, businesses, and visitors by encouraging voluntary compliance with parking regualtiosn. Those employees who operate out of the Parking Enforcement Division, Parking Enforcement Management Administration in the Department of Public Works are critical to that endeavor. As such employees serving in safety sensitive positions who work while under the influence of controlled substances may cause harm to themselves or others. Any incident that may occur because of the employee's impairment may adversely impact the Department of Public Works reputation and undermine the public's confidence in the agency.

This factor is **AGGRAVATING**.

App. at 22.

[6] Available at https://casesearch.oea.dc.gov/home/getfile?fileid={1AE08D00-CAF3-4FC8-848B-C17E3D4CE7E1}

There are two core problems with this analysis. First, as noted in connection with factor 5, there is simply no evidence that Ms. Russell "work[ed] while under the influence of controlled substances." Accordingly, insofar as the Department's analysis focuses on hypotheticals about how safety-sensitive employees who did work under the influence might harm the Department's reputation, it lacks a basis in the record and fails to address Ms. Russell's individual circumstances, as the *Douglas* analysis must. The Department's repeated resort to the safety-sensitive designation as sufficient explanation to terminate Ms. Russell without any further engagement of the circumstances of the offense flouts the purpose and requirements of *Douglas* and the Regulations. *Douglas*, 5 M.S.P.B at 303; 6B DCMR § 1606; *see also Parsons,* 707 F.2d at 1412 (concluding the Air Force had failed to consider the *Douglas* factors relevant to the "individual case" and had instead relied on generalities about the nature of the offense).

Second, the Department's analysis fails to engage with the substance of factor 8, which is how or whether the employee's conduct actually affected the reputation or notoriety of the employer, particularly with respect to the public. For example, one of the United States Court of Claims cases from which the *Douglas* Court developed its factors concluded removal was an appropriate penalty for an IRS employee who failed to file his own tax returns where "[t]he collection division chief testified that conduct such as plaintiff's would have a deleterious effect upon the

morale of other IRS personnel and upon the respect which other Government agencies and the public had for IRS." *Giles v. United States*, 553 F.2d 647, 650 (Ct. Cl. 1977). The Court agreed, noting the negative impact it would have on others in the IRS and the "taxpaying public" who knew an IRS agent had evaded compliance with the tax system. *Id*.

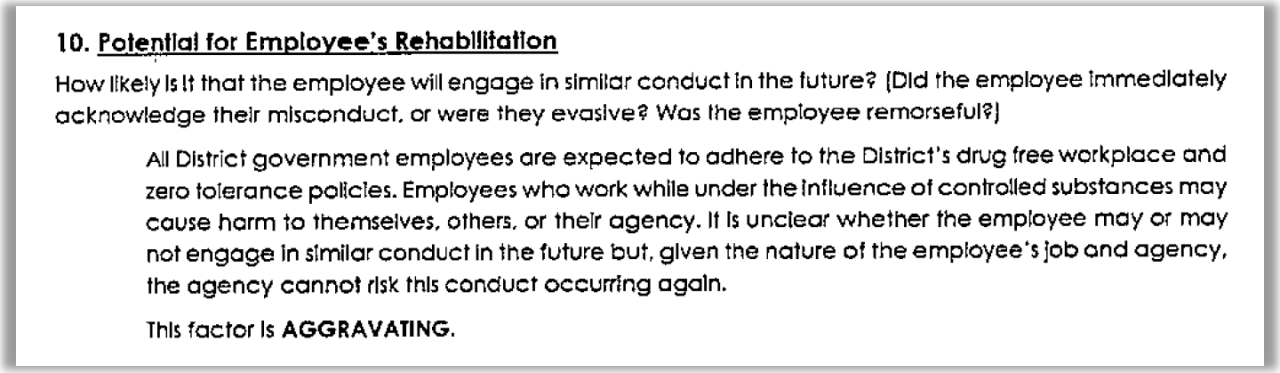
Courts applying *Douglas* factor eight have concluded similarly, particularly examining the effect of the employee's actual conduct on the public. In *Robinson v. Dep't of Veterans Affairs*, the Federal Circuit upheld the Merit System Protection Board's conclusion that factor 8 was "aggravating" where the employee's failure to manage the scheduling of VA appointments led to public allegations that numerous veterans had died while waiting for appointments. 923 F.3d 1004, 1008, 1017 (Fed. Cir. 2019). The public allegations from a United States Congressman led to federal investigations, congressional hearings, and a *New York Times* article concerning the scheduling issues at the Phoenix Veterans Administration Health Care System where the employee was the associate director. *Id*. at 1008–09. Thus, the Federal Circuit concluded the MSPB had properly considered the notoriety of the offense. *Id*. at 1017; *see also Dist. of Columbia Metro. Police Dept. v. Dist. of Columbia Off. of Emp. Appeals*, 88 A.3d 724, 730 (D.C. 2014), as amended (May 22, 2014) (noting the DC Police Department's ("MPD") assessment that a police officer's trial,

conviction, and incarceration for a DWI after hitting another motorist would "erode public confidence and respect of MPD").

Here, the Department's analysis does not consider whether Ms. Russell's actual conduct—a single positive result for cannabis on a randomly administered test—was ever known to the public or affected the public's perception of the Department. Further, even if her positive cannabis test ever had come to light, it is implausible that knowledge would have affected the Department's reputation, given that District voters chose to decriminalize possession and use by adults of small quantities of marijuana in 2014—five years prior to Ms. Russell's positive test. *See* D.C. Law 20-153. And shortly after the positive test, Mayor Bowser declared by executive order that first-time positive marijuana tests generally should not result in termination. *See* App. 110–119. Against that backdrop, knowledge that an adult who had used marijuana for medical purposes had tested positive for marijuana—one time—could not have brought public notoriety to the Department. That is precisely the kind of cannabis usage that the District's voters have chosen to treat as a minor matter, so long as it occurs in private.

5. The Department's factor 10 analysis also failed to engage with the questions the factor poses or with Ms. Russell as an individual.

Factor 10 considers the "Potential for Employee's Rehabilitation." Here too the Department found a factor "aggravating" based on confusing and illogical reasoning:



10. Potential for Employee's Rehabilitation

How likely is it that the employee will engage in similar conduct in the future? (Did the employee immediately acknowledge their misconduct, or were they evasive? Was the employee remorseful?)

All District government employees are expected to adhere to the District's drug free workplace and zero tolerance policies. Employees who work while under the influence of controlled substances may cause harm to themselves, others, or their agency. It is unclear whether the employee may or may not engage in similar conduct in the future but, given the nature of the employee's job and agency, the agency cannot risk this conduct occurring again.

This factor is **AGGRAVATING.**

App. at 22.

The factor asks the employer to assess "[h]ow likely is it that the employee will engage in similar conduct in the future? (Did the employee immediately acknowledge their misconduct, or were they evasive? Was the employee remorseful?)." *Id*. But the Agency did not consider any of that. It did not address whether Ms. Russell immediately acknowledged her misconduct, or was evasive or remorseful. In fact, the only part of the Department's answer that is arguably specific to Ms. Russell is ambivalent, stating that it is "unclear whether the employee may or may not engage in similar conduct in the future." *Id*. The Department reached the conclusion that this conduct was "aggravating" only by relying on generalized language about safety-sensitive employees. *Id*. But whether, as a general matter, District government employees are expected to adhere to workplace

rules and failure to do so could result in hypothetical harm is beside the point. *Douglas* makes clear that "[t]he likelihood of rehabilitation must be viewed in light of [the employee's] past actions." *Douglas*, 5 M.S.P.B. at 338. Yet despite acknowledging elsewhere in the Rationale Worksheet that "Ms. Russell didn't have any corrective or adverse actions within the past three (3) years," the Department failed to apply those facts to this factor, or indeed undertake any analysis particular to Ms. Russell. App. at 20.

This Court has previously concluded that termination based on misapplication of factor 10 was arbitrary and capricious under circumstances that pale in comparison to those here. *Love v. District of Columbia Off. of Emp. Appeals*, 90 A. 3d 412 (D.C. 2014). In *Love*—and unlike in this case—the Department of Corrections ("DOC") had included an individualized assessment of the likelihood for rehabilitation, but the employees argued the assessment that likelihood for rehabilitation was low improperly relied on their defense of their actions during prior administrative hearings. *Id*. at 424. Thus, they argued, the administrative law judge (in fact the same judge in this case) had abused his discretion in upholding their job terminations. *Id*. at 422. This Court agreed that Merit Systems Protection Board precedent held it was improper to equate defense of one's actions with a lack of remorse and the DOC had pointed to no other record evidence to support the conclusion the corrections officers lacked potential for rehabilitation. *Id*. at 425.

Here, there is no record evidence to support the Department's conclusion because the Department made no real conclusion about Ms. Russell's potential for rehabilitation. Thus, the Court may readily find that the OEA abused its discretion and acted not in accordance with the law based on this factor alone. *See also Torres,* 88 F.4th at 1384 (concluding a generalized finding the employee "had no potential for rehabilitation, in light of the seriousness" of the offense was insufficient under *Douglas* factor 10).

6. The Department's factor 12 analysis failed to consider whether a lesser action would deter Ms. Russell's conduct, particularly in light of the Mayor's Order.

Factor 12 asks about the adequacy of alternative sanctions, and particularly whether a "lesser action could deter similar future conduct by the employee." App. at 23. Notably, the Department admits that "[a] lesser action could deter repeated violations of the drug policy." *Id*. But it rejects any lesser action "considering the nature of the position." *Id*. The Department then concludes this factor is "mitigating." *Id*. The Department's analysis thus fails to rationally address factor 12. It is illogical to conclude both that a sanction less severe than termination could deter violations of the drug policy and also that termination is the only sufficient sanction. And given that the Department ultimately concluded only termination was sufficient, it is further illogical how the Department could label this factor "mitigating," or "less severe, intense." App. at 19.

Again, the Regulations do not require termination when a safety-sensitive employee tests positive for marijuana after a random drug test, and the Mayor's Order underscored that departments should "consider alternatives to separation" as the "District government believes in progressive discipline for all but the most serious offenses." Mayor's Order at 1, 8.

B. The Hearing Officer's Report and Recommendation Compounds the Errors in the Rationale Worksheet.

After Ms. Russell received the Notice of Proposed Separation, she responded by addressing a number of mitigating circumstances surrounding the positive marijuana test and requesting she be allowed to keep her job, which she had held for twelve years. App. at 24; *Id*. at 25–29. The hearing officer, after considering the Notice of Proposed Separation, the Rationale Worksheet, and Ms. Russell's responses, among other documents, then issued the Report recommending Ms. Russell be terminated. *Id*. at 25–29.

The OEA's characterization of the Report as further evidence the Agency sufficiently considered the *Douglas* factors is wrong. *Id*. at 102–103. Instead, the Report simply doubles down on the fact Ms. Russell held a safety-sensitive position and termination was permitted under the applicable regulations for safety-sensitive employees who test positive for marijuana. *Id*. at 25–29. Indeed, the "Conclusion" of the Hearing Officer's Report states only:

> The Merit Systems Protection Board established the legal standard for appropriateness of a penalty in *Douglas v. Veterans Administration*, 5 MSPB 313 (1982). *Douglas* sets forth a list factors for an agency to consider when assessing a penalty. These factors were incorporated in Chapter 16 of the District personnel regulations, Section 1606.2. Separation is within the range of penalties set forth in the DPM's Table of Illustrative Actions for the cause listed.

Id. at 29. Whether the proposed penalty is within the range of allowable penalties under applicable regulations hardly encompasses the entirety of the *Douglas* analysis. In fact, that consideration is only one factor out of twelve.

Even assuming the "Findings of Facts" that precede the above conclusion in the Report is meant as a holistic analysis of the *Douglas* factors, the Report failed to consider all factors, and inadequately considered Ms. Russell's mitigating circumstances and the Mayor's Order. *See id*. at 27–28. Again, like the Rationale Worksheet, the Report relies heavily on the fact Ms. Russell held a safety sensitive position and, as a general matter, employees with safety-sensitive positions could, if performing their duties under the influence of drugs or alcohol, cause potential, theoretical harm to themselves or others. *See id*. at 27. ("Ms. Russell's core responsibilities are such that her position was designated as safety-sensitive – a position with duties that, if performed under the influence of drugs or alcohol, might cause a lapse of attention which in turn, could result in dire consequences for persons or property."). Even under the most generous reading, the Report entirely fails to consider (1) whether Ms. Russell had received any past corrective or adverse action

within the relevant time frame (she had not), (2) whether termination was consistent with actions taken against other employees (Ms. Russell has alleged it was not), (3) the potential for employee's rehabilitation (there was no consideration of whether she lacked potential), and (4) the adequacy of alternative actions (the Department admitted a lesser action could deter violations of the drug policy). *See id*. at 27–28; *id*. at 19–23; *id*. at 33; *id*. at 57–64.

Further, despite indicating that the Mayor's Order was applicable and meant to "clarify the District's stance on the use of marijuana by District employees," the Report misconstrues the Mayor's Order as supposedly validating the Department's decision to terminate Ms. Russell by reading a single sentence in isolation. *Id*. at 27-28 ("In pertinent part, the Mayor's Order states that 'safety-sensitive employees who test positive for cannabis will be presumed to be in violation of relevant District and/or federal laws,' and that penalties assessed would apply to employees with or without medical marijuana cards."). To be sure, the Mayor's Order did appear to indicate that *some* form of corrective or adverse action was appropriate when a safety-sensitive employee receives a positive cannabis test. But as a whole, the Mayor's Order was clear that termination should not ordinarily be the sanction for a first-time positive test. Rather, the Mayor's Order expressly directed agencies to "consider alternatives to separation" as the "District government believes in progressive discipline for all but the most serious offenses." App. at 110, 117. The

Regulations implementing the Mayor's Order confirm that understanding by making clear that a 5-day suspension should ordinarily be the sanction for a first-time positive cannabis test, even for safety-sensitive employees. *See* 6B DCMR § 429.

Finally, although the Report notes the extenuating, mitigating circumstances Ms. Russell explained to the Department, the Report unfairly suggests that the fact Ms. Russell obtained a medical marijuana card after her positive marijuana test—despite being approved for the card long before the positive marijuana test—is reason for the harshest punishment. *Id*. at 27–28. The Report notes the Mayor's Order allowed for penalties to be assessed against employees with medical marijuana cards. But the fact the Department may take some corrective or adverse action even if the employee at issue has a medical marijuana card does not justify disregarding Ms. Russell's explanation that financial circumstances delayed her ability to obtain a medical marijuana card even though she was approved to receive a card many months before she tested positive for cannabis. *See* App. at 28.

Indeed, the Mayor's Order explicitly provided that medical marijuana use should be afforded special consideration. The Order explained that if an employee tested positive for marijuana, a medical review officer should inquire whether a prescription or recommendation for medical marijuana explained the positive result. App. at 115. If so, the employer may excuse the positive result depending on the amount of THC indicated in the test results. *Id*.

And regardless of the Mayor's Order, Ms. Russell explained the reason she was issued a medical marijuana card was due to treatment for significant personal problems. *See id*.; *id*. at 24; *id*. at 25–29. The records she attached to her response letter show the professional care she had sought for these problems and that she was a domestic violence victim. App. at 15; *id*. at 12; *id.* at 16. But the Department failed to consider these facts as mitigating circumstances despite the Mayor's Order's guidance and the fact that *Douglas* factor 11 explicitly requires it to consider mitigating circumstances including whether the employee was "[e]xperiencing personal problems." *See id*. at 23; *see also Malloy v. U.S. Postal Serv*., 578 F.3d 1351, 1357 (Fed. Cir. 2009) (concluding the agency failed to consider *Douglas* factor 11 in light of the medical evidence concerning depression and anxiety).

At bottom, the Department's failure to rationally and conscientiously consider the *Douglas* factors evinces that its analysis did not go far beyond a reflexive and summary conclusion that employees who have been designated as having a safety-sensitive position should be fired for marijuana use. This is effectively the only analysis the OEA undertook as well. In its opinion, the OEA explained that termination was within the allowable range of penalties under the Regulations. App. at 101–103. But the Department was still required to determine whether termination was proper in this case, when considering Ms. Russell's individual circumstances. *Douglas*, 5 M.S.P.B at 333; 6B DCMR § 1606. The OEA conducted no analysis of

the Department's determination on this front, other than a cursory four-sentence explanation that the Department had considered the *Douglas* factors. App. at 102–103).

II. The OEA Erred by Failing to Hold an Evidentiary Hearing on Ms. Russell's Disparate Treatment Claim.

Since her initial Petition for Appeal with the OEA, Ms. Russell has pleaded that the Department treated similarly situated employees differently. In that Petition, Ms. Russell stated that "District government policy provides for reassignment to a non-safety-sensitive position, which was offered to at least one other DPW employee, but not me." App. at 32–35.

In her prehearing conference statement and then again in her brief to the AJ, she expanded on this claim: she claimed that a specific similarly situated employee, Larry Mhoon, had eventually been reassigned to a walking route after testing positive for marijuana, rather than terminated.[7] *Id*. at 37; *id*. at 59. Mr. Mhoon was also included among Ms. Russell's list of witnesses in her prehearing conference statement in which she explained that Mr. Mhoon was a parking enforcement officer and could "testify as to the circumstances of his reinstatement of DPW as a parking

[7] In her filings at the Superior Court, Ms. Russell again raised that Mr. Mhoon had been reassigned to a walking route rather than terminated. She also argued that another male coworker, James Wilson, had received a 5-day suspension by the same deciding official after a positive drug test in August 2020. AR 147-148 (Br. in Supp. Of Pet. for Review at 6–7).

officer." *Id*. at 38. Ms. Russell also included in her witness list Gail Heath, the Department's former Labor Relations Office, and Gina Walton, the former Union President, both of whom could testify regarding the circumstances of Mr. Mhoon's reinstatement. *Id*. at 39.

Particularly because whether the Department treated similarly-situated employees differently is a *Douglas* factor, the AJ should have held an evidentiary hearing on the issue to develop the facts material to her claim. *See Barbusin*, OEA Matter No. 1601-0077-15 at 12–13.

Although the OEA has articulated certain factors that must be pleaded to establish a prima facie disparate treatment claim,[8] the OEA has also recognized a more relaxed approach can be appropriate, particularly where, as here, the disparate treatment claim is also relevant to a proper *Douglas* analysis. *Barbusin,* OEA Matter No. 1601-0077-15, at 11–13. In *Barbusin*, the suspended employee presented evidence "that at least one other [officer] who was involved in a single car accident while 'recklessly' conducting an illegal U-turn was neither investigated, nor

[8] *Sheri Fox v. Metro. Police Dept.,* OEA Matter No. 1601-0040-17 at 19 (Decision issued January 13, 2020) (concluding an employee must show that (1) "she worked in the same organizational unit as the comparison employees"; (2) "both the petitioner and the comparison employees were disciplined by the same supervisor for the same offense within the same general time period"; and (3) "a similarly situated employee received a different penalty."). Notably, the *Fox* decision was made after extensive briefing and an evidentiary hearing—which Ms. Russell did not have an opportunity for here.

disciplined for such conduct." *Id*. at 12. The OEA rejected the AJ's conclusion that the employee did not make a prima facie claim because "details and circumstances surrounding the other officer's accident [were] lacking." *Id.* at 12. Instead, the OEA recognized that whether the employee was treated differently than other similarly-situated employees could be dispositive in determining whether the suspension was reasonable under *Douglas*. *Id*. For that reason, the OEA concluded the AJ had erred by concluding the employee had failed to make a prima facie case of disparate treatment and remanded "in the interest of justice." *Id*. at 12–13.

The AJ has discretion to determine an evidentiary hearing is necessary regardless of a party's request, and the power to order such hearing. *See* 6B DCMR § 624.2[9]; *id*. § 619.2. Because it is the AJ's duty to base his decision on substantial evidence, the AJ acts arbitrarily and capriciously by failing to hold an evidentiary hearing "to resolve disputed questions of material fact." *Sium*, 218 A.3d at 234; *see also Dupree v. District of Columbia Off. of Emp. Appeals*, 36 A.3d 826, 832–33 (D.C. 2011). Here, the AJ should have held an evidentiary hearing on Ms. Russell's disparate treatment claim based on her allegations that a similarly situated employee had been reassigned to a walking route rather than terminated after testing positive for marijuana. Given the Department's representation in the Rationale Worksheet

[9] The regulations concerning evidentiary hearings are now found in § 627 but were provided in § 624 at the time Ms. Russell's case was before the AJ.

that Ms. Russell's termination was consistent with action taken against other employees in safety-sensitive positions and the fact whether this was true was relevant to the *Douglas* analysis, *see Barbusin*, OEA Matter No. 1601-0077-15 at 12–13, her disparate treatment claim raised a disputed question of material fact.

Instead of recognizing the AJ's error, the OEA simply reiterated the positions of the parties regarding the disparate treatment claim. The OEA erred by failing to address the AJ's decision not to hold an evidentiary hearing when Ms. Russell had clearly signaled her intention to contest the Department's factual assertion that it had selected the same harsh sanction for every employee in Ms. Russell's position. *See Siam*, 218 A.3d at 235 ("[W]e conclude the OEA abused its discretion in denying Ms. Sium's petition for review where the OEA ALJ decided this case without an evidentiary hearing.").

CONCLUSION

For the reasons stated above, Ms. Russell respectfully requests the Court find the OEA abused its discretion and acted not in accordance with the law by failing to find the Department disregarded its duty under *Douglas* and the Regulations and by ignoring the AJ's failure to hold an evidentiary hearing on Ms. Russell's disparate treatment claim. Ms. Russell requests the Court vacate the OEA's decision and remand for further proceedings.

Dated: February 2, 2024

Respectfully submitted,

/s/ *Kwaku A. Akowuah*

Kwaku A. Akowuah (D.C. Bar No. 992575)
Claire Homsher (D.C. Bar No. 9000339)
SIDLEY AUSTIN LLP
1501 K Street, N.W,
Washington, D.C. 20005
(202) 736-8000

Jonathan H. Levy
Legal Aid DC
1331 H Street NW
Washington, D.C. 20005

Counsel for Appellant Franswello Russell

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ *Kwaku A. Akowuah*
Signature

Kwaku A. Akowuah
Name

kakowuah@sidley.com
Email Address

23-CV-552
Case Number(s)

February 2, 2024
Date

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February 2024, a copy of the foregoing Brief was served electronically on the counsel below via the Court's E-Filing system.

Caroline Van Zile
Solicitor General
Office of the Attorney General
400 6th Street NW
Washington, D.C. 20001

Lasheka Brown
Office of Employee Appeals
955 L'Enfant Plaza SW
Suite 2500
Washington, D.C. 20024

/s/ *Kwaku A. Akowuah*
Kwaku A. Akowuah
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005