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

REPLY BRIEF OF APPELLANT FRANSWELLO RUSSELL

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INTRODUCTION

The Department of Public Works' ("DPW" or the "Department") Response is long on purported reasons why this Court should decline to reach the merits of Ms. Russell's arguments in her opening brief but offers essentially no defense on the merits. That silence is telling. As Ms. Russell's opening brief explains at length, DPW plainly failed to meet its obligation under 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 to determine the most appropriate response to that positive test. *See* 6B DCMR § 1606. DPW never argues that it did rationally and conscientiously assess the *Douglas* factors before terminating Ms. Russell from her position as a parking enforcement officer. By failing to hold DPW to that obligation, the OEA Board failed in its own obligations. The Board's decision therefore should be vacated.

Rather than address the merits head on, DPW tries several ways to steer this Court away from assessing whether the OEA Board's decision was arbitrary and capricious by summarily accepting as adequate DPW's flawed *Douglas* analysis. None of DPW's efforts is availing.

First, the Superior Court did not did dismiss Ms. Russell's petition as untimely so this Court cannot affirm the Superior Court's decision on that basis. Instead, the Superior Court expressly reached the merits and expressly denied the petition on the merits.

Second, Ms. Russell did not forfeit her argument that DPW's *Douglas* analysis was insufficient; she expressly and consistently raised that argument below. Nor can OEA's failure to conclude DPW did not rationally and conscientiously consider the *Douglas* factors be justified on those grounds. DPW is also wrong to contend that Ms. Russell is asking a reviewing body to substitute its judgment for DPW's. Ms. Russell is asking, consistent with the law and established agency review principles, that DPW be required to rationally and conscientiously determine the proper sanction for her positive marijuana test in light of all of the *Douglas* factors.

Third, DPW's claim that any failure to rationally and conscientiously weigh the *Douglas* factors was harmless lacks all merit. DPW *concedes* that there was at least one available alternative to termination—reassignment to a different position. Ms. Russell was therefore harmed, at a minimum, by DPW's failure to rationally and conscientiously weigh the *Douglas* factors to determine whether reassignment rather than termination was the most appropriate penalty for her first-time drug

violation—a positive marijuana test occasioned by Ms. Russell's use of cannabis as a mental health treatment.

And finally, DPW's similar urging that this Court should not examine whether Ms. Russell was entitled to an evidentiary hearing on her disparate treatment claim because Ms. Russell has forfeited that argument is equally unsuccessful.

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.

PROCEDURAL HISTORY

Ms. Russell respectfully refers the Court to the full factual background and procedural history described in her opening brief. Appellant's Br. at 9–19. Given the Department's (ultimately irrelevant) focus on Ms. Russell's filings in the Superior Court, Ms. Russell provides here a short procedural history of the Superior Court actions.

A. The Superior Court Proceedings

The OEA Board upheld the AJ's Initial Decision on April 22, 2021. App. at 91–109. On May 23, 2021, Ms. Russell filed, as a pro se litigant, a Complaint for Specific Performance in the Superior Court seeking reinstatement of her employment and compensation for lost wages. Supp. App. at 20–27. The Department filed an Answer on September 20, 2021. *See* Answer, *Russell v. D.C.*

Dep't of Pub. Works, 2021-CA-002494-B (D.C. Super. Ct. Sept. 20, 2021). Among other defenses, the Department challenged the Superior Court's subject matter jurisdiction given that the Comprehensive Merit Personnel Act governed Ms. Russell's redress and Ms. Russell had not filed a Petition for Review as required by the Act. *Id*. On October 29, 2021, the Superior Court held a scheduling conference where the Department verbally moved to dismiss, arguing Ms. Russell had filed a civil complaint when she should have filed a petition for review. *See* Supp. App. at 38. The Superior Court ordered the Department to file a written motion by November 8, 2021, which it did. *See id* at 39. On December 14, 2021, counsel for Ms. Russell entered an appearance. *See* Praecipe to Enter Appearance, *Russell v. D.C. Dep't of Pub. Works*, 2021-CA-002494-B (D.C. Super. Ct. Dec. 14, 2021). The following day, the Superior Court orally dismissed the case without prejudice.

On November 18, 2021, prior to dismissal of the action initiated by the civil complaint, Ms. Russell filed a Petition for Review of Agency Order or Decision with the Superior Court. Supp. App. at 28–29. Her Petition noted that because she was not represented by an attorney due to lack of funds, she had previously filed in the wrong court. *Id*. at 28. Counsel for Ms. Russell did not enter an appearance until April 8, 2022. Am. Record at 992. On September 9, 2022, the Superior Court instructed Ms. Russell to file an amended Petition naming OEA, *id*. at 5, which she did on September 13, 2022. *Id*. at 196–220. On November 22, 2022, the Court set

a briefing schedule. *Id*. at 4. Ms. Russell filed her Brief for Review of Agency Order or Decision on January 31, 2023. Supp. App. at 30–36. After a request for an extension, DPW filed its Motion to Dismiss and Opposition to Petitioner's Petition for Review of Agency Decision on April 4, 2023. Supp. App. at 37–56.

On June 22, 2023, the Superior Court denied the Petition. *Id.* at 57–66. As explained further in Ms. Russell's opening brief, Appellant's Br. at 19, the Superior Court decision adverted briefly to the *Douglas* factors, stating that, so long as the Agency "consider[ed] … certain factors," it had the authority under the Mayor's Order to terminate a safety sensitive employee. Supp. App. at 62. And the Superior Court found that because Ms. Russell failed to plead a prima facie disparate treatment claim, the AJ was not required to hold an evidentiary hearing on that claim. *Id.* at 63–65.

On June 30, 2023, Ms. Russell timely appealed to this Court.

ARGUMENT

I. The Superior Court Decided Ms. Russell's Petition on the Merits.

In favor of ignoring the substantive arguments raised in Ms. Russell's opening brief, DPW argues that this Court should affirm the Superior Court's decision "den[ying]" Ms. Russell's petition in that court as untimely. Appellee's Br. at 19, 22–24. That argument fails because it rests on a factual fallacy: The Superior Court did not dismiss Ms. Russell's petition as untimely.

A year and a half after Ms. Russell filed her petition for agency review in the Superior Court, DPW moved to "dismiss" the petition as untimely or alternatively, to "den[y]" the petition on the merits. *See* Supp. App. at 37–56. The Superior Court acknowledged DPW's motion to dismiss and stated the petition had not been timely filed. *Id*. at 60–61. But the Superior Court did not dismiss the petition. Rather, the Court denied the petition on the merits. Specifically, its holding was as follows:

> Upon review of the pleadings filed by the parties, and the entire record herein, the Court denies the Petition. As more fully explained below, the Court finds that the Office of Employee Appeals' Decision was supported by substantial evidence in the record and not clearly erroneous as a matter of law.

Supp. App. at 57–58. In the "Applicable Legal Standards" section of the Superior Court's opinion, the court recited only the standards applicable to review of the merits of an administrative decision. *Id*. at 59–60 (explaining the court must ensure an agency makes findings of facts on each material, contested issue, bases its findings on substantial evidence, and draws conclusions of law that follow rationally from the findings). The court then spent one paragraph reciting DPW's argument in favor of dismissing the petition as untimely and agreed—as part of one sentence of that paragraph—that the petition was "indeed untimely pursuant to Super. Ct. Agency Rev. R. 1(b)(2)." *Id*. at 60–61.

But the court's actual analysis undeniably addressed the merits. After the initial procedural wind-up, the court proceeded for five additional pages to consider

and reject the substantive arguments raised in Ms. Russell's petition. *Id*. at 61–65. And if there were any doubt about whether the Superior Court meant to resolve this case as a non-merits dismissal or as a merits denial, its decretal language is decisive. The court concluded that "[b]ased upon the foregoing, the Petition shall be denied [and it is] ORDERED that Franswello Russell's Petition for Review of Agency Decision is DENIED." *Id*. at 65.

DPW's brief blurs the distinction between "dismissing" a petition as untimely and "denying" the same on the merits. *See* Appellee's Br. at 3 ("The Superior Court denied Russell's petition on June 22, 2023, holding that it was untimely and alternatively that it failed on the merits."). But DPW was clear about the distinction below. At the Superior Court, DPW's Motion to Dismiss and Opposition to Petitioner's Petition for Review of Agency Decision properly distinguished between "dismiss[ing]" the petition as untimely and "den[ying]" the petition on the merits. Supp. App. at 37 ("Petitioner's PFR must be dismissed as untimely and/or it must be denied."). The Superior Court's opinion does the same, as indeed, the two terms have different implications legally. *See Spier v. Quarterman*, 278 F. App'x 303, 306 (5th Cir. 2008) ("A 'denial' signifies that we addressed and rejected the merits of a particular claim while a 'dismissal' means that we declined to consider the claim for reasons unrelated to the claim's merits.") (quoting *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997)); *see also United States v. McRae*, 793 F.3d 392, 399-

400 (4th Cir. 2015) ("When a district court denies a Rule 60(b) motion on the merits, it necessarily considers the merits of the underlying habeas petition . . . The same cannot be said about a dismissal of a Rule 60(b) motion on jurisdictional grounds." (cleaned up)). Here, in keeping with "the strong judicial and societal preference for determining cases on the merits," *Vizion One, Inc. v. D.C. Dep't of Health Care Fin.*, 170 A.3d 781, 791 (D.C. 2017) (citation omitted), the Superior Court denied Ms. Russell's petition on the merits.[1] Supp. App. at 65.

Ms. Russell respectfully submits that the Superior Court's decision results in one of three outcomes available to this Court concerning DPW's motion to dismiss:

First, this Court can conclude the Superior Court implicitly denied DPW's motion to dismiss. This seems a probable outcome given the Superior Court's acknowledgment of DPW's motion to dismiss and decision to consider the merits of

[1] Nor was the Superior Court required to dismiss Ms. Russell's petition because it was untimely. To the extent DPW now suggests otherwise, it did not raise that argument below and it is contrary to the law. The 30-day deadline to file a petition for agency review under Super. Ct. Agency Rev. R. 1(b)(2) is not jurisdictional and this Court has concluded the deadline is subject to equitable tolling. *See Brewer v. D.C. Off. of Emp. Appeals*, 163 A.3d 799, 803-04 (D.C. 2017) (concluding equitable tolling of Super Ct. Agency Rev. R. 1(b)(2) appropriate where the government delayed taking action on the untimely petition, the original filing was timely filed but in the wrong court, and petitioner "promptly acted to correct the asserted error" after being notified of that error, so there was no prejudice to the government). Here, the Superior Court would have been justified in granting equitable tolling, where Ms. Russell, acting *pro se* at the time, *see supra* at 3, timely sought review of the OEA Board's decision but did so using the wrong form – she filed a Complaint rather than a Petition for Review. Ms. Russell subsequently sought to cure her initial error by filing a petition.

Ms. Russell's petition anyway. *See Sium v. Off. of State Superintendent of Educ*., 218 A.3d 228, 233 n.7 (D.C. 2019) (noting an AJ could have implicitly denied a motion to dismiss when she "acknowledged it in her order, nonetheless determined she had jurisdiction, and then ruled on the merits."). This is also probable given that DPW offered this procedural route to the Superior Court. *See* Supp. App. at 39 ("In the event that this Court denies this motion to dismiss despite the untimely filing, the Court must uphold the OEA decision currently under review.").

If that is the case, it is too late for DPW to challenge that denial now as DPW needed to file a cross appeal to preserve the issue, which it did not. *See* D.C. Ct. App. R. 4(a)(3) ("If one party files a timely notice of appeal, any other party to the proceeding in the Superior Court may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by Rule 4 (a)(1), whichever period ends later.").

Second, the Superior Court could have implicitly denied DPW's motion to dismiss as moot after it reached and then denied Ms. Russell's petition on the merits. If that is the case, this Court can simply note that the Superior Court could have denied DPW's motion to dismiss, *see* n.1 *supra*, and proceed to the merits.

Finally, if the Court concludes there is sufficient uncertainty as to the Superior Court's ruling on DPW's motion to dismiss, it could remand to the Superior Court for further proceedings. In all events, however, there is no basis for this Court to

affirm the Superior Court's ruling as if it were something it was not: a dismissal of Ms. Russell's petition as untimely.

II. Ms. Russell Raised Her *Douglas* Claims Below and the OEA Board's Failure to Critically Examine DPW's *Douglas* Analysis was Arbitrary and Capricious.

DPW next tries to steer this Court away from consideration of Ms. Russell's substantive arguments by erroneously claiming they are forfeited because she did not make the exact same arguments at the administrative level. Appellee's Br. at 25. DPW's arguments are factually inaccurate. Ms. Russell devoted an entire section of her Petition to the OEA Board to her contention that "it was error for the ALJ to find that the agency had properly considered the *Douglas* factors in assessing the appropriate penalty." App. at 86–89 (cleaned up). The Department cherry-picks three sentences of that section and concludes that Ms. Russell "did not articulate any specific challenges to DPW's analysis of the *Douglas* factors." Appellee's Br. at 15. But Ms. Russell explicitly contended that "DCHR officials did not seriously consider any of the Douglas Factors" and suggested the OEA Board should conclude the AJ erred by failing to fault DPW when it "failed to weigh the relevant factors." App. at 88 (citing *Douglas*, 5 M.S.P.R. 313 (1981)). She pointed to her past work history, which implicates Factor 4, and mitigating circumstances implicating Factor 11. *Id.* at 88–89.

DPW also errs (*see* Appellee's Br. at 26) in contending that Ms. Russell did not argue before the AJ that DPW's *Douglas* analysis was flawed. Ms. Russell said exactly that. In her Petition for Appeal to the AJ as a pro se litigant, she said that "[t]he agency did not properly consider the Douglas Factors, including erroneously treating my length of employment as a neutral factor, not considering my personal problems as a mitigating factor, and not considering a lesser penalty." App. at 33. And in Ms. Russell's prehearing conference statement, she made clear that a number of witnesses would testify to these points. *Id.* at 38–39. And she concluded that "[i]t is clear in the record that DCHR considered no other option but termination. The process was pro forma and conclusionary." *Id*. at 38. She again raised Factor 4 and Factor 11 arguments in her brief before the AJ: "At the time of her termination employee had a clean disciplinary record and had received good employee evaluations. She was suffering from depression because of financial hardship and domestic abuse, but these mitigating factors were not considered in assessing a penalty." *Id.* at 59.[2]

[2] DPW notes in the background section of its brief that Ms. Russell added in a footnote to her brief before the OEA Board that she had not addressed "financial and domestic issues" before the AJ and so would not raise them before the OEA Board. Appellee's Br. at 15 (citing App. at 87 n.6). Given Ms. Russell's explicit explanation to the AJ that mitigating factors included financial hardship and domestic issues, Ms. Russell's footnote in her OEA Board brief was mistaken. In any case, DPW has not argued Ms. Russell has waived on appeal specifically her arguments related to DPW's failure to appropriately consider these issues as mitigating factors. *See* Appellant's Br. at 42.

Moreover, this Court has repeatedly made clear that parties are allowed to expand on their arguments made below on appeal. *Turner v. United States*, 166 A.3d 949, 954 n.11 (D.C. 2017) (finding that despite the government's protests, the defendant "expressly argued" the relevant issue before the trial court and the issue "itself was discussed by the trial judge in his ruling" (citation omitted)); *Tindle v. United States*, 778 A.2d 1077, 1082 (D.C. 2001) (cleaned up) ("[T]he Supreme Court of the United States and this court have distinguished between 'claims' and 'arguments,' holding that although 'claims' not presented in the trial court will be forfeited (and thus subject to plain error review standard), parties on appeal are not limited to the precise arguments they made in the trial court."); *James Parreco & Son v. D.C. Rental Hous. Comm'n*, 567 A.2d 43, 45 n.4 (D.C. 1989) (holding a party preserved an argument by making a related argument in agency proceedings).

Indeed, this Court has explained that even when parties "implicitly" make arguments in agency proceedings, those arguments are preserved for judicial review. *Vizion One, Inc. v. D.C. Dep't of Health Care Fin.*, 170 A.3d 781, 790-91 (D.C. 2017) (concluding issues were preserved even though "Vizion One did not make explicit arguments in this court concerning jurisdictional limitations, claim-processing rules, and equitable tolling.").

Ms. Russell discussed her past work history and mitigating circumstances surrounding her failed drug test, and she criticized the Department's *Douglas*

analysis throughout the agency proceedings. Thus, Ms. Russell both implicitly and explicitly preserved her *Douglas* claims.[3]

Accordingly, Ms. Russell's arguments that the OEA's Board's decision was arbitrary and capricious are properly before this Court. *See* Appellant's Br. at 23–43. The Department was required—and failed to—rationally and conscientiously consider the *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 327-28); Appellant's Br. at 25–38. Whether the Department did so was squarely before the OEA Board.

To be clear, Ms. Russell did not, and does not now, argue that OEA should have substituted its judgment for the Department's. *Cf.* Appellee's Br. at 27. Ms. Russell does contend, correctly, that OEA was obligated to examine whether the Department had rationally and conscientiously weighed the *Douglas* factors. OEA's failure to do so, and decision to instead summarily reject Ms. Russell's argument on

[3] The caselaw DPW cites in support of its argument is thus inapposite as it concerns situations in which an argument was never raised at all below. *See* Appellee's Br. at 25–27.

the grounds DPW had considered the *Douglas* factors and that was sufficient, was arbitrary and capricious and not in accordance with the law.[4]

III. DPW's Failure to Rationally and Conscientiously Weigh the *Douglas* Factors was not Harmless.

DPW also claims that even if it did not comply with its obligation under *Douglas* and District Regulations, any failure to do so was harmless because termination was the only available penalty for Ms. Russell's infraction. Appellee's Br. at 28–29. But termination was not the only available penalty—as DPW acknowledges in the next breath. *Id*. at 28. Instead of termination, DPW could have reassigned Ms. Russell to a different position. *Id*.; 6B DCMR § 436.9 ("personnel authority may terminate his or her 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.").

DPW attempts to brush away the availability of reassignment as an alternative sanction by arguing it was within its discretion to reassign Ms. Russell and suggesting that reassignment was not really an available option because Ms. Russell never requested it. Appellee's Br. at 28–29.

[4] Ms. Russell agrees with DPW that this case should be remanded to OEA for proper analysis of DPW's consideration of the *Douglas* factors. *See* Appellee's Br. at 28 n.7.

First, the fact that DPW had discretion to reassign Ms. Russell underscores the importance that DPW rationally and conscientiously weigh the *Douglas* factors. As Ms. Russell explained in her opening brief, the availability of reassignment as an alternative to termination is consistent with the District's policy that departments take a progressive, or graduated approach to discipline—and thus the importance of using the *Douglas* factor analysis to determine the appropriate action where a department has discretion to consider multiple available sanctions. *See* Appellant's Br. at 15-16. DPW contends its discretion allows it to skip "the progressive steps" outlined in District policy. Appellee's Br. at 4 (citing 6B DCMR § 1610.2). The regulation does indeed grant significant discretion, but it does so in acknowledgment of the fact that individual cases must be addressed on their individual merits. *See* 6B DCMR § 1610.2 ("Every situation is different and in each case management must consider a number of factors when determining an appropriate action to take. This includes, among others, consideration of the seriousness of the situation, the employee's past disciplinary history, and the employee's work history"). And again, *Douglas* is all about ensuring that departments properly and rationally employ the discretion they have to make appropriate decisions in individual cases. That DPW had discretion just underscores Ms. Russell's point that DPW's exercise of authority was arbitrary and not rationally explained.

As to DPW's second point, it cites no authority, nor has Ms. Russell found any, that requires an employee to ask for or present viable reassignment options before the department is required to consider based on a rational and conscientious weighing of the *Douglas* factors, whether reassignment is the appropriate sanction. Indeed, embodied in the concept of progressive discipline under District Regulations is the bedrock principle that the *employer* bears the burden of imposing the minimum amount of discipline necessary and appropriate under the circumstances.

There is nothing "superfluous" about the *Douglas* analysis. *See* Appellee's Br. at 29. To the contrary, it is a fundamentally important (and legally required) analysis designed to both document and ensure employers' compliance with the law. DPW failed to comply with the law and DPW does not dispute that it failed to do so. Its error is not harmless.

IV. The AJ Should Have Granted Ms. Russell an Evidentiary Hearing.

DPW's claim that Ms. Russell forfeited a right to an evidentiary hearing before the AJ because she did not request one is wrong. Appellee's Br. at 30. Although parties may request an evidentiary hearing before the AJ, the AJ also has discretion to order an evidentiary hearing. 6B DCMR § 624.2 ("If the Administrative Judge grants a request for an evidentiary hearing, *or makes a determination that one is necessary* . . . .") (emphasis added); 6B DCMR § 622.2 ("Administrative judges . . . have all powers necessary . . . including, but not limited

to, the power to . . . require an evidentiary hearing (if appropriate)"); *see* Appellant's Br. at 45.[5]

The AJ should require an evidentiary hearing "to resolve disputed questions of material fact." Appellant's Br. at 45 (quoting *Sium v. Off. of State Superintendent of Educ*., 218 A.3d 228, 234 (D.C. 2019); *Dupree v. D.C. Off. of Emp. Appeals*, 36 A.3d 826, 832–33 (D.C. 2011)). DPW suggests there were no material facts at issue because Ms. Russell failed to adequately plead a disparate treatment claim. Appellee's Br. at 31–32. And DPW tries to distinguish the OEA Board's opinion in *Barbusin v. Dep't of Gen. Servs*., OEA No. 1601-77-15 (Jan. 30, 2018), allowing a

[5] In support of DPW's related point that Ms. Russell waived this challenge by failing to raise it with the OEA Board, DPW points only to *Sium v. Office of State Superintendent of Education*, 218 A.2d 228, 233 n.7 (D.C. 2019). Appellee's Br. at 30–31. But that case is distinguishable. As noted *supra* page 9, in *Sium*, the Court concluded the Office of the State Superintendent of Education could not resurrect its defense that the OEA should have dismissed the employee's appeal as untimely either because it had neglected to seek a ruling on its motion to dismiss or because it had not raised the issue by not even filing a brief with the OEA Board. 218 A.2d at 233 n.7. Here, there is no unruled-upon argument Ms. Russell failed to challenge. Regardless, and alternatively, the Court does not need to reach whether Ms. Russell is independently entitled to an evidentiary hearing on her disparate treatment claim because, for all of the reasons explained in Ms. Russell's opening brief and herein, the Court should remand to the OEA for reconsideration of whether DPW rationally and conscientiously applied the *Douglas* factors. Whether DPW treated similarly-situated employees differently is also *Douglas* factor 6, and it was an abuse of discretion and not in accordance with the law for OEA to disregard her factor 6 argument that DPW had in fact treated similarly situated employees differently. Appellant's Br. at 29–31, 44. Thus, if the Court remands (and it should) for further proceedings, the OEA should reconsider Ms. Russell's disparate treatment allegations as part of its examination of Ms. Russell's *Douglas* arguments.

more relaxed approach to pleading a disparate treatment claim, especially when the claim is also relevant to a proper *Douglas* analysis, on the basis the employee in that case "presented evidence" to support his disparate treatment allegations. Appellee's Br. at 32. That is a distinction without a difference. Just as the employee in *Barbusin* pointed to the evidence he would adduce at a hearing and its purpose, so too did Ms. Russell. As explained in Ms. Russell's opening brief, she claimed before the AJ that:

> Prior to employee's termination, a similarly situated employee, Mr. Larry Mhoon, was also terminated for a positive marijuana test. He has been returned to the agency and assigned to a "walking route" as a parking officer. This is also a safety sensitive position. There is no explanation for the differential treatment.

App. at 37; *see* Appellant's Br. at 43–44. She also raised that Mr. Mhoon could testify as to the circumstances of his reinstatement, as could Gail Heath, the Department's former Labor Relations Office, and Gina Walton, the former Union President. App. at 39; Appellant's Br. at 44. Her proffer of that testimony was consistent with what DPW acknowledges to be the purpose of an evidentiary hearing: "to adduce testimony to support or refute facts alleged in the pleadings." Appellee's Br. at 31 (emphasis omitted) (quoting 6B DCMR § 642.1). Under those circumstances, the AJ's decision to reject Ms. Russell's disparate treatment claim without hearing the evidence that she offered to present in support of that claim was arbitrary and capricious.

CONCLUSION

For the reasons explained in Ms. Russell's opening brief and herein, 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: June 24, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June 2024, a copy of the foregoing Brief was served electronically on the counsel below via the Court's E-Filing system.

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