No. 23-CV-552

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

FRANSWELLO RUSSELL,
APPELLANT,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS, *et al.*,
APPELLEES.

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

BRIEF FOR APPELLEE THE DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

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* Authorities upon which we chiefly rely are marked with asterisks.

Regulations

Rules

Administrative Decisions

Other Authorities

STATEMENT OF THE ISSUES

Because safety-sensitive District employees—those with emergency or public-safety responsibilities—might injure themselves or others if they show up to work under the influence of drugs or alcohol, they are subject to random tests for cannabis and other controlled substances. Franswello Russell, a safety-sensitive parking enforcement officer for the Department of Public Works ("DPW"), tested positive for cannabis during one such test. Under the then-governing regulations, this result rendered her "unsuitable" for her safety-sensitive position, leaving DPW with the option to terminate her or, in the agency's discretion, reassign her to a non-sensitive position (if available). After considering a long list of factors intended to guide such penalty decisions—the "*Douglas* factors"—DPW terminated Russell.

Russell, represented by counsel, appealed to the Office of Employee Appeals ("OEA"). Before the OEA administrative judge ("AJ"), she barely mentioned the *Douglas* factors, made a cursory argument that a similarly positioned colleague had been treated differently, and never asked for an evidentiary hearing. The AJ upheld Russell's termination. In her petition to the OEA Board, still represented by counsel, Russell again made only a perfunctory argument about the *Douglas* factors—and said *nothing* about disparate treatment or the absence of an evidentiary hearing. The Board affirmed the AJ's decision.

Russell then failed to petition the Superior Court for review until roughly six months after her loss before the OEA Board—far beyond the applicable 30-day deadline. The Superior Court ruled that her petition should be dismissed as untimely. That dispositive holding goes unmentioned in Russell's opening brief in this Court. The Court also went on to reject her merits arguments. The questions presented are:

1. Whether this Court should affirm the Superior Court's holding that Russell's petition for review was untimely, given that Russell failed to argue otherwise, either in the Superior Court or in her opening brief in this Court.

2. Alternatively, whether the OEA abused its discretion or otherwise erred in addressing the limited *Douglas*-factor arguments that Russell raised in her OEA briefing.

3. Alternatively, whether the OEA abused its discretion or otherwise erred in not holding an evidentiary hearing that Russell did not request.

STATEMENT OF THE CASE

After Russell tested positive for marijuana on August 14, 2019, DPW issued a final notice of separation on December 31, 2019. SA 13-14.[1] Russell timely appealed to the OEA, App. 32-35, where she was represented by counsel. An AJ

[1] The first page of the final notice of separation appears at App. 30. What purports to be the second page of that notice, however, is in fact a separate document that appears to have been included in error.

affirmed her termination on December 3, 2020. App. 65-75. Russell, still counseled, petitioned for review by the OEA Board, which affirmed on April 22, 2021. App. 91-109. On November 18—a full six months after receiving notice of the Board's adverse decision—Russell filed a petition for review with the Superior Court under Super. Ct. Agency Rev. R. 1. SA 28-29. In opposing Russell's petition, DPW argued both that it was untimely and that it failed on the merits. SA 37-56. Russell, once again counseled, did not file a reply or otherwise respond to DPW's argument that her petition was untimely. The Superior Court denied Russell's petition on June 22, 2023, holding that it was untimely and alternatively that it failed on the merits. SA 57-66. On June 30, Russell filed a timely notice of appeal.

STATEMENT OF FACTS

1. The District's Prohibition Of Cannabis Use By Safety-Sensitive Employees.

Chapter 16 of Subtitle 6-B of the D.C. Municipal Regulations sets out the "progressive approach" by which District employees' "performance and conduct deficits" are addressed. 6-B DCMR § 1600.1.[2] The regulations set out a long but inexhaustive list of deficits—from failure to follow instructions to attendance-related offenses—that "constitute cause and warrant corrective or adverse action."

[2] Unless otherwise specified, citations to the D.C. Municipal Regulations refer to the versions in effect when Russell was terminated in 2019.

Id. § 1605.4. Among them is testing positive for an intoxicant or an unlawful controlled substance while on duty. *Id.* § 1605.4(g), (h).

The selected corrective or adverse action should be appropriate under the circumstances, *id.* § 1606.3, and managers are required to consider a list of relevant aggravating and mitigating factors, commonly known as *Douglas* factors, before imposing punishment, *id.* § 1606.2; *see Douglas v. Veterans Admin.*, 5 M.S.P.B. 313 (1981). An inexhaustive "Table of Illustrative Actions" serves as a guide for determining appropriate penalties. 6-B DCMR § 1607. Among other offenses, it lists "testing positive for an illegal drug or unauthorized controlled substance," and it counsels that first-time offenders face suspension or removal. *Id.* § 1607.2(h)(3). Although the regulations herald the District's reliance on progressive discipline as a general matter, with steps ranging from verbal counseling to adverse action, *id.* § 1610.1, "management may," when appropriate, "skip any or all of the progressive steps" outlined therein, *id.* § 1610.2.

Separate and apart from Chapter 16's provisions on "Corrective and Adverse Actions" is Chapter 4, "Suitability," which concerns a set of all-or-none measures of professional qualification. 6-B DCMR § 400 *et seq.* At the outset, "all individuals" receiving an offer of District employment "shall undergo a general suitability screening" that verifies past employment, educational background, licenses and certifications, and reference checks for character and reputation. *Id.*

§ 402.1. But some positions—known as "covered" positions—have duties and responsibilities that are unusually safety-sensitive, protection-sensitive, or security-sensitive. *Id.* § 499.1. Such positions are subject to "enhanced suitability screenings" that are more extensive and, in some cases, more frequent. *See id.* § 409.

A position classified as safety-sensitive, for example, might require an employee to "engag[e] in duties directly related to the public safety, including but not limited to, responding or coordinating responses to emergency events." *Id.* § 410.2(d). It thus would entail "duties or responsibilities [that,] if performed while under the influence of drugs or alcohol[,] could lead to a lapse of attention that could cause actual, immediate and permanent physical injury or loss of life to self or others." *Id.* § 409.2(a). As a result, applicants to safety-sensitive positions are subject to criminal background checks; traffic record checks; pre-employment drug and alcohol tests; continuing, random drug and alcohol tests; continuing "reasonable suspicion" drug and alcohol tests; and continuing post-accident or -incident drug and alcohol tests. *Id.* § 410.1.

Owing to the District's interest in a workforce that "carr[ies] out government business in a manner that honors the public trust" and promotes "the safety and security of District personnel, residents, visitors, and government property," *id.* § 400.1, "an employee deemed unsuitable pursuant to [Chapter 4] will be subject to immediate removal" from his covered position, *id.* § 400.4. As of 2019, that meant

that a positive drug or alcohol test result caused an employee to "be deemed unsuitable" and was "cause to separate [the] employee from a covered position." *Id.* § 428.1(a). Indeed, the regulations identified just two possible courses when an employee was "deemed unsuitable": (1) "the personnel authority may terminate his or her employment pursuant to the appropriate adverse action procedure"; or (2) "[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. The reassignment option, however, is "[a]t the discretion of the agency." *Id.* § 400.4.

On September 13, 2019, Mayor Muriel Bowser issued Administrative Order 2019-81 ("the Mayor's Order"), which kickstarted a reform of the D.C. Department of Human Resources' ("DCHR's") policies and procedures relating to employee use of cannabis. *See* App. 110-19 (copy of the Mayor's Order). In some respects, the Mayor's Order was reasonably understood to soften the consequences of employees' noncriminal marijuana use. An applicant disclosing recent cannabis use might see his pre-employment drug test postponed, App. 114 (Mayor's Order § IV.E.4); employees not in safety-sensitive positions would no longer receive random drug tests, App. 115 (*id.* § IV.F.2); and even safety-sensitive employers were to "consider alternatives to separation" in cases where the employee acknowledged a cannabis dependence or addiction, App. 117 (*id.* § IV.H.1). Nonetheless, the Mayor's Order did not purport to alter the regulations for ordinary cases of unauthorized cannabis

use by a safety-sensitive employee. The Mayor's Order expressed concern that employees' "best efforts . . . can by impaired by cannabis use," App. 111 (*id.* § III.G), and accordingly reaffirmed that "[s]afety-sensitive positions are subject to heightened suitability standards, including pre-employment and random drug and alcohol testing, because employees occupying those positions could cause permanent physical injury or loss of life if under the influence of or impaired by drugs or alcohol," App. 112 (*id.* § IV.A.2). In fact, safety-sensitive employees testing positive for cannabis "will be presumed to be in violation of relevant District and/or federal laws and policies regarding employment and the use of drugs." App. 116 (*id.* § IV.F.7).

In the wake of the Mayor's Order, DCHR amended various regulations within Chapters 4 and 16. A new 6-B DCMR § 429, effective September 11, 2020, provided that a safety-sensitive employee who randomly tests positive for cannabis, "with no additional evidence of impairment," will generally be subject to suspension and follow-up drug testing after a first offense, and deemed unsuitable for safety-sensitive employment after a second offense. *Id.* § 429.2. Even as of September 2020, these proposed penalties "shall only be used as a guide," *id.* § 429.3, and "employees in violation of District of Columbia cannabis laws"—such as those who possess cannabis without being enrolled in a medical marijuana program, *see id.* § 429.7—"may be found unsuitable" regardless of the new penalty

recommendations, *id.* § 429.6. There is also no suggestion that such provisions operate retroactively.

2. DPW Terminates Russell's Employment.

As a parking enforcement officer for DPW, Russell primarily patrolled an assigned area on foot or by car, recording information onto a handheld computer and citing illegally parked vehicles. SA 1. Her ambit also extended somewhat further. Malfunctioning parking meters, conflicting or missing signs, and emergency situations always merited a report to supervisors or dispatch centers; so, too, did visitor, business, or government requests for parking enforcement. SA 1. Her official job description emphasized the necessity of walking and driving, the requirement that a parking enforcement officer possess a valid motor vehicle operator's permit, and the "substantial risks" engendered by "exposure to serious harassment and/or attack from hostile members of the public protesting the issuance of citations." SA 3.

In October 2018, Russell signed a form concerning "Individual Notification of Requirements: Drug and Alcohol Testing" for safety-sensitive employees. App. 9.[3] The form cautioned that "you have been appointed to . . . a covered position that makes you subject to drug and alcohol testing," and that, as the occupant of a "Safety

[3] The signed copy of this form in the record is difficult to read. A blank copy is available at https://tinyurl.com/pvardc42 (last accessed April 29, 2024).

Sensitive" position, Russell would be subject to termination upon a positive test for marijuana use. App. 9. An all-caps, bold, underlined sentence warned that, in addition to other drugs, "**MARIJUANA USE IS ALSO PROHIBITED**." App. 9.

Russell was selected for a random drug test in August 2019 that returned a positive result for marijuana. App. 14. Russell has never disputed the accuracy of that result. In late September 2019, DPW served on Russell a notice of proposed separation containing the single charge of "Positive drug test result" and citations to 6-B DCMR §§ 435.6 and 1605.4(h). SA 11-12.[4] As the notice explained, "[w]henever an employee occupies [a 'covered position' under Chapter 4 of the District Personnel Manual] and tests positive for an illicit drug or alcohol, he or she is deemed 'unsuitable' for the position[.] . . . Regrettably, DCHR is compelled to propose this adverse action because you occupy a covered position, tested positive for marijuana, and, therefore, are unsuitable to continue serving in your present role." App. 17.

Attached to the notice was a five-page Rationale Worksheet outlining a compliance officer's consideration of the 12 *Douglas* factors, most of which DPW found aggravating. App. 19-23. In determining Russell's proposed punishment, the

[4] The first page of the proposed notice of separation appears at App. 17. What purports to be the second page of that notice, however, is in fact a separate document that appears to have been included in error.

compliance officer ultimately relied upon the District's zero-tolerance policy against drug use by safety-sensitive employees. App. 23.

Russell was entitled to file a written response, in which she was obliged to "raise every defense, fact, or matter in extenuation, exculpation, or mitigation of which [she] ha[d] knowledge or reasonably should have [had] knowledge." 6-B DCMR § 1621.6; *see id.* ("The failure of the employee to raise a known defense, fact, or matter shall constitute a waiver of such defense, fact, or matter in all subsequent proceedings."). Russell's written response raised a single excuse: that at the time of her positive test, she had obtained a valid referral for medical marijuana "on grounds of depression and anxiety," but had not actually applied for a medical marijuana card "due to financial duress." App. 24. Russell did not ask to be reassigned to a non-sensitive position within DPW as an alternative to termination. *See* App. 24.

Unpersuaded, a hearing officer—pointing to Russell's advance notice that a safety-sensitive employee's marijuana use was a fireable offense, and to the availability of separation among the penalties set forth in the District Personnel Manual's "Table of Illustrative Actions"—recommended Russell's removal. App. 25-29. On December 31, 2019, the deciding official adopted the hearing officer's findings and conclusion, and Russell was terminated effective January 3, 2020. SA 13-14.

3. Russell's Appeal To The OEA.

A. The proceedings before the administrative judge.

Russell timely appealed her termination to the OEA, where she was represented by counsel. In the first-stage proceedings before the AJ, Russell filed two written submissions relevant here. The first was a short statement for the prehearing conference. App. 36-40; *see* 6-B DCMR § 623 ("Prehearing Conferences").[5] In it, Russell admitted that she had tested positive for marijuana. App. 36. She asserted, however, that before her termination, "a similarly positioned 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. 37. Russell also previewed her legal arguments that her termination was improper. App. 37-38.

She made those arguments in full in her merits brief to the AJ. App. 57-63. Russell first argued that her termination was not consistent with the Mayor's Order. App. 59-61. She also briefly argued that DPW had not considered "the option of reassigning the employee to another position for which she was qualified." App. 60

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[5] Although the table of contents of the OEA record states that this document (which itself contains no date) was filed on August 8, 2020, that is wrong. Per the AJ's first scheduling order, the parties submitted their prehearing statements on July 2, 2020, shortly before the prehearing conference was held on July 7. SA 15-17.

(citing 6-B DCMR § 435.9). She then suggested that the revised, 2020 suitability regulations somehow made her termination unreasonable. App. 62-63. Finally, she argued that the official who proposed her termination had not been properly designated. App. 63. Nowhere in her brief did she mention the term "*Douglas* factors," let alone discuss or challenge DPW's analysis of those factors.

In December 2020, the AJ, having found that an evidentiary hearing was not required, issued an initial decision upholding Russell's removal. App. 65-73; *see* App. 65 (finding no hearing required). The decision outlined the factual and procedural history of the case, the parties' arguments, and a long line of factual concessions by Russell: that she knew she might be tested, that she knew a positive drug test would result in separation, that she never informed DPW of her marijuana use, and that obtaining a medical marijuana card would not have shielded her from termination anyway. App. 67. Considering these factors, the AJ reasoned that Russell's positive test constituted "cause for purposes of Chapter 16," and Russell was "unsuitable for District employment" under 6-B DCMR § 435.6. App. 67. Citing 6-B DCMR §§ 100.3 and 435.9, the AJ also rejected Russell's assertions that the proposing and deciding officials had acted outside the scope of their authority. App. 68.

Next, the AJ affirmed the penalty of termination, noting that 6-B DCMR § 1607 authorizes removal of any employee upon a first offense and that 6-B DCMR

§ 428.1 subjects safety-sensitive employees to immediate separation upon a positive drug test. App. 68. In the AJ's view, termination was not only permissible here but effectively the only available penalty given the safety-sensitive nature of Russell's position. App. 68-69. The AJ distinguished between the Table of Illustrative Actions in 6-B DCMR § 1607, which "notably does not account for employees in safety-sensitive positions," and 6-B DCMR § 435, "which does specifically address safety-sensitive positions [and] only allows for removal or reassignment to a non-covered position." App. 69. And as for reassignment, "it is totally discretionary on the part of the agency" and will not even be *possible* unless "a position [is] available at the time, and the employee [is] qualified to perform the duties of that particular non-covered position." App. 69.

The AJ then turned to Russell's suggestion of disparate treatment, rejecting it as unsupported. Noting that a claim of disparate treatment triggers a burden-shifting scheme weighing the genuine similarity of two employees' misconduct and genuine differences in their treatment, the AJ observed that Russell had failed to sufficiently allege in the first instance that she and Larry Mhoon were similarly situated. App. 70-71. Although Russell had described her colleague as "similarly positioned," she had not identified his position, the course of his discipline, the time period during which he had worked, or the circumstances of his "return" to the agency—a claim requiring further explanation, given that Russell had alleged that

he had been terminated. App. 71; *see* App. 37 (Russell asserting that Mhoon "was also terminated for a positive marijuana test"). Without even allegations as to those four points, the AJ concluded, Russell had failed to establish a prima facie case of disparate treatment. App. 71.

Finally, the AJ dismissed Russell's reliance upon the Mayor's Order. As the AJ noted, while abstractly promoting progressive discipline, the order did not amend the applicable law. App. 71. Indeed, the order itself reiterated "that the use of cannabis still subjects a safety-sensitive employee to separation from employment." App. 72. Nor had the Mayor's Order in any way abrogated the warning against marijuana use that Russell had received and signed. App. 72. Despite those warnings, Russell "showed that she was willing to compromise the safe and efficient delivery of her [parking enforcement officer] services," and in so doing "jeopardized both the Agency[']s and the public's trust." App. 72.

B. The proceedings before the OEA Board.

Still represented by counsel, Russell petitioned for review by the OEA Board. App. 77-89. Her lead argument, not relevant here, was that the deciding official lacked the proper authority to terminate her. App. 83-85. Next, she argued that DPW should have considered lesser penalties, especially given the Mayor's Order's endorsement of progressive discipline. App. 85-86. The final section of her petition nominally disputed whether DPW "had Properly Considered the Douglas Factors in

Assessing the Appropriate Penalty." App. 86 (section heading). Most of this section, however, discussed the history of marijuana legalization, the Mayor's Order, and the 2020 amendment of the suitability regulations. *See* App. 86-89. Russell did not articulate any specific challenges to DPW's analysis of the *Douglas* factors. Instead, she simply wrote: "The review of the Douglas Factors was pro forma, cursory and impersonal. . . . Employee was a long-term employee, with a clean disciplinary record and positive personnel evaluations." App. 87. She conceded in a footnote that "her financial and domestic issues" had not been addressed in the briefs to the AJ, so "this argument will not be raised here." App. 87 n.6. Of note, Russell's petition to the Board neither mentioned disparate treatment nor argued that the AJ should have held an evidentiary hearing. It likewise did not dispute the AJ's conclusion that whether to reassign (rather than terminate) an unsuitable employee is "totally discretionary."

In an April 2021 Opinion and Order, the Board affirmed the AJ's decision and upheld Russell's termination. App. 91-108. As relevant here, the Board first explained that termination was a lawful penalty. Testing positive for an unlawful controlled substance while on duty is cause for termination. App. 98-100 (citing 6-B DCMR §§ 428.1(a), 435.6, 1605.4(h)). Under Chapter 16's penalty table, DPW "had the ability to impose a penalty from suspension to removal." App. 101. And under Chapter 4, which was applicable because Russell's was a safety-sensitive

position, termination was "the only penalty for a positive drug test result." App. 101 (citing 6-B DCMR § 435.9). To comply with Chapter 4, in other words, DPW "had the choice to terminate [Russell] or reassign her." App. 101. The Board agreed with the AJ's unchallenged conclusion that reassignment is "totally discretionary" and thus DPW "had no obligation to" reassign Russell. App. 101 n.27.

Despite having concluded that "the only penalty" available was termination, the Board briefly addressed the *Douglas* factors. App. 102-03. The Board noted that the record clearly reflected that DPW had analyzed the factors and provided a rationale for each. App. 102-03. Russell's "mere disagreement" with DPW's analysis was not sufficient to overturn its decision. App. 103.

Finally, given that Russell never raised the issue, the Board did not address disparate treatment or the AJ's failure to hold an evidentiary hearing.

4. Russell's Dismissed And Unappealed Civil Action In The Superior Court.

The OEA Board's Opinion and Order closed with a declaration that "[e]ither party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia" and a notice that "the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1." App. 108. That rule requires that "the petition for review must be filed within 30 days" after notice is given of the order to be reviewed. Super. Ct. Agency Rev. R. 1.

Instead of petitioning the Superior Court for review of an agency decision, however, in May 2021 Russell filed a complaint in the Court's Civil Actions Branch, listing DPW (rather than the OEA) as the defendant. Russell attached a one-page narrative of her case, paperwork pertaining to the recent unpaid suspension of a DPW parking enforcement officer named James Wilson, and a copy of the OEA Board's decision. SA 20-27. After DPW was eventually served, it moved to dismiss the case as an improper attempt to challenge the OEA's decision. In an oral ruling, the court granted DPW's motion and dismissed the case. *See* SA 39, 60. Russell did not appeal that dismissal, which she now concedes "is not a subject of the present appeal." Br. 18 n.4.

5. Russell's Untimely Petition For Review In The Superior Court.

On November 18, 2021, roughly seven months after the OEA Board's decision, Russell filed a petition for review challenging that decision. SA 28-29. Although Russell filed her petition *pro se*, she obtained counsel by the time she filed her merits brief. In that brief, she argued that the OEA did not fully consider the Mayor's Order's impact on the *Douglas* analysis, and that her claims of disparate treatment at least demanded an evidentiary hearing. SA 30-36.

DPW responded with a combined motion to dismiss and merits brief. It argued first and foremost that Russell's petition should be dismissed as untimely, given that it had been filed almost six months late. SA 38-39. In the alternative,

DPW contended that the petition should be denied on the merits. There was no basis for the AJ to grant an evidentiary hearing, and the OEA's decision to uphold Russell's termination was in every other respect consistent with the evidence and the law. SA 44-55.

Russell did not respond to DPW's motion to dismiss or reply to its arguments for affirmance.

In June 2023, the court issued an order denying the petition for review, ruling in DPW's favor on both its untimeliness argument and the merits. SA 57-66. First, the court held that the petition was "indeed untimely" by almost six months SA 61. In the alternative, however, the court agreed that DPW had appropriately "determined that safety sensitive employees are held to a high standard due to the nature of their employment and their ability to cause serious injury or loss of life," and that DPW's termination of Russell was "not in contravention of the Municipal Regulations" in place at the time of her separation. SA 62. Moreover, in response to Russell's asserted entitlement to a hearing, the court opined that no provision of law or regulation "require[s] . . . an Administrative Judge . . . to set an evidentiary hearing in any given circumstance," and that "[t]he onus is on the parties to make the request for a hearing if a hearing would be beneficial to their case, which [Russell] failed to do." SA 64.

STANDARD OF REVIEW

This Court "review[s] agency decisions on appeal from the Superior Court the same way [it] review[s] administrative appeals that come to [it] directly." *Dupree v. D.C. Dep't of Corrs.*, 132 A.3d 150, 154 (D.C. 2016). "Thus, in the final analysis, confining [itself] strictly to the administrative record," the Court "review[s] the OEA's decision, not the Superior Court's." *Id.* (internal quotation marks omitted). More precisely, when a litigant appeals an initial decision to the OEA Board, "it is the [Board]'s final decision and not that of the ALJ that [is] reviewed by this court." *D.C. Dep't of Pub. Works v. Colbert*, 874 A.2d 353, 358 (D.C. 2005).

The AJ's findings of fact are binding at all subsequent levels of review unless they are not supported by substantial evidence. *Id.* "Questions of law, including questions regarding the interpretation of a statute or regulation, are reviewed *de novo*." *Dupree*, 132 A.3d at 154.

SUMMARY OF ARGUMENT

This Court should affirm the judgment of the Superior Court denying Russell's petition for review.

1. It is undisputed that Russell filed her petition for Superior Court review six months late, contrary to what Superior Court Agency Review Rule 1 requires. Given that the Superior Court denied Russell's petition for appeal on the basis of her late filing, this Court may affirm on the same grounds.

In fact, Russell has declined to raise any argument, either in the trial court or in this Court, that her petition was timely. When the District moved to dismiss her Superior Court petition as violative of Rule 1, she did not respond to the motion. When the Superior Court denied the petition on the grounds urged by the District, she omitted any discussion of the petition's untimeliness on appeal, even though it was the principal basis for the Superior Court's decision. She has thus waived and forfeited any argument that her petition was timely.

Were Russell to address the issue in her reply, she would be foreclosed by another black-letter principle of appellate review: that a party may not raise new arguments beyond its opening brief.

2. Although the foregoing is a sufficient basis on which to affirm the Superior Court, DPW would also be entitled to affirmance as to the claims actually raised in Russell's brief. First, Russell argues that the OEA failed to critically examine DCHR's *Douglas* analysis, which, in her view, contained factual errors and weak reasoning. Yet she raised none of her briefed assertions before the AJ or the OEA Board, apart from a description of the termination process as "pro forma" that was itself nominal, so she failed to exhaust these arguments.

Anyway, this Court need determine only whether the Board's decision was arbitrary and capricious—not whether it would have analyzed the *Douglas* factors in the same fashion as DPW. Moreover, as the case law makes clear, the Board must

approach its own decisions with deference to the agency's discretion in managing its workforce. The upshot is that the Board was required only to address those claims contemporaneously raised by Russell. That is precisely what it did.

If there were legal error in this review, any such error would be harmless. Under the regulations in place when Russell received her notice of termination, i.e., the final agency decision, a positive drug or alcohol test rendered a safety-sensitive employee "unsuitable" and subject to immediate removal. In other words, regardless of how the agency calibrated the *Douglas* factors, the District's zero-tolerance policy against safety-sensitive employees' drug use would inevitably control.

3. Russell's second merits argument—that the AJ should have held an evidentiary hearing on her disparate-treatment claim—is likewise forfeited. Russell, still represented by counsel, did not request a hearing, object to the AJ's reliance on the papers, or raise a related claim on appeal to the OEA Board. Her petition only raised claims about jurisdiction, progressive discipline, and DCHR's "pro forma" *Douglas* analysis.

In any case, the AJ's decision not to order a hearing was a reasonable one. Russell offered a description of a colleague as "similarly positioned," without meaningful elaboration as to whether he was safety-sensitive or maintained a similar patrol. She did not identify whether he had worked or been disciplined during a similar time period. She did not identify the circumstances of his "return" to the

agency. Given that the purpose of an OEA hearing is to adduce testimony to support or refute facts alleged in pleadings, Russell should have proffered specific details showing that she and the colleague were similarly situated.

ARGUMENT

Having added, dropped, and altered numerous claims over the course of five stages of litigation, Russell briefs two claims on appeal that were both forfeited. Yet this Court may ignore those faults in favor of a more decisive one: Russell's petition in Superior Court, the denial of which is the subject of this appeal, was filed six months late. Furthermore, despite a motion to dismiss and a denial of her petition as untimely, Russell declined every chance to excuse her late filing, and she has continued to fail to address that issue on appeal.

I. Russell's Petition For Superior Court Review Was Untimely, And She Has Both Forfeited And Waived Any Argument To The Contrary.

"Unless an applicable statute provides a different time frame"—and none does here—a petition for review of agency action by the Superior Court "must be filed within 30 days after notice is given, in conformance with the rules or regulations of the agency, of the order or decision sought to be reviewed." Super. Ct. Agency Rev. R. 1. Here, the OEA Board's decision was issued on April 22, 2021. App. 91-109. The deadline for Russell's petition for review was therefore Monday, May 24, or at most a few days later. *See* D.C. App. R. 15(a)(2); Super. Ct. Civ. R. 6(a). Yet Russell did not file her petition until November 18, almost six months too late. The

Superior Court therefore correctly held that the petition was "indeed untimely." SA 61. This untimeliness, by itself, is enough to require affirmance of the Superior Court's judgment.

Any possible argument otherwise is both forfeited and waived. *First*, Russell forfeited any such argument by failing to raise it in the Superior Court. "It is fundamental that arguments not raised in the trial court are not usually considered on appeal." *Thornton v. Norwest Bank of Minn.*, 860 A.2d 838, 842 (D.C. 2004). Here, DPW's motion to dismiss clearly challenged the timeliness of Russell's petition. If Russell had a factual explanation for her tardiness, a legal theory that rendered Superior Court Agency Review Rule 1 inapplicable, or some other meritorious excuse for her six-month delay, she was obliged to set it forth. She did not. This case is thus similar to *Thompson v. D.C. Department of Employment Services*, 848 A.2d 593 (D.C. 2004), in which an employee filed an untimely administrative appeal of an unfavorable workers' compensation order and then did not oppose his employer's motion to dismiss the appeal as untimely. *Id.* at 595. This Court declined to consider his explanation for the late administrative appeal, holding that it "was not adequately preserved for our review" because the employee "did not respond to intervenor's motion to dismiss" or otherwise "address[] the timeliness issue" in the proceedings below. *Id.*

Second, on top of this forfeiture below, Russell has not even challenged the trial court's untimeliness ruling in her opening brief in this Court. "The first task of an appellant is to explain to [the appellate court] why the [trial] court's decision was wrong." *Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015). Russell shirked that task, merely asserting without support or explanation that her Superior Court petition was "timely." Br. 18.[6] Her failure is fatal, for "[i]t is a basic principle of appellate jurisprudence that points not urged on appeal are deemed to be waived." *Rose v. United States*, 629 A.2d 526, 535 (D.C. 1993). That Russell might address this issue for the first time in her reply brief would not cure the omission. It is an "established and controlling principle of appellate review that a party may not raise new arguments in its reply brief." *In re Huber*, 708 A.2d 259, 260 n.1 (D.C. 1998).

For the reasons explained below in Parts II and III, Russell's merits arguments challenging the OEA's decision are unpersuasive. But because she has wholly failed to dispute the untimeliness of her Superior Court action, the Court need not and should not reach those issues. It should affirm on this basis alone.

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[6] This sentence of Russell's brief is followed by a citation to App. 76, which is the cover letter to her petition to *the OEA Board*, not the Superior Court.

II. The OEA Did Not Abuse Its Discretion Or Otherwise Err In Addressing Russell's Perfunctory Argument About the *Douglas* Factors.

Even if the Court reaches the merits of the OEA's decision, Russell's merits arguments are themselves forfeited. Her primary argument is that the OEA failed to critically examine DPW's *Douglas* analysis, which in Russell's view was flawed in several respects. But Russell failed to present anything like her current arguments to the OEA, so the OEA cannot be faulted for not addressing them. In any event, any possible *Douglas*-factor error was harmless.

A. The OEA adequately addressed the conclusory *Douglas*-factor argument that Russell actually presented.

Russell's *Douglas* argument in this Court fundamentally asks the wrong question. This Court's task is not to determine whether "[t]he Department's factor 5 analysis" relied too heavily "on assumptions and generalizations," Br. 27, or whether "[t]he Department's factor 8 analysis" "engage[d] with the questions the factor poses," Br. 31. Nor is it to reassess any of the other factors whose handling Russell now disputes. *See* Br. 23-43. The only question before this Court is whether the decision of the OEA Board was arbitrary and capricious. And the answer depends on what arguments Russell in fact presented to the Board. "An agency cannot be faulted," after all, "for failing to address . . . issues that were not raised by" a party. *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001); *see, e.g.*, *Stephens v. Dep't of Lab.*, 384 F. App'x 5, 6 (D.C. Cir. 2010) ("Stephens

did not make this argument before the agency, which did not act arbitrarily in failing to consider it *sua sponte*.").

> Indeed, administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented."

Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council, Inc., 435 U.S. 519, 553-54 (1978). For this reason, "[i]n the absence of exceptional circumstances, a reviewing court will refuse to consider contentions not presented before the administrative agency at the appropriate time." *D.C. Hous. Auth. v. D.C. Off. of Hum. Rts.*, 881 A.2d 600, 611 (D.C. 2005) (internal quotation marks omitted).

Neither before the AJ nor before the OEA Board did Russell challenge DPW's *Douglas* analysis in any way that resembles the assertions in her brief to this Court. Russell's counseled brief before the AJ never even used the phrase "*Douglas* factor" (or cited *Douglas*), much less argued that DPW's *Douglas* analysis was erroneous in particular respects. *See* App. 57-63. Her petition to the OEA Board said only negligibly more: "The review of the Douglas Factors was pro forma, cursory and impersonal. They were not even aware of her proper gender. Employee was a long-term employee, with a clean disciplinary record and positive personnel evaluations." App. 87. Russell did not support these assertions with record citations, *contra* 6-B DCMR § 637.4 (requiring objections "supported by reference to the

record"), and in fact her most recent evaluation noted several serious shortcomings, *see* SA 4-10. She did not explain how the mistake about her gender could have mattered. And she raised no complaint about any particular *Douglas* factor.

In the face of this limited argument, the OEA Board's analysis was not arbitrary and capricious. It correctly observed that DPW had considered and weighed each of the *Douglas* factors, and that Russell offered nothing more than "mere disagreement," which was insufficient to set aside DPW's decision. App. 102-03. The OEA's role, after all, "is not to insist that the [*Douglas*] balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce." *Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985) (quoting *Douglas*, 5 M.S.P.B. at 332). Especially given this limited role, the Board had no obligation to *sua sponte* analyze each individual *Douglas* factor. The brand-new, factor-by-factor argument in Russell's brief has thus been forfeited. *See Brown v. D.C. Pub. Emp. Rels. Bd.*, 19 A.3d 351, 358 (D.C. 2011) ("On a clearer record we might be in a

position to consider the *Douglas* factors, but on the actual record before us we conclude that appellant has waived his *Douglas* argument.").[7]

B. Any *Douglas* error was harmless because termination was the only available penalty.

Even if there were legal error in the OEA's *Douglas* analysis, and if such an assertion had not been forfeited, any error would be harmless. Under the regulations applicable at the time of Russell's positive test and through her termination, a positive drug or alcohol test result rendered a safety-sensitive employee "unsuitable" and "subject to immediate removal." 6-B DCMR §§ 400.4, 428.1(a).[8] Viewed in isolation, "subject to immediate removal" might mean only that removal is a *permissible* penalty, if justified under a *Douglas* analysis. But Section 435.9 (as it existed in 2019) made clear that the only alternative to removal was reassignment: "Instead of terminating the employee [deemed unsuitable], the personnel authority may reassign the employee to a position for which he or she is qualified and suitable." 6-B DCMR § 435.9. Any doubt on this score is erased by the preamble to the 2018 rulemaking in which this language was adopted. The purpose of this

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[7] If the Court decides that Russell should be permitted to radically reshape her *Douglas*-factor argument—and also rejects DPW's harmlessness argument, *see infra* Part II.B—it should remand to the OEA to address that argument in the first instance.

[8] Russell has never argued that the new suitability regulations adopted in September 2020 have retroactive effect, and they do not.

version of Section 435.9 was "to clarify that an employee deemed unsuitable *will be removed* unless the employee is reassigned to a non-covered position in the same agency for which he or she is qualified and otherwise suitable." 65 D.C. Reg. 12445, 12445 (Nov. 9, 2018) (emphasis added). In short, absent reassignment, removal was the only penalty possible under the suitability regulations, making the *Douglas* analysis superfluous—and any error harmless.

As for reassignment, the OEA correctly held that it is "totally discretionary" on the agency's part. App. 69 (AJ), 101 n.27 (Board); *see* 6-B DCMR § 400.4. Russell has both forfeited and waived any contrary argument by not making it in her petition to the Board or her opening brief here. Moreover, Russell did not ask for reassignment in her response to the notice of proposed termination. *See* App. 24. And despite the availability of discovery in the OEA, Russell produced no evidence that another position with DPW for which she was qualified and suitable was even available at the time of her termination. *See* 6-B DCMR § 620 (authorizing discovery).

III. Russell Abandoned Her Disparate-Treatment Claim And Any Related Request For An Evidentiary Hearing.

Russell's second merits argument is that the AJ should have held an evidentiary hearing on her disparate-treatment claim. But this claim both is forfeited and lacks merit.

To start, Russell forfeited any conceivable right to an evidentiary hearing twice. She did so first before the AJ. The OEA's regulations place the onus on parties to "request the opportunity for an evidentiary hearing to adduce testimony to support or refute any fact alleged in a pleading," 6-B DCMR § 624.1, after which the AJ may "grant[]" or deny the "request," *id.* § 624.2. Although Russell's prehearing conference statement contained a list of potential witnesses per the AJ's instructions, App. 38-39; *see* SA 16, Russell never in fact requested an evidentiary hearing. Instead, at the prehearing conference the parties "agreed" to file a series of briefs. SA 18. Nowhere in Russell's brief did she suggest that an evidentiary hearing was necessary. *See* App. 57-65; *cf. Barbusin v. Dep't of Gen. Servs.*, OEA No. 1601-77-15, at 4 (Jan. 30, 2018) (employee's brief to AJ "requested that the suspension be overturned, or in the alternative, that the AJ conduct an evidentiary hearing"), *available at* https://tinyurl.com/mtca97nw (last accessed May 2, 2024). The AJ cannot be faulted, then, for not holding one.

Moreover, Russell did not challenge the lack of an evidentiary hearing in her petition to the Board. *See* App. 77-89; *cf. Barbusin*, OEA No. 1601-77-15, at 7 (employee's petition sought remand for an evidentiary hearing). Indeed, she did not mention disparate impact or Larry Mhoon at all. This forfeiture was independently fatal under *Sium v. Office of State Superintendent of Education*, 218 A.3d 228 (D.C. 2019). *Sium* reiterated that in an OEA case that has gone to the Board, this Court

reviews *the Board's* decision, not the AJ's. *Id.* at 234. Even if a party properly puts a claim before the AJ (which Russell did not), she "abandon[s] this claim by failing to raise the issue . . . before the OEA Board." *Id.* at 233 n.7. Russell thus undeniably abandoned her disparate-impact claim and any related right to an evidentiary hearing.

In any case, even if this double forfeiture were overlooked, the AJ's decision not to hold an evidentiary hearing was reasonable. "To establish disparate penalties, the appellant must show that there is 'enough similarity between both the nature of the misconduct and . . . other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently.'" *Barbusin*, OEA No. 1601-77-15, at 11 (quoting *Boucher v. U.S. Postal Serv.*, 2012 M.S.P.B. 126, ¶ 20). If the employee makes this showing, "then the burden shifts to the agency to produce evidence that establishes a legitimate reason for imposing a different penalty on the employee." *Id.* Valid comparators "should be limited to those employees whose misconduct and/or other circumstances closely resemble those of the appellant." *Singh v. U.S. Postal Serv.*, 2022 M.S.P.B. 15, ¶ 13.

Given that the purpose of an evidentiary hearing is "to adduce testimony to support or refute facts *alleged in pleadings*," 6-B DCMR § 624.1 (emphasis added), Russell needed to proffer specific details that, if confirmed, would establish that she and Mhoon were in the same professional and disciplinary boat. She did not. She

described him as "similarly positioned," without elaboration as to whether he was safety-sensitive or maintained a similar patrol; she did not say whether they had worked or been disciplined during a similar time period; and she failed to identify the circumstances of his "return" to the agency after he too was "terminated." These nebulous allegations, which seem to involve the *same* penalty, at least to start, were not enough to justify an evidentiary hearing.

Russell cites the OEA Board's decision in *Barbusin* for the principle that "a more relaxed approach" to pleading sufficiency "can be appropriate, particularly where, as here, the disparate treatment claim is also relevant to a proper *Douglas* analysis." Br. 44. But Russell reads too much into the Board's opinion. It remanded for reconsideration of a disparate-treatment claim because the employee had "presented evidence"—namely, a deposition transcript—showing that at least one other colleague with the same title was neither investigated nor disciplined for committing the very same traffic violation as Barbusin and, like Barbusin, ending up in a single-car accident. *Barbusin*, OEA No. 1601-77-15, at 12. Russell's mere allegations were not "evidence"—and, in any event, lacked the specificity described by the OEA Board. The AJ had no obligation to order a hearing to confirm facts never alleged.

CONCLUSION

This Court should affirm the judgment of the Superior Court.

Respectfully submitted,

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ADDENDUM

TABLE OF CONTENTS

6-B DCMR § 400 (2018)

400 EMPLOYEE SUITABILITY POLICY

400.1 The District government maintains a highly qualified and diverse workforce comprised of suitable individuals of moral character and dedication who carry out government business in a manner that honors the public trust. These employees are committed to promoting the safety and security of District personnel, residents, visitors, and government property.

400.2 It is the policy of the District government to assess the suitability of each applicant, appointee, volunteer, and employee through uniform background checks and drug and alcohol testing, as deemed necessary, which meet the District's need for flexible personnel administration, government accountability, individual privacy, and other constitutionally protected rights.

400.3 General background checks, criminal background checks, and mandatory drug and alcohol testing shall be utilized to ensure that each applicant, appointee, volunteer, and employee possesses the character and background necessary to enhance the integrity and efficiency of the District government.

400.4 Unless otherwise specified in this chapter, an employee deemed unsuitable pursuant to this chapter, will be subject to immediate removal. At the discretion of the agency, the employee may be reassigned within the same agency to a non-covered position for which he or she is qualified and otherwise suitable.

428 MANDATORY DRUG AND ALCOHOL TESTING – POSITIVE DRUG OR ALCOHOL TESTS RESULTS

428.1 Unless otherwise required by law, and notwithstanding Subsection 400.4, an employee shall be deemed unsuitable and there shall be cause to separate an employee from a covered position as described in Subsections 435.9 and 439.3 for:

(1) A positive drug or alcohol test result;

(2) A failure to submit to or otherwise cooperate with drug or alcohol testing; or

(3) In the case of an employee who acknowledged a drug or alcohol problem as specified in Subsection 426.4, failure to complete a counseling or rehabilitation program(s), or a positive return-to-duty drug or alcohol test result.

428.2 The program administrator shall rescind a conditional offer or decline to make a final offer of employment to an appointee subject to pre-employment testing if he or she:

(a) Fails or otherwise refuses to submit to a required drug or alcohol test;

(b) Fails or otherwise refuses to follow instructions given during a required drug or alcohol test; or

(c) Has a positive drug or alcohol test result.

429 MANDATORY DRUG AND ALCOHOL TESTING – PRE-EMPLOYMENT

429.1 As a condition of employment, appointees to safety and protection sensitive positions shall be required to pass a pre-employment drug test in accordance with this section. In addition, the program administrator may require a pre-employment alcohol test.

429.2 For safety and protection sensitive positions, pre-employment drug and alcohol testing shall be conducted after a conditional offer of employment is made, but before the appointee's effective date of appointment.

429.3 Pre-employment drug and alcohol testing shall be carried out pursuant to Sections 425 through 428.

435 SUITABILITY DETERMINATIONS

435.1 The information contained in this section shall only apply to enhanced suitability screenings.

435.2 The program administrator shall establish and maintain written suitability assessment determinations for enhanced suitability screenings.

435.3 The program administrator shall make a suitability determination within fifteen (15) days after receiving all enhanced suitability screening information necessary to make the determination.

435.4 The final suitability determination shall establish whether:

(a) For appointees, if a conditional offer of employment should be withdrawn;

(b) For volunteers, if the individual is suitable to provide voluntary services; and

(c) For employees, if the individual may be retained in their position of record.

435.5 For appointees to and employees in safety sensitive positions in a covered child or youth service agency, as defined by D.C. Official Code § 4-1501.02(3) (2012 Repl.), the final suitability determination shall establish whether the appointee or employee presents a present danger to children or youth.

435.6 In accordance with Section 428, a positive drug or alcohol test shall render an individual unsuitable for District employment and constitute cause for purposes of Chapter 16 of these regulations.

435.7 The program administrator shall notify the employing agency of the final suitability determination.

435.8 If an appointee is deemed unsuitable based on an enhanced suitability screening, any conditional employment offer shall be withdrawn and he or she shall be notified of the final suitability determination.

435.9 If an employee is deemed unsuitable, the personnel authority may terminate his or her employment pursuant to the appropriate adverse action procedure as specified in this subtitle or any applicable collective bargaining agreement. Instead of terminating the employee, the personnel authority may reassign the employee to a position for which he or she is qualified and suitable.

435.10 If a volunteer is deemed unsuitable for voluntary service, the voluntary service process shall be terminated and he or she shall be notified of the suitability determination.

435.11 Post-accident and incident drug or alcohol testing results shall be provided to the Chief Risk Officer, Office of Risk Management, for purposes of the Public Sector's Workers Compensation Program, upon request.

CERTIFICATE OF SERVICE

I certify that on May 2, 2024, this brief was served through this Court's electronic filing system to:

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