

**District of Columbia Court of Appeals**

**No. 11-OA-36**

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**WASHINGTON TEACHERS' UNION, LOCAL #6, *et al.*,**

**Petitioners,**

**v.**

**CLARENCE LABOR, JR., *et al.*,**

**Respondents.**

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**PETITION FOR WRIT OF MANDAMUS**

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**BRIEF FOR  
METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION  
AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS**

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**Rule 28 (a)(2)(B) Corporate Disclosure Statement**

The Metropolitan Washington Employment Lawyers Association is an association. It does not have any corporate parent. It does not have any stock, and therefore no publicly held company owns 10% or more of the stock of the *amicus*.

*Alan R. Kabat*

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**I. Rule 29 (c)(3) Statement of the *Amicus Curiae*.**

The Metropolitan Washington Employment Lawyers Association (MWELA), founded in 1991, is a professional association and is the local chapter of the National Employment Lawyers Association, a national organization of attorneys who specialize in employment law. MWELA conducts continuing legal education programs for its more than 320 members, including an annual day-long conference which usually features several outside speakers, and monthly seminars. MWELA also participates as *amicus curiae* in important cases in the three jurisdictions in which its members primarily practice – the District of Columbia, Maryland and Virginia – and has filed several amicus briefs with this Court.

MWELA’s members and their clients have an important interest in ensuring that District of Columbia government agencies act with the requisite dispatch in resolving petitions for review, including post-termination hearings, in order to ensure that the constitutional and statutory rights of District employees and residents are preserved. Hence, MWELA respectfully submits this brief to assist this Court in resolution of this case.

Pursuant to Rules 29 (a) and (b), *amicus* MWELA is contemporaneously filing with this Court a consent motion for leave to file this brief.

**II. Legal Argument.**

This case is about the important role of the courts in ensuring that District of Columbia administrative agencies, including the Office of Employee Appeals (“OEA”), comply with their statutory and constitutional obligations to protect the rights of District employees and residents. Otherwise, agencies will improperly sit on petitions and requests for review for an indefinite period without taking action, thereby violating both due process and the D.C. Administrative Procedure Act (“D.C. APA”). This Court’s intervention is necessary to ensure that agencies act

with the requisite speed and accuracy in resolving post-termination hearings. Otherwise, “justice delayed is justice denied,” and the agencies will have made a mockery of their obligations.<sup>1</sup> As this Court aptly noted: “The wheels of justice sometimes grind very slowly indeed, and this case, somewhat like the interminable Chancery suit known as *Jarndyce v. Jarndyce*, appears almost to have achieved a state of perpetuity, with no end yet in sight.” *Belcon Inc. v. D.C. Water & Sewer Auth.*, 826 A.2d 380, 383 (D.C. 2003) (citing Charles Dickens, *Bleak House*). This Court should not allow OEA to treat the petitions for review as did the court in *Jarndyce*.

**A. The Administrative Procedure Act and the Due Process Clause.**

This Court has the authority, under both the D.C. APA, D.C. Code § 2-501 *et seq.*, and the Due Process Clause, to address whether an administrative agency – here OEA – has improperly delayed in adjudicating a District employee’s post-termination request for a hearing, brought in order to challenge the adverse employment action.

The D.C. APA, which is modeled on the federal APA, authorizes this Court to “compel agency action unlawfully withheld or unreasonably delayed.” *See* D.C. Code § 2-510(2); *cf.* 5 U.S.C. § 706(1) (same). The U.S. Supreme Court, in interpreting the identically-worded provision of the federal APA, stated that a petitioner could seek judicial intervention where the claim is “that an agency failed to take a *discrete* agency action that it is *required to take*.”

*Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis in original).

Where, as here, “when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency’s discretion, a court can compel the agency to act, but

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<sup>1</sup> This phrase is variously attributed to William Gladstone (1809–1898) or Roscoe Pound (1870–1964), but without citation to any of those savants’ speeches or publications. *Compare Menna v. St. Agnes Med. Ctr.*, 690 A.2d 299, 305 (Pa. Super. Ct. 1997) (“Dean Roscoe Pound’s observation that justice delayed is justice denied”) with *Geo. Walter Brewing Co. v. Henseleit*, 132 N.W. 631, 632 (Wis. 1911) (“Gladstone has truly said: ‘When the case is proved, and the hour is come, justice delayed is justice denied.’”).

has no power to specify what the action must be.” *Id.* at 65. Thus, “if an agency is under an unequivocal statutory duty to act, failure so to act constitutes, in effect, an affirmative act that triggers ‘final agency action’ review.” *Sierra Club v. Thomas*, 828 F.2d 783, 793, 264 U.S. App. D.C. 203, 213 (D.C. Cir. 1987); *accord Amador County v. Salazar*, 640 F.3d 373, 382, 395 U.S. App. D.C. 110, 119 (D.C. Cir. 2011) (“the APA defines ‘agency action’ as including ‘failure to act’”) (quoting 5 U.S.C. § 551(13)); *see generally* Stephen G. Breyer, *et al.*, *Administrative Law and Regulatory Policy*, at 808 (6th ed. 2006) (under *Norton*, “an agency’s ‘failure to act’ is an ‘action’ if there is a legal obligation to act, on the merits,” and “if Congress has clearly commanded an agency to do or not do something, and assuming there are no constitutional constraints, then that is what the agency must do (or not do).”).

**B. D.C. Employees are Entitled to a Prompt Post-Deprivation Hearing.**

This Court, the U.S. Supreme Court, and the federal courts in this jurisdiction, have consistently held that individuals are constitutionally entitled to a *prompt* post-deprivation hearing in order to preserve their due process rights. There is no specific formula for determining the amount of delay that violates due process – regardless of whether (as here) the statute specifies a time period for the post-suspension stage – since “due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances.” *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961); *accord Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 163 (1951) (“Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.”) (Frankfurter, J., concurring).

A prompt post-deprivation hearing is particularly necessary in the context of government



employees who have lost their employment, since those individuals have “a constitutionally protected property interest in [their] employment.” *Henderson v. District of Columbia*, 493 A.2d 982, 996 (D.C. 1985); *see also* Henry J. Friendly, “Some Kind of Hearing,” 123 *U. Pa. L. Rev.* 1267, 1298 (1975) (recognizing “severance from government service” as requiring greater due process “than suspension pending a further hearing”).

Hence, this Court adopted the Supreme Court’s reasoning in *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532 (1985), in determining whether the post-deprivation process was constitutionally adequate. *Henderson*, 493 A.2d at 995-96. The rationale for examining whether an agency acted with requisite dispatch in resolving the post-termination process is that “while a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.” *Id.* at 996 (quoting *Loudermill*, 470 U.S. at 543). Thus, “at some point, a delay in the post-termination hearing would become a constitutional violation.” *Id.* (quoting *Loudermill*, 470 U.S. at 547).

Under either the D.C. APA or the Due Process Clause, the courts have held that an agency’s failure to take action that it was required to take can violate the petitioner’s statutory or constitutional rights. In *Henderson*, this Court held that a delay of over fifteen months after the employee was suspended, “from January 7, 1980 (the date of the preliminary hearing) to April 22, 1981, in bringing trial board proceedings to determine Henderson’s status, while he was suspended without pay, *was constitutionally unreasonable.*” *Henderson*, 493 A.2d at 996 (emphasis added). This Court further noted that “no reason appears of record which could have conceivably justified the delay in proceeding,” and that even when Mr. Henderson sought further review by the Office of Employee Appeals (OEA), “the Corporation counsel ... contended that OEA lacked jurisdiction; at the same time, they were seeking to have the civil action stayed on

the grounds of failure to exhaust administrative remedies.” *Id.* Similarly, the D.C. Circuit recognized that OEA had failed to act in a timely manner on a former District employee’s petition for review of his termination: “Far from being resolved within the 120-day period mandated by the statute, appellant’s OEA appeal has languished for almost three years. . . . OEA did not even assign a judge until a year after appellant filed his administrative appeal, dispositive motions filed before the agency years ago still have not been ruled upon . . .” *Bridges v. Kelly*, 84 F.3d 470, 476 n.9, 318 U.S. App. D.C. 30, 36 n.9 (D.C. Cir. 1996).

Here, the petitioners have been delayed over *two years* after their terminations, without even having an Administrative Judge assigned to their case, let alone being allowed to conduct any discovery or proceed to a formal hearing at OEA. Under *Henderson* and *Bridges*, these delays without any explanation go far beyond what could be justified.

The U.S. Supreme Court and the lower federal courts have similarly held that delays by an administrative agency in acting on the deprivation of a property right – such as the due process interest of government employees in their employment – can violate the Due Process Clause or the federal APA, so that the courts must closely scrutinize agency delay to determine whether that delay violates the petitioner’s statutory and constitutional rights.

One rationale for this scrutiny is that the stigmatization of having lost a government position makes it particularly hard for a former government employee to obtain comparable employment, either at another government agency or in the private sector, while his petition for review is pending. *Loudermill*, 470 U.S. at 543; *accord Lefkowitz v. Turley*, 414 U.S. 70, 84 (1973) (same, for government contractors). Thus, it is particularly critical that agencies, such as OEA, comply with “procedural rules benefitting the party otherwise left unprotected by agency rules,” which is particularly important “in the employment context where . . . agencies cannot

‘relax or modify’ regulations that provide the only safeguard individuals have against unlimited agency discretion in hiring and termination.” *Lopez v. Federal Aviation Admin.*, 318 F.3d 242, 247, 355 U.S. App. D.C. 51, 56 (D.C. Cir. 2003); accord *Lerner v. District of Columbia*, 362 F. Supp. 2d 149, 161 (D.D.C. 2005) (same). Thus, as U.S. District Judge Urbina recently stated, the courts have “jurisdiction to review whether an agency’s conduct violates regulations . . . [that] are ‘intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion.’” *Beshir v. Holder*, No. 10-CV-652 (RMU), 2011 WL 204798, at \*8 (D.D.C. Jan. 24, 2011) (quoting *Lopez*, 318 F.3d at 247).

For example, U.S. District Judge Kessler held that the District government violated an employee’s due process rights when the District failed to provide a written decision for over four years after issuing a notice of proposed removal, so that “Defendants have failed to provide Plaintiff the process she was due.” *Lerner*, 362 F. Supp. 2d at 162. This result was compelled by the fact that “where a government employee has no procedural due process rights apart from those which the agency has chosen to create by its own regulations, scrupulous compliance with those regulations is required to avoid any injuries.” *Id.* at 161 (quoting *Lopez*, 318 F.3d at 247).

A related rationale is that the deprivation of economic benefits while the post-suspension hearing is pending – or not even commenced, as in this case – will work significant harm on the petitioners. *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975) (“In this context, the possible length of wrongful deprivation of unemployment benefits is an important factor in assessing the impact of official action on the private interests.”).

Another rationale for the close scrutiny of delays in the post-termination process is that it is in the interests of both the government and the affected individuals to have a prompt determination of the accuracy of the pre-suspension deprivation, thereby ensuring the integrity of

the entire process. *FDIC v. Mallen*, 486 U.S. 230, 242 (1988) (due process required to address “the likelihood that the interim decision may have been mistaken”); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (“the likelihood of governmental error”); *Barry v. Barchi*, 443 U.S. 55, 66 (1979) (“it would seem as much in the State’s interest as Barchi’s to have an early and reliable determination with respect to the integrity of those participating in state-supervised horse racing”); *Fusari*, 419 U.S. at 389 (“Thus, the rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process.”).

At the same time, the government has no legitimate interest in unreasonably delaying the post-termination hearing. *Barry*, 443 U.S. at 66 (“We also discern little or no state interest, and the State has suggested none, in an appreciable delay in going forward with a full hearing.”).

Therefore, unlawful or unreasonable delays at the post-suspension stage will violate the petitioner’s due process rights. *Id.* (“In these circumstances, it was necessary that Barchi be assured a prompt postsuspension hearing, one that would proceed and be concluded without appreciable delay. Because the statute as applied in this case was deficient in this respect, Barchi’s suspension was constitutionally infirm under the Due Process Clause . . .”).

### **C. OEA Failed to Provide a Prompt Post-Deprivation Hearing**

Here, OEA is under an “unequivocal statutory duty to act,” since its organic statute specifically requires it to issue a decision within 120 days of a timely filed appeal, absent “extraordinary circumstances.” *See* D.C. Code § 1-606.03(c). Thus, this Court should consider the fact that the legislature “has imposed . . . applicable deadlines or otherwise exhorted swift deliberations” in determining whether “the agency’s delay deprives the petitioner of a statutory right to timely decisionmaking.” *Sierra Club*, 828 F.2d at 797, 264 U.S. App. D.C. at 217. Although OEA’s statute allows OEA to “promulgate rules to allow a Hearing Examiner a

reasonable extension of time if extraordinary circumstances dictate that an appeal cannot be decided within the 120-day period,” *see* D.C. Code § 1-606.03(c), the statute does not allow OEA to postpone indefinitely the process of assigning an appeal to the Administrative Judge, as it has done here. Moreover, the regulations that OEA did promulgate do not even define the “extraordinary circumstances” that would allow the Administrative Judge (and not OEA’s staff) to extend the 120 day deadline for the administrative decision. *See* 6 D.C.M.R. § 632.1. Instead, the regulations require that OEA “shall promptly send a copy of the petition for appeal to the agency, and the agency shall file an answer within thirty (30) calendar days of the service of the petition for appeal,” *see* 6 D.C.M.R. § 608.2, neither of which has happened here.

The burden on OEA to assign a petition for review to an Administrative Judge, and to send the petition for review to the relevant District agency (here, the D.C. Public Schools), is minimal, so that there are no circumstances, extraordinary or otherwise, that would justify OEA’s failure to take even those clerical tasks. Once the agency has responded to the petition for review, pursuant to 6 D.C.M.R. § 608.2 and § 610, then the parties can commence discovery without any further delay, *see* 6 D.C.M.R. § 618, in order to prepare the appeal for the hearing.

Here, OEA has not complied with any of its obligations under Section 608.2, let alone its statutory obligations to render a decision within 120 days, so that OEA has seriously violated the due process and D.C. APA rights of petitioners and other District employees whose petitions for review have similarly languished without justification.

Even without this statutory deadline, due process is still violated, or can be “past due,” when the delay in the post-suspension hearing becomes unreasonable, *supra*. Yet, as the Petition for Writ of Mandamus makes clear, OEA has failed even to assign the petitions filed by the teachers formerly employed by the D.C. Public Schools to an Administrative Judge, let alone

allow the former teachers to conduct discovery or proceed to a formal hearing, despite the passage of two years. *See* Petition for Writ of Mandamus, No. 11-OA-36, at 4-6 (Nov. 1, 2011).

Under this Court's *Henderson* decision, as well as federal precedent, OEA's failure to act constitutes a clear deprivation of the petitioners' due process rights and D.C. APA rights to a prompt post-deprivation hearing. More generally, this Court's intervention is necessary to ensure that all District agencies, including OEA, comply with their obligations to protect the statutory and constitutional rights of District employees and residents.

**D. Other Consequences of OEA's Failure to Act.**

In addition to the rationales for ensuring a prompt post-termination hearing, *see* Part II.B, *supra*, there exist yet other consequences of OEA's failure to act on the petitions for review submitted by petitioners and other District employees. These significant consequences should also be taken into consideration by this Court in addressing the petition for writ of mandamus, since the delays complained of here have adversely affected MWELA's members when representing District of Columbia employees.

When delays become unreasonable, MWELA's members are faced with witnesses with poor recollection of events – a situation that hurts employees doubly. Adverse witnesses are able to “hide” behind the passage of time and avoid testifying about their own misdeeds by feigning a lack of memory of details because of the passage of time. Unfortunately, there are no procedures that permit the employee's attorney to take discovery depositions prior to the time an Administrative Judge has been assigned. Consequently, there is no means of inoculating the terminated employee from the supervisor's lack of recollection.

Additionally, the terminated employees and their supporting witnesses also suffer from loss of recollection of crucial details, which adversely affects their credibility and makes it all the

more difficult for employees to prove their cases. MWELA's members find that, while judges and juries may be willing to forgive the managers' lack of memory, the same charity is not extended to the employees, because the trier of fact expects the employee to remember with great specificity the wrongs done to him or her. In contrast, the same trier of fact is likely to rationalize the responsible manager's lack of memory on the grounds that the manager has to deal with numerous employment decisions and cannot be expected to remember the minutiae of each one, particularly when the passage of time is substantial.

The passage of time also makes it more likely that crucial witnesses have died, retired or moved away from the area. This results in either the unavailability of witnesses at trial, or additional substantial expenses to arrange for the witnesses' depositions, and for their preparation and testimony at trial.

Lastly, delays such as the ones complained of here by the petitioners also results in MWELA's members' clients deciding to permit their claims to "die on the vine" because their interest in continuing litigation fades with the passage of time, particularly if the clients manage to procure subsequent employment, despite the aforementioned stigma that attaches to employees who are terminated from government service. This is a travesty, because it means that the underlying unlawful conduct never gets aired, addressed, or rectified, which results in bad management decisions being endorsed and repeated in the future by the agencies.

### **III. CONCLUSION.**

This Court should find that OEA has violated the D.C. APA and the Due Process Clause through its refusal to assign the numerous petitions for review to Administrative Judges, its refusal to serve the petitions on the D.C. Public Schools, and its refusal to adjudicate the cases within 120 days, and should thereby grant the petition for a writ of mandamus.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

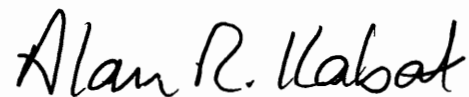
I hereby certify that a copy of the foregoing Amicus Brief was served on counsel for the parties by electronic mail and by first class mail, postage prepaid, this 29th day of November 2011, to:

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