

Agenda

D.C. OFFICE OF EMPLOYEE APPEALS (OEA) BOARD MEETING

Tuesday, October 28, 2014 at 11:00 a.m.
Location: 1100 4th Street, SW, Room 380E
Washington, DC 20024

I. Call to Order

II. Ascertainment of Quorum

III. Adoption of Agenda

IV. Minutes Reviewed from Previous Meeting

V. New Business

A. Public Comments

B. Summary of Cases

- 1. Soloman Ehiemua v. D.C. Public Schools, OEA Matter No. 1601-0337-10** – Employee worked as a School Psychologist at Agency. On July 2, 2010, Agency issued a notice to Employee informing him that due to his “Ineffective” performance rating under IMPACT, its performance assessment system, his position was terminated. Employee challenged the termination by filing a Petition for Appeal with OEA on July 22, 2010. In it, he argued that Agency used the incorrect evaluation criteria. In its response, Agency explained that Employee and all related service providers, were evaluated on the same four components – related service provider standards, individual education plan quality, assessment timeliness, and core professionalism. According to Agency, the related service provider standards comprised 70% of Employee’s score; and individual education plan quality was 15%; and assessment timeliness was 15%. Core professionalism was on a separate rating system which considered an employee’s attendance, on-time arrival, compliance with policies and procedures, and respect. However, Agency submitted that in June of 2010, it informed Employee that individual education plan quality and assessment timeliness would not be included in the final IMPACT score due to challenges with the data. Therefore, it increased the weight for related service provider standards to absorb the 30% originally allotted for individual education plan quality and assessment timeliness. Because Employee’s score fell in the category of “ineffective,” he was terminated.

On July 1, 2013, the Administrative Judge (“AJ”) issued her Initial Decision. She found that during the course of the 2009-2010 school year, Agency made changes to the original evaluation process. As a result, the AJ ruled Agency’s changes to be harmful error. She found the changes to be prejudicial to Employee because he relied on the IMPACT process to develop his plan to allocate adequate time and resources to meet the IMPACT requirements. Based on Agency witness testimony during the OEA evidentiary hearing, the AJ reasoned that Employee was also prejudiced by Agency’s failure to score certain components and its elimination of areas of the MPACT evaluation. Hence, she ordered that Agency reinstate Employee with back pay and benefits.

In response to the Initial Decision, Agency filed a Petition for Review with the OEA Board. It argued that it did not err in the application of IMPACT. It claims that the follow-up June 2, 2010 letter provided that the individual education plan quality component was too difficult to quantify and would not count in Employee's assessments or final IMPACT rating for the school year. Agency contends that the changes to the scoring were diminutive. It further argues that the AJ's decision was not based on substantial evidence, and the ruling was made *sua sponte* because Employee did not argue that it committed harmful error. Therefore, it requested that the Board dismiss Employee's appeal and declare that it did not err in its IMPACT rating. Employee filed a response on August 28, 2013. He provides that the Petition for Review was untimely filed and that he was not properly served by Agency. Employee requested that the Board deny Agency's Petition for Review.

2. **Sarah Guarin v. Metropolitan Police Department, OEA Matter No. 1601-0299-10** – Employee worked as a Police Officer with Agency. On June 9, 2009, Agency issued a Notice of Proposed Adverse Action to Employee informing her that due to her actions in an incident that occurred on February 2, 2009, she would be terminated from her position. Agency charged Employee with being involved in the commission of any act which would constitute a crime; conduct that is prejudicial to the reputation and good order of the police force; and being under the influence of an alcoholic beverage while off duty. Employee filed a Petition for Appeal with OEA on April 26, 2010. Employee asserted that the Chief of Police failed to timely respond to her appeal of the Panel's determination. As relief, she sought reinstatement with back pay and benefits, attorney's fees and costs, and compensatory damages. With regard to the Chief of Police's untimely response to Employee's appeal, Agency provided that the error was harmless. Agency explained that in accordance with the collective bargaining agreement, the Chief of Police was supposed to issue her decision within fifteen business days. However, the Chief's decision was issued within twenty-nine days. Agency contended that although the decision was issued fourteen days late, a rescission of the termination for a failure to timely respond to an appeal was not authorized by its collective bargaining agreement. Additionally, it claimed that Employee was not prejudiced by the delay.

The AJ issued his Initial Decision on May 24, 2013, and found that all of the testimony overwhelmingly depicted Employee as the aggressor during the June 2, 2009 incident. He held that the Agency Panel's findings were supported by substantial evidence. As a result, the AJ did not disturb Agency's penalty selection. As for the harmful procedural error issue, the AJ found that Agency's delay in responding to Employee's appeal was not extraordinary. Further, he explained that Employee did not present evidence of the harm she suffered as a result of the Chief's failure to timely respond to her appeal. Lastly, the AJ found that the Panel considered all of the *Douglas* Factors. Accordingly, Agency's action was upheld.

On June 25, 2013, Employee filed a Petition for Review with the OEA Board. Employee argues that the AJ's decision misapplied the harmless procedural error analysis; the decision failed to properly address the deficiencies in Agency's charges and specifications; and the AJ failed to consider all relevant evidence. Therefore, Employee believes that the AJ's decision and Agency's action must be reversed. In its Answer to the Petition for Review, Agency argues that the AJ's decision to utilize the harmless procedural error analysis was in accordance with the law. It contends that its decision was based on all relevant evidence. Therefore, Agency requests that the Petition for Review be denied.

- 3. Lisa Randolph v. Department of Motor Vehicles, OEA Matter No. 1601-0008-11** – Employee worked as an Inspector with Agency. On September 28, 2010, Agency removed Employee from her position for “any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law – offensive comments, assault, or fighting on duty” and “any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious – arguing, use of abusive or offensive language.” Employee filed a Petition for Appeal with OEA on October 12, 2010. She argued that she worked in a hostile environment that she reported Agency. Employee explained that her actions were the result of a precarious situation that occurred at work after Agency failed to protect her safety due to its own negligence and disregard. Therefore, she requested to be reinstated with back pay and benefits. Agency provided that Employee failed to substantiate her claims of a hostile work environment. Additionally, it contended that there was no nexus between Employee’s claims of a hostile work environment and her assault on a co-worker. Agency claimed that Employee was aware of the consequences of her action and chose to ignore them. Therefore, it believed that it acted appropriately by terminating Employee.

The AJ issued her Initial Decision on July 29, 2013. She held that Employee did not contest her involvement in a fight with a co-worker while on duty. She ruled that Agency had cause to establish that Employee was involved in a physical altercation at work which violated District Personnel Manual § 1603.3. As for the penalty imposed, the AJ found that in accordance with the Table of Penalties, removal was within the range of penalties for a first offense of fighting. Therefore, Agency’s action was upheld.

Employee disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on September 3, 2013. She argues that, contrary to the AJ’s holding, she did not concede that she engaged in a fight. Employee also asserts that the AJ did not consider her claim of self-defense or her acquittal of the criminal charges by the Superior Court of the District of Columbia. Finally, she contends that she could not have known that she violated the law when a court found that she had not.

- 4. Ilbay Ozbay v. District of Columbia Department of Transportation, OEA Matter No. 1601-0073-09R11** – This case was previously decided by the OEA Board. On July 23, 2012, the Board issued its Opinion and Order on the Petition for Review. It found that the AJ utilized the incorrect regulation in reaching his conclusion that Agency had cause to remove Employee. The Board also ruled that the AJ needed to determine whether Agency failed to follow the Letter of Warning instructions, and if Agency did, then the AJ must also determine if Part II, DPM Chapter 14, Subpart 2.5(G) applied. Thus, it remanded the matter to the AJ to determine whether a different outcome would result using the applicable regulation and Letter of Warning.

On remand, the AJ reviewed the applicable regulation and the Letter of Warning procedures. He found that Agency’s Letter of Warning did not fully match the performance rating period; that a discrepancy existed as to whether Agency provided assistance to Employee to improve his performance; that the Letter of Warning was unsigned and undated; and that the record did not contain a copy of the Letter of Warning. Thus, the AJ ruled that Agency failed to establish that it served Employee with a valid Letter of Warning. Therefore, in accordance with Part II, DPM Chapter 14, Subpart 2.5(G), the AJ held that Employee’s official rating for that period should have been satisfactory. Accordingly, Agency’s action was vacated, and it was ordered to reinstate Employee with back-pay and benefits.

On July 3, 2013, Agency filed a Petition for Review of the Amended Initial Decision on Remand. Agency argues that the decision failed to consider OEA's rule on harmless error. It is Agency's position that its lack of conformity with the instructions for the Letter of Warning was harmless procedural error. Therefore, Agency requests that the AJ's remand decision be reversed, or in the alternative, remanded for further consideration of OEA Rule 631.3. Employee filed an Answer to Agency's Petition for Review contending that Agency waived its argument regarding harmless error when it failed to preserve the issue before the AJ. Further, Employee argues that harmful error did not exist in this case because he was prejudiced by Agency's failure to sign and issue the Letter of Warning to him. Because he did not have the Letter of Warning, he could not grieve Agency's decision. As a result, Employee requests that the Board affirm the Amended Initial Decision on Remand.

C. Deliberations – This portion of the meeting will be closed to the public for deliberations in accordance with D.C. Official Code § 2-575(b)(13).

D. Open Portion Resumes

E. Final Votes on Cases

F. Public Comments

VI. Adjournment