Agenda

D.C. OFFICE OF EMPLOYEE APPEALS ("OEA") BOARD MEETING
Tuesday, October 22, 2019 at 11:00 a.m.
Location: 955 L'Enfant Plaza, SW, Suite 2500
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 on Petitions for Review

B. Summary of Cases

1. Wanda Wright v. University of the District of Columbia, OEA Matter No. J-0085-18-
Employee worked as a Campus Police Officer with the University of the District of Columbia Agency. According to Agency, it mailed a notice to Employee she was removed from her position during her one-year probationary period. In her Petition for Appeal, Employee asserted that Agency terminated her without cause. Employee explained that despite Agency's claims that it mailed her termination notice prior to the effective date, she did not receive the notice via U.S. mail. Employee contended that Agency emailed her termination notice on Friday, August 17, 2019, one day after her probationary period ended. As a result, she argued that Agency violated its Collective Bargaining Agreement, and DCMR Chapter 8 and 8B.

In response, Agency filed a Motion to Dismiss for Lack of Jurisdiction, where it explained that it issued a notice of termination to Employee on August 13, 2018, with an effective termination date of August 15, 2018. Agency provided that the letter was mailed via "Overnight Express Mail," addressed to Employee's home address, and sent via USPS "Priority Mail Express 1-day." Moreover, it provided documentation of the confirmation of the delivery on August 14, 2018. Further, Agency contended that pursuant to 8-B DCMR § 1110.1, each employee shall be subject to a one-year probationary period. It also noted that Article 10 of the CBA between Agency and Local 2087 states that the probationary period for employees is one year. Agency provided that in accordance with the DCMR and CBA, Employee's employment commenced on August 16, 2017; therefore, she remained a probationary employee through August 15, 2018. Because she was terminated during her probationary period, Agency requested that Employee's appeal be dismissed for lack of jurisdiction.

On October 2, 2018, the OEA Administrative Judge requested that the parties submit a written brief addressing whether Employee's appeal should be dismissed for lack of jurisdiction. In her brief, Employee reiterated that she received Agency's final notice via email one day after her probation period ended. Moreover, she contended that pursuant to District Personnel Manuel §§ 1608.7 and 1614.6, Agency was required to send the notice of final decision by courier, or by certified or registered mail, return receipt requested. Employee cited to *Nursat Aygen v. D.C. Office of Employee Appeals*, providing that when an employee is not on duty, the final notice must be delivered to employee on or before the effective action date with a request for the employee to acknowledge it. Agency countered by arguing that DPM §§ 1608.7 and 1614.6 did not apply to probationary employees. Additionally, Agency posited that *Aygen* is inapplicable since the notice of Final Agency Action is part of the procedures that are applicable only to permanent employees of the District government, not probationary employees.

On November 13, 2018, the AJ issued her Initial Decision. She found that OEA did not have jurisdiction to consider the matter. The AJ held that Employee's one-year probationary period expired at 12:00 a.m. on August 16, 2018. However, Employee was terminated effective August 15, 2018, which was less than one year from her start date. She also held that Agency proved that Employee's notice was delivered to her address of record prior to the effective date of termination. Furthermore, the AJ explained that Employee's matter is distinguishable from *Aygen* in that, the employee in *Aygen* was a permanent employee at the time of their termination and was within their rights to receive a written final agency notice. Whereas in the instant matter, Employee was a probationary employee at the time of her termination, and she was not entitled to any of the privileges afforded to permanent employees under the law. Finally, the AJ held that Agency adequately complied with DPM § 814.2 which provides that an employee terminated during their probationary period shall be notified in writing and the notice must include an effective date. Consequently, the AJ dismissed the matter for lack of jurisdiction.

Employee filed a Petition for Review on December 18, 2018. She asserts that the AJ's findings were not based on substantial evidence and that the Initial Decision failed to address all material issues of law and fact raised on appeal. Employee maintains that she was not a probationary employee at the time of termination. She contends that the AJ erroneously interpreted 6-B DCMR §§ 1618.6, 1618.8, and 1623.7. Moreover, Employee objects to the AJ's conclusions that she had access to Agency's termination letter that was delivered to her based on the mail tracking information that was provided by Agency. Finally, she argues that because Agency approved her sick leave for August 15 and 16, 2018, she was not on administrative leave as Agency alleged. Therefore, she requests that the Board grant her Petition for Review.

2. Frances Wade v. Department of Behavioral Health, OEA Matter No. 1601-0067-15R19- This case has been previously before the Board. Employee worked as a Consumer Affairs Liaison with the Department of Behavioral Health. On March 4, 2015, Employee was served with a fifteen-day Advance Notice of Proposed Removal based on charges of neglect of duty; unauthorized absence; failure to follow procedures for leave request and approval; and absence without official leave. On March 31, 2015, Agency issued its Notice of Final Decision, sustaining the charges against Employee. The effective date of her termination was April 7, 2015.

The Board issued its first Opinion and Order on Petition for Review on December 18, 2018. Based on the state of the record at the time, the Board could not satisfactorily conclude that the Initial Decision was based on substantial evidence. The Board noted that the documentation from Employee not specifically address the status of her medical condition during the time period in which she was charged with being AWOL or that she was unable to perform the duties of her position during that time. Because Employee's medical status was germane to the disposition of this appeal, the Board granted Agency's Petition for Review and remanded the matter to the Administrative Judge to make the appropriate factual findings.

The AJ issued an Initial Decision on Remand on April 5, 2019. The AJ held that re-opening the record for additional, supporting evidence was proper. Regarding the AWOL charge, the AJ provided that the Board's instructions on remand required her to make a specific determination regarding Employee's medical status from February 9, 2015 to February 27, 2015. In making her determination, the AJ concluded that Dr. Moghal's newly-submitted statements supported a finding that Employee's medical condition was so severe that she was not able to perform the functions of her job during the relevant time period. She further held that Dr. Moghal's affidavits corroborated the information contained in the Employee's VOT forms. As a result, the AJ held that Employee's absence was excusable during the relevant time period and could not; therefore, serve as a basis for Agency's adverse action. Consequently, she held that Agency's termination action was improper. Agency was ordered, again, to reinstate Employee with backpay and benefits.

Agency filed a second Petition for Review with OEA's Board on May 10, 2019. It argues that the AJ violated the DCAPA and erred by exceeding the scope of the remand order. Agency asserts that under the DCAPA, the AJ should have only been permitted to make findings based on the exclusive record when it was closed on February 27, 2018. Agency also contends that the AJ erred by considering Dr. Moghal's statements without a showing by Employee that the statements were unavailable before the record closed. Additionally, Agency opines that the proceedings on remand were unfair because instead of making findings based on the record that closed February 27, 2018, the AJ issued a January 2, 2019 order that gave Employee a second opportunity to present a defense to the AWOL charge. Therefore, Agency requests that the Board grant its Petition for Review.

Employee filed a response to Agency's petition on June 7, 2019, arguing that the AJ's decision to re-open the administrative record was within the scope of the Board's remand order. She also reasons that the AJ did not err in giving weight to Dr. Moghal's statements. Employee believes that the remand proceeding conducted by the AJ was fair; nothing in the AJ's January 2, 2019 order prohibited Agency from asking for leave to submit its own rebuttable evidence; and Agency has had many opportunities to depose or examine Dr. Moghal but failed to do so. As such, Employee submits that Agency's termination action was unlawful and requests that the Board affirm the AJ's Initial Decision on Remand.

3. Samuel Murray v. Department of Youth Rehabilitation Services, OEA Matter No. 1601-0032-14R17R18—This case has been previously before the Board. After several remands, the AJ issued a Second Initial Decision on Remand on October 31, 2018. Fist, he determined that the statutory language D.C. Official Code § 1-623.45(b)(1), instead of the regulatory language of 7 DCMR § 139.2 should govern this matter. Next, the AJ noted that this Board previously determined that the Disability Certificate, coupled with Agency's act of permitting Employee to return to work, constituted substantial evidence that Employee overcame his injury as of November 5, 2012. However, he stated that the issue presented on remand appeared to be one of first impression before OEA which largely hinged on the statutory interpretation of the meaning of "commencement of compensation" as it relates to D.C. Official Code § 1-623.45(b)(1). In concluding that November 10, 2018 was the date Agency should have used for calculating the two-year period, the AJ pointed to the plain language of the Code. The AJ held that using November 18, 2018 as the date that Employee's "commencement of compensation" began was consistent with the language of D.C. Official Code § 1-623.45(b)(1) because that is the date when Employee's Worker's Compensation benefits commenced (or began). Thus, the AJ held that Employee had to years from November 18, 2010 to overcome his injuries.

In the alternative, the AJ suggested that even if he agreed with Agency's position that October 30, 2010 should be the date utilized to calculate the two-year period, Employee suffered a recurrence of his injury after briefly returning to work from November 5, 2018 until December 17, 2012. Based on the foregoing, the AJ held that Employee was entitled to resume full-time employment with Agency because he overcame his workplace injury within two years after the commencement of compensation under D.C. Official Code § 1-623.45(b)(1). The AJ also concluded that the two-year period was reset when Employee suffered a recurrence of his injury. As a result, he determined that Agency failed to comply with the applicable statutory provisions. Therefore, Employee was ordered to be reinstated to his previous position with backpay and benefits.

Agency disagreed with the AJ and filed a second Petition for Review with OEA's Board on December 5, 2018. It argues that the Second Initial Decision on Remand failed to comply with the Board's remand instructions. It states that the AJ also failed to provide a legal basis to support his determination that November 18, 2010, and not October 30, 2010, was the appropriate date for calculating the two-year time period under D.C. Official Code § 1-623.45. It maintains that October

30, 2010 should have been used because that is when Employee first became entitled to benefits. As a result, Agency asks that Employee's termination be affirmed.

In response, Employee reiterates his previous contention that he is entitled to return to work under D.C. Official Code § 1-623.45 and that the preceding statute does not conflict with the regulatory language of 7 DCMR § 139.2. He also asserts that the AJ fully complied with the Board's instructions on remand. Therefore, Employee asks this Board to uphold the AJ's Second 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