

Agenda
D.C. OFFICE OF EMPLOYEE APPEALS (“OEA”) BOARD MEETING
Tuesday, September 4, 2018 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. George Dunmore, Jr. v. The Department of General Services, OEA Matter No. 2401-0141-10 (Motion for Reconsideration) — This matter was previously before the Board. Employee worked as a Supervisory Mail Assistant with the Department of General Services. On October 5, 2009, Agency notified Employee that he was being separated from his position pursuant to a Reduction-in-Force (RIF).

An Initial Decision was issued on May 12, 2012. The AJ held that Employee was the sole occupant of the Supervisory Mail Assistant position in his competitive level. Therefore, the statutory provision affording him one round of lateral competition is inapplicable. The AJ also held that Agency provided Employee with at least thirty days’ written notice. With respect to Employee’s request for an evidentiary hearing, the AJ reasoned that Employee provided no basis to support a finding that a hearing was warranted or that there were material issues of fact in dispute. Additionally, the AJ indicated that there was nothing in the record to show that Employee was prejudiced by Agency’s failure to provide a timely answer to the Petition for Appeal. Finally, the AJ was unpersuaded by Employee’s claims that the RIF action was pre-textual in nature or a result of retaliation. Accordingly, the AJ upheld Agency’s RIF action.

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA’s Board on October 16, 2016. He argued that the AJ’s finding that Agency’s failure to submit a timely answer to the Petition for Appeal was not harmless error. Therefore, he requested that the Board grant his Petition for Review and reverse the Initial Decision.

The OEA Board issued its Opinion and Order on July 11, 2017. It found that Employee’s petition did not present any new arguments or material evidence in accordance with OEA Rule 633.3. Furthermore, the Board held that under OEA Rule 633.1, a party wishing to file a Petition for Review with OEA must do so within thirty-five calendar days, including holidays and weekends, of the issuance date of the Initial Decision. Employee’s Petition for Review was filed over four years after the issuance of the Initial Decision. Consequently, the Board denied Employee’s Petition for Review.

On August 22, 2017, Employee filed what is essentially a Motion for Reconsideration. He maintains many of the same arguments that were filed in his Petition for Review. Employee also claims that he was not afforded fair, unbiased, or impartial consideration in this matter. Accordingly, Employee requests that the Board reconsider its decision and determine his full relief.

2. Khaled Falah v. Office of the Chief Technology Officer, OEA Matter No. 2401-0093-17
Khaled Falah (“Employee”) worked as a Program Manager with the D.C. Office of the Chief

Technology Officer (“Agency”). On August 25, 2017, Agency issued a notice to Employee informing him that he was being separated from his position pursuant to a Reduction-in-Force (“RIF”). Employee contested the RIF action and filed a Petition for Appeal with OEA on September 22, 2017. He claimed that he was a victim of constructive dismissal and that Agency discriminated against him based on his age. Therefore, Employee requested that he be reinstated.

On November 1, 2017, Agency filed its Response to Employee’s Petition for Appeal. It denied Employee’s discrimination and constructive dismissal allegations. Additionally, Agency argued that Employee failed to allege an actual violation of any provision of the Comprehensive Merit Personnel Act (“CMPA”). Moreover, Agency asserted that the RIF was implemented based on its operational needs. It requested additional time to obtain a copy of Employee’s Official Personnel Folder (“OPF”) and other relevant documents to submit to OEA for further review.

The AJ issued an Order Requesting Briefs from both parties on November 15, 2017. The AJ ordered the parties to address whether Agency adequately followed the proper statutes, regulations, and laws when conducting the RIF action. Additionally, Agency was ordered to submit a copy of the retention register; the Administrative Order authorizing the RIF; and a copy of Employee’s Personnel Standard Form 50. In accordance with the order, Agency had until December 5, 2017, to file its brief, and Employee had until December 26, 2017. The order concluded by noting that if either party failed to take reasonable steps to prosecute or defend the appeal, the AJ may dismiss the action or rule for the appellant.

On December 4, 2017, Agency filed a Motion for Continuance until December 19, 2017 to file its brief. Agency noted that OEA sent the Order Requesting Briefs to the wrong address for Agency. Counsel for Agency explained that she was contacted and informed of the order, two weeks after the order was issued, by the office to which OEA improperly mailed the order. Accordingly, Agency requested additional time in which to file its brief.

On January 3, 2018, the AJ issued an Order for Statement of Good Cause for Agency’s failure to submit its brief by the December 19, 2017 deadline. Agency was provided a new deadline of January 16, 2018, to file its brief. The Order provided that failure to establish good cause for Agency’s failure to submit its response would result in the imposition of sanctions, including the dismissal of the matter.

The AJ issued her Initial Decision on January 17, 2018. She stated that Agency failed to provide a written response to the orders that were required for a proper resolution of the matter on its merits. Additionally, she stated that Agency failed to adhere to its requested extension deadline of December 19, 2017. Furthermore, the AJ opined that the orders to Agency were not returned to OEA, and the certificates of service attached to the orders were mailed to the address of record. The AJ affirmed that OEA was not notified by Agency of a change of address. Consequently, she reversed Agency’s action of separating Employee from service; ordered that Agency reinstate Employee to his last position of record; that Agency reimburse him all back-pay and benefits lost as a result of the RIF; and file documents evidencing compliance with the terms of the Order within thirty days.

Upon realizing that the AJ issued her Initial Decision, Agency filed a Petition for Review with the OEA Board on February 2, 2018. It states that the AJ’s decision to reverse Employee’s separation from employment was harsh and unwarranted. Agency provides that Employee’s position was abolished due to a budgetary shortfall and that its request to conduct a RIF and eliminate ten positions was approved. Agency also argues that the Initial Decision was flawed because it did not address all the material issues of law and fact raised in the appeal.

Moreover, Agency argues that it provided good cause by filing a timely motion for a continuance in December. However, before Agency could comply with the December 19, 2017 deadline, counsel's uncle passed away before the holidays. Agency explains that it was the third death in counsel's family for the year. It argues that it requested a reasonable amount of time to comply and requested acknowledgement from Employee for the extension, and Employee registered no objection. Moreover, Agency's counsel states that it was in the midst of a major transition because the former Chief Technology Officer ("CTO") stepped down from her post, which required her to update the Interim CTO on all Agency matters. Accordingly, it requests that the matter be remanded to render a decision on the merits.

Employee filed his response to Agency's Petition for Review on March 9, 2018. He argues that according to OEA Rule 621.3, the AJ was correct in ordering his reinstatement with full back pay and benefits. Employee also states that Agency flagrantly disregarded two Orders from the AJ; thus, its petition should be denied. Additionally, Employee asserts that Agency failed to timely submit its brief by the due date imposed by the AJ or even its own self-determined deadline of December 19, 2017.

3. **Carl Mecca v. Office of the Chief Technology Officer, OEA Matter No. 2401-0094-17**— Carl Mecca ("Employee") worked as a Program Manager with the D.C. Office of the Chief Technology Officer ("Agency"). On August 25, 2017, Agency issued a notice to Employee informing him that he was being separated from his position pursuant to a Reduction-in-Force ("RIF"). Employee challenged the RIF by filing a Petition for Appeal with OEA on September 22, 2017. He claimed that he was a victim of constructive dismissal and that Agency discriminated against him based on his age. Therefore, Employee contested his removal.

On November 1, 2017, Agency filed its Response to Employee's Petition for Appeal. It denied Employee's discrimination and constructive dismissal allegations. Additionally, Agency argued that Employee failed to allege an actual violation of any provision of the CMPA. Moreover, Agency asserted that the RIF was implemented based on its operational needs. It requested additional time to obtain a copy of Employee's OPF and other relevant documents to submit to OEA for further review.

The AJ issued an Order Requesting Briefs from both parties on November 15, 2017. The AJ ordered the parties to address whether Agency adequately followed the proper statutes, regulations, and laws when conducting the RIF action. Additionally, Agency was ordered to submit a copy of the retention register; the Administrative Order authorizing the RIF; and a copy of Employee's Personnel Standard Form 50. In accordance with the order, Agency had until December 5, 2017, to file its brief, and Employee had until December 26, 2017. The order concluded by noting that if either party failed to take reasonable steps to prosecute or defend the appeal, the AJ may dismiss the action or rule for the appellant.

On December 4, 2017, Agency filed a Motion for Continuance until December 19, 2017 to file its brief. Agency noted that OEA sent the Order Requesting Briefs to the wrong address for Agency. Counsel for Agency explained that she was contacted and informed of the order, two weeks after the order was issued, by the office to which OEA improperly mailed the order. Accordingly, Agency requested additional time in which to file its brief.

On January 3, 2018, the AJ issued an Order for Statement of Good Cause for Agency's failure to submit its brief by the December 19, 2017 deadline. Agency was provided a new deadline of January 16, 2018, to file its brief. The Order provided that failure to establish good cause for Agency's failure to submit its response would result in the imposition of sanctions, including the dismissal of the matter.

The AJ issued her Initial Decision on January 17, 2018. She stated that Agency failed to provide a written response to the orders that were required for a proper resolution of the matter on its merits.

Additionally, she stated that Agency failed to adhere to its requested extension deadline of December 19, 2017. Furthermore, the AJ opined that the orders to Agency were not returned to OEA, and the certificates of service attached to the orders were mailed to the address of record. The AJ affirmed that OEA was not notified by Agency of a change of address. Consequently, she reversed Agency's action of separating Employee from service; ordered that Agency reinstate Employee to his last position of record; that Agency reimburse him all back-pay and benefits lost as a result of the RIF; and file documents evidencing compliance with the terms of the Order within thirty days.

Upon realizing that the AJ issued her Initial Decision, Agency filed a Petition for Review with the OEA Board on February 2, 2018. It states that the AJ's decision to reverse Employee's separation from employment was harsh and unwarranted. Agency provides that Employee's position was abolished due to a budgetary shortfall and that the request to conduct a RIF and eliminate ten positions was approved. Agency also argues that the Initial Decision was flawed because it did not address all the material issues of law and fact raised in the appeal.

Moreover, Agency argues that it provided good cause by filing a timely motion for a continuance in December. However, before Agency could comply with the December 19, 2017 deadline, counsel's uncle passed away before the holidays. Agency argues that it requested a reasonable amount of time to comply and requested acknowledgement from Employee for the request, and Employee registered no objection. Moreover, Agency's counsel states that it was in the midst of a major transition because the former CTO stepped down from her post, which required her to update the Interim CTO on all Agency matters. Accordingly, it requests that the matter be remanded to render a true decision on the merits.

Employee filed his response to Agency's Petition for Review on March 9, 2018. He argues that according to OEA Rule 621.3, the AJ was correct in ordering his reinstatement with full back pay and benefits. Employee also states that Agency flagrantly disregarded two orders from the AJ; thus, its petition should be denied. Additionally, Employee asserts that Agency failed to timely submit its brief by the due date imposed by the AJ or even its own self-determined deadline of December 19, 2017.

4. **Kyanna Feliciano v. Department of Behavioral Health, OEA Matter No. J-0014-18**—Employee worked as a Forensic Mental Health Coordinator with the Department of Health. On September 22, 2017, Employee was issued a Notice of Expiration of Term Appointment. The notice provided that the expiration date of Employee's appointment to Agency was September 30, 2017.

Employee challenged the adverse action and filed a Petition for Appeal with OEA. She argued that she was promised the position of Forensic Outreach Counselor by Agency's Director. Employee further stated that she asked Agency on several occasions to verify that her position was permanent, and Agency gave her verbal assurances that she was operating in a permanent capacity. Consequently, she requested to be reinstated to the position of Forensic Mental Health Coordinator. In its response, Agency contended that OEA lacked jurisdiction over this matter because appeals from term appointments are not actions encompassed under Chapter 6, Section B604 of the DCMR. Agency also stated that there was no evidence to support Employee's assertion that she was converted to a permanent position.

On January 24, 2018, the AJ issued an Initial Decision. He concluded that Employee failed to meet her burden of proof in establishing jurisdiction before this Office because she was a term employee at the time Agency issued its Notice of Expiration of Term Appointment. The AJ explained that Chapter 8, Sections 823 and 826 of the DPM applied to the current case because Employee was placed on notice that her position as a Forensic Mental Health Coordinator was a term appointment. He also noted that both term and temporary employees are specifically excluded from the jurisdictional authority of OEA. Additionally, the AJ agreed with Agency's position that the law does not guarantee a term employee a permanent position after the expiration of an appointment. Relying on the language of D.C. Official Code § 1-606.03(a), the AJ opined that Employee's complaint was more of a grievance, which is no

longer covered under OEA's jurisdiction. As a result, he concluded that OEA lacked jurisdiction to consider Employee's substantive arguments. Consequently, Employee's Petition for Appeal was dismissed.

Employee filed a Petition for Review on February 28, 2018. She contends that the AJ failed to address her claim that there was a verbal promise made by the Director of Forensic Services that her position was permanent. Employee also states that the AJ did not address her argument that she relied on Agency's reinforcements that her position was permanent, or whether Agency's actions amounted to an enforceable contractual agreement. Additionally, Employee submits that she had an employment contract with Agency at the time of her termination. Accordingly, she requests that the Board reverse the Initial Decision.

In response, Agency maintains that the Initial Decision addressed all material issues of fact and law. Agency notes that the AJ acknowledged Employee's argument that the Director of Forensic Services made a verbal promise to her regarding a permanent position. Moreover, Agency agrees with the AJ's assessment that Employee's complaint is a grievance over which OEA lacks jurisdiction. Lastly, Agency contends that the AJ properly dismissed Employee's appeal for lack of jurisdiction. Accordingly, it requests that her Petition for Review be denied.

- 5. Sampson Lawrence, III v. Metropolitan Police Department, OEA Matter No. 1601-0080-16—** Employee worked as a Police Officer with the Metropolitan Police Department. On April 3, 2014, he was charged with "conduct constituting a crime whether or not a court record reflects a conviction" and "conduct unbecoming of an officer." The charges stemmed from a November 24, 2013 incident wherein Employee was involved in a domestic dispute with his wife. Agency's Adverse Action Panel subsequently held an administrative hearing and determined that Employee was guilty of each charge and specification levied against him. On June 10, 2016, Agency issued its Final Notice of Adverse Action, sustaining the charges against Employee. The effective date of Employee's termination was August 26, 2016.

Employee filed a Petition for Appeal with OEA on August 17, 2016. He explained that the domestic incident involving his wife did not prevent him from performing the duties of an officer. Additionally, Employee opined that other officers were allowed to retain their positions after being charged and convicted of crimes. As a result, he requested to be reinstated with back pay and benefits.

In response, Agency denied Employee's claims and requested that OEA conduct a hearing. An OEA Administrative Judge was assigned to the matter in December of 2016. During a prehearing conference, the AJ determined that the applicable CBA limited OEA to determining whether Agency's removal action was based on substantial evidence; whether Agency committed a harmful procedural error; and whether Agency's decision was done in accordance with the law or applicable regulations.

The AJ issued an Initial Decision on January 22, 2018. With respect to the substantial evidence requirement, the AJ noted that Agency's adverse action hearings required a lower burden of proof than Employee's criminal trial. He further stated that Agency conducted a *de novo* administrative hearing and determined that Employee intentionally struck his former wife with a metal light fixture. Additionally, the AJ believed that Employee's conduct reflected poorly on his judgment and character as an officer. Consequently, he held that Agency's findings were based on substantial evidence.

Regarding whether Agency committed a harmful procedural error, the AJ first addressed the 90-day rule, which provides the time in which agencies must commence adverse actions against employees. The AJ stated that the rule, codified in D.C. Official Code § 5-1031, has been amended over the years. However, the AJ relied on the 2004 version of § 5-1031, which did not contain a tolling exception. Since Employee's November 25, 2013 arrest was the subject of a criminal investigation, but was not tolled, the AJ concluded that Agency's April 3, 2014 Notice of Proposed Adverse Action did not violate the 2004 version of the 90-day rule.

As it related to the 55-day rule, the AJ stated that Article 12, Section 6 of the CBA required that Employee be given a written decision no later than fifty-five days after the date that Employee elected to have a departmental hearing. After reviewing the evidence, the AJ found that Employee waived the 55-day rule, as it applied to the length of the requested continuances, because his previous attorney requested and/or agreed to postpone the hearing on at least eight occasions. Thus, the AJ determined that Employee was served with a written decision on the forty-seventh business day after he requested a departmental hearing. Therefore, he held that Agency did not violate the 55-day rule.

Finally, the AJ disagreed with Employee's argument that Agency failed to consider or misapplied at least two of the *Douglas* factors. The AJ stated that Agency had the primary discretion in selecting an appropriate penalty and that Agency provided a lengthy and thorough analysis of the *Douglas* factors which demonstrated that it selected the appropriate penalty of termination. Furthermore, he concluded that Employee failed to make a *prima facie* case of disparate treatment. Consequently, Agency's termination action was upheld.

Employee filed a Petition for Review with OEA's Board on March 5, 2018. He argues that the AJ erroneously determined that the 2004 version of D.C. Official Code § 5-1301 applies to the instant matter. Additionally, Employee asserts that Agency was required to issue the Amended Notice of Proposed Adverse Action no later than ninety days after May 7, 2015, when Employee was found not guilty of the criminal charges. Employee also asserts that the AJ erred in finding that Agency appropriately applied the *Douglas* factors in selecting the appropriate penalty. Lastly, Employee argues that the AJ erred in finding that Agency did not violate the 55-day rule. As a result, he requests that the Board reverse the Initial Decision.

In response, Agency contends that it did not violate the 2004 or the 2015 version of D.C. Official Code § 5-1301. It disagrees with Employee's position that the 2015 amended statute is applicable in this case. Regarding the 55-day rule, Agency believes it did not violate the 55-day rule because Employee received his Final Notice of Adverse Action forty-seven business days after he requested an administrative hearing. Lastly, Agency reiterates that it did not abuse its managerial discretion in selecting the appropriate penalty and requests that the Board uphold the Initial Decision.

- 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