

## Minutes

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

Tuesday, April 9, 2019

Location: 955 L'Enfant Plaza, SW, Suite 2500

Washington, DC 20024

**Persons Present:** Lasheka Brown (OEA General Counsel), Sheila Barfield (OEA Executive Director), Sommer Murphy (OEA Deputy General Counsel), Clarence Labor (OEA Board Chair), Vera Abbott (OEA Board Member), Patricia Hobson Wilson (OEA Board Member), Jelani Freeman (OEA Board Member), Peter Rosenstein (OEA Board Member), and Wynter Clarke (OEA Paralegal).

- I. **Call to Order** – Clarence Labor called the meeting to order at 11:24 a.m.
- II. **Ascertainment of Quorum** – There was a quorum of Board members present for the office to conduct business.
- III. **Adoption of Agenda** – Peter Rosenstein moved to adopt the Agenda. Jelani Freeman seconded the motion. The Agenda was adopted by the Board.
- IV. **Minutes from Previous Meeting** – The February 26, 2019 meeting minutes were reviewed. There were no corrections. The minutes were accepted.

V. **New Business**

A. **Public Comments on Petitions for Review**

1. There were no public comments offered.

B. **Summary of Cases**

1. **Tyhasha Wright v. D.C. Public Schools, OEA Matter No. 2401-0083-17**— Employee worked for the D.C. Public Schools as an Administrative Officer. On May 22, 2017, Employee received a notice from Agency that she would be removed from her position due to a Reduction-in-Force. Employee contested the RIF action and argued that Agency retaliated against her and failed to protect her from workplace bullying.

On September 21, 2017, Agency filed its Answer and Motion to Dismiss Employee's Petition for Appeal. It explained that prior to Employee's termination date, she accepted a position at another elementary school. Therefore, Agency requested that Employee's petition be dismissed because she was not separated from service.

The Administrative Judge ("AJ") issued his Initial Decision on August 27, 2018. He held that Mayor's Order 2007-186 granted Agency's Chancellor the authority to make personnel decisions, including RIFs. However, he noted that Agency failed to provide an Administrative Order, or equivalent document, from the Chancellor approving the RIF. The AJ found that the notice did not serve as the Administrative Order which identifies the competitive area or positions to be abolished, by position number, title, series, grade, and organizational location. He held that although Agency may have complied with the other requirements set forth in D.C. Official Code § 1-624.02, without

proper approval of the Chancellor, the RIF was invalid. Consequently, he reversed Agency's RIF action and ordered it to reimburse Employee all back pay and benefits lost as a result of her being transitioned into a part-time position from August 4, 2017, through November 12, 2017.

On October 2, 2018, Agency filed a Petition for Review. It states that the AJ's decision was not based on substantial evidence. Agency argues that the AJ was incorrect in finding that the Chancellor was required to issue a written Administrative Order authorizing the RIF. Additionally, it explains that D.C. Official Code § 1-624.02 does not provide that the Chancellor is required to issue a written Administrative Order that demonstrates that she authorized the RIF. Further, Agency asserts that the Chancellor was fully aware of the activities concerning the RIF action. Finally, it explains that it provided Employee with a notice that outlined the Chancellor's basis for the reduction, a listing of job fairs, and the affected employees' job titles. Accordingly, Agency requests that this Board reverse the AJ's Initial Decision. On November 5, 2018, Agency filed a Motion to Voluntarily Withdraw its Petition for Review. As a result, it requests that the OEA Board dismiss the petition.

2. **Rickey Robinson v. Department of Forensic Sciences, OEA Matter No. 1601-0045-17**– Employee worked as a Lab Support Repairer with the D.C. Department of Forensic Sciences. On April 6, 2017, Agency issued a final notice of removal to Employee. Employee filed a Petition for Appeal and argued that he should not have been terminated because he followed the procedures set forth by Agency's drug policy notice and the Employee Assistance Program ("EAP"). Employee argued that District Personnel Manual Chapters 36 and 39 provide that an agency must give an employee the opportunity to receive counseling and treatment for drug or alcohol issues before subjecting the employee to administrative action. Therefore, he requested that he be reinstated and awarded back pay and attorney fees.

On June 22, 2017, Agency filed its Answer to Employee's Petition for Appeal. It argued that it did not violate any statutes or regulations by separating Employee based on his positive drug test results. Agency asserted that it is its policy to perform drug and alcohol testing on District employees who maintain positions with duties or responsibilities, which if performed while under the influence of drugs or alcohol, could lead to a lapse of attention and cause physical injury or loss of life to themselves or others. Furthermore, Agency argued that Employee failed to notify it of his alleged substance abuse problem or to seek treatment prior to reporting to work while under the influence of an illegal controlled substance. Therefore, it requested that OEA dismiss Employee's appeal.

The AJ issued an Initial Decision on September 24, 2018. She held that on July 21, 2016, Employee was notified and signed an acknowledgment form which provided that his position was designated as safety sensitive. The AJ held that 6B DCMR § 2050.8 provided that an employee's participation in an EAP "shall not preclude the taking of a disciplinary action under Chapter 16 of these regulations, if applicable or any other appropriate administrative action, in

situations where such action is deemed appropriate....” Moreover, she found that when Employee acknowledged his new position’s designation as safety sensitive position, pursuant to 6B DCMR § 426.4, he had thirty days to disclose any substance abuse issues and undergo treatment. The AJ determined that Employee was subject to removal pursuant to 6B DCMR § 428.1, which deems an employee unsuitable for having a positive drug test. Moreover, the AJ opined that DPM § 1603.3(i) provided in the Table of Penalties that the penalty for a first offense for illegal drug use ranges from a fifteen-day suspension to removal. Accordingly, she upheld Agency’s action of terminating Employee from service.

On October 29, 2018, Employee filed an Unopposed Motion for Extension of Time to File Petition for Review. He requests a two-week extension of time to file his Petition for Review. Employee provides that good cause exists for the extension because his attorney experienced medical issues, and the resulting effect on his workload in this matter and other cases, have compromised his normal work time significantly. Accordingly, he requests that his motion be granted, and the petition be due on November 12, 2018. Subsequently, Employee filed a motion to withdraw his Petition for Review. He states that he elected to instead file a *pro se* Petition for Review of the Initial Decision with the Superior Court for the District of Columbia.

3. **Davette Butler v. Department of Human Services, OEA Matter No. 2401-0090-17** – Employee worked as a Registrar with D.C. Public Schools. On May 22, 2017, Employee received a notice from Agency that she would be removed from her position due to a Reduction-in-Force. Employee filed a Petition for Appeal with the Office of Employee Appeals on August 30, 2017. She argued that Agency violated D.C. Official Code § 1-623.45(b) by failing to provide her with job protection because of an injury she sustained while on duty.

Agency filed its answer on October 2, 2017. It explained that Employee was the only Registrar at Miner Elementary School; thus, she was not entitled to one round of lateral competition under D.C. Municipal Regulation § 1503.3. Agency also stated that Employee was given at least thirty days’ written notice prior to the effective date of the RIF. Therefore, it posited that the RIF action complied with District law.

The AJ issued her Initial Decision on August 27, 2018. She held that Agency failed to provide an Administrative Order, or the equivalent, from the Chancellor approving the RIF. Additionally, she found that the notice to Employee regarding the RIF did not constitute the equivalent of an administrative order to prove that the RIF action was authorized. As a result, the AJ concluded that Agency failed to prove that the RIF was properly approved and authorized under the applicable regulations. Consequently, she reversed Agency’s RIF action and ordered it to reinstate Employee with all back pay and benefits lost as a result of her separation from service.

On October 2, 2018, Agency filed a Petition for Review with OEA’s Board. It states that the Initial Decision was based on an erroneous interpretation of

statute, regulation, or policy; the findings of the AJ were not based on substantial evidence; and that the Initial Decision failed to address all material issues of law and fact properly raised on appeal. Agency also explains that it set up meetings with school principals to explain the RIF process; conducted tutorial sessions regarding the RIF; prepared Competitive Level Documentation Forms for each employee subject to competition; and issued notices to all employees that explained the basis for the RIF. Accordingly, it requests that this Board reverse the AJ's Initial Decision.

Employee filed a response on November 1, 2018. She contends that OEA may not exercise jurisdiction over Agency's Petition for Review because it was not filed within thirty-five days as required by D.C. Official Code § 1-606.03. Employee also posits that the AJ did not err in finding that Agency failed to produce the documentation which properly authorized the RIF. Lastly, she disagrees with Agency's argument that the absence of the Administrative Order constituted a harmless error. Therefore, Employee requests that Agency's petition be dismissed. On November 5, 2018, Agency filed a Motion to Voluntarily Withdraw its Petition for Review. As a result, it asks that this Board dismiss the petition.

4. **Kyle Quamina v. Department of Youth Rehabilitation Services, OEA Matter No. 1601-0055-17**— Employee worked as a Materials Handler for the Department of Youth Rehabilitation Services. On December 15, 2016, Employee received a Notice on Proposed Suspension of Thirty Days based on charges of failure or refusal to follow instructions; neglect of duty; failure to meet performance standards; providing false statements/records; fiscal irregularities; attendance-related offenses; and violation of Agency's conduct policy. Employee submitted a response to the proposed suspension on January 3, 2016. A Final Notice on Proposed Suspension was issued via email on February 22, 2017. Agency subsequently issued a Revised Final Notice on Proposed Suspension of Thirty Days on May 3, 2017 because the first notice did not include appeal rights to OEA.

Employee filed a Petition for Appeal with the Office of Employee Appeals on June 2, 2017. In his appeal, Employee argued the Agency violated several D.C. Municipal Regulations placing him on administrative leave for more than ninety days, and by failing to issue a final decision within forty-five days after receiving Employee's response to the proposed suspension. As a result, Employee requested that his suspension be reversed with back pay and attorney's fees.

Agency filed its answer on July 19, 2017. It argued that Employee was properly disciplined for cause pursuant to D.C. Official Code § 1-601.01, § 1-616.51(1), and 6 DCMR § 1602.1. According to Agency, Employee made false statements to his supervisor regarding his attendance; had unauthorized absences; and falsified timesheets on at least two occasions. Additionally, it asserted that Employee's failure to "hand scan" upon the start and end of the work day constituted a neglect of duty. Agency further explained that Employee violated

its Conduct Policy, DYRS-010, which requires Materials Handlers to adhere to the highest level of ethical conduct and maintain the confidence of the public. Thus, it opined that a thirty-day suspension was an appropriate remedy pursuant to District regulations. Consequently, it requested that Employee's appeal be dismissed.

The AJ issued her Initial Decision on September 17, 2018. She held that Agency violated 6B DCMR § 1623.4, which requires that final agency decisions be accompanied by a copy of OEA's rules and an OEA appeal form. The AJ also found that Agency failed to comply with 6B DCMR § 1623.6, which provides in part that a final decision must be completed within forty-five days after the agency receives the employee's response to the advance notice of adverse action. The AJ disagreed with Agency's argument that its procedural error was harmless because the first notice did not constitute a valid final notice pursuant to the applicable regulations. As a result, the AJ concluded that Agency did not comply with all applicable laws, rules, and regulation in its administration of the instant adverse action. Consequently, Employee's suspension was reversed, and Agency was ordered to reimburse Employee all back-pay and benefits lost as a result of the suspension.

Agency disagreed with the Initial Decision and filed a Petition for Review on October 22, 2018. It argues that the AJ's finding that Employee's procedural due process rights were violated is not supported by substantial evidence and is based on an erroneous interpretation of the relevant case law. Agency argues that its Final Notice and the Revised Final Notice being served beyond the forty-five-day time limit imposed under 6B DCMR § 1623.6 does not invalidate Employee's suspension because the language of the regulation is directory, and not mandatory in nature. According to Agency, Employee suffered no prejudice by having to serve his suspension prior to asserting his appeal rights before OEA. Thus, it believes that the delays in issuing both notices did not render Employee's suspension invalid. Consequently, Agency asks Board to grant its Petition for Review and reverse the Initial Decision.

In his answer, Employee asserts that Agency waived its legal argument regarding the directory nature of § 1623 because it failed to raise this issue in its submissions to the AJ. He posits that even if Agency is permitted to raise the issue on appeal to the Board, the language of 6B DCMR § 1623 is mandatory, not directory in nature. Employee further argues that the AJ's conclusion that Agency's procedural errors were harmful is supported by substantial evidence in the record. Therefore, he requests that Agency's Petition for Review be denied.

- C. Deliberations** – After the summaries were provided, Vera Abbott moved that the meeting be closed for deliberations. Peter Rosenstein seconded the motion. All Board members voted in favor of closing the meeting. Clarence Labor stated that, in accordance with D.C. Official Code § 2-575(b)(13), the meeting was closed for deliberations.

**D. Open Portion of Meeting Resumed**

**E. Final Votes** – Clarence Labor provided that the Board considered all of the matters. The following represents the final votes for each case:

**1. Tyhasha Wright v. D.C. Public Schools**

<b>MEMBER</b>	<b>GRANTED</b>	<b>DENIED</b>	<b>REMANDED</b>	<b>DISMISSED</b>
Clarence Labor				X
Vera Abbott				X
Patricia Hobson Wilson				X
Jelani Freeman				X
Peter Rosenstein				X

Five Board Members voted in favor of dismissing Agency’s Petition for Review. Therefore, the petition was dismissed.

**2. Rickey Robinson v. Department of Forensic Sciences**

<b>MEMBER</b>	<b>GRANTED</b>	<b>DENIED</b>	<b>REMANDED</b>	<b>DISMISSED</b>
Clarence Labor				X
Vera Abbott				X
Patricia Hobson Wilson				X
Jelani Freeman				X
Peter Rosenstein				X

Five Board Members voted in favor of dismissing Employee’s Petition for Review. Therefore, the petition was dismissed.

**3. Davette Butler v. D.C. Public Schools**

<b>MEMBER</b>	<b>GRANTED</b>	<b>DENIED</b>	<b>REMANDED</b>	<b>DISMISSED</b>
Clarence Labor				X
Vera Abbott				X
Patricia Hobson Wilson				X
Jelani Freeman				X
Peter Rosenstein				X

Five Board Members voted in favor of dismissing Agency’s Petition for Review. Therefore, the petition was dismissed.

**4. Kyle Quamina v. Department of Youth Rehabilitation Services**

<b>MEMBER</b>	<b>GRANTED</b>	<b>DENIED</b>	<b>REMANDED</b>	<b>DISMISSED</b>
Clarence Labor	X		X	
Vera Abbott	X		X	
Patricia Hobson Wilson	X		X	
Jelani Freeman	X		X	
Peter Rosenstein	X		X	

Five Board Members voted in favor of granting and remanding Agency's Petition for Review. Therefore, the petition was granted, and the matter was remanded to the Administrative Judge.

**F. Public Comments** – There were no public comments offered.

**VI. Adjournment** – Peter Rosenstein moved that the meeting be adjourned; Vera Abbott seconded the motion. All members voted affirmatively to adjourn the meeting. Clarence Labor adjourned the meeting at 11:57 a.m.

**Respectfully Submitted,  
Wynter Clarke  
Paralegal Specialist**