

## Minutes

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

Thursday, April 22, 2021

Location: Virtual Meeting Via Webex

**Persons Present:** Lasheka Brown (OEA General Counsel), Sheila Barfield (OEA Executive Director), Sommer Murphy (OEA Deputy General Counsel), Clarence Labor, Jr. (OEA Board Chair), Patricia Hobson Wilson (OEA Board Member), Jelani Freeman (OEA Board Member), Peter Rosenstein (OEA Board Member), Dionna Maria Lewis (OEA Board Member), Wynter Clarke (OEA Paralegal), and Johnnie Barton (Member of the Public).

- I. **Call to Order** – Clarence Labor, Jr. called the meeting to order at 11:05 a.m.
- II. **Ascertainment of Quorum** – There was a quorum of Board members present for the office to conduct business.
- III. **Adoption of Agenda** – Patricia Hobson Wilson moved to adopt the Agenda. Peter Rosenstein seconded the motion. The Agenda was adopted by the Board.
- IV. **Minutes from Previous Meeting** – The March 25, 2021 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. **Franswello Russell v. Department of Public Works, OEA Matter No. 1601-0031-20**—Employee worked as Parking Enforcement Officer with the Department of Public Works (“Agency or DPW”). She was terminated after submitting a urine sample which tested positive for the presence of marijuana, in violation of 6B District of Columbia Municipal Regulations (“DCMR”) §§ 435.6 and 1605.4(h). Employee filed a Petition for Appeal with OEA on January 27, 2020. She asserted that although she was employed by DPW, she was terminated by the District of Columbia Human Resources (“DCHR”). Additionally, she contended that Agency did not properly consider the mitigating factors provided in *Douglas v. Veterans Administration*; that Agency should have considered the lesser penalty of suspension; that Agency could have reassigned her; and that Agency engaged in disparate treatment. Therefore, she requested that the adverse action be reversed; that Agency reassign her to a non-safety sensitive position; and that she be awarded back pay and attorney’s fees.

Agency filed an Answer to the Petition for Appeal on February 28, 2020. It asserted that pursuant to Chapter 4 of the DCMR, Employee was not suitable for employment in a safety-sensitive position. Agency contended that Employee’s marijuana use violated 6B DCMR §§ 1605.4 and § 428.1. As for Employee’s argument regarding reassignment, Agency explained that she would have had to apply for a non-safety-sensitive position; it could not simply reassign an employee unless they qualified for the position. Finally, Agency argued that it considered the *Douglas* factors when determining the appropriate discipline. As a result, it requested that Employee’s removal action be upheld.

In a Post-Conference Order, the OEA Administrative Judge (“AJ”) explained that Employee admitted to testing positive for marijuana. However, it was Employee’s position that the removal was too severe of a penalty and that the process was flawed. As a result, the AJ ordered both parties to submit briefs addressing whether the penalty should be upheld under District law.

In its brief, Agency responded to an argument Employee raised in her Pre-hearing Statement. Employee opined that DCHR officials could not be substituted for Agency officials in the disciplinary process. However, Agency explained that 6B DCMR § 435.9 expressly provided that the personnel authority may terminate employment of an individual who submits a positive drug test. Agency contends that because DCHR has personnel authority over DPW, it was authorized to terminate employment under Chapter 4 of the DCMR. It also provided that 6B DCMR § 439 designated the Director of DCHR as the program administrator for subordinate agencies, and when the program administrator deems an employee unsuitable, the removal action shall be carried out by the personnel authority. Thus, Agency argued that the regulations made clear that DCHR was well within its authority to remove Employee following her positive drug test. As for the penalty, Agency asserted that both 6B DCMR § 1607 and 6B DCMR § 428.1 authorize removal on the first occurrence of the misconduct committed by Employee. Finally, it asserted that it considered the *Douglas* factors. Thus, Agency requested that its termination action be upheld.

In her brief, Employee asserted that when she was hired as a Parking Enforcement Officer, there were no provisions for drug or alcohol testing. Employee contended that the suitability regulations, which were amended in 2018, subjected Parking Enforcement Officers to random drug testing for the first time because they were designated as safety-sensitive employees. However, Employee conceded that she was informed of the drug-testing requirement and the consequences of a positive test. She further admitted that she did not disclose her cannabis use prior to her positive drug test. However, she argued that prior to her termination, a similarly positioned employee was also terminated for a positive marijuana test; however, he was subsequently assigned to a walking route as a parking officer. She, again, argued that Agency failed to consider progressive discipline as directed in Mayor’s Order 2019-081, and it failed to comply with DCMR Chapters 4 and 16. According to Employee, Chapter 4 of the DCMR did subject an employee to termination; however, it was her position that merely because she was subject to termination, did not mean that the regulation required that she be terminated. Moreover, she posited that pursuant to Section 1607 of the Table of Illustrative Actions, the penalty for a first occurrence of a positive drug test result was suspension through removal. Hence, she requested that she be reinstated to her position and that she be awarded full back pay.

Agency filed a Response to Employee’s Opposition Brief on November 8, 2020. As for Employee’s claims regarding a similarly situated employee, Agency opined that she failed to make a prima facie case regarding disparate treatment. Agency also noted that the Mayor’s Order 2019-081 was issued over one month after Employee’s positive drug test. However, Agency explained that the Mayor’s Order did not alter the rules for progressive discipline provided in the DCMR, which allowed it to deviate from progressive discipline where it deemed appropriate. It also asserted that it had no obligation to reassign Employee. Thus, Agency requested that its termination action be upheld.

On December 3, 2020, the AJ issued his Initial Decision. He first noted that from August 6, 2007 through October 9, 2018, Employee signed documents acknowledging that she held a safety-sensitive position which required random, mandatory drug and alcohol testing. He further held that Employee admitted to testing positive for marijuana and that she failed to disclose her use of medicinal marijuana prior to testing positive. The AJ found that in accordance to 6B DCMR §§ 435.6 and 1605.4(h), Agency had sufficient cause to terminate Employee. As for Employee's argument regarding DCHR officials who were substituted for Agency officials, the AJ reasoned that the proposing and deciding officials were authorized to make employment decisions pursuant to 6B DCMR §§ 100.3 and 435.9. Moreover, he explained that Agency served Employee's Notice of Proposed Removal and Notice of Separation, not DCHR.

With respect to Employee's contention that a lesser penalty was not considered, the AJ found that 6B DCMR § 1607 was applicable to non-safety sensitive employees, but it also authorized removal for a first offense of a positive drug test. He further explained that 6B DCMR § 428.1 expressly provided that an employee who is in a safety-sensitive position and tests positive for drugs is subject to separation. Thus, he held that removal was within the range of penalties and that Agency properly considered the *Douglas* factors. Regarding Employee's disparate treatment argument, the AJ concluded that she failed to meet the burden of a *prima facie* claim. He opined that Employee did not offer enough information about the alleged similarly positioned employee to substantiate her claim. Finally, regarding Mayor's Order 2019-081, the AJ reasoned that while the Mayor's Order promotes progressive discipline, it does not amend or bolster the progressive discipline policy discussed in 6B DCMR Chapter 16. Consequently, he ordered that Agency's termination action be upheld.

On January 11, 2021, Employee filed a Petition for Review with the OEA Board. Employee argues that D.C. Code § 1-620.31, known as the Child and Youth Safety and Health Omnibus Amendment Act of 2004 ("CYSHA"), mandated random drug tests for employees holding safety-sensitive positions. Employee provides that the statute defined a safety-sensitive position as employment with direct contact, care, health, welfare, or safety of children or youth. She contends that the statutory definition of safety-sensitive positions has not been amended since CYSHA went into effect in 2005. Therefore, Employee argues that the subsequent DCMR Chapter 4 regulations went beyond its legal authority because the statutory definition of safety-sensitive has not been expanded.

She also claims that pursuant to Chapter 16 of the DCMR, the proposing official is required to be a management official within the chain of command of the employee or a management official designated by the personnel authority. Additionally, she alleges that the deciding official is required to be the agency

head or a designee. It is Employee's position that the deciding official in this case, was not the head of DPW, and he was not designated by the DPW director to perform that function. Thus, Employee contends that although the disciplinary process must be instituted by DCHR through the appointment of an appropriate proposing official, the Agency head must make the final decision to terminate an employee. Consequently, Employee argues that the deciding official had no authority to make decisions related to her continued employment. Therefore, she believes that her removal action should be nullified and reversed. Finally, Employee reiterates her arguments regarding progressive discipline and consideration of the Douglas factors. She requests that she be reinstated with back pay.

On March 3, 2021, Employee filed an addendum to the Petition for Review. She explained that a Memorandum of Understanding ("MOU") between the Department of Public Works and the Department of Human Resources for Fiscal Year 2021, provides that the Director of Department of Human Resources or her designee, shall serve as the final deciding official for any corrective or adverse actions related to suitability screenings. Employee contends that pursuant to the MOU, Agency did not delegate its decision-making authority in this case during the time of her termination. Therefore, she requests that the MOU be included as part of the record.

2. **Nikeith Goins and Shawnee Nowlin-Goins v. Metropolitan Police Department, OEA Matter Nos. 1601-0083-19 and 1601-0084-19** —Nikeith Goins ("NG") and Shawnee Nowlin-Goins ("SNG") or ("Employees" collectively) worked as police officers with the Metropolitan Police Department ("Agency"). Employees were terminated based on charges of Fraud in the First Degree and Prejudicial Conduct after Agency was notified that their children were attending a District school as Maryland residents. The effective date of their terminations was July 5, 2019. In his December 3, 2020 Initial Decision, the AJ held that the matter was guided by holding in *Pinkard v. Metropolitan Police Department*, which limits OEA's purview to determining whether the Panel's decision was supported by substantial evidence; whether Agency committed a harmful procedural error; and whether the adverse actions were taken in accordance with applicable laws and regulations. Concerning the substantive charges against NG, the AJ agreed with the Panel's conclusion that he committed fraud in the first degree because both of his children attended D.C. Preparatory under the pretense that they were District residents, when they were not. He concluded that the record evidence established that: NG was a Maryland resident during the relevant years; NG claimed his children as dependents on his taxes during each of these years; and he had no legal documentation establishing the children as District residents. Additionally, the AJ noted that the Panel considered witness testimony and numerous documents that proved that NG signed paperwork that contained information which turned out to be erroneous, notwithstanding his acknowledgement that the information provided in the forms was true and accurate. Additionally, he agreed with the Panel's determination that NG's work challenges did not establish the inability to care

for his children, which was a prerequisite to establishing the necessity for giving another individual other primary caretaker status of a child.

Regarding the charge of making false statements, the AJ held that on April 14, 2014, April 22, 2015, and April 18, 2016, NG knowingly falsified and signed student enrollment and verification forms affirming that his children were residents of the District despite knowing that the content of the forms was false. The AJ opined that NG's actions constituted prejudicial conduct because he orchestrated a scheme with the help of SNG, Harris, and Bell to enroll his children in a District school as Maryland residents. Additionally, he held that NG's actions were prejudicial to the good order and reputation of Agency.

Concerning SNG, the AJ reasoned that there was enough evidence in the record to show that she was also guilty of committing fraud because as a parent and a sworn officer, she had a responsibility to ensure that her children were properly receiving District resources. Moreover, he noted that SNG's admitted ignorance did not absolve her of any liability or responsibility for the fraudulent documents that were submitted, as she had a close relationship with all of the parties involved. For the same reasons stated above, the AJ also held that SNG's actions constituted prejudicial conduct in that she conspired with her spouse and other family members, to enroll her children at D.C. Preparatory under false pretenses to obtain an unjust enrichment. The AJ agreed with the Panel's rejection of SNG's defense that she left the registration process up to her husband and was reluctant to be involved, taking a "see no evil," hands-off approach to the enrollment process. He noted that allowing the children to be enrolled at the tuition-free school, first using SNG's mother's address, then using a cousin's address, established that all of the parties involved conspired to ensure the enrollment of the children at D.C. Preparatory. Consequently, the AJ concluded that each charge and specification levied against Employees should be sustained.

Finally, as it related to whether Agency violated the 90-day rule, the AJ highlighted D.C. Code § 5-1031, which provides that no corrective or adverse action against a sworn member of the Metropolitan Police Department shall commence more than 90 days (excluding Saturdays, Sundays, and legal holidays) after the date Agency either knew or should have known of the act or occurrence allegedly constituting cause. He explained that the statute contained a tolling provision under § 5-1031(b) in cases where there is an ongoing criminal investigation by Metropolitan Police Department, the USAO, OAG, or the Office of Police Complaints. In calculating the timeline, the AJ provided that the ninety-day period was triggered when Agency generated an IS number for Employees on October 18, 2017. The AJ provided that under D.C. Code § 5-1031(b), the matter was tolled from October 25, 2017 to October 26, 2017, when the matter was referred to the USAO for review, and from December 18, 2017 to June 6, 2018, when the matter was under review by OAG.

Because the AJ did not believe that Agency conducted its own criminal investigation during the remaining time periods, he surmised that the ninety-day clock was not tolled from October 18th through October 25th of 2017, and from October 26th through December 18, 2017, for purposes of D.C. Code § 5-1031. The AJ ultimately determined that a total of 119 business days passed between when the IS number were generated and when Agency issued its notices of proposed termination. Since Employees did not receive their notices until October 1, 2018, the AJ held that Agency violated D.C. Code § 5-1031, which he deemed was a mandatory statutory provision,

not discretionary. As such, Agency’s termination actions were reversed; it was ordered that Employees be reinstated to the same or similar positions; and Agency was instructed to reimburse Employees for all back pay and benefits lost as a result of their terminations.

Agency disagreed with the AJ’s findings a filed a Petition for Review with the OEA Board on January 5, 2021. It submits that the Initial Decision is based on an erroneous interpretation of statute, regulation, or policy. In further support of its position, Agency submitted a Statement of Reasons in Support of Petition for Review on March 31, 2021. It states that OAG’s June 6, 2018 letter of declination marked the conclusion of the criminal investigation for purposes of the 90-day rule because it marked an objective “bright line” from which to measure the ninety-day period. According to Agency, although the USAO previously issued its letter of declination on October 26, 2017, it still believed that the matter had criminal overtones based on its subsequent referral to OAG for possible criminal prosecution. Thus, it opines that the proposed notices were issued in a timely manner and did not violate the 90-day rule. It reasons that the AJ’s interpretation and application of D.C. Code § 5-1031 in this case resulted in an injustice that should not stand. Alternatively, it requests that if the Board determines that there was a 90-day rule violation, that the matter be remanded for it to submit evidence that it continued to conduct a criminal investigation after the USAO declined to prosecute Employees. Consequently, Agency asks that its Petition for Review be granted or remanded to the AJ for further consideration. Subsequently, on April 21, 2021, Agency filed a motion to dismiss its Petition for Review because the parties reached a settlement in this matter. Therefore, it asks for the Board to dismiss its petition.

**C. Deliberations** – After the summaries were provided, Jelani Freeman 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, Jr. stated that, in accordance with D.C. Code § 2-575(b)(13), the meeting was closed for deliberations.

**D. Open Portion of Meeting Resumed**

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

**1. Franswello Russell v. Department of Public Works**

<b>MEMBER</b>	<b>GRANTED</b>	<b>DENIED</b>	<b>REMANDED</b>	<b>DISMISSED</b>
Clarence Labor, Jr.		X		
Patricia Hobson Wilson		X		
Jelani Freeman		X		
Peter Rosenstein		X		
Dionna Lewis		X		

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

**2. Nikeith Goins and Shawnee Nowlin-Goins v. Metropolitan Police Department**

<b>MEMBER</b>	<b>GRANTED</b>	<b>DENIED</b>	<b>REMANDED</b>	<b>DISMISSED</b>
Clarence Labor, Jr.				X
Patricia Hobson Wilson				X
Jelani Freeman				X
Peter Rosenstein				X
Dionna Lewis				X

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

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

**VI. Adjournment** – Peter Rosenstein moved that the meeting be adjourned; Patricia Hobson Wilson seconded the motion. All members voted affirmatively to adjourn the meeting. Clarence Labor, Jr. adjourned the meeting at 11:56 a.m.

**Respectfully Submitted,  
Wynter Clarke  
Paralegal Specialist**