Minutes
D.C. OFFICE OF EMPLOYEE APPEALS (OEA) BOARD MEETING
Tuesday, May 19, 2020
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 Andrew Johnson (Member of the Public).

I. **Call to Order** – Clarence Labor, Jr. called the meeting to order at 11:07 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 January 14, 2020 meeting minutes were reviewed. There were no corrections. The minutes were accepted.

V. **New Business**

A. Public Comments on Petitions for Review

1. Andrew Johnson provided that the AJ did not properly consider his argument that OEA reversed decisions wherein the terminations of other Group 12 psychologists were overturned because of procedural violations. Mr. Johnson highlighted three cases that he opined to be similar to his appeal. He stated that Agency committed eleven procedural violations. According to Employee, the duty plan for psychologists was changed during the middle of the year, which caused them to be unfairly evaluated. He noted that he was evaluated under the same system as the other employees who had their terminations overturned. It was Mr. Johnson's opinion that Agency committed a harmful error in this regard. He argued that the concept is exactly the same in his case as in the other cases. The only difference is that AJ ignored that the duty plan was changed mid-year in this case.

According to Mr. Johnson, Agency admitted that his AT score was the only reason for his low IMPACT score. He stated that Agency admitted that the score was due to one late student assessment. It is Mr. Johnson's belief that he presented evidence that Agency incorrectly calculated the score. He opined that the AJ ignored evidence that the collection of data for the calculation of his AT score was flawed. Moreover, he noted that one student should not have been included in his AT score calculation.

Mr. Johnson also provided that his evaluator, Dr. Mitchell, indicated that all his student reports were completed on time. He provided that he submitted documentation that proved such, and the AJ ignored this evidence. Mr. Johnson contended that Agency did not score everything they should have scored. He argued that Agency did not deny that at least sixteen evaluations should have been used to calculate his AT score, not three. Additionally, he stated that the Core Professionalism score was an issue was raised solely by the AJ, but it was not raised by Agency.

Mr. Johnson argued that the AJ did not consider the evidence that his termination was arbitrary and capricious. He stated that he was given the termination letter before his AT score, which is a harmful error and that the score was the "but for" reason he was terminated. Mr. Johnson provided that there was an email from Dr. Michell regarding his AT score in which she said that the calculation of the AT score after issuing his termination might pose a problem. According to Mr. Johnson, Dr. Mitchell was aware that he always completed his assessments on time. He also states that Agency gave him incomplete and incorrect evidence. Mr. Johnson argued that the AJ did not consider this undisputable evidence. Lastly, he contended that he presented evidence that shows that Dr. Mitchell did not tell the truth regarding his termination.

B. Summary of Cases

1. **Hugh Long v. University of the District of Columbia, OEA Matter No. 1601-0026-18 –**Employee worked as a Police Officer with the University of the District of Columbia. On December 18, 2017, Agency notified Employee that he was being terminated from his position for failure to meet all of the qualifications necessary to perform the essential functions of his position, and because he committed multiple integrity violations on the shooting range. Specifically, Agency alleged that Employee failed to successfully complete his firearms qualifications on the required range; failed to demonstrate consistent proficiency with marksmanship and safe firearms handlings; and failed to follow range safety and integrity rules. The effective date of Employee's removal was January 2, 2018.

   The AJ issued her Initial Decision on June 19, 2019. She found that Agency failed to provide Employee with a Notice of Proposed Action. The AJ held that Agency's violation of Employee's due process rights was more egregious and prejudicial than Employee's untimely filing of the due process claim to Agency. She concluded that Agency's action constituted a harmful error and provided that as long as the record was still open, it was within her discretion to accept and amend the issues presented. Moreover, the AJ determined that Agency was required to provide Employee with a fifteen-day notice of proposed action, as provided in the requirements of District Personnel Manual § 1618. Accordingly, the AJ reversed Agency's adverse action and ordered that Employee be reinstated to his position and reimbursed all back pay and benefits.

   On July 19, 2019, Agency filed a Petition for Review of the Initial Decision. It argues that as an independent agency with its own personnel authority, it is not subject to the DPM requirements. Agency provides that DPM § 1600.2 is not applicable to the University of the District of Columbia. It contends that pursuant to Article 27, Section 5, of the Collective Bargaining Agreement between Agency and Employee's Union, American Federation of the State, County, and Municipal Employees, Agency is required to provide a union member with fifteen calendar days advance notice prior to the effective date of the implementation of discipline. Agency submits that Employee was presented with a Notice of Termination on December 18, 2017 and was advised that he would be terminated effective January 2, 2018 – fifteen days after his Notice of Termination, as required under the CBA. Agency argues that the AJ did not address all material issues of law and fact properly raised in the appeal. It asserts that Employee was terminated for failing to pass his required weapons qualification training on the PSTA required range and for his multiple and continuous integrity violations. Therefore, Agency requests that the OEA Board either vacate the Initial Decision and

dismiss Employee's Petition for Appeal, or it requests that the matter be considered on its merits.

Employee filed his response to the Petition for Review on August 19, 2019. He contends that he was wrongfully terminated pursuant to the grievances he filed against Agency and maintains that he passed the qualifications course and test. Moreover, Employee argues that Agency failed to provide evidence that he failed a portion of the firearms qualification test. Similarly to Agency, Employee requests that his case be decided on the merits. Accordingly, he asks that that he be reinstated to his position or a comparable position; that he receives back pay and benefits lost as a result of the termination; and that the adverse action be removed from his personnel file.

2. Roxanne Cromwell v. Department of Small and Local Business Development, OEA Matter No. J-0009-18 – Employee worked as an Administrative Officer with the Department of Small and Local Business Development. On September 11, 2017, Employee received a notice that she would be terminated by Agency. According to Agency, Employee was removed from her position during her probationary period. The effective date of her removal was October 9, 2017.

On January 29, 2018, the AJ issued her Initial Decision. She found that pursuant to the DPM, Employee was required to serve a second probationary period. The AJ explained that DPM § 823.8 provides that an employee serving a term appointment shall not acquire permanent status on the basis of a term appointment and shall not be converted to a regular Career Service appointment, unless the initial term was through open competition within the Career Service, and the employee satisfied the probationary period. Additionally, the AJ found that DPM § 813.9(c) noted that an employee who once satisfied a probationary period in the Career Service shall be required to serve another probationary period when the employee is appointed as the result of open competition to a position in a different line of work. The AJ held that neither party disputed that Employee's appointment was through open competition. Moreover, after reviewing the job descriptions of both positions, the AJ ruled that the positions were in a different line of work. As a result, it was the AJ's finding that Employee was required to serve a second probationary period. She held that the second probationary period was from May 28, 2017 through May 27, 2018. Because Employee was removed from her position effective October 9, 2017, the AJ found that Employee did not complete the second probationary period. Additionally, the AJ relied on DPM § 814.3 which provides that a termination during an employee's probationary period cannot be appealed to OEA. Accordingly, she dismissed Employee's Petition for Appeal for lack of jurisdiction.

Employee filed a Petition for Review on July 26, 2019. She contends that OEA has jurisdiction over the matter because she was in a Career Permanent status at the time of her termination; therefore, she could have only been terminated for cause. Additionally, Employee asserts that there is no evidence in the record to establish that she competed with others for the position through open competition. It is Employee's position that she was promoted non-competitively to backfill the Administrative Officer role. As evidence, Employee provided a document titled "Checklist for Submissions of Competitive & Non-Competitive Recruitment Actions to DCHR/Priority Consideration Clearance for Non-Competitive Term Appointments" which indicates a non-competitive appointment. Therefore, Employee requests that the Initial Decision be reversed.

On August 30, 2019, Agency filed its Answer to Employee's Petition for Review. It maintains that the AJ's findings are based on substantial evidence and that the AJ correctly held that Employee was a probationary employee. Further, Agency argues that Employee's petition is untimely. It explains that pursuant to OEA Rule 633.1, a party may file a Petition for Review within thirty-five calendar days of the issuance of the Initial Decision. Agency asserts that Employee filed her Petition for Review over sixteen months after the Initial Decision became final. As for the open competition issue, Agency contends that Employee did not assert that her appointment was non-competitive, nor did she present any evidence to support the assertion in her Petition for Appeal or in her brief on jurisdiction. According to Agency, it presented evidence that the appointment was through open competition by providing two Standard Form-50s, the Career Service term letter, the DCHR acknowledgment of the offer acceptance, the job requisition number, and the E-DPM Instruction Nos. 8-55 & 38-14. Moreover, Agency alleges that the Human Resource Specialist and Administrative Officer positions are within a different line of work. Finally, it argues that Employee was serving in a probationary period at the time of removal. Therefore, Agency requests that Employee's Petition for Review be dismissed.

On September 13, 2019, Employee filed a Reply to Agency's Response to Petition for Review. Most notably, Employee provided a copy of the funding certificate from Agency to the Office of the Chief Financial Officer. The document provides that the Administrative Officer position number 004287 was non-competitive. Agency filed a Motion to Strike Employee's Reply and reasoned that the OEA Rules does not allow for a party to file a reply to an answer.

3. Gina Vaughn v. Metropolitan Police Department, OEA Matter No. 2401-0020-12R16-R19 – This matter was previously before the Board. Employee worked as a Computer Specialist with the Metropolitan Police Department. On September 14, 2011, Agency notified Employee that she was being separated from her position pursuant to a Reduction-in-Force. The effective date of her termination was October 14, 2011.

The Board issued its Opinion and Order on Remand on July 11, 2017, dismissing Employee's filing. It concluded that Employee's October 18, 2016 letter to the AJ was not intended as a Petition for Review of the Initial Decision on Remand. In the alternative, the Board stated that even if it were to construe Employee's letter as a Petition for Review, the filing was untimely under OEA Rule 633.1.

On February 8, 2018, Employee filed an appeal with the Superior Court for the District of Columbia. In its November 27, 2018 ruling, the Court held that although Employee's letter to OEA was filed beyond the thirty-five-day time limit, the Board erred in failing to equitably toll the deadline for submitting her Petition for Review. Further, the Court believed that Employee took several steps to comply with the filing requirements and to preserve her rights before OEA. As a result, the matter was remanded to OEA for briefing on Employee's Petition for Review. On May 28, 2019, the Board issued an Order Requesting Briefs.

In her brief, Employee argues that the AJ erred by failing to address her argument that another computer-related specialist, ("K.A."), should have been included in her competitive level when the RIF was conducted. Employee asserts that Agency's "2210" series nomenclature was merely a re-numbering of the former "334" occupational series for Computer Specialists. It is Employee's contention that if

Agency had correctly construed the competitive level to include K.A., she would not have been separated as a result of the RIF. Additionally, she asserts that she was placed in the incorrect competitive level because her proper position description was DS-0334-12-10-N, not DS-0334-07-N. As a result, she requests that this Board grant her Petition for Review and reverse the AJ's Initial Decision on Remand.

In its brief, Agency contends that the Initial Decision on Remand was based on substantial evidence. It disagrees with Employee's argument that K.A. should have been included in her competitive level at the time of the RIF. Agency states that under Chapter 6B, Section 2410.4 of the D.C. Municipal Regulations, positions with different classification series cannot compete in the same competitive level. According to Agency, the classification series for the position occupied by Employee was "334;" whereas, K.A. occupied a position designated as "2210." Agency also opines that Employee's argument that her correct competitive level should have been DS-0334-12-7-N, and not DS-0334-12-10-N, is without merit. Additionally, Agency posits that its error in identifying Employee as a DS-0334-12-10-N Computer Specialist on its RIF notice constitutes a harmless error. Consequently, it asks this Board to deny Employee's Petition for Review.

4. Andrew Johnson v. D.C. Public Schools, OEA Matter No. 1601-0215-11R18 – This matter was previously before the Board. Employee worked as a School Psychologist with D.C. Public Schools. On July 15, 2011, Employee was notified that he would be terminated because he received a final IMPACT rating of "Minimally Effective" for the 2009-2010 and 2010-2011 school years. The effective date of his termination was August 12, 2011.

The AJ issued an Initial Decision on Remand on June 14, 2019. He held that Employee received a "Minimally Effective" IMPACT rating during both the 2009-2010 and the 2010-2011 school years, which subjected him to termination. The AJ determined that nothing in the record supported a finding that Employee's IMPACT scores were incorrect or that Agency committed a procedural error in completing Employee's assessments. Therefore, he found Employee's argument that Agency used flawed, subjective, and contradictory rating criteria in its evaluation process to be without merit. The AJ also found Employee's arguments related to Agency improperly changing the IMPACT standards during the school year to be unpersuasive. As a result, he held that Agency adhered to the IMPACT process, and because Employee received a rating of "Minimally Effective" for two consecutive school years, Agency established sufficient cause to terminate him. Therefore, Employee's termination was upheld.

Employee subsequently filed a Petition for Review with OEA's Board. He argues that Agency violated the IMPACT process by failing to provide him with a copy of the Guidebook at the beginning of the school year and that the IMPACT process was not followed because the standards for evaluation were changed during the 2009-2010 school year. He also contends that Agency's utilization of IMPACT as an evaluation tool is illegal because it conflicts with District of Columbia laws that were already in place prior the establishment of IMPACT. In addition, he asserts that the AJ failed to address his argument that he did not use the Berry Visual Motor Integration Test but was rated on its use. Employee contests Agency's determination that he submitted an untimely psychological assessment, which resulted in an erroneous calculation of his score. Employee disagrees with the AJ's conclusion that Dr. Mitchell observed and evaluated his work as required under IMPACT. He also echoes his previous sentiment that the IMPACT process was not followed because the standards for evaluation were

changed during the 2009-2010 school year. Therefore, Employee requests that this Board grant his Petition for Review.

In response, Agency argues that the AJ correctly concluded that the District of Columbia Omnibus Authorization Act specifically overrides any prior laws that conflict with the IMPACT rating system. Agency contests Employee's claim that flawed, subjective, and contradictory rating criteria were used to evaluate him. It believes that the record supports a finding that Dr. Mitchell properly evaluated Employee during the 2009-2010 school year. According to Agency, Employee failed to follow the proper psychological report procedures outlined in the IMPACT Guidebook and report template. Lastly, it claims that the AJ addressed each of Employee's arguments raised on appeal. Consequently, Agency requests that the Board deny Employee's Petition for Review.

C. Deliberations – After the summaries were provided, Patricia Hobson Wilson 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. Official 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. Hugh Long v. University of the District of Columbia

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

Five Board Members voted in favor of remanding the matter to the Administrative Judge for adjudication on its merits. Therefore, the matter was remanded.

2. Roxanne Cromwell v. Department of Small and Local Business Development

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

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

3. Gina Vaughn v. Metropolitan Police Department

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
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.

4. Andrew Johnson v. D.C. Public Schools

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

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

F. Public Comments – Mr. Johnson thanked the Board for its decision on his case. He also asked for clarification on if the matter would be remanded to the original Administrative Judge. OEA's General Counsel, Lasheka Brown, informed him that the matter would be remanded to the same judge. Mr. Johnson provided that he previously asked for the Administrative Judge to recuse himself for unfairness. Sheila Barfield, OEA's Executive Director, told Mr. Johnson that if he wished to file another request for recusal, then he was free to do so.

VI. Adjournment – Peter Rosenstein moved that the meeting be adjourned; Dionna Lewis seconded the motion. All members voted affirmatively to adjourn the meeting. Clarence Labor, Jr. adjourned the meeting at 12:44 p.m.

Respectfully Submitted,
Wynter Clarke
Paralegal Specialist