

## Minutes

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

Tuesday, May 28, 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), Patricia Hobson Wilson (OEA Board Member), Jelani Freeman (OEA Board Member), Peter Rosenstein (OEA Board Member), Wynter Clarke (OEA Paralegal), and Zakia Nesbit (OEA Legal Intern).

- I. **Call to Order** – Clarence Labor called the meeting to order at 11:15 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 April 9, 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. **Lendia Johnson v. Metropolitan Police Department, OEA Matter No. 1601-0011-17**—Employee worked as a Community Outreach Coordinator with the Metropolitan Police Department. On October 19, 2016, Agency terminated Employee for “any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations, to include incompetence. Incompetence includes: careless work performances; serious or repeated mistakes after receiving appropriate counseling or training; failing to complete assignment timely.”

Employee filed a Petition for Appeal with OEA and argued that she was improperly removed from Agency. Employee claimed that she received little or no supervision, and she did not receive training on new policies and expectations of Agency. Accordingly, Employee requested that she be reinstated to her position.

In its Pre-hearing Statement, Agency provided that Employee’s termination was appropriate and in compliance with D.C. law pursuant to District Personnel Manual §1603.3(f). Agency also argued that there were three specifications listed to support the charge of incompetence. The first specification included an incident that occurred on October 28, 2015, wherein Employee prepared letters soliciting Halloween candy donations from businesses in the Seventh District. Agency explained that Employee drafted the letters using Agency letterhead under the signature of the Vice President of the Citizen’s Advisory Committee. Agency asserted that Employee’s action was clear evidence of incompetence and a violation of General Order 201.26, Part V(A)(6). Agency provided that the second specification occurred on October 9, 2015. It explained that Employee ordered goods, but when the delivery truck came with the

items, Employee made a unilateral decision to send the delivery driver back. The result was that Agency incurred a re-delivery fee. Thus, it is Agency's assertion that this was further evidence of Employee's incompetence.

Before issuing her Initial Decision, the AJ held an evidentiary hearing on April 11, 2018. After considering the testimonies provided during the hearing and documentary evidence, the AJ ruled that Agency lacked cause to take the adverse action imposed on Employee. The AJ determined that Agency failed to prove that Employee refused delivery of the items. She found that the delivery driver made the decision that he was unable to deliver the items on that date because he was unable to maneuver the truck in a manner conducive to make the delivery. Thus, the AJ concluded that Employee did not act in a manner consistent with the definition of incompetence. With regard to the solicitation charge, the AJ explained that the language of General Order 201.26, Part V, cites to the prohibition of a member's personal solicitation or receipt of gratuity from organizations, businesses or individuals (emphasis added). The AJ found that the letters authored by Employee and signed by the CAC Vice President did not solicit personal gifts for Employee but were provided specifically for a CAC Halloween Safe Haven party. As a result, the AJ ruled that Employee did not violate General Order 201.26, Part V. Because Agency lacked cause, she found that termination was inappropriate under the circumstances. Accordingly, she ordered that Agency's action be reversed and that it reinstate Employee to her position with back pay and benefits.

On November 2, 2018, Agency filed a Petition for Review of the Initial Decision. It argues that there is substantial evidence to support its claim that Employee was incompetent with regard to the specifications. Agency contends that the AJ based her decision solely on Employee's testimony that the delivery driver allegedly refused delivery and that Employee could not find anyone to assist her with the delivery. Agency explains that if the delivery driver could not deliver the items, Agency would not have been charged with a re-delivery fee. It claims that Employee made the decision to send the products back to the store despite being advised of the incurrence of a re-delivery fee. Therefore, Agency posits that Employee performed her duties incompetently with regard to the delivery incident. Additionally, Agency asserts that there is no language in the provision of General Order 201.26 that states that the solicitation of gratuities must be for personal use. It acknowledges that subsection (a) of General Order 201.26, Part V(A)(6) states in pertinent part that members are prohibited from accepting personal or business favors; however, the entirety of Part V (A)(6) is not limited to the prohibition of personal favors. Agency argues that the AJ cites no legal authority to support her interpretation of that provision of the General Order. Moreover, Agency asserts that Employee violated its rules and authored a letter on Agency letterhead instead of the CAC's letterhead. Therefore, Agency requests that the Board grant its petition and reverse the Initial Decision.

Employee filed her response to Agency's Petition for Review on November 30, 2018. She argues that Agency's petition should be denied because the appeal fails to present evidence for the OEA Board to grant Agency's request, as required by OEA Rule 628.1. Additionally, Employee asserts that Agency used the wrong standard of review. According to Employee, Agency incorrectly asserts that there is substantial evidence that Employee was incompetent. However, the standard of review is whether the Administrative Judge's findings were based on substantial evidence. Moreover, she notes that mere disagreements with the AJ's ruling in this matter is not a valid basis for appeal. Accordingly, Employee requests that Agency's Petition for Review be denied.

2. **Frank Copeland v. Department of Public Works, OEA Matter No. 1601-0054-18**— Employee worked as a Parking Officer with the D.C. Department of Public Works. On May 8, 2018, Agency terminated Employee for “(1) any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, specifically: neglect of duty: failure to observe precautions regarding safety; careless or negligent work habits and (2) any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, specifically: misfeasance: careless work performance.”

Employee filed a Petition for Appeal with OEA on June 11, 2018. Employee argued that this was his first offense and that within his fourteen years of service, he never experienced an accident in a government vehicle.

On July 13, 2018, Agency filed its Answer to Employee’s Petition for Appeal. It argued that its adverse action against Employee was warranted. Agency explained that pursuant to District Personnel Manual § 1616.2, an employee may be suspended or removed summarily when his or her conduct: (a) threatens the integrity of District government operations; (b) constitutes an immediate hazard to the agency, to other District employees, or to the employee; or (c) is detrimental to the public health, safety, or welfare. Agency asserted that Employee’s action of exiting a vehicle while leaving the ignition on and in gear, was a failure to follow instructions or precautions regarding safety and showed that Employee engaged in careless and negligent work habits. Moreover, Employee’s failure to perform his duties in a safe manner resulted in injury to two people and significant property damage. Therefore, Agency requested that its removal action be upheld.

The OEA Administrative Judge held a Pre-hearing Conference on March 26, 2019. Agency appeared for the Pre-hearing Conference; however, Employee failed to appear. The AJ issued a Show Cause Order on the same date, ordering Employee to provide a Statement of Good Cause for failing to appear at the Pre-hearing Conference. The statement was due on or before April 2, 2019. On April 9, 2019, the AJ issued his Initial Decision. He held that Employee did not file a Good Cause Statement by the deadline. Consequently, he dismissed Employee’s appeal.

On May 6, 2019, Agency filed its Petition for Review. It explains that without knowledge to the AJ, the parties executed a settlement agreement on April 7, 2019, pursuant to which Employee was required to withdraw his case with prejudice by April 22, 2019. Accordingly, Agency requests that the matter be remanded to the AJ so that he can properly dismiss the case with prejudice.

3. **James Wilson v. Department of Parks and Recreation OEA Matter No. 2401-0020-12R16R18** – Employee worked as a Motor Vehicle Operator with the Department of Parks and Recreation. On March 29, 2017, Employee received an Advance Written Notice of Proposed Removal for “any on-duty or employment-related act or omission that employee knew or should reasonably have known is a violation of law: fighting” and “any on duty or employment-related act or omission that is not arbitrary or capricious: arguing.” The charges stemmed from a February 17, 2017 incident wherein Employee had an altercation with another Motor Vehicle Operator. Agency issued its Final Decision on May 31, 2017. Employee’s termination became effective on June 5, 2017.

Employee filed a Petition for Appeal with the Office of Employee Appeals on June 22, 2017. In his appeal, Employee argued that Agency lacked cause to terminate him. He

also stated that the penalty of termination was excessive. As a result, he requested to be reinstated to his former position without a break in service; have any references to termination removed from his personnel file; and be awarded attorneys' fees associated with his appeal.

On July 26, 2017, Agency filed a Motion to Dismiss and a Motion for Summary Disposition. Agency opined that Employee failed to set forth any facts in support of his allegations and that his pleadings were deficient. Consequently, Agency requested that OEA either dismiss Employee's appeal for failure to state a claim or make a ruling on its request for summary disposition. On October 10, 2017, the AJ issued an Order Denying Agency's Motion to Dismiss and held a prehearing conference on December 18, 2017. A hearing was subsequently held on March 6, 2018.

An Initial Decision was issued on September 26, 2018. The AJ explained that under the applicable District regulations, a cause of action involving fighting includes an employee who has engaged in activities that carry criminal penalties or an employee who has violated federal or District laws. She noted that in order to establish the elements of a criminal assault, pursuant to the applicable case law, the employee must have made an attempt with force of violence to injure another; with the apparent present ability to effect the injury; and with intent to do the act constituting the assault. The AJ concluded that while Employee was not the initial aggressor, his reflexive, physical striking of D.D. constituted an assault.

Notwithstanding, the AJ determined that Agency failed to appropriately consider Employee's invocation of self-defense because he was harassed, threatened, and physically attacked by D.D. Therefore, she held that Agency failed to appropriately consider the *Douglas* factor relating to "mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment; harassment, or bad faith, malice or provocation on the part of others involved." Consequently, Agency's termination action was reversed, and Employee was ordered to be reinstated with back pay and benefits.

Agency disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on October 31, 2018. It argues that the Initial Decision is based on an erroneous interpretation of statute, regulation, or policy because it misapplies the doctrine of self-defense. Agency further states that the Initial Decision ignored the fourth element of self-defense: that the response was necessary to save a person from danger. According to Agency, the AJ's findings are not supported by substantial evidence because the testimonial evidence, written statements, and other evidence submitted during the evidentiary hearing establish that Employee engaged in the conduct detailed in the charges against him. Lastly, Agency submits that the AJ failed to address the charge of arguing in a meaningful way. As a result, it requests that this Board grant its Petition for Review and reverse the Initial Decision.

4. **Gina Vaughn v. Metropolitan Police Department, OEA Matter No. 2401-0020-12R16R18**— 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 AJ issued his first Initial Decision on December 11, 2014, holding that Employee's separation from service was done in accordance with all applicable rules, statutes, and

regulations. Therefore, he reversed Agency's RIF action, and ordered Employee to be reinstated to her previous position of record with back pay and benefits. Agency filed a Petition for with OEA's Board on January 15, 2015. The Board remanded the matter because Agency was not afforded an opportunity to provide a brief in response to Employee's material allegations; Agency was not given a chance to provide an explanation regarding the discrepancies and inaccuracies in the RIF documents; and the AJ made a mistake of fact in concluding that a specific numerical indicator was a reference to a pay scale step rather than a designation of the position description.

The AJ issued an Initial Decision on Remand on September 9, 2016. He held that Employee was placed in the correct competitive level and concluded that Employee was classified as a Computer Specialist, DS-0334-12-07-N at the time of the RIF. Additionally, the AJ concluded that the inconsistencies in the RIF documents constituted a harmless error because they did not significantly affect Agency's final decision to separate Employee from service. Therefore, the AJ reversed his previous ruling and upheld Agency's RIF action on remand.

On October 18, 2016, Employee filed a Request for Extension of Time to File a Brief with OEA, stating that she made several attempts to contact her attorney of record, Leslie Deak, to determine whether a brief was filed on her behalf concerning the outstanding issues on remand. Employee also requested an additional week in which to file her brief. On October 27, 2016, Employee filed a second letter titled "Abandonment by Attorney: Request for Leave to Obtain Attorney & Further [Extend Time] to File Brief-Memorandum on Pending Issues on Remand." Thus, she requested leave to find new counsel to represent her before OEA.

On December 19, 2016, Employee's newly-retained attorney, Stephen Leckar, filed a Motion for Leave to Submit Memorandum in Support of Petition for Review of Initial Decision, wherein he asserted that Employee submitted a timely *pro se* letter to OEA after being abandoned by her previous attorney. Additionally, he requested leave to submit a brief in support of Employee's argument that the AJ failed to address her claim that her competitive level should have included a fellow Computer Specialist. Therefore, Employee's attorney asked the Board for leave to supplement the previously submitted letters and to explain why the AJ failed to address a dispositive matter of law that was timely raised before the AJ.

OEA's Board issued its Opinion and Order on Remand on July 11, 2017, concluding Employee's submission was not a Petition for Review because it only attempted to determine whether her attorney filed a Brief on Remand in a timely manner. The Board further stated the document was nonetheless filed in an untimely manner because under OEA Rule 633.1, a Petition for Review must be filed with the Board within thirty-five calendar days of the issuance date of the Initial Decision on Remand. Lastly, the Board noted that it did not have the legal authority to grant requests for extensions of time to file Petitions for Review. Consequently, Employee's filing was denied.

Employee subsequently filed an appeal with D.C. Superior Court on February 8, 2018. In its ruling, the Court held that although Employee's letter to OEA was filed beyond the thirty-five-day period, the Board erred in failing to equitably toll the deadline for submitting Employee's 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. Accordingly, the matter was remanded to OEA for briefing on 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 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. Lendia Johnson v. Metropolitan Police Department**

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Clarence Labor		X		
Patricia Hobson Wilson		X		
Jelani Freeman		X		
Peter Rosenstein		X		

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

**2. Frank Copeland v. Department of Public Works**

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Clarence Labor	X		X	
Patricia Hobson Wilson	X		X	
Jelani Freeman	X		X	
Peter Rosenstein	X		X	

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

**3. James Wilson v. Department of Parks and Recreation**

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Clarence Labor		X		
Patricia Hobson Wilson		X		
Jelani Freeman		X		
Peter Rosenstein		X		

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

**4. Gina Vaughn v. Metropolitan Police Department**

MEMBER	ORDERED BRIEFS	DENIED	REMANDED	DISMISSED
Clarence Labor	X			
Patricia Hobson Wilson	X			
Jelani Freeman	X			
Peter Rosenstein	X			

Four Board Members voted that briefs on Employee's Petition for Review be filed by July 2, 2019, with Agency's response due thirty-five calendar days after.

- 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 adjourned the meeting at 12:03 p.m.

**Respectfully Submitted,  
Wynter Clarke  
Paralegal Specialist**