

Minutes
D.C. OFFICE OF EMPLOYEE APPEALS (OEA) BOARD MEETING
Tuesday, June 30, 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), and Wynter Clarke (OEA Paralegal).

- I. Call to Order** – Clarence Labor, Jr. called the meeting to order at 11:10 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. Patricia Hobson Wilson seconded the motion. The Agenda was adopted by the Board.
- IV. Minutes from Previous Meeting** – The May 19, 2020 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. **Christopher Micciche v. Metropolitan Police Department, OEA Matter No. 1601-0019-18** — Employee worked as a Police Officer with the Metropolitan Police Department. Agency issued its Notice of Proposed Adverse Action on September 11, 2017. Employee was charged with violation of General Order Series 120.21, Attachment A, Part A-12 (conduct unbecoming an officer); violation of General Order Series 120.21, Attachment A, Part A-20 (misuse of official position, or unlawful coercion of an employee for personal gain or benefit); and violation of General Order Series 120.21, Attachment A, Part A-25 (prejudicial conduct). On October 27, 2017, Agency issued a Final Notice of Adverse Action against Employee. It found Employee guilty of all of the charges and specifications and imposed a penalty of a twenty-day suspension without pay and a demotion to the rank of Lieutenant.

The AJ issued an Initial Decision on January 10, 2020. He ruled that Agency had cause to impose the adverse actions against Employee. The AJ found that Agency's charge of conduct unbecoming was appropriate because Employee admitted to signing the Police and Fire Clinic's ("PFC") Acceptable Use Agreement on August 16, 2016. The agreement provided, inter alia, that in accordance with federal HIPAA, state, and local law, it was unlawful for him to view or modify his own electronic Patient Health Information. The AJ found that the signed agreement bore a direct relation to Employee being authorized to carry out central functions of his position. Thus, he held that Agency proved the conduct unbecoming charge. As it related to the misuse of official position charge, the AJ reasoned that Employee's prohibited sharing of other member's health/medical information was done in an attempt to avoid taking the required Fitness for Duty examination. Finally, with regard to the charge of prejudicial conduct, the AJ

opined that Employee failed to provide a credible reason for printing the other members' information. He found that Employee was lax in securing confidential medical documents and failed to take additional measures to safeguard the documents in a secure locked cabinet. Consequently, the AJ held that Agency's actions were taken for cause and that the demotion and twenty-day suspension were appropriate.

Employee filed his Petition for Review on February 14, 2020. He argues that there was no regulation, guidelines, directives, or General Orders that required Agency personnel to adhere to PFC policies. Specifically, Employee asserts that Agency did not charge him with violating the Acceptable Use Agreement but that he violated the law. It is his position that the Acceptable Use Agreement did not apply to him and that he was not bound by a PFC policy because PFC had no authority over MPD employees. As for the second charge, Employee contends that there was no personal benefit or gain as it relates to him submitting to a Fitness for Duty examination. He provides that Agency offered no evidence that the members, whose information he disclosed, did not submit to the Fitness for Duty exam. Finally, Employee argues that Agency incorrectly asserted that he violated any law or policy by leaving members' Protected Health Information ("PHI") in his locked office. Moreover, he provides that an Agency witness testified that leaving medical records behind a locked door is HIPAA compliant. Accordingly, Employee requests that the Board grant his petition and reverse the Initial Decision.

On March 31, 2020, Agency filed its Opposition to Employee's Petition for Review. As it relates to the first charge, Agency contends that Employee violated the Acceptable Use Agreement regarding his access to PHI. It asserts that the charge did not provide that he violated a law. Additionally, Agency argues that Employee's assertion that he was not an employee of the clinic is immaterial because he admitted to signing the agreement, and thereby, agreed to comply with the clinic's confidentiality rules. Moreover, Agency opines that there was no requirement that Employee actually reap a benefit as a basis for the second charge. It claims that Employee admitted that he shared two other members' medical information during his treatment session. According to Agency, Employee used the medical information, he gained through Centricity about the other members, to influence his own personal treatment that he was receiving at the clinic. Finally, Agency argues that Employee was only authorized to research members' sick leave history and medical status. Therefore, he was not authorized to access the PHI of members, print out the PHI, and leave it in an unsecured location. Thus, Agency requests that the Initial Decision be upheld.

2. Laura Jackson v. Department of Health, OEA Matter No. 2401-0020-10R17C19

After determining that Employee was wrongfully removed from her position, the AJ asked the parties to address several issues on compliance. The AJ issued an order requesting that both parties submit briefs addressing the amount of annual leave owed to Employee; the restoration of Employee's 457(b) contributions; and any entitlement of interest on Employee's back-pay award. She found that although Employee was reinstated to her position, she was not reimbursed back pay, and Agency did not fully restore Employee's annual leave hours. Regarding interest on Employee's back pay, the AJ determined that there is no precedent by OEA to award interest on a back-pay award. Thus, she found that Employee was not entitled to interest. The AJ also ruled that Agency was required to deduct whatever contribution Employee would have made to her 457(b) account from her back-pay sum, for the period of 2010 through 2018.

Because of the outstanding compliance issues, the AJ certified the matter to the OEA's General Counsel's Office for Enforcement of the Addendum Decision on Compliance.

Employee filed a Petition for Review on October 24, 2019. She argued that the AJ's decision regarding interest on her back-pay award was incorrect because the AJ did not properly consider applicable federal law. Therefore, Employee requested that her back-pay award include interest. On January 13, 2020, Employee filed a Request for Clarification and/or Correction of Statement and Status of Appeal. She argued that she was reinstated to her position; however, she has not been restored to her entitled grade, and she has not been reimbursed any back pay-to- date. Moreover, Employee asserted that other than her reinstatement, none of the other mandates in the May 1, 2018 order have been met. Therefore, she requested reimbursement of back pay; back pay to her social security benefits; back pay to her standard retirement fund; back pay to her 457(b) Retirement Plan; and that her annual leave be restored.

On February 11, 2020, the OEA's General Counsel issued a General Counsel's Order on Compliance. The order specifically addressed the outstanding compliance issues related to Employee's annual leave hours and the deduction of her 457(b) contributions. In accordance with D.C. Code § 1-606.02(a)(6) and OEA Rule 635.9, the General Counsel ordered Agency to submit documents verifying that it reimbursed Employee all back pay and benefits, including all of Employee's annual leave that she would have accrued had she not been improperly terminated, and the deduction of contributions Employee would have made to her 457(b) account from the back-pay sum.

On June 15, 2020, Agency provided an updated status report to OEA's General Counsel. The report provided that Employee was issued a check for back pay in the amount of \$398,865.12 on June 4, 2020. Moreover, it provided proof that Employee's annual leave was properly restored. Finally, Agency explained that it is actively coordinating with the 457(b) Plan Administrator, ICMA-RC, to issue a check to ICMA-RC for \$93,200, the amount due to Employee's 457(b) account.

- 3. Tara Blunt v. D.C. Department of Parks and Recreation, OEA Matter No. 1601-0067-16**—Employee worked as a Recreation Specialist in the Aquatics Division of the D.C. Department of Parks and Recreation. On June 1, 2016, Agency issued Employee an Advance Written Notice of Proposed Removal, charging her with “any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: insubordination.” The charge was based on Employee's failure to complete a mandatory International Lifeguard Training Program. On June 29, 2016, Agency issued its Notice of Final Decision on Proposed Removal. Employee's termination became effective on June 29, 2016.

The AJ issued an Initial Decision on September 30, 2019. With respect to the certification requirement, the AJ concluded that Agency made a reasoned and necessary decision to change from the ARC certification to the ILTP certification based on its determination that the former failed to meet national standards for pool safety. She concluded that, during the relevant time, the position descriptions for the Aquatics Division staff were generic and outdated; Agency had the authority and discretion to waive the ILTP certification requirements for employees who did not have actual lifeguard duties; and that Agency offered reasonable explanations

regarding why the individuals alleged by Employee to be similarly situated were not terminated. As a result, she found Employee's argument to be unpersuasive. Additionally, the AJ held that Agency presented sufficient evidence to establish that Employee knowingly and intentionally refused to comply with a directive given by her supervisor. The AJ determined that Agency complied with Article 24, Section 2.2 of the CBA which requires that employees and the Union are provided with notice of proposed disciplinary within forty-five business days after the date the employer knew or should have known or the act or occurrence allegedly constituting cause. Lastly, she concluded that Agency met its burden of proof in establishing that the penalty of termination was appropriate under the circumstances. Therefore, Agency's termination action was upheld.

Additionally, the AJ held that Agency presented sufficient evidence to establish that Employee knowingly and intentionally refused to comply with a directive given by her supervisor. The AJ determined that Agency complied with Article 24, Section 2.2 of the CBA which requires that employees and the Union are provided with notice of proposed disciplinary within forty-five business days after the date the employer knew or should have known or the act or occurrence allegedly constituting cause. Lastly, she concluded that Agency met its burden of proof in establishing that the penalty of termination was appropriate under the circumstances. Therefore, Agency's termination action was upheld.

Employee disagreed with the AJ's findings and filed a Petition for Review with the OEA Board on November 4, 2019. Employee states that the Initial Decision should be reversed because the AJ erroneously determined that Agency complied with the notice requirement contained in Article 24, Section 2.2, of the CBA. Additionally, she opines that the AJ erred in determining the admissibility and veracity of testimony entered into the record. Regarding the issue of disparate treatment, Employee submits that the AJ erred in determining that certain aquatics division employees with the same position description and lifeguard duties were not required to take and pass the ILTP. Concerning the substantive charge of insubordination, she states that Agency did not have the authority to order her to take the ILTP course in 2015 because the certification change had not been bargained for with the Union, as required by the CBA. Thus, Employee believes that she was not insubordinate in refusing to obtain the new certification. Therefore, she requests that this Board reverse the Initial Decision; reinstate her with back pay and benefits; remove all adverse information related to the personnel actions leading up to termination action; award damages for emotional distress; and award attorney's fees.

4. **Michael Minor v. Metropolitan Police Department, OEA Matter No. 1601-0052-18**—Employee worked as an Investigator for the Metropolitan Police Department. On November 1, 2017, Agency issued Employee a Notice of Proposed Adverse Action. Employee was charged with violating General Order 120.21 for “engaging in [the] commission of a crime, whether or not a court record reflects a conviction; failure to obey directives by the Chief of Police; and conduct unbecoming of an officer.” The charges stemmed from a February 20, 2016 incident wherein Employee was involved in a traffic dispute with another civilian, W.S., while traveling near Interstate 295 in the District of Columbia. On March 22, 2018, Agency issued its Final Notice of Adverse Action. On April 5, 2018, Employee filed an appeal with the Chief of Police. On April 25, the Chief of Police denied Employee's appeal. The effective date of his termination was May 11, 2018.

The AJ issued an Initial Decision on August 26, 2019. With respect to the substantial evidence requirement, the AJ concluded that the Adverse Action Panel's findings regarding each charge against Employee were supported by the record. He also found Employee's contention that he acted out of self-defense during the confrontation with W.S. to be without merit. As is related to the penalty of termination, the AJ held that Agency properly considered and weighed each *Douglas* factor in selecting the appropriate penalty.

With respect to whether Agency committed a harmful procedural error, the AJ held that Agency did not violate D.C. Code § 5-1031(b). Highlighting the holdings in *Ebert v. Metropolitan Police Department*, *D.C. Metropolitan Police Department v. D.C. Office of Employee Appeals*, and *McCain v. D.C. Office of Employee Appeals*, the AJ explained that Agency was permitted to rely on "bright lines" to determine the appropriate tolling period. In this case, the AJ held that the conclusion of the criminal investigation into Employee's conduct occurred on June 23, 2017, the date on which Employee's ADW charge was dismissed as *nolle prosequi*. Since Agency issued its Notice of Proposed Adverse Action November 1, 2017, exactly ninety business days after the conclusion of the criminal investigation, the AJ held that there was not a violation of the 90-day rule. As a result, Employee's termination was upheld.

Employee filed a Petition for Review and a Motion to Stay and Request for an Extension of Time to Submit a Statement of the Reasons for Appealing the Award on September 16, 2019. In his petition, Employee states that the legal disposition of this matter is not ripe for review before the OEA Board because the AJ relied heavily upon the holdings in *McCain* and *Thomas-Bullock* in support of his ruling; however, both cases were on appeal at the time of his filing. Therefore, Employee requests that the Board stay his appeal pending the resolution of *McCain* and *Thomas-Bullock*. He further requests thirty calendar days after the issuance of the aforementioned cases to file his Statement for the Reasons for Appealing the Initial Decision.

Agency filed an Opposition to Employee's Petition for Review and Motion to Stay and Request for an Extension of Time to Submit a Statement of the Reasons for Appealing the Award on October 10, 2019. It states that Employee was well aware that appeals in the matters of *McCain* and *Thomas-Bullock* were filed before the AJ issued the Initial Decision in this matter. Thus, it reasons that Employee should have requested a stay prior to the issuance of Initial Decision and not before the Board on petition for review. Consequently, Agency asks that Employee's motion be denied and requests that the Initial Decision be upheld.

C. Deliberations – After the summaries were provided, Jelani Freeman moved that the meeting be closed for deliberations. Dionna Maria Lewis 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. Christopher Micciche 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.

2. Laura Jackson v. Department of Health

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.

3. Tara Blunt v. D.C. Department of Parks and Recreation

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. Michael Minor 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.

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

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 12:24 p.m.

**Respectfully Submitted,
Wynter Clarke
Paralegal Specialist**