

Minutes

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

Tuesday, December 3, 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), Dionna Maria Lewis (OEA Board Member), and Wynter Clarke (OEA Paralegal).

- I. **Call to Order** – Clarence Labor called the meeting to order at 11:17 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. Dionna Lewis seconded the motion. The Agenda was adopted by the Board.
- IV. **Minutes from Previous Meeting** – The October 22, 2019 meeting minutes were reviewed. There were no corrections. The minutes were accepted.
- V. **New Business**
 - A. **Public Comments on Motion to Expedite**
 1. There were no public comments offered.
 - B. **Summary of Case**
 1. **Andrew Johnson v. D.C. Public Schools, OEA Matter No. 1601-0215-11R18**—On November 15, 2019, Employee filed a Motion to Expedite his case. Employee argues that there has been an extraordinary amount of time between when his Petition for Review was filed with the OEA Board and the issuance of the Initial Decision on Remand.
 - C. **Public Comments on Petition for Review**
 1. There were no public comments offered.
 - D. **Summary of Cases**
 1. **Willie Porter v. D.C. Department of Behavioral Health, OEA Matter No. 1601-0046-12C16** — This matter was previously before the Office of Employee Appeals' Board. Employee was a Psychiatric Nurse with Agency. Employee was charged with any knowing or material misrepresentation on an employment application. In an Initial Decision on Remand, the AJ held that the new and material evidence provided by Employee supported his argument that he resigned from his position and was not removed. Therefore, in the interest of justice, the AJ ruled that Agency did not have cause to remove Employee. As a result, he ordered that Employee be reinstated with back pay and benefits.

Employee was reinstated on or around May 20, 2017. On August 6, 2018, Employee filed numerous pleadings with OEA regarding Agency's back payment calculations. The calculation issues included projected overtime pay; reimbursement for out-of-pocket insurance payments; tax neutralization or tax gross up; pre- and post-judgment interest; and calculations of interim earnings. On September 21, 2018, Agency filed a response in opposition to Employee's memorandums. It asserted that Employee was not entitled to any enhancement of his back-pay award; and that his projected overtime, interest, offset, medical benefits, and tax neutralization claims lacked merit. Therefore, it requested that Employee's requests be denied.

The AJ issued his Addendum Decision on Compliance on February 15, 2019. He held that 6B DCMR § 1149.14 is clear that overtime pay shall not be included in any award for back pay. The AJ reasoned that Employee's assertions for medical reimbursement were incorrect. He explained that Employee would have still been responsible for paying a portion of the health insurance premiums through payroll deductions if he elected coverage through one of the District-provided health insurance plans. The AJ opined that because Employee elected to receive his full back pay amount without having his health insurance retroactively reinstated, he was not entitled to be compensated for his out-of-pocket insurance payments. Additionally, he found that OEA did not have authority to grant a tax gross-up. As for Employee's claim for interest, the AJ held that the new and material evidence presented to the OEA Board did not exist at the time Agency terminated Employee, nor at the time he issued his Initial Decision. Thus, he did not find an award for interest appropriate in the matter. However, the AJ did rule that Employee's income from his second job at Medical Staffing Network was to supplement his employment income, rather than replace it from his employment with Agency. He reasoned that, in accordance with 6B DCMR § 1149.13, Agency shall deduct "only that employment engaged in by the employee to takes the place of employment from which the employee was separated." Accordingly, the AJ ordered that Agency recalculate the amount of outside earnings that was deducted from the total back pay due to Employee. Specifically, he determined that the \$40,449.35 earned by Employee from Medical Staffing Network and attributed to Employee's outside earnings on the Reinstatement with Back Pay Worksheet should not be reflected as outside earning for purposes of awarding the back pay owed to Employee.

On March 22, 2019, Employee filed a Petition for Review. He posits that interest should be awarded to him since interest has been held to be virtually mandatory. Additionally, Employee argues that the AJ erred in denying his request that he be reimbursed for out-of-pocket insurance payments. He contends that the AJ incorrectly implied that the insurance carrier would have reimbursed his out-of-pocket expenses had Employee elected to retroactively reinstate his coverage as part of his reinstatement package. Therefore, Employee requests that the AJ's decision be reversed.

Agency filed a Motion to Strike Employee's Petition for Review on April 19, 2019. It argues that OEA Rule 633.1 permits a party to file a Petition for Review of an Initial Decision, not a Petition to an Addendum Decision on Compliance. Moreover, Agency asserts that OEA Rules 635.1-635.11 permit parties to address compliance issues by motion to the presiding AJ. Accordingly, Agency requests that Employee's petition be stricken.

On April 29, 2019, Employee filed a response in opposition to Agency's motion. Employee claims that Agency failed to cite any authority for its position that his Petition for Review should be stricken. As a result, Employee requests that Agency's motion be denied.

In response to Employee's Opposition to Agency's Motion to Strike, Agency admits that it inadvertently failed to include citation to authority to support its position. It argues that in *Delores Junious v. D.C. Child and Family Services*, the OEA Board held that "OEA's rules do not contain a specific provision for filing a petition for review in response to an addendum decision on compliance. If a party wishes to contest the findings of a decision regarding compliance, the matter must first be certified to this Office's General Counsel for enforcement." Agency asserts that Employee's matter was not certified to the Office's General Counsel for enforcement. Furthermore, it contends that OEA Rules 635.8 and 635.9 specifically provide the available remedy upon a finding of non-compliance by an agency and neither rule provides for an appeal. Therefore, Agency requests that Employee's Petition for Review be denied.

2. **Vennie Jones v. University of the District of Columbia, OEA Matter No. J-0003-19** – Employee worked as a Clerk with Agency. On September 25, 2018, she received a notice that her temporary appointment would expire on September 30, 2018. Specifically, Agency explained that it did not receive funding to extend the grant into fiscal year 2019, and therefore, Employee would not receive a new temporary appointment.

Employee filed a Petition for Appeal with OEA on October 4, 2018. She claimed that Agency blacklisted her from being considered for other temporary full-time or permanent full-time positions. Agency asserted that Employee held a temporary appointment; thus, OEA lacked jurisdiction over the matter. Additionally, Agency posited that Employee knew that she was a temporary, full-time employee when she received her appointment letter. Agency argued that pursuant to District Personnel Manual § 826.1, Employee's employment ended at the expiration date of her temporary appointment. Accordingly, it requested that Employee's Petition for Appeal be dismissed.

On January 18, 2019, the AJ issued his Initial Decision. The AJ found that Employee was on notice that her appointment was a temporary appointment. Additionally, he explained that once a temporary or term employee's status expired, there is no legal obligation for Agency to renew the appointment. Moreover, the AJ reasoned that OEA consistently held that pursuant to OEA Rule 628.2, employees have the burden of proving that OEA has jurisdiction to hear and decide their appeals. He determined that Employee did not meet this burden. Consequently, the AJ dismissed the appeal for lack of jurisdiction.

On February 8, 2019, Employee filed a Petition for Review. She argues that the AJ failed to address all of the issues of law and fact; that the Initial Decision was based on an erroneous interpretation of statute, regulation, or policy; and that the AJ did not consider her original arguments. Employee maintains that she worked in a hostile work environment and that Agency blacklisted her from being considered for other temporary full-time or permanent full-time positions.

3. **Adham Numair-El v. Metropolitan Police Department, OEA Matter No. 1601-0027-18-** Employee worked as a Police Officer with the Metropolitan Police Department. On March 10, 2017, Agency issued a Notice of Proposed Adverse Action, charging Employee with being “involved in the commission of any act which would constitute a crime, whether or not a court record reflects a conviction” and “conduct prejudicial to the reputation of good order of the police force.” The charges were based on Employee’s failure to have any federal tax withholdings deducted from his salary from February 28, 2010 through January 10, 2012 and because he allegedly used the PeopleSoft system to claim an exemption from federal tax withholdings based on his representation that he was of Native American heritage. The effective date of Employee’s termination was September 29, 2017.

On February 1, 2018, Employee filed a Petition for Appeal with the Office of Employee Appeals challenging Agency's termination action. He argued that Agency violated D.C. Official Code § 5-1031 (commonly referred to as the 90-day rule). Employee stated that he did not change his federal tax exemption status in PeopleSoft. Therefore, he requested that Agency rescind its termination action. Agency filed a response to Employee’s appeal on March 5, 2018. It denied Employee’s claims and requested an oral hearing.

The AJ held a pre-hearing conference on July 12, 2018 to assess the parties’ arguments. During the prehearing conference, the AJ determined that a *de novo* evidentiary hearing before OEA was unwarranted. Accordingly, the AJ directed the parties to submit written briefs.

The AJ issued an Initial Decision on December 6, 2018. He held that the D.C. Court of Appeals in *Metropolitan Police Department v. Pinkard* limited OEA to determining whether Agency's removal action was supported by substantial evidence; whether Agency committed a harmful procedural error; and whether Employee's termination was in accordance with the law and applicable regulations. After reviewing the record and the arguments presented by the parties, the AJ concluded that Agency’s Trial Board met its burden of proof in establishing the charges and specifications against Employee. The AJ disagreed with Employee’s argument that the Trial Board was not actively engaged during the hearing. Additionally, the AJ determined that Agency's internal investigation, coupled with witness testimony provided during the hearing, supported a finding that Employee’s termination was proper.

Regarding whether the Agency committed a harmful procedural error, the AJ concluded that Agency complied with the 90-day rule because it first became aware of Employee's alleged misconduct November 30, 2016 when Agency received an August 5, 2016 letter from the Department of Justice Tax Division. He explained that IAD Agent Altieri initiated an investigation into Employee’s conduct on December 1, 2016 and Agency issued its Advance Notice of Termination to Employee on March 10, 2017, prior to the expiration of the 90-day statutory period.

Accordingly, the AJ held that Agency did not commit a harmful procedural error. Lastly, the AJ found that Agency properly considered the *Douglas* factors. As a result, he concluded that Employee’s termination was taken in accordance with all applicable laws and regulations. Consequently, Agency's termination action was upheld.

Employee filed a Petition for Review with OEA's Board on January 10, 2019. He argues that the AJ's decision was based on an erroneous interpretation of D.C. Official Code § 5-1031 because Agency became aware of Employee's alleged tax issues when Agent McGuire learned of Employee's attempt to change his name on September 22, 2010. Employee asserts that the AJ erred when he applied the 2015 version of the 90-day rule, instead of the 2004 version. Additionally, he contends that the AJ's conclusion that Employee's conduct was both criminal and prejudicial to the Department is not supported by substantial evidence. Employee also posits that the AJ failed to adequately address his concerns regarding the Trial Board's erroneous interpretation of the *Douglas* factors. Consequently, he requests that this Board grant his Petition for Review.

Agency filed its Response to Employee's Petition for Review on February 14, 2019. It argues that it did not violate D.C. Official Code § 5-1031 and that the evidence clearly shows that Agency was not made aware of Employee's misconduct until November 30, 2016, and not in 2010 as Employee suggests. Further, Agency contends that the Trial Board's and the AJ's findings were supported by substantial evidence in the record. Lastly, Agency opines that the AJ properly addressed Employee's concerns regarding the *Douglas* factors. Therefore, it and requests that the Board uphold the Initial Decision.

E. 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.

F. Open Portion of Meeting Resumed

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

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

| MEMBER | GRANTED | DENIED | REMANDED | DISMISSED |
|------------------------|---------|--------|----------|-----------|
| Clarence Labor | | X | | |
| Patricia Hobson Wilson | | X | | |
| Jelani Freeman | | X | | |
| Peter Rosenstein | | X | | |
| Dionna Lewis | | X | | |

Five Board Members voted in favor of denying Employee's Motion to Expedite. Therefore, the motion was denied.

2. Willie Porter v. D.C. Department of Behavioral Health

| MEMBER | GRANTED | DENIED | REMANDED | DISMISSED |
|------------------------|---------|--------|----------|-----------|
| Clarence Labor | | 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. Vennie Jones v. University of the District of Columbia

| MEMBER | GRANTED | DENIED | REMANDED | DISMISSED |
|------------------------|----------------|---------------|-----------------|------------------|
| Clarence Labor | | 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. Adham Numair-El v. Metropolitan Police Department

| MEMBER | GRANTED | DENIED | REMANDED | DISMISSED |
|------------------------|----------------|---------------|-----------------|------------------|
| Clarence Labor | X | | | |
| Patricia Hobson Wilson | X | | | |
| Jelani Freeman | | | X | |
| Peter Rosenstein | X | | | |
| Dionna Lewis | X | | | |

Four Board Members voted in favor of granting Employee’s Petition for Review. Therefore, the petition was granted. Accordingly, Agency is ordered to reinstate Employee and reimburse him all back pay and benefits lost as a result of his termination.

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

VI. Adjournment – Peter Rosenstein moved that the meeting be adjourned; Jelani Freeman seconded the motion. All members voted affirmatively to adjourn the meeting. Clarence Labor adjourned the meeting at 12:36 p.m.

Respectfully Submitted,
Wynter Clarke
Paralegal Specialist