Agenda

D.C. OFFICE OF EMPLOYEE APPEALS (OEA) BOARD MEETING
Tuesday, January 20, 2015 at 11:00 a.m.
Location: 1100 4th Street, SW, Suite 380E
Washington, DC 20024

I. Call to Order

II. Ascertainment of Quorum

III. Adoption of Agenda

IV. Minutes Reviewed from Previous Meeting

V. Old Business

A. Public Comments on Motion to Expedite

B. Summary of Case

1. Derek Gadsden v. Department of General Services, OEA Matter No. J-0065-14 – Employee filed a Petition for Review on May 9, 2014. He motioned to expedite the Board's review of his case because he is a father of two who is experiencing extreme financial difficulties. At the December 9, 2014 meeting, two Board members voted to grant Employee's motion and two voted to deny it. Therefore, it was tabled for today's meeting for William Persina to cast the deciding vote.

VI. New Business

A. Public Comments on Petitions for Review

B. Summary of Cases

1. Joseph O'Rourke v. Metropolitan Police Department, OEA Matter No. 1601-0310-10 – Employee worked as a Police Officer with Agency. He was removed from his position for "willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Officer to, or in the presence of, any superior officer, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing." The effective date of removal was May 7, 2010.

Employee explained that prior to his termination, he was injured on July 1, 2007, while chasing a carjacking suspect. As a result of the injury, he was placed in a limited-duty, administrative position within Agency. Agency referred Employee to the Police and Firefighter's Retirement Board for consideration of disability retirement benefits. However, before a decision was issued on Employee's disability retirement action, Agency issued its final decision to terminate him.

On February 14, 2013, Employee issued a brief which provided that the Retirement Board issued its final decision on his disability retirement. He asserted that in accordance with the final order, Agency retroactively retired him on May 7, 2010, thereby, nullifying his termination action which was effective on the same day. Employee contended that because Agency initiated the disability retirement process, then his retirement was involuntary. Therefore, the termination action was not in accordance with law or regulation, and there was harmful procedural error committed. As a result, Employee argued that he was the prevailing party in this matter and requested that OEA award him attorney's fees.

The Administrative Judge ("AJ") issued an Order requesting that both parties brief whether Employee voluntarily retired from his position based on the ruling in *Christie v. United States*, that for a retirement to be deemed involuntary, the employee must show that agency imposed undue

coercion, misrepresentation, or mistaken information. Employee filed his response and explained that his retirement was involuntary because it was the result of a disability action that Agency initiated. Employee argued that this is different than the standard provided in *Christie*. Agency claimed that Employee's disability retirement is presumed to be voluntary because Employee failed to show that it was the result of coercion or misrepresentation. Consequently, Agency argued that OEA lacked jurisdiction to adjudicate Employee's appeal. On October 1, 2013, the AJ issued his Initial Decision on this matter. He ruled that Employee's disability retirement was voluntary because he failed to offer proof of coercion or misrepresentation.

Employee filed a Petition for Review on October 25, 2013. He raised many of the same arguments on appeal. Additionally, he argues that the AJ misunderstood the disability retirement law and utilized an improper analogy to conclude that his retirement was voluntary. Further, he alleges that OEA has the ability to award attorney's fees in this matter. Accordingly, Employee is requesting back pay from the effective date of his disability retirement – May 7, 2010 – until February 6, 2013.

On November 29, 2013, Agency filed its Response to Employee's Petition for Review. It argued that OEA lacked jurisdiction because Employee voluntarily retired. Agency also contends that the AJ properly relied on the employment law determination of voluntary versus involuntary retirement. It provides that OEA is not required to follow the Retirement Board's determination of an involuntary retirement. Additionally, Agency claims that the lawfulness of Employee's termination is moot. Finally, it asserts that Employee is not the prevailing party and is, therefore, not entitled to attorney's fees.

2. Ronnell Dennis v. Office of the Chief Medical Examiner, OEA Matter No. 1601-0404-10 – Employee worked as an Autopsy Assistant with the Agency. Agency removed Employee from his position for "any on-duty or employment-related act or omission that the employee knew or should reasonably have known was a violation of law." Specifically, Agency claimed that on June 24, 2010, Employee sexually harassed and assaulted another employee, Ms. Jamison, by using sexually degrading language to describe her body. Additionally, it alleged that Employee poked Ms. Jaimson in the stomach and hit her on the hip. Moreover, Employee told the security guard, Ms. Brown, that she looked like his dog when she attempted to intervene.

Employee filed a Petition for Appeal with OEA on September 14, 2010. He argued that the appropriate penalty for Agency's action was a five to fifteen-day suspension. Further, Employee alleged that the removal action was in retaliation against him for filing an Equal Employment Opportunity Commission ("EEOC") complaint. Therefore, he sought to be reinstated to his position with back pay and benefits.

Agency provided that Employee's termination complied with provisions of the District Personnel Manual ("DPM"), and it relied on the Table of Appropriate Penalties to assess the penalty taken against Employee. Therefore, it reasoned that Employee's removal action was not retaliatory in nature, as he suggests.

The AJ conducted an evidentiary hearing on December 4, 2012, and issued his Initial Decision in the matter on October 31, 2013. In the Initial Decision, the AJ made several credibility determinations and found Ms. Jaimson to be a more credible witness than Employee. He ruled that in accordance with Mayor's Order 2004-171, Employee did engage in the sexual harassment and assault of Ms. Jamison. The AJ further found that the penalty for Employee's conduct was removal. He relied on DPM § 1619(5)(b) and (c) and Mayor's Order 2004-171 to support his decision. Finally, the AJ determined that there was no credible evidence to support Employee's contention that his removal was in retaliation to an EEOC compliant. Therefore, Employee's termination was upheld.

Employee disagreed with the AJ's decision and filed a Petition for Review with the OEA Board on November 15, 2013. He claimed that Agency failed to adhere to OEA Rule 607.2 which required it

to file its answer to his Petition for Appeal within thirty calendar days. Employee contends that the AJ erred in denying his Motion to Dismiss the matter on this basis during the evidentiary hearing.

Moreover, Employee asserts that Agency committed harmful procedural errors and failed to comply with the DPM and Mayor's Order 2004-171 when removing him. He went on to provide that there were witness testimonies that proved that he did not engage in the alleged conduct. He also offered, what he deemed, several inconsistencies with witness testimonies. Finally, he explained that the AJ relied on the wrong section of the DPM §1619.5 of the Table of Penalties. Therefore, he requested that the Board reverse the Initial Decision.

On January 8, 2014, Agency submitted its Response to Employee's Petition for Review. It provided that during the evidentiary hearing, Employee admitted that the incident occurred. Agency reasoned that the as the factfinder, the AJ is entitled to make his credibility findings based on the first-hand observation of witnesses. Because Agency believed Employee failed to offer any evidence to contradict the AJ's findings, it requested that his Petition for Review be denied.

3. Sylvester Butler v. District of Columbia Department of Public Works, OEA Matter No. 1601-0161-11 – Employee worked as a Property Control and Disposal Specialist with Agency. Agency issued a Notice of Final Decision removing Employee for "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 maintain a valid motor vehicle operator's permit)." Employee filed a Petition for Appeal with OEA on August 11, 2011. He provided that he sought and obtained help with his drinking problem. Hence, Employee requested that OEA review his removal action.

Agency argued that as a Property Control and Disposal Specialist, Employee's duties included driving passenger vehicles to transport customers to their vehicles in the impound lot; driving vehicles to be inspected or to receive preventative maintenance; and retrieving vehicles in the lot. Therefore, it contended that in order for Employee to properly execute his duties, he was required to possess and maintain a valid driver's license.

Agency provided that, in accordance with Article 24, Section C of the Collective Bargaining Agreement ("CBA"), any employee's failure to maintain a license can lead to disciplinary action or termination. It asserted that Employee's license was revoked for seven months because he was involved in an accident which resulted in five citations. Agency contended that although Employee attempted to obtain a limited occupational license, his request was denied. Agency reasoned that termination was appropriate under the Table of Appropriate penalties, and it considered the *Douglas* factors. Therefore, it requested that OEA sustain the termination action.

During a Pre-hearing Conference, Employee asserted that there were mistakes on his driving record that, if corrected, would have allowed him to obtain a limited occupational license. Employee provided that errors were corrected by the Department of Motor Vehicles as reflected on an October 2011 printout. According to Employee, the corrected printout reflects that he only had fourteen points assessed. Therefore, Employee contended that he would have qualified for a limited occupational license because his points did not exceed sixteen. Agency explained that there was nothing in the Department of Motor Vehicles records which indicated that there was an error committed during the initial charging process. It provided that the difference between the two records could be attributed to a remedy Employee sought himself; the result of litigation; or an act that occurred during the normal course of business

The AJ issued his Initial Decision on September 11, 2013. He held that without a valid driver's license, Employee was unable to perform the full duties of his position, including moving vehicles on the government's impound lot. Therefore, he held that Agency had cause to charge Employee with failure to maintain a valid motor vehicle operator's permit. Additionally, the AJ ruled that

removal was an appropriate penalty under the circumstances. As for the alleged driving record errors, the AJ found that Employee did not offer a date for when the error was supposedly corrected, and he provided no documents from the Department of Motor Vehicles which explained that the nineteen points on his record was in error. Therefore, he ruled that Agency's decision to remove Employee be upheld.

Employee filed a Petition for Review with the OEA Board on October 16, 2013. He presents the same arguments made before the AJ regarding the alleged errors in his driving record and his notice to Agency of the error. Employee argues that the charge of "failure to report accident" was a five-point assessment. However, he claims that this particular offense was repealed on December 12, 2003. It is also Employee's position that Agency was required to consider a lesser penalty of disciplinary action.

On December 11, 2013, Agency filed its Reply to Employee's Petition for Review. It argues that Employee offered no new evidence on Petition for Review and failed to cite to any authority regarding its requirement to consider a lesser penalty. It reasoned that because the action was taken for cause and removal was within the range of penalty, then the Petition for Review should be denied.

4. April Dyson v. Department of Consumer and Regulatory Affairs, OEA Matter No. 2401-0315-10 – Employee worked as a Risk Manager Coordinator with Agency. Agency provided Employee with a Reduction-in-Force ("RIF") notice which stated that she would be removed from her position effective June 25, 2010. Employee appealed Agency's RIF action to OEA. She argued that Agency commenced the RIF action against her while she was on Worker's Compensation which is a violation of D.C. Official Code § 1-623.45.

Agency filed its Answer to Employee's Petition for Appeal and contended that Employee received one round of lateral competition and thirty days' notice. Agency explained that it submitted to the City Administrator a request for approval of the RIF action, which was approved on May 13, 2010. Additionally, it provided that Employee was the sole Risk Management Coordinator within her competitive level. Therefore, one round of lateral competition was not required. Because it complied with Chapter 24 of the DPM, Agency claimed that the RIF was properly executed. As for Employee's Worker's Compensation argument, Agency submitted that in *Marsha Karim v. D.C. Public Schools*, OEA held that "there is no legal requirement that exempts an employee with an approved worker's compensation claim from being subject to a RIF, unless the termination was conducted in retaliation for the filing of the claim."

Employee argued that Agency violated D.C. Official Code § 1-623.45 because it terminated her before the two-year period for her to overcome her disability. Employee also claimed that Agency terminated her in retaliation for her Worker's Compensation claim. Furthermore, she contended that although the effective date of the RIF action was June 26, 2010, she continued on Leave Without Pay at Agency for two years. Employee explained that she received a final paycheck from Agency on July 24, 2012; however, she did not receive a subsequent RIF notice in 2012 terminating her from her position. Thus, she requested that the AJ grant her appeal.

Agency responded and explained that in accordance with D.C. Official Code § 1-623.45, it was required to provide disability benefits for Employee from February 21, 2009 until February 21, 2011, for a total of two years. However, Agency contended that because it was required to provide Employee with disability benefits, does not mean that it was not also within its authority to take the RIF action. It again cited to the *Karim* case. Agency claimed that the RIF action was properly taken; however, it had to keep Employee on the payroll for two years to comply with the disability benefits statute until Employee was transferred to the Office of Risk Management's payroll. Furthermore, Agency provided that if it generated Employee's Standard Form 50 reflecting the RIF

action, it would have resulted in an interruption to her disability benefits. Accordingly, it placed Employee on LWOP during this time.

On October 31, 2013, the AJ issued her Initial Decision. She found that one round of lateral competition was not applicable in this case because Employee was in a single-person competitive level. Moreover, the AJ ruled that Employee received the requisite thirty days' notice. As for Employee's argument that she was not properly RIFed because she remained on the payroll, the AJ was unpersuaded by this claim. She found Agency's explanation of the personnel procedure established to prevent interruption to Employee's disability benefits to be persuasive. The AJ ruled, as she did in *Karim*, that D.C. Official Code § 1-623.45 does not exempt an employee from being subjected to a RIF action. Therefore, the RIF action was upheld.

Employee filed a Petition for Review of the Initial Decision with the OEA Board. She argues that the AJ erred in finding that the RIF was proper while she remained on Agency's payroll for two years. Employee presents the same arguments raised on appeal regarding the Standard Form 50, as well as her dental and life insurance benefits. Therefore, she requests that the Initial Decision be reversed.

Agency filed its Response to Employee's Petition for Review on January 2, 2014. It provided that Employee was placed in the proper competitive area and level before the RIF action. However, because she was in a single-person competitive level, one round of lateral competition did not apply. Moreover, Agency asserted that Employee received the requisite thirty days' notice.

Employee replied by reiterating the same arguments regarding the Standard Form 50. Additionally, she argues that because Agency never RIFed her in May 21, 2010, then OEA lacked jurisdiction over her case. Therefore, she asked that the Initial Decision be reversed.

5. Widmon Butler v. Metropolitan Police Department, OEA Matter No. J-0421-10 -- Employee worked as a Human Resource Specialist with Agency. On July 23, 2010, Agency issued an Advanced Written Notice of Proposed Adverse Action to Employee, suspending him for twenty-five days. Employee was charged with any on duty or employment related act that Employee knew or should reasonably have known was a violation of the law; any on duty or employment related act or omission that interferes with the efficiency or integrity of government operations; and any other on duty or employment related reason for corrective or adverse action that is not arbitrary or capricious. After a departmental hearing, Employee received a Notice of Final Decision, which reduced the suspension to five days and placed him on an Employee Improvement Plan.

Employee filed a Petition for Appeal with OEA on October 8, 2010. He argued that the Notice of Final Decision failed to provide an alleged offense; the charge and penalty violated the regulations provided in the DPM; that the charge was not supported by substantial evidence; that the adverse action violated D.C. Official Code § 5-1031; and that the penalty was too harsh. Therefore, Employee requested that OEA vacate Agency's action. In response to the Petition for Appeal, Agency explained that per OEA's rules, OEA did not have jurisdiction over suspensions of less than ten days. Accordingly, Agency requested that the appeal be dismissed with prejudice.

Employee provided that he was suspended for fifteen days. He explained that he was required to serve a five day suspension for the current matter, and a ten day suspension for a previous case against him. Therefore, he believed OEA had jurisdiction over the matter and requested that Agency's motion be denied.

The AJ issued an Initial Decision on January 5, 2012. He found that Employee appealed a five-day suspension for the current case and five-day suspension for a previous case wherein an agreement had been reached with Agency. First, the AJ held that OEA lacked jurisdiction over suspensions of less than ten days. Furthermore, he found no law or regulation that would allow Employee to couple

two suspensions together for the sake of claiming jurisdiction. Therefore, the matter was dismissed for lack of jurisdiction.

Employee appealed this matter to the Superior Court for the District of Columbia on February 15, 2012. The Court held that Employee appealed his five-day suspension to OEA and did not appeal the ten-day suspension. The Court reasoned that in accordance with D.C. Official Code § 1-606.03(a) and OEA Rule 604.1, OEA lacked jurisdiction to consider Employee's appeal. Moreover, it explained that Employee could not add the days of his two, independent suspensions to meet OEA's jurisdictional threshold. Accordingly, Employee's Petition for Review was denied effective November 4, 2013.

One month later, OEA received a letter filed by Employee and addressed to the AJ. The letter requested that the AJ correct a clerical error. Employee explained that although his penalty was reduced to a five-day suspension, Agency added an additional ten days for a previous case, but only five of those days could have been attributed to that case. Thus, Employee argued that Agency imposed an additional penalty when it suspended him for fifteen days.

C. **Deliberations** – This portion of the meeting will be closed to the public for deliberations in accordance with D.C. Official Code § 2-575(b)(13).

D. **Open Portion Resumes**

E. **Final Votes on Cases**

F. **Public Comments**

VII. Adjournment