

## **Agenda**

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

Tuesday, January 24, 2017 at 11:00 a.m.

Location: 1100 4<sup>th</sup> Street, SW, Suite 380 (East Building)

Washington, DC 20024

**I. Call to Order**

**II. Ascertainment of Quorum**

**III. Adoption of Agenda**

**IV. Minutes Reviewed from Previous Meeting**

**V. New Business**

**A. Public Comments on Interlocutory Appeal and Petitions for Review**

**B. Summary of Cases**

**1. Brendan Cassidy v. D.C. Public Schools, OEA Matter No. 2401-0253-10R13R16** – Employee worked as an English teacher with Agency. On October 2, 2009, Agency notified Employee that he was being separated from his position pursuant to a Reduction-in-Force (“RIF”). The AJ issued his Initial Decision on Remand on May 28, 2015. He held that Agency should have used D.C. Official Code § 1-624.08, instead of D.C. Official Code § 1-624.02, because the RIF was taken as the result of budgetary constraints. Consequently, he provided that, in accordance with D.C. Official Code § 1-624.08, Employee was entitled to one round of lateral competition and thirty days’ notice. The AJ ruled that Employee was provided thirty days’ notice. As for the one round of lateral competition, the AJ used Title 5, DCMR § 1503.2 *et al.* and 1503.1.

On September 13, 2016, the OEA Board held that Chapter 24 of the DPM should be used when determining if the RIF actions conducted under D.C. Official Code § 1-624.08 were proper. Because the AJ improperly analyzed this case using Chapter 15 of the DCMR, the Board reasoned that the AJ’s Initial Decision on Remand was not based on substantial evidence. Accordingly, the matter was remanded to the AJ for the limited purpose of determining if Agency complied with DPM Chapter 24 when conducting the RIF action, as provided in D.C. Official Code § 1-624.08.

The AJ held a Status Conference on October 17, 2016. Subsequently, he issued a Post-Status Conference Order requesting that both parties submit briefs on “whether Agency complied with DPM Chapter 24, as provided in D.C. Official Code § 1-624.08, when it conducted the instant RIF action.” On October 24, 2016, Employee filed a Motion Requesting Certification of an Interlocutory Appeal. In his motion, Employee argues that his case would be unfairly prejudiced if Agency was allowed to submit briefs on DPM Chapter 24, when it had ample opportunity to provide this information before the record was closed.

Subsequently, on October 27, 2016, the AJ issued an order granting Employee’s certification of the Interlocutory Appeal to the Board. After the order was granted, Agency filed its response to the Interlocutory Appeal. It asserts that in general, courts and administrative forums disfavor Interlocutory Appeals. Agency contends that the AJ has total discretion in rendering his findings. It offers several examples of matters that were remanded to Administrative Judges who allowed parties to submit briefs or conduct evidentiary hearings. Therefore, Agency requests that the motion for Interlocutory Appeal be denied.

**2. Dale Jackson v. Department of Health, OEA Matter No. 2401-0089-11R14** –Employee worked as a Motor Vehicle Operator with Agency. On August 20, 2010, Agency conducted a RIF. Employee was terminated from Agency effective September 24, 2010. Employee filed a Petition for Appeal with OEA on October 14, 2010.

On July 10, 2015, the AJ issued an Initial Decision on Remand. He found that DPR § 2410.4 provided Agency with a choice to group employees pursuant to their grade or their occupational level when planning for and implementing a Retention Register as part of a RIF action. In this instance, Agency opted to group its competitive level using an employee’s grade and not their occupational level. He held that another Agency employee should not have been included in the same competitive level as Employee and that no other Agency employee occupied the same competitive level. The AJ reasoned that Employee was properly included in a single-person competitive level; therefore, one round of lateral competition was inapplicable. Accordingly, he upheld Agency’s RIF action.

Employee disagreed with the AJ’s decision and filed a Petition for Review on Remand on July 22, 2015. He contends that the AJ ignored DPM §2410.4 which provides that a competitive level consists of all positions with the same grade or occupational level. He asserts that he and another employee shared the same occupational level and performed the same job.

On August 25, 2015, Agency filed its Response to Employee’s Petition for Review on Remand. It provides that the Administrative Order contained in the record defines the position selected for abolishment in the instant RIF as the Grade 6, Series 5703 level. Agency explains that the other Agency employee should not have been included in the same competitive level as Employee because he occupied a Grade 5 Motor Vehicle Operator Position. It agreed with the AJ that Employee was appropriately placed in a single-person competitive level in this matter. Accordingly, Agency requests that this Board uphold the AJ’s Initial Decision on Remand.

**3. Jennifer Cohen v. D.C. Public Schools, OEA Matter No. J-0051-16** – Employee worked as a World Language Teacher with Agency. She was removed from her position for “incompetence, including either inability or failure to perform satisfactorily the duties of the position of employment.” She filed a Petition for Appeal with OEA on June 1, 2016. She argued that she was fit for duty and requested that reasonable accommodations be made for her medical condition. Accordingly, she asked that the termination action against her be reversed.

The AJ issued her Initial Decision on September 8, 2016. She held that in accordance with OEA Rule 621, Employee failed to prosecute her appeal. Accordingly, she dismissed her case.

On September 19, 2016, Employee submitted a request for an extension. Because it was filed after the Initial Decision, this Board will consider Employee’s request a Petition for Review. Employee explains that she was homeless from July 23, 2016 through August 2, 2016. Additionally, she was hospitalized from August 7, 2016 through August 19, 2016. Therefore, she requested an extension to defend her rights.

**4. Joseph O’Rourke v. Metropolitan Police Department, OEA Matter No. 1601-0310-10R15** – Employee worked as a Police Officer with Agency. On June 22, 2015, the AJ issued his Initial Decision on Remand. The AJ held that OEA was unable to provide Employee any relief in this matter because Employee was placed on disability retirement on the same day of his removal. The AJ held that OEA’s enabling statute does not allow for Employee to recover

anything under the circumstances. Accordingly, he ordered that the matter be dismissed for lack of jurisdiction.

On Petition for Review, Employee argues that once the disability retirement process started, Agency had an obligation to complete it. Therefore, he contends that Agency violated the process by removing him before the disability retirement procedure was complete. Employee asserts that he only received forty percent of his pay from May 2010 until February 2013. It is his position that he would have received his entire pay if he was not wrongfully removed by Agency. Therefore, he requested that OEA award back pay for that time period.

On August 26, 2015, Agency filed its response to Employee's Petition for Review. It argues that OEA is not the proper forum to adjudicate Employee's claims. Moreover, it provides that Employee's retirement was effective the same day as his termination action. Finally, Agency notes that Employee's retirement did not occur until after his disciplinary investigation was complete. Therefore, it requests that his Petition for Review be denied.

**5. Robert Willis v. D.C. Public Schools, OEA Matter No. 2401-0210-10R14** - Employee worked as a Science Teacher with Agency. On October 2, 2009, Agency notified Employee that he was being separated from his position pursuant to a RIF.

The AJ issued his Initial Decision on Remand on June 10, 2015. He found that Employee was properly afforded one round of lateral competition and explained that Agency properly considered all of the factors enumerated in DCMR § 1503.2 when it conducted the RIF. He also held that Agency provided Employee the required thirty-day notice. As a result, the AJ upheld Agency's RIF action against Employee.

On July 15, 2015, Employee filed a Petition for Review. He argues that there was conflicting testimony provided by Agency witnesses regarding the length of time a principal could consider when evaluating employees for the RIF action. Moreover, he argues that the AJ's decision did not consider all issues of law and fact raised on appeal. In a subsequent filing, Employee asserts that Agency violated DPM Chapter 24 when removing him through its RIF action. Accordingly, Employee requests that he be reinstated to his position with back pay and benefits.

Agency filed its Response to Employee's Petition for Review on August 19, 2015. It contends that the AJ credibly found that the principal presented substantial evidence to support the CLDF. Agency also claims that the AJ correctly relied on 5 DCMR § 1503.1 when analyzing this case. Therefore, it requests that this Board uphold the AJ's ruling.

**6. Angela Washington v. District of Columbia Office of Unified Communications, OEA Matter No. 1601-0076-14** – Employee worked as a Telecommunications Equipment Operator with Agency. On March 31, 2014, Agency issued Employee a Notice of Final Decision on Proposed Removal, charging her with “any on-duty or employment-related act or omission that Employee knew or should reasonably have known is a violation of law.” Specifically, Employee was charged with engaging in activities that carried criminal penalties, in violation of federal or District of Columbia laws and statues. The charges stemmed from an incident wherein Employee allegedly misused government resources by accessing the Washington Area Law Enforcement System (“WALES”) in order to retrieve an individual's personal information without a legitimate purpose or Agency's authorization.

The AJ issued her Initial Decision on June 25, 2015. She first determined that Agency established that it had cause to initiate a termination action. The AJ noted that Employee admitted to accessing WALES for the purpose of obtaining someone's personal information that was unrelated to any work assignment, which was prohibited by Agency policy. Regarding the penalty, the AJ held that Agency did not abuse its discretion in terminating Employee. Moreover, she provided that Agency considered all of the relevant factors in reaching its decision to terminate Employee. Accordingly, Agency's termination action was upheld.

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on July 30, 2015. She argues that the AJ's decision was based on an erroneous interpretation of statute. Employee also contends that the Initial Decision was not based on substantial evidence. She, therefore, requests that this Board grant her Petition for Review and overturn the Initial Decision.

Agency filed its Reply to Employee's Petition for Review on September 3, 2015. It believes that the Initial Decision is supported by substantial evidence. Agency asserts that Employee was provided with due process because both the Advance Notice of Termination and the Final Notice of Termination included the same sustained charge and that she was given ample time to provide a response. Consequently, it asks that the Initial Decision be upheld and that Employee's Petition for Review be denied.

**7. Anthony Gillespie v. District of Columbia Public Schools, OEA Matter No. 1601-0044-15** – Employee worked as a Custodian with Agency. On January 23, 2015, Employee was placed on administrative leave, pending an investigation into an allegation that he had inappropriate contact with a child. Subsequently, Agency discovered that it issued an incorrect offer letter to Employee. According to Agency, the original offer letter stated that Employee was being hired as a Custodian, when, in fact, he should have been hired as a Term Custodian.

An Initial Decision was issued on July 27, 2015. The AJ held that Employee failed to meet his burden of proof in establishing jurisdiction before this Office. The AJ highlighted DPM §813.2, which provides that a person hired to serve under a Career Service Appointment is required to serve a probationary period of one year. She further noted that under DPM §813.4, a termination during a probationary period is not appealable or grievable. Since Employee was hired on August 21, 2014, and was terminated on January 23, 2015, the AJ held that he was still in a probationary status at the time Agency issued its termination notice. Consequently, Employee's Petition for Appeal was dismissed for lack of jurisdiction.

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on August 24, 2015. Employee submitted new evidence of another electronic offer letter that he received from Agency, wherein there was no "Not to Exceed Date" listed on the document. It is his contention that Agency's conflicting offer letters prove that he was not hired as a term employee. In addition, Employee contends that he was a paying member of the Teamsters Local 639 Union. It is his belief that term custodians are ineligible to join the union; therefore, his membership supports the argument that he was hired as a permanent employee. As a result, he request that this Board find that OEA has jurisdiction over his appeal.

Agency filed its Answer to Employee's Petition for Review on September 30, 2015. It maintains that the AJ was correct in concluding that Employee was in probationary status at the time he was terminated. In addition, it claims that Employee's newly presented evidence does not address the AJ's finding that he was terminated during his probationary period. Thus, it asks this Board to uphold the Initial Decision and dismiss Employee's Petition for Review.

**8. Charmaine Hicks v. Office of the State Superintendent of Education, OEA Matter No. J-0008-15**— Employee worked as a Bus Attendant with Agency. On November 12, 2013, Agency issued written notice to Employee notifying her that she was being terminated for “any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty.” The effective date of her termination was November 12, 2013.

An Initial Decision was issued on May 12, 2015. The AJ held that Employee failed to meet her burden of proof in establishing jurisdiction before this Office. According to the AJ, Employee’s appeal was filed approximately one year after the effective date of Agency’s termination action. Consequently, Employee’s appeal was dismissed for lack of jurisdiction.

Employee subsequently filed a Petition for Review with OEA’s Board on September 14, 2015. In her submission, she restates that overwhelming personal issues prevented her from being able to file an appeal of her termination with OEA in a timely manner. Employee further notes the length of time it took for the AJ to issue an Initial Decision. In addition, she argues that Agency never submitted an answer to her Petition for Appeal or an optional response brief to the jurisdictional order. As a result, Employee requests that this Board grant her Petition for Review and reinstate her to her previous position.

**9. Jamell Stallings v. Metropolitan Police Department, OEA Matter No. 1601-0072-14** – Employee worked as a Detective with Agency. On August 2, 2012, Employee was charged with six counts of Identity Fraud, five counts of Theft Over \$500, one count of Forgery, one count of Create/Forge/Utter/Counterfeit, one count of Utter Forge Check/Counterfeit, one count of Theft of Property with a value at least \$10,000, one count of Aggregated Theft, and one count of Knowing Use of a Document with a Forged, False, or Counterfeit Signature.

The AJ issued an Initial Decision on August 12, 2015. He reasoned that Agency’s Internal Affairs Division did not have all of the pertinent information when it first commenced an investigation into Employee’s alleged misconduct and rendered a finding of “insufficient facts” on May 11, 2012. According to the AJ, Employee’s indictment and conviction triggered separate causes of action for purposes of the ninety-day rule. He stated that the time period for commencing an adverse action under D.C. Official Code § 5-1031 began on February 15, 2013; the day Employee was criminally convicted. Since Agency issued its Amended Proposed Notice of Adverse Action on May 20, 2013, the AJ stated that there was no ninety-day rule violation in this case. With respect to the penalty, the AJ held that removal is appropriate for a first time offense of a criminal conviction and Agency acted within its managerial discretion. Consequently, he determined that Employee’s termination should be upheld.

Employee disagreed and filed a Petition for Review with OEA’s Board on September 16, 2015. She states that the Initial Decision was based on an erroneous interpretation of D.C. Code § 5-1031 and that Agency incorrectly interpreted the ninety-day rule. Employee further argues that the AJ failed to address her concerns pertinent to Agency’s inclusion of the *Douglas* factors in its advance notice of termination. Accordingly, she requests that the Initial Decision be reversed.

In response to the Petition for Review, Agency states that the AJ’s interpretation of D.C. Code § 5-1031 was correct. It also submits that the AJ adequately addressed, and rejected, Employee’s argument concerning the application of the *Douglas* factors. Thus, Agency contends that the Initial Decision should be affirmed.

**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**

**VI. Adjournment**