Agenda

D.C. OFFICE OF EMPLOYEE APPEALS (OEA) BOARD MEETING
Tuesday, March 3, 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 Ronnell Dennis v. Office of the Chief Medical Examiner

B. Summary of Case

1. **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.

   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 sexually harassed and assaulted 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.

At the January 20, 2015 Board meeting, two Board members voted to grant Employee's petition and two voted to deny it. Therefore, it was tabled for today's meeting for Patricia Hobson Wilson to cast the deciding vote.

VI. New Business

A. Public Comments on Motion to Expedite

B. Summary of Case

1. **Janell Johnson v. D.C. Public Schools, OEA Matter No. 1601-0175-11 –** Employee seeks to have the OEA Board expedite her case because she is a single mother of two, who provides full-time care to her ailing mother. She has a son in college for whom she is financially responsible. Employee is experiencing health challenges and her home is nearing foreclosure.

C. Public Comments on Petitions for Review

D. Summary of Cases

1. Loraine Cousins v. D.C. Public Schools, OEA Matter No. 2401-0122-12– Employee was a Business Manager and was removed from her position as a result of a Reduction-in-Force ("RIF"). She filed a Petition for Appeal on June 27, 2012. She argued that she was initially told by her principal that her position was being excessed; that she consistently performed her duties; and that she had more seniority than other staff members within her school. In Agency's Answer to Employee's Petition for Appeal, it asserted that the RIF action was conducted in accordance with the D.C. Official Code and District of Columbia Municipal Regulations. It explained that Employee received thirty days' notice that she would be removed from her position. However, because Employee was the only Business Manager, Agency explained that she was in a single-person competitive level and one round of lateral competition was not applicable in her case.

On December 16, 2013, the OEA Administrative Judge issued her Initial Decision. She found that the record supported that Employee was the sole Business Manager; therefore, Agency was not required to rate and rank the position to be abolished. Additionally, the Administrative Judge concluded that Agency provided the requisite thirty days' notice to Employee. As for Employee's arguments regarding past performance evaluations and being excessed opposed to RIFed, the Administrative Judge opined that she offered no evidence to support her contentions. Finally, the Administrative Judge held that Employee failed to comply with three of her orders requesting additional documentation. Thus, the Administrative Judge reasoned that Employee failed to prosecute her case and the RIF action was upheld.

On December 20, 2013, Employee filed a Response to the Administrative Judge's Order for Good Cause Statement. Employee explains that she had the Post Office hold her mail because she was recovering from surgery. In response to the Initial Decision, Employee provides that she "under[stood] the reason for the instant reduction-in-force and that the District of Columbia followed proper District of Columbia statutes, regulations[,] and laws." However, Employee disagrees with the decision and believes that another position should have been eliminated.

2. Ronald Holman v. D.C. Public Schools, OEA Matter No. 1601-0100-12 – Employee worked as a Custodian with Agency. On May 16, 2012, Employee received a Notice of Proposed Disciplinary Action from Agency informing him that effective June 1, 2012, he would be terminated from his position. Employee was charged with falsifying records; dishonesty; and any other cause authorized by the laws of the District of Columbia. Employee challenged Agency's action by filing a Petition for Appeal on May 17, 2012. He provided that he was out of work for one year, and as a result, received unemployment insurance benefits for that time period. In Agency's Answer to the Petition for Appeal, it argued that Employee knowingly and willfully failed to report his earnings when he applied for and received unemployment insurance benefits.

After the matter was assigned to the Administrative Judge, she scheduled a Status Conference and subsequently issued a Post Status Conference Order which required the parties to submit briefs. Agency did not file its brief by the required deadline. As a result, the Administrative Judge issued an Order for Statement of Good Cause to Agency directing it to submit its brief along with an explanation for its failure to respond to her Post Status Conference Order. On the date that Agency's filings were due, the Administrative Judge received an email from Agency's Representative which explained that she had been on medical leave since after Thanksgiving. The Representative provided that she would be able to file the Statement for Good Cause by December 16, 2013, but she would not be able to respond to the Post Status Conference Order for at least a week after that date.

On December 26, 2013, the OEA Administrative Judge issued her Initial Decision. She found that Agency failed to respond to the Post Status Conference Order and failed to submit a Statement of Good Cause. As a result, the Administrative Judge found that Agency violated OEA Rule 621. Thus, Agency's adverse action was reversed, and it was ordered to reinstate Employee with back-pay and benefits. Agency filed a Petition for Review with the OEA Board on February 3, 2014. Agency states that new and material evidence is available that was not available when the record closed. It submits a letter from its Representative's doctor that is dated November 26, 2013, and provides that she was unable to work for at least two to three weeks. Agency also provides a Medical Certification form which states that the Representative's estimated return to work date was December 16, 2013. Agency claims that its failure to respond to the Post Status Conference Order and the Statement for Good Cause was due to circumstances beyond its Representative's control. In response to the Petition for Review, Employee argues that Agency's Petition for Review was untimely filed.

3. **Shalonda Smith v. D.C. Fire and Emergency Medical Services Department, OEA Matter No. 1601-0195-11 –** Employee was a Firefighter with Agency. On July 22, 2011, Agency issued a Letter of Decision informing Employee that she would be suspended for one hundred and sixty-eight hours. Employee was charged with any on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: misfeasance. Specifically, the Fire Trial Board ("Trial Board") found Employee guilty of two counts of misfeasance for (1) violating Agency's Special Order 20 and (2) providing misleading information regarding the location of her ambulance. Employee contested the suspension and filed a Petition for Appeal on August 25, 2011. She provided that Agency's penalty was too harsh because she did not have any previous disciplinary actions. Furthermore, she explained that her failure to update her unit to 'available for service' was unintentional and common practice. In its response to the Petition for Appeal, Agency argued that per OEA's rules, Employee's Petition for Appeal was untimely filed. Additionally, Agency asserted that pursuant to *D.C. Metropolitan Police Department v. Elton L. Pinkard*, 801 A.2d 86 (D.C. 2002), OEA's review of its decision was limited to determining whether the action was supported by substantial evidence.

The OEA Administrative Judge issued his Initial Decision on November 27, 2013. First, he found that pursuant to *Pinkard*, he must defer to the Trial Board's credibility determinations. With regard Employee's violation of Special Order 20, the Administrative Judge held that there were other employees who did not update the unit to available for service until the unit was " . . . at or near Engine 32's quarters." The Administrative Judge stated that these employees were similarly situated to Employee and that this procedure was a common practice. He explained that this common practice directly contradicted Special Order 20. As a result, the Administrative Judge held that there was disparate treatment and reversed the first charge of misfeasance. With regard to the second charge of misfeasance, the Administrative Judge found that Employee provided Agency the exact same information that her partner did; however, her partner was found not guilty for this charge. The Administrative Judge stated that Employee established a *prima facie* argument that she was treated differently than her partner and ruled that the second charge for misfeasance must also be reversed. Accordingly, Agency's action was reversed, and it was ordered to reimburse Employee all back-pay and benefits lost as a result of the suspension.

Agency filed a Petition for Review with the OEA Board on January 2, 2014. The Petition for Review provided that the Initial Decision was based on an erroneous interpretation of statute, regulation, or

policy. Agency also filed a motion for an extension of time to submit its Memorandum of Points and Authorities to support its Petition for Review. On January 31, 2014, Agency submitted its memorandum which explains that when the Administrative Judge ruled on the first charge of misfeasance, he relied on a document that was not admitted into the evidence during the Trial Board hearing. In addition, Agency claims that the Administrative Judge erred when he relied on the testimony of Lieutenant Nickens, and not the testimony of the head of the organizational unit, when reviewing Employee's disparate treatment claim. Lastly, Agency submits that it did not subject Employee to disparate treatment for the second misfeasance charge.

4. Samuel Brooks v. Department of Health, OEA Matter No. 1601-0316-10 – Employee worked as a Resource Development Specialist with Agency. On April 29, 2010, Agency issued a termination notice removing Employee from his position. The notice provided that Employee was being terminated during his probationary period which commenced on May 11, 2009. The effective date of Employee's termination was May 14, 2010. Employee filed a Petition for Appeal on June 4, 2010. He argued that in accordance with *Holliday v. Metropolitan Police Department*, OEA Matter No. 1601-0046-09 (November 6, 2009), he became a permanent employee at the close of business on May 10, 2010. Employee further alleged that because Agency did not have a legitimate cause of action to remove him, as a permanent employee, then its termination action was illegal. In Agency's Answer to Employee's Petition for Appeal, it provided that in light of Employee's performance, he was removed from his position during his probationary period. Agency asserted that its practice is to provide employees with two weeks' notice before termination to ensure that they can complete any outstanding projects. It explained that this is why the April 29, 2010 termination notice listed May 14, 2010, as the effective termination date. However, upon realizing that Employee would be removed after his probationary period ended, Agency contended that it executed a second notice removing Employee from his position effective May 7, 2010. Agency provided that Employee signed the acknowledgement receipt for the second notice.

The OEA Administrative Judge issued his Initial Decision on November 25, 2013. He held that in order for Agency to have properly terminated Employee, the termination action must have been done by someone with the authority to remove him prior to the end of his probationary period. Additionally, the Administrative Judge reasoned that Employee's termination must have actually occurred prior to the end of the probationary period. He considered that Agency paid Employee through May 14, 2010 and continued to make retirement contributions. Therefore, he ruled that Employee achieved permanent, career status. Accordingly, Agency's action was reversed, and it was ordered to reinstate Employee with back pay and benefits.

Agency filed a Petition for Review on December 30, 2013. Agency's Petition for Review requests "review of the Initial Decision because it is based on an erroneous interpretation of statute, regulation[,] or policy." Agency also filed a Motion for an Extension of Time to file its Memorandum of Points and Authorities in Support of its Petition for Review. In opposition to Petition for Review, Employee argues that the petition should be dismissed because it failed to comply with OEA Rule 633.3. Employee contends that because the statutory time limit to file an appeal is mandatory, OEA is not at liberty to grant extensions of time to file. On January 31, 2014, Agency filed its Memorandum in Support of the Petition for Review. It argues that there are still material issues in dispute. Agency claims that the outstanding issues are whether the amended notice was effective; whether Employee was Career Service; and whether OEA had jurisdiction.

E. 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).

F. Open Portion Resumes

G. Final Votes on Cases

H. Public Comments

VII. Adjournment