Agenda

D.C. OFFICE OF EMPLOYEE APPEALS (OEA) BOARD MEETING
Tuesday, April 14, 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

VI. New Business

A. Public Comments on Petitions for Review

B. Summary of Cases

1. Shalonda Miller v. Metropolitan Police Department, OEA Matter No. 1601-0325-10– Employee was an Officer with Agency. She was terminated for neglect of duty, prejudicial conduct, and compromising a felony. The Administrative Judge ("AJ") in this matter issued an order requiring both parties to submit briefs addressing whether Agency violated the 90-day rule; whether Agency violated the 55-day rule; and whether Agency was prevented from removing Employee from service because she accepted the initial proposed penalty of suspension.

Employee asserted in her brief that the 90-day period commenced on March 5, 2009. However, Agency did not serve her notice until November 23, 2006, which was 182 business days later. With regard to the 55-day rule, Employee provided that Agency violated this rule because the 55 days began to run on November 23, 2009, and it did not serve its Final Notice until April 13, 2010. She also believed that she had a contractual agreement with Agency following her acceptance of the penalty provided in the Proposed Notice.

Agency explained in its brief that after March 5, 2009, it conducted a criminal investigation to determine whether Employee engaged in criminal activity. It argued that in accordance with D.C. Official Code § 5-1031(b), the 90-day period was tolled until the conclusion of its investigation. Agency asserted that its investigation concluded on July 20, 2009, when the United States Attorney for the District of Columbia issued a letter declining to criminally prosecute Employee. It contended that on July 21, 2009, the 90-day period commenced, and it served the Proposed Notice eighty-six business days later on November 23, 2009. With regard to the 55-day rule, Agency opined that it complied with this rule because the Amended Notice was served on February 1, 2010, and the Final Notice was served on April 13, 2010. Lastly, Agency stated that the matter was not resolved with the original penalty of suspension and argued that the principles of contract law were inapplicable to Employee's matter.

The AJ issued his Initial Decision on December 30, 2013. With regard to the 90-day rule, he found that the 90-day period commenced on July 21, 2009. Accordingly, he ruled that Agency did not violate the 90-day rule because its Proposed Notice was issued eighty-six business days after July 21, 2009. As for the 55-day rule, the AJ found that Employee was served with the Final Notice fifty days after the Amended Notice. Therefore, he ruled that Agency did not violate the 55-day rule. Lastly, with regard to Employee's belief that she had a contractual agreement with Agency, the AJ stated that the principles of contract law were inapplicable to her matter. As a result, he determined that Agency had cause to remove Employee and upheld its decision.

On February 3, 2014, Employee filed a Petition for Review with the OEA Board. She argues that the Initial Decision is based an erroneous interpretation of D.C. Official Code § 5-1031; that the AJ erroneously applied the 55-day rule; and that the AJ erroneously determined that the Proposed Notice was not an offer. Furthermore, Employee believes that the AJ prematurely concluded that the Agency had cause to remove her. In response to the Petition for Review, Agency states that the AJ's interpretation of D.C. Official Code § 5-1031 and application of the 55-day rule were correct. It believes that the Initial Decision correctly determined that the Proposed Notice was not an offer.

2. John Judd v. Department of Public Works, OEA Matter No. 1601-0184-12 – Employee was a Motor Vehicle Operator with Agency. He was removed from his position for any act which constitutes a criminal offense whether or not the act results in a conviction, specifically: making a false statement or representation knowing it to be false or knowingly failing to disclose a material fact to obtain or increase unemployment insurance benefits as provided in D.C. Official Code § 51-119(a)(2001).

Employee challenged Agency's action by filing a Petition for Appeal on April 7, 2012. He asserted that Agency's Director was unaware that payments were being made to the Department of Employment Services regarding the unemployment benefits. In Agency's Answer to the Petition for Appeal, it contended that Employee was terminated because his action of stealing funds was a serious offense.

The AJ issued her Initial Decision on January 15, 2014. She held that Employee violated D.C. Official Code § 51-119(a). She explained that Agency was able to prove that Employee made a false statement of material fact or failed to disclose a material fact; that Employee knew the statement was false; and that Employee made the statement with the intent to obtain or increase benefit. However, the Administrative Judge ruled that although removal was within the range of penalty for Employee's action, Agency violated District Personnel Manual ("DPM") § 1613. She held that the deciding official violated the regulation by imposing a penalty of removal after the Hearing Officer recommended that the proposed removal be reduced to a thirty-day suspension. Therefore, she reversed Agency's action and reinstated Employee with back pay and benefits.

Agency filed a Petition for Review on February 19, 2014. It contends that the AJ misinterpreted the DPM when she held that the deciding official could not impose a penalty greater than that which was recommended by the Hearing Officer.

3. **Janell Johnson v. D.C. Public Schools, OEA Matter No. 1601-0175-11 –** Employee was a Special Education Coordinator with Agency. Employee was terminated from her position because of her "Ineffective" performance rating under IMPACT, Agency's performance assessment system. Employee filed a Petition for Appeal on August 15, 2011. She argued that her IMPACT evaluation was unfair and not justified; that the evaluators lacked credibility; that her evaluation was retaliatory in nature; and that the evaluation was subjective and not based her performance. In response to the Petition for Appeal, Agency provided that Employee's IMPACT evaluation was performed during the 2010-2011 school year, and it was based on her time as a Special Education Teacher at Johnson Middle School. It noted that her final rating was "Ineffective."

Following an OEA Evidentiary Hearing, the AJ ordered the parties to submit closing briefs. In Employee's brief, she provided that Agency committed harmful error when it failed to provide her a position description and relied on a plagiarized IMPACT evaluation. Agency's brief denied Employee's contentions and explained that Employee's poor evaluation was based on objective standards.

The Initial Decision was issued on June 4, 2014. First, the AJ reasoned that she was guided by the provisions set forth in the collective bargaining agreement ("CBA") between Agency and the Council of School Officers. She found that under the D.C. Municipal Regulations ("DCMR"),

Agency had the authority to implement IMPACT. After reviewing the IMPACT processes conducted by Agency, the AJ determined that Agency complied with the CBA. With regard to Employee's claim of plagiarism, the AJ found that her 2010-2011 IMPACT evaluation supported this assertion. The AJ determined that the Principal and Assistant Principal used boilerplate language in evaluating Employee. As a result, she held that Employee's ratings did not reflect a fair and accurate performance evaluation; that Agency did not meet its burden of proof; and that Agency's removal action was arbitrary and capricious. Accordingly, Agency's action was reversed, and it was ordered to reinstate Employee with back pay and benefits.

On July 8, 2014, Agency filed a Petition for Review with the OEA Board. It argues that the AJ's findings were not based on substantial evidence and that the Initial Decision was based on an erroneous interpretation of regulation. Agency reiterates that it provided Employee with a fair and accurate evaluation. It states that the Principal and Assistant Principal used the language provided in the rubric standard description. Furthermore, Agency states that Employee's termination was caused by her inability to adhere to the performance metrics and not the assessments provided by the Assistant Principal and Principal. It argues that the AJ failed to give any weight to Employee's entire IMPACT evaluation.

In opposition to Agency's Petition for Review, Employee argues that the AJ's findings are based on substantial evidence and accurate interpretations of law. She states that Agency's arguments are merely disagreements with the Administrative Judge's findings, and that the Petition for Review questions the AJ's credibility determinations. Employee submits that the AJ's conclusions were supported by a thorough and substantive review of the record. She reiterates that Agency committed harmful error in terminating her.

4. Willie Porter v. Department of Mental Health, 1601-0046-12 – Employee was a psychiatric nurse with Agency. He was removed from his position for any knowing or material misrepresentation on an employment application. Employee filed a Petition for Appeal with OEA on December 29, 2011. He requested that OEA reinstate him with back-pay and attorney fees. Employee also requested that OEA expunge the adverse action from his record. In response to the Petition for Appeal, Agency argued that the appeal was untimely and requested that OEA dismiss the matter.

The AJ denied Agency's motion to dismiss and subsequently ordered the parties to submit briefs addressing whether Agency's action was for cause and whether the penalty was appropriate. Agency's brief provided that its removal action was taken in accordance with Chapter 16, § 1603.3 of the DPM. Additionally, it explained that pursuant to DPM Chapter 4, § 405.10, Employee was deemed unsuitable for the position because of misconduct in his prior employment. Agency provided that under the DPM Table of Penalties, removal was the appropriate penalty for misrepresentation.

In Response to Agency's brief, Employee claimed that Agency knew about his employment with Walter Reed Army Medical Center ("Walter Reed") prior to its offer of employment. In support of this assertion, Employee submitted to OEA an application dated October 5, 2010, which listed his employment with DeWitt Army Hospital. He asserted that he resigned from Walter Reed.

In reply, Agency provided that Employee submitted an application on September 16, 2010, and it relied on that application. Moreover, Agency stated that there was no evidence to show that the October 2010 application was actually submitted. Lastly, Agency argued that sending a letter of resignation did not prove that Employee resigned from his position at Walter Reed.

The AJ issued his Initial Decision on December 24, 2013. He found that Employee submitted an application on September 16, 2010, and then submitted another application on October 6, 2010. The AJ provided that although Employee's October 2010 application indicated that he resigned from

Walter Reed, his Standard Form 50 ("SF-50") indicated that he was terminated from his position there for cause. Moreover, the AJ found that Employee did not offer any evidence to contradict the accuracy of the SF-50, nor did he prove that his resignation letter was received by Walter Reed. As a result, the AJ ruled that Agency's adverse action was taken for cause, and its penalty was appropriate. Accordingly, the action was upheld.

Employee filed a Petition for Review with the OEA Board on February 4, 2014. He requests that the final decision by OEA be delayed until the Merit Systems Protection Board could provide new and material evidence from his personnel file to prove that he was unaware of Walter Reed's adverse action charges. In opposition to the Petition for Review, Agency asserts that the filing was untimely and should be dismissed for lack of jurisdiction. In the alternative, Agency submitted that the Petition for Review should be denied because the Initial Decision was supported by substantial evidence, and Employee did not provide a reason for the Board to grant his Petition for Review.

Employee filed a Response to Agency's Opposition to the Petition for Review and an Amended Petition for Review. He reiterates that he did not knowingly omit information from his employment application. Additionally, Employee submits a settlement agreement with the Department of the Army, wherein the Department agreed to accept his voluntary resignation; create a SF-50 which indicated that his resignation was tendered; and remove all SF-50's referencing the Department's removal action from Employee's Official Personnel File. Employee argues that the settlement agreement proves that the allegations on his SF-50 were not factual. Agency submitted a Motion to Strike Employee's submission, arguing that it does not comply with OEA's rules. Agency reasons that Employee did not provide new and material evidence that was not available when the record closed. Agency states that the settlement agreement does not change the fact that Employee omitted information from his employment application.

On January 8, 2015, Bradley E. Eayrs, Attorney for the Department of the Army, submitted a letter addressed to the OEA Administrative Judge. The letter provides that "the Department of the Army's personnel records does not show that a notice of decision to terminate Mr. Porter was ever provided to him." However, its records did "show that Mr. Porter submitted his resignation prior to 12 June 2006." The letter went on to provide that Employee's SF-50 forms would be updated to indicate that he resigned from his position and that "[a]ny documentation to indicate any action other than a voluntary resignation for the purposes of non-federal employment will be rescinded."

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