

Agenda
D.C. OFFICE OF EMPLOYEE APPEALS (“OEA”) BOARD MEETING
Tuesday, April 18, 2017 at 11:00 a.m.
Location: 1100 4th 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 Motion to Expedite

B. Summary of Case

1. Webster Rogers v. D.C. Public Schools, OEA Matter No. 2401-0255-10 – Employee requests that Agency’s Petition for Review be expedited so that it is not allowed to unnecessarily delay the resolution of his case. The matter on appeal involves an attorney’s fee award.

C. Public Comments on Petitions for Review

D. Summary of Cases

1. Alexis Parker v. Department of Health, OEA Matter No. J-0007-11R13 – This matter has been previously before this Board. Employee worked as a Public Health Outreach Technician with Agency. On April 8, 2010, Employee received a notice of termination from her position. Employee challenged the termination by filing a Petition for Appeal with OEA on October 7, 2010. She argued that because her position was a reinstatement, Agency improperly placed her in a probationary status.

On April 28, 2011, the Administrative Judge (“AJ”) issued her Initial Decision. She held that because Agency’s vacancy announcement was open to the general public, Employee was required to apply for the position through open competition. Moreover, the AJ found that Employee’s formal offer letter stated that she was subject to satisfactorily completing a one-year probationary period. Accordingly, she ruled that pursuant to DPR § 813.3, Employee was in a probationary status at the time of her termination. Thus, she held that OEA lacked jurisdiction over Employee’s appeal, in accordance with DPR § 814.3.

The OEA Board upheld the Initial Decision. However, the Superior Court for the District of Columbia remanded the matter to the AJ for further consideration. The Court held that the AJ’s decision was based on an incorrect reading of the record; a misunderstanding of the facts and arguments; and a failure to set out clearly the reasons for the decision reached.

The AJ issued an Initial Decision on Remand on October 22, 2015. She found that Employee was not hired through a non-competitive selection process but through open competition. Thus, she ruled that Employee was required to serve a second one-year probationary period because she was appointed as a result of open competition in a different line of work.

Employee filed a Petition for Review on November 25, 2015. She contends that the AJ erred in finding that she was given priority consideration and hired through open competition. It is

Employee's position that an appointment through Agency's Priority Reemployment Priority Placement Program ("ARPP") is not an appointment through open competition because ARPP does not permit Agency to consider applicants without regard to current or former District government employment. Additionally, she noted that she did not apply for the Public Health Outreach Technician position but was referred to the position based on her ARPP status. Employee also explained that all of the employees who were considered for the position were Displaced Employees in the ARPP. Thus, she believed that this proved that she was not hired through open competition. Moreover, Employee asserts that the AJ erred in finding that her new position and the previous position she held did not involve similar duties. She contends that in accordance with DPR § 813.8(c), that the determination was to have been made by the appropriate personnel authority. Employee explains that Agency offered no evidence that the appropriate personnel classified the positions differently. Therefore, she requests that OEA reverse the Initial Decision on Remand.

On December 30, 2015, Agency filed its response to Employee's Petition for Review. It argues that Employee failed to provide evidence that she was hired through a non-competitive process. Agency contends that the AJ's reasoning that Employee was hired through open competition was supported by substantial evidence. It explains that just because Employee was hired through ARPP, does not automatically mean she was hired non-competitively. Additionally, Agency claims that Employee was on notice of her need to serve a second probationary period. Furthermore, Agency opines that the Public Health Outreach Technician and Community Relations Specialist positions were in a different line of work. As a result, it provides that the AJ properly dismissed Employee's appeal for lack of jurisdiction. Therefore, it requests that Employee's Petition for Review be denied.

2. Steve Steinberg v. D.C. Fire and Emergency Medical Services Department, OEA Matter No. 1601-0015-14 – Employee worked as an Emergency Medical Technician with Agency. Employee filed a Petition for Appeal with OEA on November 5, 2013. According to Employee, he filed a previous appeal with OEA in 1997. Employee provided that although he was reinstated to his position as a result of the 1997 appeal, Agency still had not finalized the calculations of his back pay and benefits.

The AJ issued her Initial Decision on November 13, 2015. She found that Agency's decision to change Employee's pay status from Administrative Leave with Pay ("ALWP") to Leave Without Pay ("LWOP"), did not constitute an enforced leave action as defined under D.C. Official Code § 1-616.54 and DCMR § 1620. The AJ explained that Agency's October 2, 2013 letter to Employee specifically addressed its inability to calculate back pay. The AJ found that the letter was not a proposed advanced notice of Agency's intent to place Employee on enforced leave without pay based on any reasons enumerated in D.C. Official Code § 1-616.54. Moreover, she stated that the letter did not serve as a final notice that Employee was being placed on enforced leave without pay. The AJ ruled that OEA does not have jurisdiction over grievances and found no credible evidence to support a finding that Employee's appeal would fall within OEA's jurisdictional parameters. Accordingly, the appeal was dismissed for lack of jurisdiction.

Employee filed a Petition for Review with the OEA Board on December 17, 2015. He argues that Agency's action resembles an enforced leave as outlined in D.C. Official Code § 1-616.54. Alternatively, he contends that the action constituted a suspension for ten days or more, as defined in DCMR § 1699.1. Employee reasons that both an enforced leave and indefinite suspensions are appealable to OEA. Employee maintains that he was forced on to LWOP for reasons entirely unrelated to his ALWP. He states that he complied with Agency's requirement

to produce the appropriate tax information. Accordingly, Employee requests that the Initial Decision be vacated and that the matter be remanded to the AJ for further proceedings.

3. Stephanie Huey v. D.C. Public Schools, OEA Matter No. 1601-0113-15 – Employee worked as a Math Teacher with Agency. On July 10, 2015, Agency issued a notice of termination to Employee. The notice provided that under IMPACT, Agency’s assessment system for school-based personnel, employees who receive a final IMPACT rating of Ineffective were subject to termination. Employee was rated Ineffective for the 2014-2015 school year. As a result, she was terminated effective August 7, 2015.

On November 2, 2015, the AJ issued her Initial Decision. The AJ found that OEA did not have jurisdiction. She held that the Office’s jurisdiction was established in the District of Columbia Comprehensive Merit Personnel Act of 1978 (“CMPA”) and Omnibus Personnel Reform Amendment Act of 1998 (“OPRAA”) which provided that OEA could consider appeals of permanent employees in Career and Education Services who are not serving in a probationary period. The AJ noted that Employee’s offer letter specifically informed her that her employment status was probationary for a period of two school years. Therefore, she ruled that OEA lacked jurisdiction over the appeal because Employee served in her position for less than two years. Accordingly, she ordered that Agency’s removal action be upheld.

Agency filed a Response to Employee’s Petition for Review on November 16, 2015. It maintains that the AJ’s findings are based on substantial evidence and that the AJ correctly held that Employee was a probationary employee. Therefore, Agency requests that Employee’s Petition for Review be dismissed.

4. Kimberli Motley v. D.C. Metropolitan Police Department, OEA Matter No. 1601-0120-13 – Employee worked as a Police Officer with Agency. On May 23, 2013, Agency issued a final notice of adverse action to Employee. The notice provided that Employee failed to report to duty. Consequently, Agency charged Employee with “AWOL (Absent Without Leave), i.e., reporting late for duty more than six (6) times within a one-year period, an absence from duty without official leave in excess of the first four (4) hours of a scheduled duty assignment that is not in the category of lateness” and “any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force.” Employee appealed this decision to Chief Lanier. On June 26, 2013, Chief Lanier issued a final Agency decision which upheld a twelve-day suspension without pay as the result of Employee’s actions.

Before issuing her Initial Decision, the AJ held an evidentiary hearing on March 2, 2015. After considering the testimonies provided during the hearing and documentary evidence, the AJ ruled that Agency had cause for both charges. She found that Employee failed to report for her regularly scheduled tour of duty on January 1, 2013, and she was not granted leave from a lieutenant for that date. Therefore, Employee was AWOL. The AJ found Employee’s arguments that she could not use her government email and did not have possession of her weapon or other equipment unpersuasive. She reasoned that there was no evidence in the record to prove that Employee’s work email was inaccessible or inoperable while she was on non-contact status. The AJ also noted that Employee conceded to not checking to see if her email was operational.

Additionally, the AJ found that Agency adequately proved the charge of prejudicial conduct. She held that the record supported Agency’s claim that Employee submitted a leave request to a second Lieutenant after having her leave previously denied. Hence, the AJ opined that

Agency's action was taken for cause and that the penalty of a twelve-day suspension was appropriate. Accordingly, Agency's suspension action was upheld.

On December 9, 2015, Employee filed a Petition for Review with the OEA Board. She asserts that the AJ failed to address all of the issues of law and fact, and the Initial Decision was based on an erroneous interpretation of statute, regulation, or policy. Employee contests the testimonies of several Agency witnesses. Additionally, she argues that Agency failed to consider all of the *Douglas* Factors. Employee contends that she was not returned to full duty status until December 20, 2012, after her equipment was returned and she received her gun. She claims that she remained in non-duty status for several weeks after and would not have been able to work on January 1, 2013.

5. Yvette Howe v. Superior Court of the District of Columbia, OEA Matter No. J-0004-16 – Employee worked as a Deputy Clerk with Agency. On September 1, 2015, Employee received a notice that she would be terminated from Agency. The effective date of her termination was September 11, 2015.

On January 15, 2015, the AJ issued her Initial Decision. She agreed with Agency and held that D.C. Official Code § 1-602.01(a) did not apply to Employee. Additionally, the AJ explained that Employee's termination notice included information related to personnel procedures, and it outlined the manner by which she could appeal her termination. Therefore, the AJ dismissed the appeal for lack of jurisdiction.

On February 19, 2016, Employee filed a Petition for Review of the Initial Decision. She states that the AJ failed to address all material issues of law and fact that were raised on appeal. Employee argues that she was not afforded an administrative review of her termination by OEA. Further, she argues that the Initial Decision failed to address the constitutional issues raised. Employee requests that this Board find that Agency's removal violated the United States Constitution's Fifth and Fourteenth Amendments.

Agency filed its response to Employee's Petition for Review on March 4, 2016. It states that the AJ correctly determined that OEA does not have jurisdiction over D.C. Court employees' personnel appeals. Therefore, OEA cannot address all material issue of law and fact properly raised in the appeal. Moreover, Agency provides that Employee was afforded the right to appeal her termination and address material issues through its internal and statutorily-sanctioned personnel process. It is Agency's position that had Employee acted within a timely manner, her request for an administrative hearing would have been honored. Therefore, Agency requests that the Petition for Review be dismissed.

6. Donna Green v. Department of General Services, OEA Matter No. 2401-0097-15 – Employee worked as a Statistician with Agency. On June 1, 2015, Agency notified Employee that she was being separated from her position pursuant to a Reduction-in-Force ("RIF"). An Initial Decision was issued on September 29, 2015. The AJ noted that Employee failed to submit a brief addressing the jurisdictional issue as of the date of the Initial Decision. He held that OEA does not retain jurisdiction over RIFs that do not result in an employee being separated from service. According to the AJ, the record was clear that Employee accepted a new position with Agency, which prevented her from being separated as a result of the RIF. He further explained that there was no credible evidence in the record to support a finding that Employee suffered a break in service or a reduction in salary as a result of the RIF. Lastly, the AJ determined that Employee's additional arguments presented in her appeal constituted grievances over which this

Office no longer has jurisdiction. As a result, 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 October 30, 2015. In the petition, counsel for Employee states that the AJ failed to address all material issues of law and fact that were raised in his September 11, 2015 Amended Answer and Brief in Support of Jurisdiction. According to counsel, the AJ did not acknowledge receiving his entry of appearance or his request for leave to file a response to the jurisdictional order. Thus, counsel submits that the AJ erred in failing to consider the aforementioned submissions prior to issuing his Initial Decision. Consequently, counsel requests that this Board remand the matter to the AJ for further consideration.

Agency filed its Answer to Employee's Petition for Review on January 4, 2016. It maintains that Employee's Petition for Appeal was properly dismissed for lack of jurisdiction because she voluntarily accepted a new, higher paying position through a competitive process. Agency further argues that the RIF was eventually cancelled; thus, Employee was not terminated and was not subject to an adverse employment action. In the alternative, Agency posits that even if OEA has jurisdiction over this matter, the RIF was conducted in accordance with all applicable laws, rules, and regulations.

7. Widmon Butler v. Metropolitan Police Department, OEA Matter Nos.1601-0236-12, 1601-0069-14 – Employee worked as a Claims Examiner with Agency. On July 24, 2012, Agency issued a notice to Employee ordering him to serve a twenty-five day suspension based on “any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: Insubordination and Misfeasance.” The suspension commenced on August 6, 2012. On April 14, 2014, Employee filed a second Petition for Appeal for a separate adverse action in which Agency suspended him for thirty days based on a charge of “any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: Insubordination.” The thirty-day suspension commenced on April 21, 2014.

An Initial Decision was issued on September 28, 2015. With respect to the twenty-five day suspension, the AJ held that Agency met its burden of proof for both the insubordination and misfeasance charges. According to the AJ, Agency had cause to discipline Employee because he circumvented the chain of command. In reviewing the Table of Appropriate Penalties provided in Chapter 16 of the DPM, the AJ determined that the penalty for a second offense for charges of insubordination and misfeasance ranged from a fifteen-day suspension to a thirty-day suspension. Therefore, Employee's twenty-five day suspension was upheld.

Regarding the thirty-day suspension, the AJ held that Agency met its burden of proof for the insubordination charge. According to the AJ, Employee willfully disobeyed a direct order from his supervisor when he failed to leave electronic copies of his work prior to going on annual leave. Consequently, the AJ held that Employee's actions constituted insubordination and that a thirty-day suspension was appropriate under the circumstances. Thus, Employee's suspension was upheld.

Employee disagreed with the Initial Decision and filed a Petition for Review of both suspensions with OEA's Board on November 3, 2015. Regarding the twenty-five day suspension, Employee argues that the AJ erroneously placed the burden of proof on him, instead of Agency, to prove that the suspension was taken for cause. Employee also posits that his suspension was retaliatory because he filed a complaint with the D.C. Office of Equal Opportunity (“EEO”) in August of 2011 and was successful in appealing a performance review

rating in February of 2012. In addition, Employee disagrees with the AJ's findings pertinent to the veracity and consistency of the testimony provided by Agency's witnesses.

Concerning the thirty-day suspension, Employee asserts that Agency wrongfully punished him for performing his duties as a Claims Examiner. He also states that Agency suspended him in retaliation for making complaints about his supervisors. According to Employee, Agency exhibited a pattern of charging him with misconduct for "relatively trivial incidents." He further claims that Agency failed to prove that his conduct affected the efficiency of government operations. As a result, Employee requests that both the twenty-five day and thirty-day suspensions be reversed with back pay and benefits.

8. Veronica Butler v. D.C. Office on Aging, OEA Matter No. 1601-0132-14 – Employee worked as a Special Assistant with Agency. On September 3, 2014, Agency notified Employee that she was being terminated from her position based on the charge of AWOL and unauthorized absence. According to Agency, Employee failed to respond to an official notification concerning her failure to submit certain medical documentation. Specifically, she was required to provide Agency with documents from a physician to explain her absence from work from July 28, 2014 through August 8, 2014.

An Initial Decision was issued on October 27, 2015. First, the AJ held that Agency was adequately apprised of Employee's ongoing medical treatment, as evidenced by several letters from her treating psychiatrist. She stated that Employee submitted documentation to prove that her illness was a result of job-related stress and a hostile work environment. Next, the AJ determined that Employee's absences from July 28, 2014 through August 8, 2014, were excusable because of her illness. Therefore, she concluded that Agency did not have cause to charge Employee with AWOL and Unauthorized Absence.

The AJ also held that Employee was required to be provided with at least fifteen (15) days' advance written notice of her termination under DPM §1608.1. According to the AJ, Agency's first attempt to deliver Employee's final notice of termination via FedEx was insufficient to prove that it complied with the notice requirements. In addition, she held that Agency's second attempt to deliver the notice via the U.S. Postal Service was insufficient because Employee was only provided with fourteen days' notice.

Lastly, the AJ held that Employee failed to make a prima facie showing that her termination was retaliatory in nature. She further stated that Employee's arguments relevant to discrimination were outside the purview of OEA's jurisdiction. After reviewing the record, the AJ concluded that Agency did not meet its burden of proof to sustain the charges against Employee. As a result, Agency's termination action was reversed, and Employee was reinstated to her position of record with back pay and benefits.

Agency disagreed with the AJ's findings and filed a Petition for Review with OEA's Board on December 1, 2015. It contends that the AJ's decision to forego an evidentiary hearing was arbitrary, capricious, and an abuse of discretion. According to Agency, there are genuine issues of material fact at issue which cannot be decided based on the record alone. Agency further argues that the AJ erred in finding that Employee was not served with the Advance Written Notice of Proposed Removal in accordance with the applicable regulations. Therefore, Agency requests that this Board grant its Petition for Review and remand the matter to the AJ for the purpose of conducting an evidentiary hearing.

Employee filed a response to Agency's Petition for Review on January 5, 2016. She believes that the AJ correctly determined that an evidentiary hearing was unwarranted in this case. According to Employee, the medical reports, affidavits, and doctor's notes are sufficient to establish that her absences were excused. Moreover, Employee reiterates her argument that the

AJ did not err in concluding that Agency failed to comply with the notice requirements of DPM §1608. Consequently, she requests that the Board deny Agency's Petition for Review and uphold the Initial Decision.

9. Nury Hernandez v. Office of Unified Communications, OEA Matter No. 1601-0073-14 – Employee worked as a Dispatcher with Agency. On March 17, 2014, Agency issued Employee an Advance Written Notice of Proposed Suspension of Ten Days based on a charge of “any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty.” On April 9, 2014, Agency issued a Final Decision on Proposed Suspension of Ten Days, sustaining the charge against Employee. Her suspension became effective on April 14, 2014.

After reviewing the submissions of the parties, the AJ decided that an evidentiary hearing was not warranted and that a decision could be decided based on the documents of record. An Initial Decision was subsequently issued on October 6, 2015. The sole issue that was addressed was whether Employee's Petition for Appeal should be dismissed as moot. The AJ concluded that Agency rescinded Employee's ten-day suspension on October 8, 2014, and reimbursed her with all lost wages incurred as a result of the suspension. However, the AJ provided that as of the date of the Initial Decision, Employee's Petition for Appeal was moot because a reversal of the suspension was the only remedy that she would be entitled to if she was to prevail on the merits of her appeal. According to the AJ, there were no longer any issues in controversy as of the date of her Initial Decision. Consequently, Employee's Petition for Appeal was dismissed.

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on November 2, 2015. She argues that the AJ disregarded the “law of the case” doctrine. Employee also contends that the AJ should have determined that this matter is not entirely moot because Agency did not reimburse her for attorneys' fees, thereby affording her full relief. In addition, she states that she needed to retain legal counsel for the sole purpose of convincing the Agency to rescind her suspension. Consequently, Employee believes that she is the prevailing party in this matter and requests that the Board overturn the Initial Decision and permit her to file a petition for reimbursement of attorneys' fees.

Agency filed an Opposition to the Petition for Review on December 2, 2015. It argues that the “law of the case” doctrine is inapplicable in this matter. Agency further states that the Initial Decision was based on substantial evidence because the AJ correctly determined that Employee's appeal is moot. Lastly, it provides that Employee cannot be considered the prevailing party in this matter because she did not secure a favorable judgment before OEA on the merits of her appeal. Therefore, Agency requests that her Petition for Review be denied.

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

VI. Adjournment