

Agenda

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

Tuesday, April 24, 2018 at 11:00 a.m.

Location: 955 L’Enfant Plaza, SW, Suite 2500

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 Petitions for Review

B. Summary of Cases

1. Doris Williams v. Department of Human Services, OEA Matter No. J-0054-17 -- Employee worked as a Program Support Assistant with Agency. According to Agency, on April 13, 2017, Employee received a written advance notice of a proposed removal. Agency recommended removal pursuant to Employee’s violation of District Personnel Manual (“DPM”), Chapter 16 §1607.2(b)(4): “false statements/records – (4) knowingly and willfully reporting false or misleading material information or purposely omitting material facts to any superior.” Specifically, Agency claimed that Employee falsified time and attendance records. On May 18, 2017, Employee submitted a resignation from her position.

Employee filed a Petition for Appeal with OEA on May 31, 2017. She argued that she did not receive legal advice or have union representation. Additionally, Employee explained that she was unaware that she could not work overtime in another department. She also claimed that her supervisor did not question the validity of her time and attendance. Employee contended that she did not misrepresent the completion of her tour of duty and attested that she remained at Agency from the time that she signed into work until the time she signed out. Moreover, she provided that Agency retaliated against her after she reported that two employees were exercising during their tour of duty. Therefore, Employee requested that she be reinstated and reassigned to another division.

On July 3, 2017, Agency filed its Response to Employee’s Petition for Appeal. It asserted that Employee’s petition should be dismissed for lack of jurisdiction in accordance with OEA Rule 604.1. Agency argued that Employee resigned from her position via email on May 18, 2017. Agency explained that it accepted Employee’s resignation the same day via email. Furthermore, it argued that acceptance of Employee’s resignation was also confirmed by Agency in a letter dated May 23, 2017. Accordingly, Agency requested that the appeal be dismissed because OEA lacked jurisdiction over the matter.

The OEA Administrative Judge (“AJ”) issued her Initial Decision on August 16, 2017. She provided that because Employee had the burden of proof regarding jurisdiction, to prevail, she had to prove that her resignation was involuntary. She found that Employee never asserted a claim that her resignation was involuntary. The AJ reasoned that for a resignation to be considered involuntary, Employee must show that Agency provided misinformation, deceived her, or coerced her into resigning. As for Employee’s claim that her union president informed her to resign, the AJ held that the union president was not an agent of Agency. The AJ ruled that on May 18, 2017, Employee voluntarily submitted an email to Agency informing it of her decision to resign from her position effective May 13, 2017. She explained that as a general

principle, an employee's decision to resign is considered voluntary if the employee is free to choose, understands the transaction, is given reasonable time to make his/her choice, and is permitted to set the effective date. Moreover, she found that Employee failed to provide credible evidence to prove that Agency deceived her or provided her with misleading information with regards to her resignation. Therefore, the AJ dismissed the matter for lack of jurisdiction.

On September 25, 2017, Employee filed a Petition for Review. She states that the AJ failed to address all material issues of law and fact that were raised on appeal. Employee argues that her resignation was involuntary because she resigned from her position in lieu of an immediate termination for cause and that the union president advised her that she had no other choice than to resign. Additionally, Employee states that after her termination, she filed a claim for unemployment benefits. She appealed the initial denial of unemployment benefits to the D.C. Office of Administrative Hearings ("OAH"). Employee contends that OAH issued a Final Order on August 7, 2017, reversing the denial of unemployment benefits and found that she was qualified to receive benefits because she did not voluntarily resign. Accordingly, Employee requests that the Board grant her Petition for Review and reverse the Initial Decision.

2. Webster A. Rogers v. D.C. Public Schools, OEA Matter No. 2401-0255-10AF16 – This matter has been previously before the Office of Employee ("OEA") Board. By way of background, Webster Rogers ("Employee") worked as a Music Teacher with D.C. Public Schools ("Agency"). On October 2, 2009, Agency notified Employee that he was being separated from his position pursuant to a Reduction-in-Force ("RIF").

After a protracted litigation process with several levels of appeals, the AJ found that one round of lateral competition was not provided to Employee and ordered that Agency reinstate Employee to his position with back pay and benefits. The only outstanding issue in this case is attorney's fees and costs.

On January 13, 2017, the AJ issued a Second Addendum Decision on Attorney's Fees and Costs. He held that Employee was the prevailing party, and in the interest of justice, attorney's fees were warranted. As it related specifically to the fees, the AJ noted that Agency did not contest the hourly rates cited by Employee's counsel. He found that the rates were reasonable and allowable pursuant to the *Laffey* Matrix and the holdings in *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) and *Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985). As for Agency's argument that Employee's counsel's fees should be reduced based on the attorney's experience and work performed before Superior Court, the AJ reasoned that although Agency's improper action was corrected, it was necessary for Employee's counsel to withstand multiple levels of review before the AJ, OEA Board, and Superior Court. Therefore, the AJ awarded Employee attorney's fees and costs for a total of \$149,537.69, which included fees incurred at the OEA and Superior Court.

On February 17, 2017, Agency filed a Petition for Review. It argued that in accordance with *Jenkins*, OEA has consistently held since 1994 that it does not have jurisdiction to award attorney's fees for work performed in the Superior Court. Agency claimed that the holding in *Stanley* provided that a reviewing court should not determine the attorney's fees for work incurred at the trial court level and that the D.C. Court of Appeals found that it was not in the position to issue an attorney's fee award for work performed outside of its court. According to Agency, the AJ in *Stanley* only awarded attorney's fees for work incurred at OEA and not Superior Court or the D.C. Court of Appeals. Furthermore, Agency contended that OEA did not award attorney's fees for work performed in the D.C. Court of Appeals in the matter of *Doney Olivieri v. District of Columbia Public Schools*, OEA Matter No. J-0137-03A09 (March

29, 2011). Agency, again, asserted that in *Sefton*, the AJ awarded attorney's fees for work performed at OEA but excluded the work incurred in Superior Court. It claimed that the AJ in the current case failed to consider the rulings in *Olivieri* and *Sefton*, and as a result, he misapplied the law in this matter. Finally, Agency explained that the AJ improperly made a sweeping finding on the issue of excessive fees instead of reviewing all of the entries to determine their reasonableness. Therefore, Agency requested that the Board deny Employee's request for fees incurred before Superior Court. Moreover, it sought to have the matter remanded for a review of its claims that portions of the fees requested are excessive.

Employee filed his answer to Agency's Petition for Review on March 24, 2017. He asserted that pursuant to D.C. Official Code § 1-606.08, "if the appellant prevails and it is in the interest of justice, he or she is entitled to all reasonable fees." Employee explained that Agency relied heavily on *Jenkins* even though the D.C. Court of Appeals overruled the *Jenkins* holding in *Stanley*. Employee contended that historically, Superior Court used to award attorney's fees for work performed there. However, he provided that the plain language of D.C. Official Code § 1-606.08; the holding in *Stanley*; and the ruling in *Bryant* make it clear that OEA is the proper forum to award attorney's fees for work performed at OEA and the courts. Additionally, Employee argued that Agency failed to articulate which time entries it deemed excessive and that the AJ clearly reviewed all of the requested fees and determined that they were reasonable. Accordingly, Employee requested that the Board affirm the Second Addendum Decision.

On November 7, 2017, the Board issued an Opinion and Order on Remand. It held that in *Department of Mental Health v. District of Columbia Office of Employee Appeals, et al.*, Case No. 2015 CA 007829 P(MPA)(D.C. Super. Ct. July 13, 2017), the Superior Court for the District of Columbia ruled that it has no statutory authority to award attorney's fees because the D.C. Official Code authorizes a Hearing Examiner to award attorney's fees. However, no authority was conferred upon the Superior Court to award fees related to the review of decisions made by OEA. This Board found this reasoning to be consistent with the ruling in *Stanley*, which requires that requests for attorney's fee originate at OEA. Thus, the Board ruled that the AJ's decision to award fees for work performed before OEA and Superior Court was proper. Finally, the Board determined that Employee's counsel offered a detailed account of the work performed on this case. As a result, it upheld the AJ's ruling that the fees requested were reasonable. Consequently, Agency's Petition for Review was denied.

On December 5, 2017, Employee filed a Motion to the Office of Employee Appeals Board for an Award of Attorney's Fees and Costs. In it, he provides that he filed an attorney's fee petition with the AJ for all fees and costs. However, out of an abundance of caution, he filed the fee petition with the Board in the event the AJ determined that he did not have jurisdiction to award fees for work incurred before the OEA Board. Employee goes on to explain that he is the prevailing party in the matter and an award of attorney's fees and costs are warranted and in the interest of justice. Accordingly, Employee requests an award of \$7,952.40 in attorney's fees and \$274.03 in costs for work performed before the OEA Board.

3. William Redden v. Office of the Inspector General, OEA Matter No. 1601-0021-17 – Employee worked as an Investigator with Agency. On November 8, 2016, Agency issued a Proposed Notice of Separation, charging Employee with "conduct prejudicial to the District government: unauthorized disclosure of information protected by statute." On December 21, 2016, Employee was issued a Final Agency Decision. The effective date of Employee's termination was December 30, 2016.

Employee filed a Petition for Appeal with OEA on January 6, 2017. In his appeal, Employee argued that termination was unduly harsh and that Agency discriminated against him. He also

opined that Agency's termination action was callous, cynical, and administratively improper. Consequently, Employee asked to be reinstated with back pay and benefits.

Agency filed an Answer to Employee's Petition for Appeal on February 8, 2017. It asserted that Employee admittedly failed to follow procedures and policies by releasing a prisoner complaint to a federal prison without authorization. In addition, Agency provided that Employee was not terminated for discriminatory reasons. Accordingly, it requested that the termination action be upheld.

After conducting a Prehearing Conference, the OEA Administrative Judge ordered the parties to submit briefs addressing whether Agency engaged in progressive discipline; whether termination was appropriate under District law and the Table of Appropriate Penalties; and whether Agency properly considered the Douglas factors in imposing its adverse action against Employee.

In its brief, Agency argued that Employee's termination was taken for cause because his actions violated its policy regarding referrals of inmate complaints and unauthorized disclosure of confidential information. Agency further contended that it engaged in progressive discipline prior to removing Employee. Lastly, it provided that the Douglas factors were properly considered in selecting the penalty of termination. Therefore, Agency requested that the AJ uphold Employee's termination.

In response, Employee argued that Agency failed to engage in progressive discipline and maintained that its actions constituted harassment. With respect to the penalty, Employee submitted that Agency did not accurately consider the Douglas factors when instituting its termination action. He further stated that Agency discriminated against him. As a result, Employee opined that his termination was improper.

The AJ issued an Initial Decision on November 8, 2017. She held that Employee violated D.C. Official Code § 1-301.115. Consequently, the AJ concluded that Agency established that it had cause to institute an adverse action against Employee. With respect to Employee's claims of discrimination, the AJ stated that D.C. Official Code § 2-1411.02 specifically reserves complaints of unlawful discrimination to OHR. In reviewing Employee's submissions, the AJ concluded that his claims did not allege any whistleblowing activities, and Agency's termination action was not retaliatory in nature.

Concerning Employee's contention that he was demoted in his duties, the AJ held that complaints of this nature were considered grievances which fall outside the scope of OEA's jurisdiction. With regards to the penalty, the AJ opined that Agency did not abuse its discretion in its selection of the penalty of termination. The AJ further concluded that Agency considered the relevant Douglas factors in selecting the appropriate penalty. Lastly, the AJ found Employee's contention that Agency failed to engage in progressive discipline to be unpersuasive. Based on the foregoing, the AJ concluded that Employee's termination should be upheld.

Employee disagreed and filed a Petition for Review with OEA's Board on December 5, 2017. In his appeal, Employee reiterates that he was incorrectly assigned in his position with RAFP. Employee also claims that the AJ should have conducted an evidentiary hearing. Additionally, he disputes the AJ's reliance on Agency's assessment of the Douglas factors. Employee also requests that this Board remand the matter to the AJ to determine why Agency failed to place him on a Performance Improvement Plan ("PIP") prior to terminating him.

Agency filed a Response to Employee's Petition for Review on February 12, 2018. It argues that since there are no genuine issues of material fact, the AJ's decision to not hold an evidentiary hearing was warranted. Agency also maintains that OEA lacks jurisdiction to address Employee's claims of discrimination because OHR is the proper venue for adjudicating such matters. As such, it contends that the matter need not be remanded to the AJ, and asks this Board to uphold the Initial Decision.

4. Samuel Murray v. Department of Youth Rehabilitation Services, OEA Matter No.

1601-0032-14R17 – This matter was previously before the Board. By way of background, Employee filed a Petition for Appeal OEA, contesting Agency's act of removing him from his position as a Motor Vehicle Operator. Employee was charged with "any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: incompetence" and "any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious: inability to perform the essential functions of the job." The effective date of Employee's termination was November 29, 2013.

The OEA Administrative Judge ("AJ") issued an Initial Decision on September 18, 2015, concluding that Agency failed comply with D.C. Official Code § 1-623.45. He further held that Agency did not meet its burden of proof in establishing that Employee was terminated for cause. Consequently, Agency was ordered to reverse its termination action and reinstate Employee to the same or a comparable position.

The OEA Board issued its Opinion and Order on Petition for Review on March 7, 2017. It determined that there was no medical documentation from Employee's physician stating that he overcame his injury in November of 2012, or that Employee was provided with medical treatment to lessen his disability, as required under D.C. Official Code § 1-623.45(b)(1). Since there was insufficient evidence in the record to determine whether Employee overcame his disability in November of 2012, the Board remanded the matter to the AJ to make further determinations.

The AJ subsequently ordered the parties to address the issues discussed in the Board's Order. In his brief, Employee asserted that there was substantial evidence in the record to show that Agency permitted him to commence working on November 5, 2012, and paid him for the work performed. Employee further provided that he made frequent office visits and participated in certain medical treatments while under the care of his treating physician, Dr. Sankara Rao Kothakota ("Kothakota"). Included with his brief, was a newly-produced Disability Certificate from Dr. Kathokota, dated October 26, 2012. The certificate indicated that Employee could return to work as a Van Driver on November 5, 2012. As a result, Employee opined that he was medically cleared to return to work, without restriction, on November 5, 2012.

In its brief, Agency argued that Employee failed to demonstrate that he overcame his injury within the two-year statutory period under D.C. Official Code § 1-623.45. According to Agency, "commencement of payment of compensation for in Employee's case was no later than October 30, 2010, or as early as August 26, 2010." Thus, it claimed that in order to be entitled to rights under § 1-623.45(b)(1), Employee would have to present evidence that he overcame his injury no later than October 29, 2012. Agency also contended that the Disability Certificate from Dr. Kothakota did not establish that Employee was medically cleared to return to work. Therefore, Agency maintained that it did not violate D.C. Official Code § 1-623.45 and requested that the AJ uphold Employee's termination.

The AJ issued an Initial Decision on Remand on October 25, 2017. The AJ dismissed Agency's argument that the commencement of payment of compensation occurred on August 26, 2010,

and again on October 30, 2012. He also concluded that the Disability Certificate issued by Employee's physician on October 26, 2012, in addition to Employee returning to work on November 5, 2012, clearly demonstrated that Employee had overcome his disability within the two-year statutory time limit as required under § 1-623.45(b)(1).

Next, the AJ held that the Disability Certificate could be considered part of the record on remand. He disagreed with Agency's position that the Disability Certificate failed to demonstrate that Employee actually recovered from his disability. The AJ noted that the certificate placed no restrictions or limitations on Employee's ability to work as a Van Driver. While Employee was placed in a mail room position upon his return to work, the AJ nonetheless concluded that Agency accepted the Disability Certificate as proof that Employee was medically cleared on November 5, 2012. Moreover, he stated that the December 17, 2012 medical report from Dr. Kothakota did not negate the fact that Employee was medically cleared to return to work on November 5, 2012. Based on the foregoing, the AJ held that Employee overcame his medical disability within in a two-year period. Consequently, Agency's termination action remained reversed, and Employee was ordered to be reinstated with back pay and benefits.

Agency disagreed and filed a second Petition for Review with the OEA Board on November 29, 2017. It reiterates its previous argument that the Disability Certificate issued by Dr. Kathakota does not demonstrate that Employee overcame his injury as of November 5, 2012. Agency further posits that the AJ erred in relying on November 18, 2010 as the date from which to calculate the two-year "commencement of payment of compensation" period. Additionally, Agency states that the AJ erroneously relied on 7 DCMR § 139.2 to reverse Agency's termination action. Thus, it requests that the Board grant its Petition for Review.

In response, Employee asserts that the Initial Decision on Remand should be upheld because the Disability Certificate provided by Dr. Kothakota serves as substantial evidence that he overcame his disability. Employee further echoes his previous contention that Agency accepted Dr. Kothakota's medical documentation as proof that he was medically cleared to return to work, without restriction, on November 5, 2012. Therefore, Employee reasons that Agency cannot currently argue that the same Disability Certificate only gave him the "opportunity to perform full duty." Additionally, he states that the AJ was correct in concluding that November 18, 2010 was the date on which to commence the two-year statutory period. As a result, Employee argues that Agency's Petition for Review should be denied.

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