

Agenda

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

Tuesday, June 9, 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. New Business

A. Public Comments on Motion to Expedite

B. Summary of Case

1. Webster Alexander Rogers v. D.C. Public Schools, OEA Matter No. 2401-0255-10R14 – Employee seeks to have the OEA Board expedite his case because Agency failed to defend its action before the Administrative Judge (“AJ”) on remand. Employee asserts that he was removed from his position over five and one-half years ago and that Agency is attempting to further delay his reinstatement.

C. Public Comments on Petitions for Review

D. Summary of Cases

1. Theodore Powell v. D.C. Public Schools, OEA Matter Nos. 1601-0281-10 and 1601-0029-11 – Employee was a Physical Education Teacher with Agency. On February 2, 2010, Agency advised Employee that he would be placed on Administrative Leave from February 4, 2010 through February 10, 2010, due to his arrest for threats to do bodily harm to a student. Subsequently, Agency notified Employee that his period of Administrative Leave ended, and he would be placed on Enforced Leave status starting March 9, 2010. On November 5, 2010, Agency issued another notice to Employee informing him that he would be terminated for insubordination. It explained that while Employee was on Enforced Leave, he was directed to submit to a mental and physical examination, but he refused to answer the physician’s questions. His effective date of the termination was November 30, 2010.

Employee contested the Enforced Leave action and filed a Petition for Appeal with OEA on March 12, 2010. He subsequently filed another Petition for Appeal on November 29, 2010, to contest his termination action. With regard to the Enforced Leave action, Employee argued that he should not have been subjected to the action because he was assaulted on-the-job and was diagnosed with Post Traumatic Stress Disorder/Adjustment Disorder. In his second Petition for Appeal, Employee explained that although he submitted to the Fitness for Duty Examination, Agency’s physician was not a mental health professional. Therefore, he requested to be reinstated to his position and to be reimbursed for emotional and psychological damages.

In Agency’s Answer to the first Petition for Appeal, it explained that the Enforced Leave action was justified because Employee’s crime bore a relationship to his position at Woodson High School. It provided that the action was in accordance with D.C. Official Code § 1-616.54 (a)(3). Accordingly, Agency requested that the first Petition for Appeal be dismissed for Employee’s failure to state a claim. In its Answer to Employee’s Second Petition for Appeal, Agency provided that his termination action was in accordance with Title 5, Section 1401.2 of the District of Columbia Municipal Regulations (“DCMR”). It explained that while Employee was on Enforced Leave, he was directed to undergo the Fitness for Duty examination but failed to do so within the required timeframe. Thus, Agency requested that the Employee’s Second Petition for Appeal also be dismissed for failure to state a claim.

The Initial Decision was issued on January 31, 2014. The AJ found that Agency had cause to place Employee on Enforced Leave. He reasoned that Employee’s crime bore a relationship to his position and that Agency “. . . took reasonable steps to ensure the safety of the student populace.” With regard to the charge of insubordination, the AJ found that “Employee failed to actively participate for the Fitness for Duty so that a reasonable examination could occur.” He held that this failure challenged Employee’s ability to effectively carry out his essential job functions. Thus, he ruled that Agency had cause to remove Employee for insubordination. Accordingly, Agency’s action was upheld.

Employee filed a Petition for Review of the Initial Decision with the OEA Board on February 21, 2014. He states that the Initial Decision was not a factual document; the AJ erred in his judgment of the witnesses; Agency provided the AJ false information; and he was subjected to retaliation, double jeopardy, discrimination, and punishment. Employee provides that Traci Higgins, the Director of Labor Management and Employee Relations, and Gerald Austin, the Assistant Principal at H.D. Woodson Senior High School, made false statements. Additionally, Employee believes that Dr. Webb was not qualified to conduct the Fitness for Duty examination. Therefore, Employee believes that he was wrongfully terminated and is entitled to relief.

Agency filed a Motion for Leave to File a Response to Employee's Petition for Review on April 10, 2015. Agency provides that it did not receive a timely copy of the Petition for Review. Agency's Response to Employee's petition was not received before the issuance of this decision.

- 2. Kimberly McCain v. D.C. Fire and Emergency Medical Services, OEA Matter No. 1601-0375-10** – Employee was an Emergency Medical Technician with Agency. On July 19, 2010, Agency advised Employee that she would be removed from her position for any on duty or employment related act or omission that Employee knew or should reasonably have known was a violation of the law. Specifically, on July 12, 2009, Employee was arrested for driving under the influence of alcohol. Employee subsequently pled guilty to driving and attempting to drive while under the influence. The effective date of removal was July 23, 2010.

Employee contested the removal and filed a Petition for Appeal with OEA on August 19, 2010. She argued that the Advanced Notice of Proposed Removal was untimely; her removal violated statute, regulation, personnel practices, and the Douglas Factors; and the removal was discriminatory. Employee contended that there was no conviction upon which her removal was based and that the conviction was defective. Therefore, she requested reinstatement with back-pay and benefits, removal from her personnel file all documents referencing the removal, and attorney fees.

In Agency's Answer to the Petition for Appeal, it explained that its Advanced Notice of Proposed Removal was issued within ninety days of Employee's finding of guilt in the Superior Court for the District of Columbia. Moreover, it asserted that its action did not violate D.C. Official Code § 5-1031(b). As for Employee's contention that the removal was defective, Agency provided that she did not present evidence to support this allegation.

The AJ issued an Order Convening a Status Conference and subsequently ordered the parties to submit briefs. Employee asserted that the charge of any on duty or employment related act or omission that Employee knew or should reasonably have known was a violation of the law could not stand because Agency did not allege that she was on duty, per Article VI, Section 8 of the Fire & Emergency Medical Services' rules and regulations. She also opined the conviction of a misdemeanor could not be sustained because pursuant to Article VII, Section 2(4), the penalty for DWI should have been a suspension ranging between ninety and one hundred and twenty hours. Furthermore, Employee provided that her guilty plea was defective because based on information she received from the Office of Attorney General ("OAG"), the DWI conviction was based on a flawed blood alcohol analysis.

In opposition to Employee's Motion, Agency argued that Employee's removal was based on her conviction of a crime relevant to her position. Moreover, Agency contended that Article VI, Section 8 of the Fire & Emergency Medical Services rules did not apply to Employee because she was not under that particular labor agreement. It submitted that under the Table of Penalties, removal was the appropriate penalty. Accordingly, Agency requested that its action be affirmed.

The Initial Decision was issued on January 27, 2014. The AJ found that Employee was not on duty when she was arrested. Accordingly, she determined that because the conduct occurred while Employee was off-duty, there needed to be a nexus between the misconduct and the efficiency of Employee's service. The AJ agreed with Agency's assertion that driving while under the influence, even while off-duty, conflicted with its mission. She reasoned that "FEMS employees, especially firefighters and EMTs, are in the public eye on a daily basis and are expected to follow the law." As a result, the AJ found that pursuant to Chapter 6, § 1603.3(e) of the DCMR, Agency had cause to charge Employee.

With regard to the charge of conviction of a misdemeanor, the AJ found that OAG ". . . conceded that several of the intoxilizer devices used by the Metropolitan Police Department were miscalibrated between the years of 2008 and 2010." However, she concluded that because Employee did not file a motion with the Superior Court for the District of Columbia to withdraw her guilty plea, she was bound by the conviction. As a result, the AJ concluded that this charge was supported by substantial evidence and also in accordance with 6 DCMR § 1603.3(b).

Lastly, with regard to the appropriateness of the penalty, the AJ found that DCMR § 1619.1(2) was the relevant regulation for any on duty or employment related act or omission that Employee knew or should reasonably have known was a violation of the law. She found that Employee should have known that her actions violated the law. As

for the conviction of a misdemeanor, the AJ found that under Agency's Collective Bargaining Agreement with Local 3721, the imposed discipline was based on the rules of the Comprehensive Merit Personnel Act ("CMPA"). Accordingly, based on the District Personnel Manual ("DPM"), the AJ found that the penalty for a conviction of a misdemeanor based on conduct relevant to an employee's job position was removal. Thus, she ruled that Agency's action was taken for cause, and its penalty was not an abuse of discretion. Therefore, its action was upheld.

Employee filed a Petition for Review with the OEA Board on February 28, 2014. She asserts that new and material evidence is available that was not available when the record closed. Employee provides that on December 6, 2013, she filed a Motion to Withdraw Guilty Plea and Vacate Conviction in the Superior Court for the District of Columbia. She explains that the Court subsequently issued an Order vacating her conviction. As a result, Employee believes that the Initial Decision must be reversed.

With regard to the charge of conviction of a misdemeanor, Employee argues that the AJ incorrectly determined that there was a nexus between her offense and her position. She notes that Agency did not cite the charge of conviction of a misdemeanor in its final decision, but the AJ cited this charge pursuant to 6 DCMR § 1603.3(b). Lastly, Employee submits that the AJ ". . . misperceived her role in reviewing penalties . . ." and failed to rule that the penalty was inappropriate. She argues that the AJ and Agency did not thoroughly review and apply the Douglas Factors. Therefore, Employee believes that the Initial Decision must also be reversed.

3. William Barnette v. Department of General Services, OEA Matter No. 2401-0332-10 – Employee was a Facilities Operations Manager with Agency. On May 11, 2010, Agency issued a notice to Employee informing him that he was being separated from his position pursuant to a reduction-in-force ("RIF"). The effective date of the RIF was June 13, 2010.

Employee contested the RIF action and filed a Petition for Appeal with OEA on July 13, 2010. He argued that Agency did not properly conduct the RIF. Employee reasoned that he had more years of service than the other senior managers. In a subsequent filing, Employee also argued that Agency failed to provide proper notice for its second RIF notice.

In its response to Employee's Petition for Appeal, Agency explained that a budgetary crisis forced it to abolish twenty-three positions. It explained that it followed the RIF regulations, as defined in Chapter 24 of the DPM and the CMPA. Accordingly, it provided Employee with one round of lateral competition and a written, thirty-day notice prior to his separation date. Hence, Agency believed that Employee failed to state a claim for which relief could be granted and requested that his appeal be dismissed with prejudice.

The Initial Decision was issued on January 31, 2014. The AJ found that D.C. Official Code § 1-624.08 was the applicable statute to govern the RIF. As a result, she ruled that § 1-624.08 limited her review of the appeal to determining whether Employee received a written, thirty-day notice prior to the effective date of his separation, and if Agency provided one round of lateral competition within his competitive level. The AJ found that Employee was placed in the correct competitive area and competitive level. However, because Employee was the sole person within his competitive level, the AJ concluded that the rules pertaining to one round of lateral competition were inapplicable in this matter.

With regard to Employee's assertion that he should have received thirty days' notice from the date of the alleged second RIF notice, the AJ disagreed. She explained that neither Agency nor Employee produced a hard copy of the alleged second notice, and without a hard copy, there was no way to determine whether the document was in fact a RIF notice. As a result, the AJ found that Agency did not issue a second RIF notice and concluded that the May 11, 2010 notice provided Employee thirty days' notice. Accordingly, she ruled that the RIF action was proper and upheld Agency's decision.

Employee filed a Petition for Review with the OEA Board on March 7, 2014. He argues that the Initial Decision was based on an erroneous interpretation of the CMPA and the DPM; the AJ's findings were not based on substantial evidence; and the Initial Decision ignored material issues. Employee asserts that Agency's personnel authority was not intended to apply to RIFs. He reiterates that Agency did not properly prepare the retention register; it did not properly establish the competitive area; he did not receive one round of lateral competition; Agency did not properly establish a lesser competitive level; and although Agency issued two RIF notices, he did not receive proper notice for the second one. Therefore, Employee requests that the OEA Board reverse the Initial Decision; reinstate him with back pay and benefits; and provide an award of nineteen days' pay for Agency's failure to provide the proper notice.

Agency filed an Answer to the Petition for Review on April 11, 2014. It opines that the Initial Decision was supported by substantial evidence. Agency asserts that in accordance with D.C. Official Code § 1-624.08, Employee received one round of lateral competition and a written thirty days' notice. It argues that a June 8, 2010 letter merely

revised and corrected Employee's severance pay; however, it was not a second RIF notice. Lastly, Agency reiterates that it did not need Mayoral approval to conduct the RIF, and it properly established the competitive area and competitive level. Accordingly, Agency requests that the Petition for Review be denied.

4. Nancy Willson v. Department of Transportation, OEA Matter No. 1601-0170-13 – Employee was a Staff Assistant with Agency. On August 2, 2013, Agency issued a letter to Employee informing her that she would be terminated from her position during her probationary period. On August 8, 2013, Agency issued a revised termination letter to Employee explaining that the previous letter contained inaccurate information. The letter went on to provide that the effective date of separation was August 23, 2013. Subsequently, on August 15, 2013, Agency issued another letter to Employee informing her that the August 8, 2013 letter “contained a typographical error in regards to [the] effective date of separation.” It explained that the effective date of separation should have been August 13, 2013.

Employee filed a Petition for Appeal with OEA on September 30, 2013. She argued that Agency's termination action was improper. Employee reasoned that in two separate notices, Agency stated that her effective date of separation was eleven days after her probationary period ended. She further submitted that in its August 15, 2013 letter, Agency attempted to back date her effective separation date. Employee opined that once her probationary period ended, she became a Career Service Employee, and as a result, Agency needed cause to terminate her. Therefore, Employee requested reinstatement with back-pay and benefits restored.

Agency filed a Motion to Dismiss the Petition for Appeal on November 1, 2013. It argued that OEA lacked jurisdiction over the appeal because Employee was terminated during her probationary period. Agency explained that its first two notices contained incorrect effective dates of separation. It asserted that Employee's effective date of separation was August 13, 2013.

On January 22, 2014, the AJ issued her Initial Decision. She found that “[b]ased on Employee's paystub, Agency continued paying Employee long after the purported August 13, 2013 termination effective date.” The AJ was not convinced by Agency's argument that its first two termination notices contained typographical errors with regard to Employee's termination effective date. Furthermore, she reasoned that even if the August 15, 2013 letter contained the correct termination effective date, Agency's termination action against Employee was still in error because at 12:00 a.m. on August 13, 2013, Employee became a Career Service employee. As a result, the AJ ruled that Agency needed cause to remove Employee. Accordingly, Agency's motion to dismiss was denied, and its termination action was reversed.

On February 24, 2013, Agency filed a Petition for Review of the Initial Decision with the OEA Board. It submits that the AJ's findings were not based on substantial evidence. Agency explains that after Employee's probationary period ended, she was not paid for actual work and that she was on Administrative Leave with Pay. It went on to provide that Employee's Retroactive Pay and Terminal Leave Pay were for work performed during her probationary period. It asserts that as early as August 2, 2013, Employee was aware that she was to be terminated during her probationary period and that she was being placed on Administrative Leave with Pay. Therefore, it requests that the Initial Decision be reversed and that its termination action be sustained.

In response to the Petition for Review, Employee argues that the Initial Decision correctly stated the facts and correctly applied the law. She provides that after 11:59 p.m. on August 12, 2013, she became a Career Service employee who was on Administrative Leave with Pay. Therefore, she requests that the Board deny Agency's Petition for Review.

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