

Agenda

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

Tuesday, July 21, 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 Petitions for Review

B. Summary of Cases

1. Webster Rogers v. D.C. Public Schools, OEA Matter No. 2401-0255-10R14 – Employee worked as a Music Teacher with Agency. On October 2, 2009, Agency notified Employee that he was being separated from his position pursuant to a reduction-in-force (“RIF”). Employee contested the RIF action and filed a Petition for Appeal with OEA on December 2, 2009. He argued that the RIF was a pre-text to terminate him without due process. Employee claimed that Agency failed to follow the rules of D.C. Official Code § 1-624.08. Therefore, he requested reinstatement with back pay and benefits.

Agency filed its response to the Petition for Appeal on January 7, 2010. It explained that the RIF was conducted pursuant to D.C. Official Code § 1-624.02 and Title 5, Chapter 15 of the District of Columbia Municipal Regulations (“DCMR”). It submitted that pursuant to 5 DCMR § 1501, Moten Elementary School was the competitive area, and under 5 DCMR § 1502, the ET-15 Music Teacher position was the competitive level subject to the RIF. Agency asserted that it provided Employee with one round of lateral competition within his competitive level and a written, thirty-day notice that his position was being eliminated. As a result, Agency believed the RIF action was proper.

The AJ issued her Initial Decision on June 13, 2012. She found that although Agency conducted the RIF in accordance with D.C. Official Code § 1-624.02, D.C. Official Code § 1-624.08 was the applicable statute to govern the RIF because the RIF was conducted for budgetary reasons. As a result, she held that in accordance with D.C. Official Code § 1-624.08, Employee received one round of lateral competition within his competitive level and a written, thirty-day notice prior to the RIF. Accordingly, Agency’s RIF action was upheld.

On August 6, 2012, Employee filed a Petition for Review of the AJ’s decision with the Superior Court for the District of Columbia. The petition provided that the AJ erred when she applied 5 DCMR 1503.2 to this case when it is governed by D.C. Official Code § 1-624.08. The Court issued an Opinion on the matter on December 9, 2013. It found that although the AJ correctly determined that D.C. Official Code § 1-624.08 was the applicable statute to govern the RIF, the AJ mistakenly applied the standards provided in 5 DCMR 1503. The Court held that because the Abolishment Act applied to this RIF, the AJ should have reviewed the RIF utilizing D.C. Official Code § 1-624.08 and the regulations of Chapter 24 of the District Personnel Regulations (“DPM”). Furthermore, the Court held that Employee had a right to be placed on Agency’s priority reemployment list. As a result, it reversed the AJ’s Initial Decision and remanded the matter for further findings.

Following the Court’s reversal and remand, the AJ scheduled a Status Conference and subsequently issued an Order requiring the parties to address whether Agency conducted the RIF in accordance with the Abolishment Act. Rather than address the issue presented by the AJ and in accordance with the Court’s directive, Agency reiterated that its use of D.C. Official Code § 1-624.02 and 5 DCMR 1503 was proper. Agency reasoned that the Mayor gave the Chancellor authority to issue the RIF, and the Chancellor implemented the RIF pursuant to D.C. Official Code § 1-624.02. Agency provided that it was impossible for it to conduct the RIF under D.C. Official Code § 1-624.08 because the Abolishment Act did not apply to Employee, who was an Educational Service employee at the time of the RIF. Agency also claimed that because Employee was deemed an “Inadequate Performer,” he would not have retained his position over the other two Music teachers.

Employee provided that Agency lacked authority to retroactively apply the Abolishment Act; it could not prove that Employee was an “Inadequate Performer” because it did not utilize the DPM’s procedures for determining whether he

was an “Inadequate Performer;” and his termination could not stand because he was on approved sick leave at the time of the evaluation.

The Initial Decision on Remand was issued on February 27, 2015. The AJ agreed with Employee and held that OEA does not have jurisdiction to overturn the Court’s findings and consider Agency’s arguments regarding the Abolishment Act. The AJ found that one round of lateral competition was not provided to Employee. She reasoned that Agency failed to conduct the RIF under the Abolishment Act and failed to prove that Employee was rated as an “Inadequate Performer.” The AJ also held that Agency did not prove that Employee was considered for priority reemployment. Furthermore, she opined that Agency failed to consider Employee for the Displaced Employee Program. Therefore, Agency’s action was reversed and it was ordered to reinstate Employee with all back pay and benefits.

Agency filed a Petition for Review with the OEA Board on April 3, 2015. It claims that the “unsatisfactory” rating that Employee received pursuant to the rules of D.C. Official Code § 1-624.02 is equivalent to the rating “Inadequate Performer,” as provided in the rules of the Abolishment Act. It is Agency’s position that “. . . an employee is provided with one round of lateral competition when a CLDF is completed for that Employee.” Additionally, Agency argued that the AJ did not have jurisdiction to consider whether Employee was provided consideration for the Priority Re-employment or Displaced Employee programs. Thus, it believes that its RIF action was proper.

In Employee’s Answer to the Petition for Review, he provides that Agency must prove that he received a meaningful round of lateral competition in accordance with the requirements of Chapter 24 of the DPM. Moreover, he submits that OEA is required to follow the directives of the Remand Order. He provides that Agency committed harmful error when it terminated him without one round of lateral competition. Furthermore, he argues that Agency failed to prove that he was rated as an “Inadequate Performer.” Therefore, Employee requests that the Board reinstate him with back-pay and benefits. In the alternative, he submits that if the Board rules that he was properly separated, it should direct Agency to place him on the reemployment register and award him damages.

On May 8, 2015, Employee filed a Motion to Expedite Agency’s Petition for Review. He submitted that Agency’s Petition for Review lacks legal and factual support. He explained that Agency did not defend its action before the AJ and instead requested that the AJ refuse to follow the Superior Court’s order. Lastly, Employee provides that it has been nearly six years since he was terminated from his position and he deserves a speedy resolution. The OEA Board granted Employee’s Motion to Expedite on June 9, 2015.

- 2. Garnetta Hunt v. D.C. Department of Corrections, OEA Matter No. 1601-0053-11** – Employee worked as a Correctional Officer with Agency. On November 19, 2010, Agency issued its final decision to remove Employee, charging her with any on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: unauthorized absence of ten days or more and incompetence. Employee challenged her termination by filing a Petition for Appeal with OEA on December 22, 2010. She argued that her termination was in retaliation to her filing a discrimination complaint. She claimed that Agency discriminated against her because of her disability and that Agency’s action constituted constructive termination. Employee explained that she was attacked by an inmate while on duty and was placed on disability from March 23, 2004 through February 20, 2006. She asserted that she returned to Agency after her period of disability but was eventually placed on administrative leave. Employee claimed that upon her return to work, she suffered from panic attacks while on duty and contended that Agency refused to process the information needed to complete a disability claim. She later submitted a physician’s letter stating that she could return to work with no direct inmate contact, but Agency did not allow her to return nor did it place her on worker’s compensation. She claimed that although Agency kept her on the payroll, she did not receive compensation. Employee contended that her orthopedic surgeon provided a letter stating that she could return to work but in a sedentary position. Despite the letters from her doctors, Employee was not allowed to return to Agency. Employee stated that there were numerous positions that could have accommodated her working restrictions. Therefore, she requested reinstatement to her position with back pay, benefits, and attorney’s fees.

Agency filed a Pre-hearing Statement on January 21, 2011. It argued that Employee was terminated for cause. It explained that on April 18, 2006, Employee came to work, but she was later placed on administrative leave pending clearance from her physician to return to work. It provided that when Employee’s administrative leave ended, it mailed a letter to her informing her of her employment options. On June 18, 2009 and June 26, 2009, Agency informed Employee that she was in an unauthorized leave status. It provided that Employee’s removal was based on her continued unauthorized leave status and that the penalty of removal was in accordance with the DPM Table of Penalties. Thus, it requested that the removal action be upheld.

On February 14, 2014, the AJ issued her Initial Decision. She found that the issues surrounding Employee’s reasonable accommodations had been fully litigated in several previous appeals before other tribunals, and she was

precluded from addressing Employee's claims that Agency did not afford her reasonable accommodations or allow her to return to work. She provided that as of April 26, 2011, Employee was required to return to work, but she did not do so and was absent without authorization for more than ten consecutive days. Furthermore, the AJ found that during Employee's period of administrative leave, she was required to submit medical documentation stating that she could return to work with no restrictions, but she failed to do so. Thus, she held that Agency's adverse action was taken for cause in accordance with D.C. Official Code §1-616.5. With regard to Employee's claim that Agency's analysis of the *Douglas* factors proved that the termination was not justified, the AJ disagreed. She held that despite Agency's failure to consider mitigating circumstances, given the matter's unique circumstances, Agency chose the appropriate penalty. Moreover, she held that Employee did not prove that there was an abuse of discretion in Agency's consideration of the *Douglas* factors. Accordingly, because Employee could not show that she was medically cleared to return to work with no restrictions and because Employee could not present an alternative resolution to her situation, the AJ upheld Agency's termination action.

On March 14, 2014, Employee filed a Petition for Review with the OEA Board. She argues that the AJ overstepped the parameters of the March 18, 2013 order and deprived her of the opportunity for further discovery or a hearing. Therefore, she requests that the Board reverse the AJ's ruling; direct the AJ to continue discovery in the matter; and have the AJ conduct a hearing.

In response to the Petition for Review, Agency states that Employee's Petition for Review is not based on the grounds established in OEA's rules for Petitions for Review. Moreover, Agency argues that the AJ properly held that OEA lacked jurisdiction to consider Employee's arguments regarding reasonable accommodations. Therefore, Agency requests that the Board affirm the AJ's decision.

- 3. Belynda Roebuck v. D.C. Office on Aging, OEA Matter No. 1601-0098-12** – Employee worked as a Special Projects Coordinator with Agency. On April 11, 2012, Employee received a Final Notice of Summary Removal from Agency informing her that she was charged with 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. Agency claimed that Employee failed to report her earnings from the D.C. Government Personnel Office and continued to collect unemployment insurance benefits to which she was not entitled.

Employee challenged Agency's action by filing a Petition for Appeal with OEA on May 11, 2012. She provided, that the overpayment for unemployment benefits was the result of Agency's non-payment of earnings for the weeks of August 30, 2010 through September 11, 2010. Employee explained that during this time, Agency did not have the funds to pay her, and it knowingly deferred the recordation of said payroll transaction incurred in fiscal year 2010 to a subsequent fiscal year. Moreover, Employee provided that Agency violated her due process rights when it did not comply with the DPM governing the notice requirements for adverse actions. Therefore, she requested reinstatement, back pay, benefits, and damages for pain and suffering.

In its Answer to the Petition for Appeal, Agency provided that Employee began working full time on August 30, 2010 but continued to file for and receive unemployment compensation after that date. It explained that Employee failed to disclose her earnings to the Department of Employment Services ("DOES"). With regard to Employee's claim that it did not pay her for the weeks of August 30, 2010 through September 11, 2010, Agency provided that this non-payment was the result of an administrative error. However, Agency contended that this error did not justify Employee's actions regarding unemployment compensation. Lastly, Agency argued that removal was an acceptable penalty under Chapter 16 the DPM. Thus, it requested that the removal be upheld.

On February 5, 2014, the AJ issued her Initial Decision. She found that in order to prove that Employee violated D.C. Official Code § 51-119(a), Agency needed to show that Employee made a false statement of a 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. After reviewing the party's submissions, the AJ held that Employee knowingly falsified and submitted Continued Claim Forms in order to collect unemployment compensation in the amount of one thousand five hundred and thirty-six dollars (\$1,536.00). She reasoned that Employee began working at Agency on August 30, 2010, but on the Continued Claim Forms, she reported that she was not working. Thus, the AJ ruled that Agency had cause for the adverse action. With regard to the appropriateness of penalty, the AJ found that Agency considered the *Douglas* factors when making its decision to terminate Employee. Thus, she held that Agency's decision to remove Employee was not an error of judgment. Lastly, as it relates to the proper notice, the AJ found that Agency did not provide Employee with an advanced fifteen-day notice in accordance with DPM §1608.1(a). However, she ruled that this error was harmless and could be corrected by ordering Agency to compensate Employee with fifteen days' pay and benefits. Accordingly, Agency's action was upheld, but it was ordered to reimburse Employee for fifteen days' pay and benefits for its failure to provide her the proper notice.

Both parties filed Petitions for Review with the OEA Board. In Agency's petition, it argues that the Initial Decision was not based on evidence in the record. It claims that on February 8, 2012, it provided Employee an advanced written notice of its proposal to terminate her. It explains that sixty-two days after that date, it notified Employee of its decision to sustain the action. Therefore, Agency requests that the AJ's determination regarding the fifteen days' back pay be overruled.

In Employee's Petition for Review, she argues that the Initial Decision was based on an erroneous interpretation of statute, regulation, or policy; that the AJ's findings were not based on substantial evidence; and that the Initial Decision did not address all issues of fact raised in the Petition for Appeal. Employee asserts that the AJ was wrong in supporting Agency's contention that it considered the *Douglas* factors when it terminated her. She reiterates that there were mitigating circumstances, but the AJ did not consider them. Moreover, Employee believes that AJ should have conducted an evidentiary hearing. Lastly, Employee provides that the AJ did not address the issue of collateral estoppel. Employee claims that when the AJ made her ruling regarding whether she knowingly and willfully failed to report her earnings, she failed to consider two contrary holdings in decisions issued by the Office of Administrative Hearings. Thus, Employee believes that the Initial Decision should be reversed and requests reinstatement with back pay and benefits.

In opposition to Employee's Petition for Review, Agency argues that the AJ's findings regarding the appropriate penalty are supported by substantial evidence. Furthermore, Agency contends that Employee did not explain the error the AJ made with regard to the appropriateness of the penalty. With regard to Employee's argument that the AJ should have held an evidentiary hearing, Agency provides that the AJ was not required to conduct an evidentiary hearing. As for Employee's collateral estoppel argument, Agency argues that this doctrine does not apply to unemployment compensation matters. Therefore, Agency requests that the termination be upheld.

4. Pamela Dishman v. D.C. Public Schools, OEA Matter No. 2401-0028-11 – Employee worked as a Program Manager with Agency. On October 22, 2010, Agency notified Employee that she was being separated from her position pursuant to a RIF. Employee challenged the RIF by filing a Petition for Appeal with OEA on November 29, 2010. She argued that the RIF's procedures and process were flawed and that Agency discriminated against her. Employee also believed that the RIF was a pre-text to terminate her. Therefore, she requested that Agency's action be reversed and that she be reinstated with back pay based on her non-public manager position.

In its response to the Petition for Appeal, Agency denied Employee's contentions and provided that its action was taken in accordance with D.C. Official Code § 1-624.02 and Title 5, Chapter 15 of the DCMR. It asserted that the RIF was based on a reorganization, the elimination of functions, the curtailment of work, and for budgetary reasons. Agency explained that pursuant to 5 DCMR § 1503.2, the NPU was the competitive area, and the Program Manager position was the competitive level subject to the RIF. It asserted that Employee was provided with one round of lateral competition where she was ranked the lowest within her competitive level. As a result, it provided Employee a written, thirty-day notice that her position was being eliminated. Thus, Agency believed that the RIF action was proper and requested that the appeal be dismissed for failure to state a claim.

The Initial Decision was issued on February 10, 2014. The AJ found that although the RIF was authorized pursuant to D.C. Official Code § 1-624.02, D.C. Official Code § 1-624.08 was the applicable statute to govern the RIF. As a result, she ruled that D.C. Official Code § 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 her separation and one round of lateral competition within her competitive level. The AJ found that Employee's competitive level was properly established, and she was afforded one round of lateral competition. She also held that Agency provided Employee the required thirty-day notice. Accordingly, Agency's RIF action was upheld.

Employee filed a Petition for Review with the OEA Board on March 14, 2014. She provides that the former Chancellor did not have discretion to impose a RIF; the AJ incorrectly determined that the Abolishment Act applied to the RIF; Agency did not prove that her last position of record was a Program Manager; and the AJ failed to address her belief that the RIF was a pre-text to terminate her. Employee states that the AJ ignored her evidence which proved that Agency manipulated personnel information in order to terminate her. Furthermore, she argues that the ratings that she received were substantially different from her previous ratings and were written in an effort to justify her removal. Lastly, Employee asserts that based on the evidence submitted she should have been afforded a hearing. Therefore, she requests that the matter be remanded to the AJ and that the Initial Decision be reversed.

Agency filed a Response to the Petition for Review on April 18, 2014. It argues that the Mayor's Order 2007-186 delegated to the Chancellor all personnel authority, and at the time of the RIF, this Order was still in effect. Agency reiterated that its use of D.C. Official Code § 1-624.02 and 5 DCMR 1503 was proper. It provided that it was

impossible for it to conduct the RIF under D.C. Official Code § 1-624.08 because the Abolishment Act did not apply to Employee, who was an Educational Service employee at the time of the RIF. However, Agency provides that the AJ's findings were based on substantial evidence, and the Initial Decision addressed all materials of law and fact raised on appeal. Accordingly, it believes that the RIF should not be reversed.

Employee submitted a Notice of Supplemental Authority in Support of her Petition for Review on June 20, 2014. She provides that in accordance with the Board's decision in *James Johnson v. D.C. Homeland Security and Emergency Management Agency*, OEA Matter No. 2401-0011-11, Opinion and Order on Petition for Review (June 10, 2014), the official position of record is established by the Standard Form 50. Thus, Employee contends that based on this error alone, the RIF must be reversed.

5. Deidre Council Ellis v. D.C. Public Schools, OEA Matter No. 2401-0052-11 – Employee worked as a Compliance Specialist with Agency. On October 22, 2010, Agency notified Employee that she was being separated from her position pursuant to a RIF. Employee challenged the RIF by filing a Petition for Appeal with OEA on December 21, 2010. She argued that the RIF's procedures and process were flawed and that Agency discriminated against her. Employee also believed that the RIF was a pre-text to terminate her without cause. Lastly, Employee stated that Agency's RIF was not based on her Compliance Specialist position. Therefore, she requested reinstatement or to settle the matter.

In its response to the Petition for Appeal, Agency denied Employee's contentions and provided that its action was in accordance with D.C. Official Code § 1-624.02 and Title 5, Chapter 15 of the DCMR. It asserted that the RIF was based on a reorganization, a curtailment of work, and for budgetary reasons. Agency explained that pursuant to 5 DCMR § 1503.2, the Non-Public Unit was the competitive area and the Compliance Specialist position was the competitive level subject to the RIF. However, because Employee's entire competitive level was eliminated, she was not provided one round of lateral competition. As a result, Agency provided Employee a written, thirty-day notice that her position was being eliminated. Thus, it believed that the RIF action was proper and requested that the appeal be dismissed for failure to state a claim.

The Initial Decision was issued on February 11, 2014. The AJ found that although the RIF was authorized pursuant to D.C. Official Code § 1-624.02, D.C. Official Code § 1-624.08 was the applicable statute to govern the RIF. As a result, she ruled that D.C. Official Code § 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 her separation and one round of lateral competition within her competitive level. The AJ found that while Employee alleged that she had been detailed, her position of record was Compliance Specialist, and there was no evidence in the record to support her contention regarding the Placement Specialist Position. Thus, because the entire Compliance Specialist competitive level was abolished, the AJ found that Agency was not required to provide one round of lateral completion to Employee. She also found that Agency provided Employee the required thirty-day notice. Accordingly, Agency's RIF action was upheld.

Employee filed a Petition for Review with the OEA Board on March 18, 2014. She provides that Agency has the burden of proving all procedural requirements. Additionally, she claimed that Agency conducted the RIF in accordance with D.C. Official Code § 1-624.02, while the AJ determined that the RIF was conducted under different procedures.

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