Agenda

D.C. OFFICE OF EMPLOYEE APPEALS ("OEA") BOARD MEETING
Tuesday, December 19, 2017 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. Debra Johnson v. D.C. Public Schools, OEA Matter No. 1601-0037-13 – Employee worked as a Teacher with Agency. On November 23, 2012, Agency issued a notice of voluntary resignation to Employee. Employee filed a Petition for Appeal with the Office of Employee appeals ("OEA") on December 21, 2012. She argued that her employment with Agency was terminated after a forced voluntary resignation. On January 31, 2013, Agency filed a response to Employee's Petition for Appeal. Agency explained that it informed Employee that failure to return to work or to submit the Americans with Disabilities Act ("ADA") packet by November 23, 2012, would be treated as a voluntary resignation of employment. Moreover, it asserted that because Employee's resignation was not an adverse action, OEA lacked jurisdiction over the matter. Therefore, Agency requested that Employee's Petition for Appeal be dismissed.

The Administrative Judge ("AJ") issued her Initial Decision on January 19, 2017. She found that OEA did have jurisdiction over this appeal since the evidence supported the conclusion that Employee did not voluntarily resign from or abandon her position. The AJ stated that it was appropriate for Agency to invoke the provisions of 5 District of Columbia Municipal Regulations ("DCMR") 1020.6 when an employee fails to communicate with Agency; fails to report to work with an accepted excuse; and/or fails to respond to requests from Agency for documentation or information. However, she provided that Employee always responded to Agency's communications and proved that she intended to retain her employment. Additionally, the AJ held that Agency's deadline, by which Employee was to return the ADA packet from her physician, was unreasonable given the holiday, weekend, and its denial of Employee's request for an extension. Therefore, she ruled that Agency improperly invoked 5 DCMR 1020.6 and that Employee did not abandon or resign from her position. As a result, the AJ determined that Employee's separation was considered a constructive removal which is considered an adverse action, over which OEA has jurisdiction. Accordingly, she reversed Agency's removal action; ordered that Employee be reinstated to her position; and ordered that Agency restore Employee's benefits that which were lost as a result of Agency's improper action.

On February 23, 2017, Agency filed its Petition for Review. Agency maintains that Employee was not entitled to relief because she voluntarily resigned from her position when she failed to provide medical support for her request for extended leave. Therefore, it requests that the

Board reverse the Initial Decision or remand the case to the AJ for clarification on the proposed remedy.

On February 23, 2017, Employee also filed a Petition for Review. She contends that she is entitled to back pay as part of her damages. Furthermore, Employee explains that the issue of relief was never addressed, and the AJ's decision requires more information to make a determination on the issue of relief. Employee argues that the AJ should have awarded her back pay from 2012 to when she is reinstated. Therefore, she requests that her petition be granted and that the Board remand the matter for a thorough evaluation and determination on her entitlement to back pay and damages.

On March 9, 2017, Agency filed a Statement of Compliance. In its statement, it provides a chart outlying Employee's benefits and illustrating the cost to restore benefits. Agency explains that in order for Employee's health, vision, and dental insurance to be restored, Agency and Employee would have to make contributions to the insurance plans. Agency asserts that it consulted with Employee's counsel who conveyed that Employee does not have the funds to contribute to restoring her health insurance for the past four years. Accordingly, it contends that it is unable to restore any of Employee's benefits for that period. However, Agency attests that it did advise Employee of the necessary steps to reinstate employment.

On August 4, 2017, Agency issued a second Statement of Compliance. It states that Employee submitted all documents required for Agency to reinstate her. However, Agency explains that Employee was notified on June 21, 2017, that she was not eligible for reinstatement because it was determined that Employee posed a present danger to children and/or youth. Accordingly, Agency asserts that Employee is ineligible to hold employment at its schools.

2. Dale Jackson v. D.C. Department of Health OEA Matter No. 2401-0089-11R14 (Motion for Reconsideration) – This matter has been previously before the OEA Board. By way of background, the OEA Board issued its Opinion and Order on Remand on January 24, 2017. It held that Employee and another employee, Mr. Flores, did not share the same classification series for one round of lateral competition, as required by DPM § 2410.4. The Board found that Employee held a classification of a "continuing" employee; while Mr. Flores was designated a "term" employee. Further, it reasoned that because Employee was in a single-person competitive level, one round of lateral competition was inapplicable in this matter. Accordingly, it ruled that Agency properly removed Employee pursuant to the RIF action and denied Employee's Petition for Review.

On February 28, 2017, Employee filed what is essentially a Motion for Reconsideration. He argues that he and Mr. Flores were in the same classification series 5703. Consequently, Employee contends that he was entitled to one round of lateral competition. It is Employee's position that if he was afforded the opportunity to compete against Mr. Flores, he would have been retained based on his tenure. Accordingly, Employee requests that the Board reconsider its decision and find that his termination under the RIF was improper.

On March 10, 2017, Employee also filed an appeal in the Superior Court of the District of Columbia of OEA's Opinion and Order on Remand, issued January 24, 2017. Employee stated that the Board's Opinion should be overturned because it is based on an erroneous interpretation of DPM § 2410.4 and is not based on substantial evidence. Thus, Employee requested that he be reinstated; receive back and front pay; have the termination expunged from his record; and be awarded compensatory damages, costs, and attorney's fees.

Agency filed its response to Employee's Petition for Review on April 4, 2017. It asserts that Employee's petition should be denied because it is improper; it was untimely filed; and OEA no longer has jurisdiction over this matter because an appeal was filed in the Superior Court.

Agency argues that OEA Rule 633.3 does not contain any provision authorizing a Petition for Review from the OEA Board's Opinion and Order on Remand. Additionally, it explains that the OEA rules do not contain any provision for a Motion for Reconsideration of a Board decision. It explains that *assuming arguendo* that the OEA rules allowed for a Motion for Reconsideration, pursuant to the Superior Court Civil Rules, Employee's Petition for Review would be untimely, as Superior Court Rule 59(e) requires that such a motion be filed within ten days after entry of the Opinion and Order. Thus, Agency contends that Employee's Motion for Reconsideration should have been filed no later than February 7, 2017. Thus, it was untimely filed on February 28, 2017. Finally, Agency argues that OEA Rule 633.12 provides that an appeal of a final decision may be made in Superior Court in accordance with the District of Columbia Government Comprehensive Merit Personnel Act of 1978. As a result, it requests that Employee's petition be denied.

3. Widmon Butler v. D.C. Metropolitan Police Department, OEA Matter No. 1601-0041-14 – Employee worked as a Civilian Claims Specialist Agency. On November 8, 2013, Agency issued Employee a Notice of Final Decision ordering him to serve a thirty-day suspension based on a charge of "[a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: Misfeasance."

Employee filed a Petition for Appeal with OEA on December 23, 2013. In his appeal, Employee argued that the Agency's charge was false and misleading because his conduct did not constitute misfeasance. As a result, Employee requested that his suspension be reversed.

Agency filed its Answer to the Petition for Appeal on January 16, 2014. It denied Employee's substantive allegations and requested that a hearing be held in the matter. An Initial Decision was issued on January 27, 2017. The AJ held that Agency met its burden of proof with respect to the misfeasance charge. In addition, the AJ dismissed Employee's arguments regarding the charges levied against him. Furthermore, the AJ stated that Employee's testimony during the evidentiary hearing was defensive, combative, evasive, and not credible. He determined that Employee consistently performed his duties in a careless and unprofessional manner. Consequently, the AJ determined that Agency had sufficient cause to charge Employee with misfeasance and that a thirty-day suspension was proper under the Table of Appropriate Penalties. Accordingly, Employee's suspension was upheld.

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on February 22, 2017. He makes a myriad of arguments regarding the AJ's findings of fact. Of note, Employee contends that Agency did not have cause to charge him with misfeasance and that it did not meet its burden of proof with respect to the charge and specification levied against him. Employee also disagrees with the AJ's credibility determinations. In addition, Employee submits that the Initial Decision was not based on substantial evidence. According to Employee, the AJ made a mistake of fact by a including prior incident of discipline in his analysis that was previously settled by the parties. He further states that Agency's adverse action was an act of retaliation and a part of a "workplace mobbing event." Thus, Employee requests that the Board reverse his suspension.

4. Cecil Byrd v. University of the District of Columbia, OEA Matter No. 1601-0040-15 – Employee worked as the Director of the Office of Veterans Affairs at Agency. On January 20, 2015, Agency notified Employee that he was being terminated from his position because of his poor performance. In addition, Agency alleged that Employee placed the University at risk of losing its ability to obtain funding from the U.S. Department of Veterans Affairs ("VA") to educate and serve students who are Veterans.

On February 2, 2015, Employee filed a Petition for Appeal with OEA. In his appeal, Employee argued that Agency failed to follow the proper procedures and that he was not evaluated prior to being terminated. As a result, he requested that OEA reinstate him and that he be permitted to file for damages.

Agency filed its response on April 7, 2015. It contended that Employee was provided with ample notice of his ongoing performance deficiencies and was afforded the opportunity to improve upon his performance. Also, Agency stated that Employee submitted inaccurate and untimely certifications of Veterans' documents to the VA; failed to follow instructions from the VA; and altered documents submitted to the VA. Agency further alleged that there was a conflict of interest with respect to Employee's purchase of school supplies for a Veteran student and because Employee performed work as an Executive Director for a non-profit organization during work hours. Therefore, Agency requested that OEA deny Employee's Petition for Appeal.

An Initial Decision was issued on February 14, 2017. The AJ provided that Agency notified Employee about his "lackluster on-the-job performance" on more than one occasion, and he was counseled several times about what was expected of the position. He further noted that Employee was provided with numerous opportunities to improve upon his job skills but did not. In addition, the AJ opined that Employee's skill deficiencies were detrimental to the Veteran students at Agency because they relied on the proper and timely submission of VA documents in order to obtain the benefits that they were rightfully entitled to. As a result, the AJ held that Agency met its burden of proof in this matter. He further concluded that termination was appropriate under the circumstances. Consequently, Employee termination was upheld.

Employee disagreed with the Initial Decision and filed a Petition for Review on March 16, 2017. He argues that the AJ's findings were not based on substantial evidence because Agency's adverse action was not taken for cause. Employee reiterates his positon that Agency never formally notified him of his performance deficiencies and that he was not allowed to address any allegations of poor performance prior to being terminated. He also states that Agency failed to provide him with a formal evaluation process. Moreover, Employee posits that several of Agency's witnesses provided false and/or misleading testimony during the hearings.

With respect to his duties as the Director of the Office of Veterans Affairs, Employee maintains that Agency was not familiar with the roles and responsibilities of his position as required by federal regulation. He also reasons that many of the issues Agency raised could have been rectified if Agency had a proper mechanism in place for tracking the information related to Veteran students as required by his job. According to Employee, the AJ also erred by rejecting ninety-five percent of the witnesses that he wanted to testify. Moreover, Employee states that the lack of staff and support personnel contributed to his inability to complete certain tasks. Lastly, he disagrees with many of the AJ's findings of fact and conclusions of law. Therefore, Employee asks that the Board grant his Petition for Review.

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