

Minutes

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

Thursday, February 24, 2022

Location: Virtual Meeting Via Webex

Persons Present: Lasheka Brown (OEA General Counsel), Sheila Barfield (OEA Executive Director), Sommer Murphy (OEA Deputy General Counsel), Clarence Labor, Jr. (OEA Board Chair), Patricia Hobson Wilson (OEA Board Member), Jelani Freeman (OEA Board Member), Peter Rosenstein (OEA Board Member), Dionna Maria Lewis (OEA Board Member), Wynter Clarke (OEA Paralegal), and Employee (Member of the Public).

- I. **Call to Order** – Clarence Labor, Jr. called the meeting to order at 11:08 a.m.
- II. **Ascertainment of Quorum** – There was a quorum of Board members present for the office to conduct business.
- III. **Adoption of Agenda** – Peter Rosenstein moved to adopt the agenda. Dionna Maria Lewis seconded the motion. The agenda was adopted by the Board.
- IV. **Minutes from Previous Meeting** – The December 17, 2021 meeting minutes were reviewed. There were no corrections. The minutes were accepted.
- V. **New Business**

A. Public Comments on Petitions for Review

1. There were no public comments offered.

B. Summary of Cases

1. **Employee v. Office of the State Superintendent of Education, OEA Matter No. 1601-0026-20** – Employee worked as a Bus Attendant for the Office of the State Superintendent of Education (“Agency”). On December 9, 2019, she received a final notice of separation from Agency. The notice provided that on August 29, 2019, Employee submitted a urine sample which tested positive for the presence of marijuana, in violation of 6B District of Columbia Municipal Regulations (“DCMR”) §§ 435.6 and 1605.4(h). Consequently, Employee was terminated effective December 9, 2019.

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on January 9, 2020. Employee asserted that the urine sample that she provided did not contain the presence of marijuana. Moreover, she provided that the testing process was unusually long. Consequently, she requested that OEA determine if Agency failed to follow the proper policies and procedures, and if it met the appropriate timeframes for testing.

Agency filed an Answer to the Petition for Appeal on February 11, 2020. It provided that Employee held a safety-sensitive position and was therefore, subject to random drug testing. Agency further asserted that Employee signed a notice which provided that she would be subject to disciplinary action for a positive drug test, pursuant to 6B DCMR §§ 1605.4(h) and 428.1. Agency also argued that it considered the Douglas factors when determining the appropriate discipline. Therefore, it requested that Employee’s removal action be upheld.

Prior to the evidentiary hearing, the OEA Administrative Judge (“AJ”) ordered Agency to submit briefs addressing its failure to test a split sample when Employee made the request; the chain of custody of the sample; and the storage procedure for the sample. In its brief, Agency asserted that Employee’s removal was within the range of penalties for a positive drug test, as set forth in Chapter 16 of the DCMR Table of Illustrative Actions. As for the testing procedure, it explained that Employee’s split sample was retested for the presence of marijuana. According to Agency, both the sample from Employee taken on August 29, 2019 and the split sample retested on July 18, 2020, tested positive for marijuana. Moreover, it explained that there is no specific timeframe in which a split sample should be tested, but a one-year timeframe is consistent with the federal regulations for drug testing. Regarding the chain of custody, Agency explained that the sample was held in a freezer until it was removed on July 17, 2020, for retesting. Additionally, it provided a detailed explanation of where the sample went from the time of collection until it was retested by a second laboratory.

In her brief, Employee argued that although she submitted her sample on August 29, 2019, she did not receive the results from the drug test until September 16, 2019. Employee provided that it was then that she voiced her concerns about the testing procedures and that the test was wrong. However, her union, DCHR representative Tamika Cambridge, and Hearing Officer Rudy Chounoune, ignored her pleas. Moreover, Employee claimed that Agency admitted to violating her rights. Finally, she asserted that she never saw her identification number indicated on the sample that she provided; therefore, she contended that either her sample was mislabeled or cross-contaminated.

After conducting an evidentiary hearing, the AJ issued her Initial Decision on September 22, 2021. The AJ held that Agency did not provide justification for its failure to conduct a timely testing of the split sample. She found that DCHR managers Tamika Cambridge and Torey Draughn both testified that they received notification of Employee’s request to have a split sample tested, but they failed to test the sample until nearly one year later. The AJ opined that Agency’s claim of harmless error for the delayed testing was unfounded. She reasoned that Agency had ample notice to test the sample ahead of the OEA adjudicatory process. The AJ found that Agency failed to act with due diligence to ensure that its procedures and processes were followed. Moreover, she explained that Agency’s reliance on testing the sample within a one-year time frame did not cure itself of the oversight. She ruled that Agency’s failure was in violation of the Fifth Amendment Due Process and caused prejudice to Employee’s rights. Accordingly, the AJ ordered that Agency’s termination action be reversed; that Agency reinstate Employee; and that Agency reimburse Employee all pay and benefits lost as a result of her removal.

On October 26, 2021, Agency filed a Petition for Review. It argues that the Initial Decision is based on an erroneous interpretation of statute and unsupported by substantial evidence. Agency cites to the *Kyle Quamina v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0055-17, Opinion and Order on Petition for Review (April 9, 2019) matter which provides that the harmless error rule requires a two-prong analysis in which an AJ must find both substantial harm or prejudice and a significant affect on an agency’s final decision. As it relates to the second prong, the error significantly affecting the agency’s final decision, Agency explains that there must be a showing that the procedural error was likely to have caused Agency to reach a different conclusion from the one it would have reached in

the absence or cure of the error. It contends that Employee cannot assert that but for Agency's failure to test the split sample upon request, she would not have been terminated. It further provides that this assertion cannot be made because Employee's original test and split sample both tested positive for marijuana. Accordingly, even if Agency had conducted the split sample when Employee requested it, it would not have changed the termination action. As it relates to the AJ's due process analysis, Agency asserts that the delay in testing the split sample did not violate Employee's due process rights because it was not new and material evidence. Furthermore, it contends that even if it violated Employee's due process rights by failing to test the sample when requested, it cured the issue.

2. **Employee v. Department of Youth Rehabilitation Services, OEA Matter No. 1601-0032-14AF21** –This matter was previously before the Board. On February 4, 2021, April 19, 2021, and June 4, 2021, counsel for Employee filed what were treated as Petitions for Attorney's Fees. Agency submitted its opposition to Employee's Petition for Attorney Fees on July 2, 2021. The AJ issued an Addendum Decision on Attorney's fees on September 15, 2021. He explained that pursuant to the holdings *Zervas v. D.C. Office of Personnel* and *Hodnick v. Federal Mediation and Conciliation Service*, in order to be entitled to an award of fees, an employee must be considered the "prevailing party," meaning he or she received "all or significant part of the relief sought" as a result of the decision. Since it was undisputed that Employee was the prevailing party in this matter, the AJ held that an award of fees was warranted in the interest of justice.

In considering the reasonableness of the attorney's fees requested by Employee's counsel, the AJ utilized what is commonly referred to as the "Laffey Matrix" which calculates reasonable hourly attorney's fees based on the amount of work experience the attorney has and the year in which the work was performed. He opined that the rate requested by counsel for Employee, \$500 per hour, was reasonable considering the Laffey Matrix as well as counsel's fifty years of legal experience. However, the AJ believed that the petition for fees contained time entries which were excessive and duplicative. According to the AJ, the hours counsel for Employee expended in prosecuting the current appeal did not align with the amount of time expected of someone with his experience. Therefore, he believed that a significant reduction in fees was warranted. As a result, the AJ reduced the number of hours requested by Employee's counsel from 323.08 hours to 58.5 hours. Consequently, Agency was ordered to pay a total of \$29,250 in fees to Employee's counsel.

Agency disagreed with the Addendum Decision and filed a Petition for Review and Request for Extension of Time to Submit its Memorandum of Supporting Points and Authorities with the OEA Board on October 19, 2021. It claims that Employee's now former counsel admitted on October 14, 2021, that his law license had been suspended since July of 2019. Agency states that despite counsel's suspension, he represented to Employee and this Office that he was an active member of the District of Columbia bar. It believes that the award of fees should be denied in light of counsel's current suspension.

Agency subsequently filed a Memorandum of Supporting Points and Authorities in Support of Agency's Petition for Review on November 3, 2021. Agency claims that the Addendum Decision on Attorney's Fees should be granted under OEA Rule 633.3(a) because counsel's suspension/pending disbarment with the D.C. Bar constitutes new and material evidence to which it had no actual knowledge of until a

October 14, 2021 status conference. It reasons that counsel's purposeful neglect of well-established rules constitutes an "extraordinary circumstance" that warrants the outright denial of attorney's fees. Agency also reasons that counsel's disbarment nullified the good cause basis upon which the AJ waived the untimeliness of the fee petition. Therefore, it submits that without good cause remaining, the OEA Board should now enforce OEA Rule 634.2 as it is written.

Counsel for Employee filed a Memorandum in Opposition to Agency's Petition for Review on December 27, 2021. Counsel argues that he is legally and lawfully entitled to attorney's fees for the legal work that he performed over the course of eight years on Employee's behalf. He further submits that Agency has raised irrelevant and pretextual arguments regarding his administrative suspension. Additionally, counsel states that the D.C. Court of Appeals has yet to render a final decision regarding the status of his law license. As such, he believes that Agency's Petition for Review be denied because it has failed to introduce any new and additional evidence which would serve as a basis for reversing the Second Initial Decision on Remand. Consequently, counsel asks this Board to uphold the award of attorney's fees.

- 3. Employee v. Department of Youth Rehabilitation Services, OEA Matter No. 1601-0037-20** – Employee worked as a Maintenance Mechanic Lead for the Department of Youth Rehabilitation Services ("Agency"). On December 31, 2019, Employee was notified of Agency's decision to suspend him without pay for fifteen (15) days for violation of Chapter 6B of the District Personnel Manual ("DPM") §1607.2 (d)(2) - Failure/Refusal to Follow Instructions: Deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions. According to Agency, Employee refused to follow several directives to hand-scan in and out of the Youth Services Center to track his time and attendance. After conducting an internal review, Agency's Deciding Official found that there was cause for Employee to be suspended. On February 18, 2020, the Deciding Official issued their final decision, suspending Employee for fifteen days.

The AJ issued an Initial Decision on September 22, 2021. First, she highlighted the language of DPM § 1602.3(a), which provides that a "corrective or adverse action shall be commenced no more than ninety (90) business days after the agency or personnel authority knew or should have known of the performance or conduct supporting the action." She noted that the OEA Board has previously held that the legislative intent of the provision was to "establish a disciplinary system that included *inter alia*, agencies provide prior written notice of the grounds on which the action is proposed to be taken." Additionally, the AJ provided that like its statutory counterpart found in D.C. Code § 5- 1031, the language of § 1602.3(a) is mandatory in nature.

Concerning when Agency first knew or should have known of Employee's conduct forming the basis of the instant appeal, the AJ held that July 31, 2019, was the date that should serve as the anchor date for purposes of § 1602.3(a). She explained that Employee was given specific instructions to set up a scan profile by July 19, 2019, and to begin hand-scanning on July 22, 2019. However, the AJ stated that a July 31, 2019 follow-up email presented clear evidence that Agency knew or should have known that Employee was not following instructions considering the specific deadline it set for him to comply with its instructions. She provided that the documentary and testimonial evidence supported a finding that Agency consistently referred to Employee's failure to abide by the instructions for hand scans as a refusal to follow instructions.

As it related to Agency’s argument that it could not have known that Employee was going to fail to follow instructions until November of 2019, the AJ concluded that this argument was disingenuous because it relied on July dates in its adverse action as a basis for suspending Employee. According to the AJ, the October 2019 and November 2019 emails regarding hand-scanning were memorandums sent to all staff members. As such, she concluded that that Agency knew or should have known that Employee was refusing to follow instructions by the time it sent its July 31, 2019 correspondence. Because Agency's Advanced Written Notice was dated December 31, 2019, the AJ held that the notice was untimely because it was issued more than ninety days after December 10, 2019, the ninetieth business day following the date when Agency was placed on notice of Employee’s failure to follow instructions. Accordingly, the AJ ruled that Agency violated the mandatory nature of DPM § 1602.3(a). Therefore, Employee’s fifteen-day suspension was reversed, and Agency was ordered to reimburse Employee all back-pay and benefits lost as a result of the adverse action.

Agency disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on October 27, 2021. It contends that the record contradicts the AJ’s finding that July 31, 2019, was the correct date to trigger the 90-day rule. It states that the record makes clear that Agency's suspension was based on Employee's deliberate refusal to clock in and out of work using a hand-scanner and that it could not have reasonably known by July 31, 2019, that Employee's failure to use the hand-scanner was deliberate. Agency also states that the Initial Decision is not based on substantial evidence record, noting that the application of DPM § 1602.3(a) was unnaturally rigid.

According to Agency, the AJ did not sufficiently explain its finding in context with the record, as she omitted a discussion of material issues of fact relevant to three of the five instances wherein Employee ignored instructions. Agency echoes its previous sentiment that it could not reasonably have known by July 31, 2019, that Employee’s failure to follow hand-scanning instructions was deliberate or malicious. Alternatively, Agency suggests that even if the OEA Board upholds July 31, 2019, as the trigger date, it should nonetheless be permitted to discipline Employee for his refusal to follow instructions. As a result, it opines that the Initial Decision is based on an erroneous interpretation of DPM § 1602.3(a). Therefore, it requests that this Board reverse the Initial Decision and uphold Employee’s fifteen-day suspension.

C. Deliberations – After the summaries were provided, Patricia Hobson Wilson moved that the meeting be closed for deliberations. Peter Rosenstein seconded the motion. All Board members voted in favor of closing the meeting. Clarence Labor, Jr. stated that, in accordance with D.C. Code § 2-575(b)(13), the meeting was closed for deliberations.

D. Open Portion of Meeting Resumed

E. Final Votes – Clarence Labor Jr. provided that the Board considered all of the matters. The following represents the final votes for each case:

1. Employee v. Office of the State Superintendent of Education, OEA Matter No. 1601-0026-20

MEMBER	GRANTED	REVERSED	DENIED	REMANDED	DISMISSED
Clarence Labor, Jr.	X	X			
Patricia Hobson Wilson	X	X			

Jelani Freeman	X	X			
Peter Rosenstein	X	X			
Dionna Lewis	X	X			

Five Board Members voted in favor of granting Agency’s Petition for Review and reversing the Initial Decision. Therefore, the petition was granted; the Initial Decision was reversed; and Agency’s termination action was upheld.

2. Employee v. Department of Youth Rehabilitation Services, OEA Matter No. 1601-0032-14AF21

MEMBER	GRANTED	REVERSED	DENIED	REMANDED	DISMISSED
Clarence Labor, Jr.			X		
Patricia Hobson Wilson			X		
Jelani Freeman			X		
Peter Rosenstein			X		
Dionna Lewis			X		

Five Board Members voted in favor of denying Agency’s Petition for Review. Therefore, the petition was denied.

3. Employee v. Department of Youth Rehabilitation Services, OEA Matter No. 1601-0037-20

MEMBER	GRANTED	REVERSED	DENIED	REMANDED	DISMISSED
Clarence Labor, Jr.	X	X			
Patricia Hobson Wilson	X	X			
Jelani Freeman	X	X			
Peter Rosenstein	X	X			
Dionna Lewis	X	X			

Five Board Members voted in favor of granting Agency’s Petition for Review. Therefore, the petition was granted. The Initial Decision reversing Employee’s fifteen-day suspension was reversed, and Agency’s suspension action was upheld.

F. Public Comments

1. There were no public comments offered.

VI. Adjournment – Peter Rosenstein moved that the meeting be adjourned; Dionna Maria Lewis seconded the motion. All members voted affirmatively to adjourn the meeting. Clarence Labor, Jr. adjourned the meeting at 12:01 p.m.

**Respectfully Submitted,
Wynter Clarke
Paralegal Specialist**