

Minutes

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

Thursday, March 25, 2021

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), Jelani Freeman (OEA Board Member), Peter Rosenstein (OEA Board Member), Dionna Maria Lewis (OEA Board Member), Wynter Clarke (OEA Paralegal), and Sheree DeBerry (Member of the Public).

- I. **Call to Order** – Clarence Labor, Jr. called the meeting to order at 11:03 a.m.
- II. **Ascertainment of Quorum** – There was a quorum of Board members present for the office to conduct business.
- III. **Adoption of Agenda** – Dionna Maria Lewis moved to adopt the Agenda. Jelani Freeman seconded the motion. The Agenda was adopted by the Board.
- IV. **Minutes from Previous Meeting** – The February 4, 2021 meeting minutes were reviewed. There were no corrections. The minutes were accepted.
- V. **New Business**

A. Public Comments on Motions for Interlocutory Appeal

1. There were no public comments offered.

B. Summary of Motions on Interlocutory Appeal

1. **Harold Dargan v. D.C. Fire and Emergency Medical Services, OEA Matter No. 1601-0091-13R20**— This matter is before the Board on interlocutory appeal. On October 20, 2015, the OEA Administrative Judge issued his Initial Decision. He found that Agency initiated its termination action against Employee within the required time period provided in D.C. Code § 5-1031. According to the AJ, Employee was removed for failing to maintain the required Department of Health certification. The AJ reasoned that while Bulletin No. 83 allowed for three testing opportunities, the total number of tests allotted was not mandatory. He explained that the three testing opportunities was the maximum number of tests that could be taken before an adverse action was required. The AJ opined that after Employee’s second failed attempt, Agency was not required, under Bulletin No. 83, to allow him another retest. Consequently, he ruled that Employee’s termination should be upheld.

Employee appealed the matter to the Superior Court for the District of Columbia. The Court found that there was substantial evidence in the record to support the AJ’s decision that Agency initiated the adverse action in a timely manner. Additionally, the Court held that Employee’s due process rights were not violated. Accordingly, it upheld the AJ’s decision.

The matter was then appealed to the District of Columbia Court of Appeals. The Court found that there was not substantial evidence in the record to determine that Employee was administered the psychomotor exam on any of the dates specified by OEA. The Court also determined that the AJ focused on the wrong certification. It explained that Bulletin No. 83’s National Registry of EMTs (“NREMT”) certification policy, issued

in 2010, set forth the new procedures for the new obligation adopted in 2009 for all emergency services providers to maintain NREMT certification, in addition to the DOH certification. The Court reasoned that the testing procedures of Bulletin No. 83 applied to the former certification, not the latter. As a result, the Court remanded the matter for OEA to determine which procedures should have been followed to deny Employee's DOH recertification, before terminating him for not having a current DOH certification; whether the procedures were followed in the matter; and whether Employee was provided proper notice of the decision not to recertify him, if he was entitled to such notice.

After conducting a telephonic status conference, the AJ issued a Post-Conference Order on April 28, 2020. He determined that an evidentiary hearing was warranted to resolve the issues remanded by the D.C. Court of Appeals. On June 29, 2020, the AJ issued an order which outlined the issues to be addressed during the October 13, 2020 virtual evidentiary hearing. However, prior to the scheduled hearing, Employee's Counsel filed a Request to Disqualify the AJ. Counsel explained that he has appeared before Senior Administrative Judge Lim in previous matters. He noted that the subsequent appeals to the Superior Court of the District of Columbia and the District of Columbia Court of Appeals in *Latisha Porter v. D.C. Fire and Emergency Medical Services* and *Robert Johnson v. D.C. Fire and Emergency Medical Services*, resulted in reversals or remands of Judge Lim's decisions. As it related to the current appeal, Employee's Counsel argued that Judge Lim significantly reduced the number of issues to be addressed at the hearing; precluded much of the evidence; and limited many of Employee's witnesses. Specifically, Counsel contended that Judge Lim eliminated consideration of whether Agency complied with the ninety-day rule, as ordered on remand by the District of Columbia Court of Appeals. Employee's Counsel asserted that Judge Lim refused to allow six witnesses that he intended to present. Counsel also objected to Judge Lim's requirement that he provide the witnesses and their email addresses because all, but one, of the witnesses were current or former Agency employees, so Agency was aware of their known locations and email addresses. Counsel concluded by arguing that Judge Lim's failure to render impartial decisions in the past, and his failure to do so in this appeal, represented his desire to uphold his Initial Decision despite the remand, or it represented his personal bias against Counsel.

Subsequently, on September 29, 2020, the parties filed a joint motion to postpone the evidentiary hearing until the disqualification issue was resolved. On October 1, 2020, the AJ issued an order granting the parties' motion to postpone the virtual hearing. Additionally, he ordered Agency to submit its response to Employee's Motion to Disqualify by October 8, 2020.

On October 8, 2020, Agency filed its Opposition to Employee's Request to Disqualify. It asserted that Employee participated in Office of Human Rights proceedings which involved allegations of discrimination and retaliation. Agency explained that these issues were outside of the purview of OEA's jurisdiction and were irrelevant in the present matter. Agency also contended that Employee erroneously represented that the AJ significantly reduced the number of issues to be addressed during the evidentiary hearing. It explained that during the June 29, 2020 telephonic Status Conference, the AJ identified the same four issues in his April 28, 2020 Post-Conference Order. Moreover, Agency provided that the issue of proper notice included compliance with the

ninety-day rule. Therefore, it requested that Employee's motion be denied.

On October 13, 2020, the AJ issued an Order Denying Employee's Motion to Disqualify. He explained that the evidence pertaining to Employee's allegations of discrimination were raised before OHR and were not within OEA's jurisdiction. Additionally, the AJ reasoned that he did not disallow the issue involving the ninety-day rule, as proper notice was included among several issues to be decided. He concluded his order by addressing the *Porter* and *Johnson* decisions raised by Counsel and his claims of bias.

Employee's Counsel filed a Motion for Certification on October 20, 2020. He moved for the AJ to certify his order denying Employee's request that he disqualify himself in the matter, pursuant to OEA Rule 616. He maintains the same arguments made in his Request to Disqualify. Employee filed a Supplement to his Request to Disqualify. He cited to a recent D.C. Court of Appeals decision, *Butler v. Metropolitan Police Department, et al.*, and claimed that the Court concluded that the consideration and calculation of the ninety-day rule by Judge Lim was determined without substantial evidence. Employee posited that because of this decision, the AJ will once again improperly construe the ninety-day rule without substantial evidence; thus, requiring another set of appeals.

On October 22, 2020, the AJ issued an order certifying this matter to the OEA Board under OEA Rule 616.4. The order provided the Judge's rationale for denying Employee's Counsel's Motion to Disqualify. In accordance with the order, the matter was stayed pending the resolution of the interlocutory appeal of his disqualification before the Board.

- 2. Patricia Johnson v. D.C. Public Schools, OEA Matter No. 1601-0009-20** — Employee worked as a Parking Enforcement Officer with the Department of Public Works. On October 22, 2019, Agency issued Employee a Final Decision on Proposed Removal. Employee was terminated based on charges of Conduct Prejudicial to the District Government; Misrepresentation; Knowingly and Willingly Making an Incorrect Entry on an Official Record; Reporting False or Misleading Material Information; and Conduct Prejudicial to the District Government. The effective date of her termination was October 25, 2019.

Employee filed a Petition for Appeal with the Office of Employee Appeals on November 19, 2019. She denied violating any Agency's rules and claimed that Agency failed to meet its burden of proof in establishing the charges levied against her. In response, Agency contended that Employee's arguments were unfounded, without merit, and discipline in this case was both warranted and appropriate. Therefore, it requested that OEA sustain the termination action.

An OEA Administrative Judge was assigned to this matter in July of 2020. On October 29, 2020, the AJ held a prehearing conference to assess the parties' arguments. He then issued a post-conference order which originally scheduled an evidentiary hearing for February 16th and 17th of 2021. The order also set forth a briefing schedule to afford the parties an opportunity to address OEA's jurisdiction

because Agency objected to the Office's ability to determine whether Employee's removal was in retaliation for filing a sexual harassment complaint.

After reviewing the submissions, the AJ issued an Order on Jurisdiction Regarding Retaliation on January 22, 2020. In his order, the AJ held that OEA may consider evidence of Employee's claim that her termination was a pretext manufactured by Agency. He explained that this Office lacked original jurisdiction over complaints of unlawful discrimination because those claims are generally reserved for the D.C. Office of Human Rights. However, the AJ reasoned that in *Raphael v. Okyiri*, the D.C. Court of Appeals concluded that OEA retained the jurisdictional authority to address an employee's retaliation claim as a cognizable defense in an adverse action that was not a Reduction-in-Force. Additionally, he disagreed with Agency's reliance on the holdings in *El-Amin v. Dist. Of Columbia Dep't of Pub. Works* and *Office of the Dist. of Columbia Controller v. Frost* to support its position that OEA could not address Employee's retaliation claims. The AJ provided that in both instances, the OEA rules relied upon by the agencies were no longer in effect at the time the current Order on Jurisdiction Regarding Retaliation was issued. As such, he determined that Employee's claims of retaliation constituted a cognizable defense to Agency's termination action. Consequently, the AJ held that OEA retained the jurisdictional authority to address Employee's argument.

On January 28, 2021, Agency filed a Motion for Certification of Interlocutory Appeal to the OEA Board and Request for Stay of Proceedings. It reiterated its previous contention that OEA was not the proper venue to adjudicate Employee's claims of unlawful discrimination and retaliation because the appropriate venue for addressing these arguments was OHR. Agency acknowledged that the OEA regulations that were utilized at the time that *El-Amin* was decided were no longer in effect at the time of Employee's appeal. However, its rationale was that *El-Amin* was nonetheless instructive because the D.C. Court of Appeals confirmed, after reviewing the language of the District of Columbia Human Rights Act that the term "unlawful discrimination" includes retaliation claims. Additionally, Agency stated that the AJ failed to give the holding in *El-Amin* the appropriate weight in rendering his decision. Thus, Agency maintained that the AJ erred in concluding that OEA retained jurisdiction to adjudicate Employee's claims of retaliation because his decision unlawfully expanded this Office's jurisdiction. As a result, it requested that the AJ's Order on Jurisdiction be reversed and that all pending deadlines be stayed. On January 29, 2021, the AJ issued an Order Granting Agency's Motion for Certification of Interlocutory Appeal to the OEA Board.

C. Deliberations – After the summaries were provided, Dionna Maria Lewis moved that the meeting be closed for deliberations. Jelani Freeman 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. Harold Dargan v. D.C. Fire and Emergency Medical Services

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

Four Board Members voted in favor of denying Employee’s Motion on Interlocutory Appeal. Therefore, the motion was denied.

2. Patricia Johnson v. Department of Public Works

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

Four Board Members voted in favor of denying Agency’s Motion for Certification of Interlocutory Appeal. Therefore, the motion was denied.

F. Public Comments – There were no public comments offered.

VI. Adjournment – Dionna Maria Lewis moved that the meeting be adjourned; Jelani Freeman seconded the motion. All members voted affirmatively to adjourn the meeting. Clarence Labor, Jr. adjourned the meeting at 11:57 a.m.

**Respectfully Submitted,
Wynter Clarke
Paralegal Specialist**