

Minutes

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

Thursday, August 26, 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), Patricia Hobson Wilson (OEA Board Member), Jelani Freeman (OEA Board Member), Peter Rosenstein (OEA Board Member), Wynter Clarke (OEA Paralegal), and Nicholas Weil (Member of the Public).

- I. **Call to Order** – Clarence Labor, Jr. called the meeting to order at 11:14 a.m.
- II. **Ascertainment of Quorum** – There was a quorum of Board members present for the office to conduct business.
- III. **Adoption of Agenda** – Patricia Hobson Wilson moved to adopt the Agenda. Peter Rosenstein seconded the motion. The Agenda was adopted by the Board.
- IV. **Minutes from Previous Meeting** – The June 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. District of Columbia Department of Public Works, OEA Matter No. 1601-0038-20**– Employee worked as a Parking Enforcement Officer with the Department of Public Works (“Agency”). On February 19, 2020, Agency issued a final notice of separation informing Employee that he would be removed from his position. The notice provided that on November 7, 2019, Employee submitted a urine sample which tested positive for the presence of opiates, in violation of 6B District of Columbia Municipal Regulations §§ 435.6 and 1605.4(h). Consequently, he was terminated from employment effective February 22, 2020.

On March 19, 2020, Employee filed a Petition for Appeal with the Office of Employee Appeals. He asserted that he was wrongfully terminated from his position. Employee claimed that he was not feeling well and took medication to alleviate his cold symptoms. He contended that he was not aware that the medication would impact the results of his urine sample. Employee explained that during a doctor’s visit, he informed his doctor that the test was performed. According to Employee, his doctor provided a letter explaining his symptoms and the medication she prescribed. Employee requested that his termination action be reversed and that he be reinstated to his position of record.

Agency filed its Answer to Employee’s petition on July 17, 2020. It asserted that Employee held a safety-sensitive position and that his positive test was all that was required to warrant termination. Agency asserted that Employee was seen by his doctor after he provided a positive drug urine sample. Agency also provided that the note from the doctor explained that Employee was prescribed medication which

contained a controlled substance; however, the doctor noted that Employee did not fill the prescription. Finally, Agency submitted that it considered the relevant factors provided in *Douglas v. Veterans Administration*. As a result, it requested that Employee's removal action be upheld.

On February 18, 2021, the OEA Administrative Judge held a telephonic status conference. Agency's representative appeared as required; however, Employee was absent. Accordingly, the AJ issued two show cause orders for Employee's failure to attend the scheduled status conference. Employee failed to submit a response to either of the AJ's orders.

The AJ issued her Initial Decision on March 18, 2021. She held that there was no dispute that Employee tested positive for codeine after a random drug test on November 7, 2019. Thus, the AJ found that Agency had cause for an adverse action against Employee because of the positive test. However, she held that Agency abused its discretion by imposing a penalty of termination in this matter. According to the AJ, Employee provided justification for why he tested positive for codeine by explaining that he took his girlfriend's prescription medication the night before the test. She also considered Employee's submission from his doctor of a prescription of promethazine with codeine; his years of service; his past disciplinary history and work record; and his health/mindset at the time he took his girlfriend's medication. She explained that the range of penalty for the first offense of a positive drug test is suspension to removal. Therefore, based on the mitigating factors, the AJ held that Agency should have imposed a lesser penalty. Consequently, she ordered that Agency's termination action be reversed; that Agency reinstate Employee to his previous position of record or a comparable position; that Agency suspend Employee for fifteen (15) days for testing positive for an unlawful controlled substance (codeine) while on duty; and that Agency reimburse Employee all back pay and benefits lost as a result of the adverse action.

On April 22, 2021, Agency filed a Petition for Review. It argues that the Initial Decision was based on an erroneous interpretation of statute, regulation, or policy and that the findings of the Initial Decision were not based on substantial evidence. Agency asserts that it provided notice to Employee that because he held a safety-sensitive position, he would be deemed unsuitable if he tested positive for drugs or alcohol. According to Agency, Employee signed this notice on October 12, 2018. Thus, it contends that it could remove Employee for a positive drug test. Further, Agency argues that Employee taking prescription medication without a prescription violates both District and federal law. However, it opines that even if Employee could have taken someone else's prescription medication, an evidentiary hearing was warranted to determine if Employee was unaware that his girlfriend's prescription contained codeine; to determine if the letter from the doctor's office could be authenticated; and to determine the validity of Employee's unsworn assertions. Therefore, it requested that its petition be granted, and the Board reverse the Initial Decision.

- 2. Employee v. D.C. Alcoholic Beverage Regulation Administration, OEA Matter No. 1601-0006-20**– Employee worked as a Licensing Specialist with the Alcoholic Beverage Regulation Administration. On July 31, 2019, Agency issued Employee a Notice of Proposed Removal based on her failure to successfully complete a Performance Improvement Plan (“PIP”) in accordance with Chapter 6, Section 1410 of the D.C. Municipal Regulations. Agency issued its Final Notice of Removal on October 15, 2019. The effective date of Employee's termination was October 25, 2019.

The AJ issued an Initial Decision on March 11, 2021. She held that Agency violated the District Personnel Manual, as it related to the implementation of Employee's PIP, because Agency improperly added to her workload during the relevant time period. She disagreed with Employee's argument that Agency failed to evaluate her performance under the PIP for at least thirty days, as required under DPM § 1410.3. The AJ provided that, notwithstanding Employee's Alternate Work Schedule, and the Fourth of July, Agency complied with DPM § 1499 by providing her with thirty calendar days of observation under the PIP. With respect to the specific performance goals outlined in Employee's PIP, the AJ concluded that Agency established cause to discipline Employee for the failure to meet Performance Goal No. 1 because she did not meet several deadlines for submitting cases to her supervisor for review by the Alcohol Beverage Commission Board. As it related to Performance Goal No. 2, the AJ opined that Employee failed to properly contact licensees regarding their applications and failed to adequately document and manage correspondence with the applicants.

Concerning Employee's argument that Agency implemented the PIP in retaliation for filing a federal lawsuit with the Equal Employment Opportunity Commission, the AJ found no causal connection between her complaint and Agency's termination action. Therefore, the AJ determined that Employee was not retaliated against. Additionally, she opined that Agency failed to consider relevant mitigating factors or progressive discipline when selecting the appropriate penalty to levy against Employee. The AJ reasoned that the penalty of termination was excessive given Employee's years of service with Agency. Further, she noted that Agency erred in not permitting Employee to retire in lieu of termination, although Employee emailed her supervisor prior to Agency's issuance of its proposed adverse action, indicating her intent to retire in February of 2020.

Accordingly, the AJ held that Agency violated DPM §§1410.2 and 1410.3 when it added cases to Employee's already-established PIP without amending the PIP period or goals to accommodate the new, additional cases. She also determined that Agency's selection of the penalty of termination was an abuse of managerial discretion. As a result, the AJ concluded that Agency's actions constituted a reversible error. Therefore, Agency's termination action was reversed; Agency was ordered to permit Employee to retire effective February 6, 2020; and Agency was ordered to reimburse Employee all back pay and benefits lost as a result of the adverse action, from October 15, 2019 through February 6, 2020.

Agency filed a Petition for Review with the OEA Board on April 15, 2021. It argues that the AJ erred in ruling that Agency violated DPM §§1410.2 and 1410.3 by adding cases to Employee's workload during the PIP because there is no prohibition within the applicable regulations against adding assignments during the observation period. Agency asserts that the AJ improperly held that selecting the penalty of termination was an abuse of managerial discretion and that it considered all options within its authority when determining that removal was the appropriate course of action. Moreover, it submits that the Initial Decision is not based on substantial evidence. Therefore, Agency requests that the Board grant its Petition for Review.

3. **Employee v. Metropolitan Police Department, OEA Matter No. 1601-0059-15R21**—This matter was previously before the Board. Employee worked as a Civilian Claim Specialist with the Metropolitan Police Department's Medical Services Branch. Employee was charged with "any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations: misfeasance; dishonesty; unauthorized use of government resources; using or authorizing the use of

government resources; using or authorizing the use of government resources for other than official business.” Employee was also charged with violating Chapter 18, Section 1800.3 of the D.C. Personnel Regulations which prohibits District employees from engaging in outside employment or private business that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities. On February 5, 2015, Agency issued its Notice of Final Decision. Employee’s termination was effective on February 6, 2015.

After conducting his first evidentiary hearing, the AJ issued an Initial Decision on November 30, 2016, concluding that Agency met its burden of proof with respect to the charges levied against Employee. Accordingly, Employee’s termination was upheld. Employee subsequently filed a Petition for Review with the OEA Board. On November 17, 2017, the Board denied Employee’s appeal. He then appealed to the Superior Court of the District of Columbia. On October 17, 2018, Superior Court upheld the Board’s findings and denied Employee’s petition for review. Thereafter, Employee filed an appeal with the District of Columbia Court of Appeals. In its October 29, 2020 decision, the Court ruled that the substantive charges against Employee were based on substantial evidence. However, it disagreed with the AJ’s, the Board’s, and Superior Court’s determinations regarding when the ninety-day period was tolled under D.C Code § 5-1031(b). Therefore, the matter was remanded to the AJ for further proceedings.

The AJ held a second evidentiary hearing on February 2, 2021, during which the parties addressed the issues as directed by the Court of Appeals. On March 18, 2021, the AJ issued an Initial Decision on Remand. First, the AJ confirmed that for purposes of D.C Code § 5-1031(b), Agency was deemed to have notice of the act or occurrence allegedly constituting cause on September 12, 2013, when it generated Incident Summary number 13-002588. Thus, the ninety-day time period began to run on this date. The AJ noted, however, that the assigned investigator, Paulet Woodson, did not actually begin to conduct her investigation until September 16, 2013, when she assessed that Employee’s acts appeared to be criminal in nature. As a result, the AJ concluded that the ninety-day period began to be tolled on September 16, 2013.

Next, the AJ concluded that the 90-day clock was tolled between September 16, 2013 through June 2, 2014 because Woodson referred the matter to the USAO, although it declined to prosecute Employee by a Letter of Declination dated June 2, 2014. In accordance with the USAO’s instructions in its notice, Agency was directed to proceed with any administrative action it deemed appropriate. Accordingly, the AJ concluded that criminal charges against Employee were precluded after this date because neither Agency, the Office of the Corporation Counsel, nor the Office of Police Complaints criminally investigated the matter. Lastly, he determined that Agency’s administrative investigation concluded on September 25, 2014, when IAD issued its investigative report.

In calculating whether Agency acted in a timely manner under D.C Code § 5-1031(b), the AJ provided that eighty-eight business days elapsed between June 2, 2014, when the USAO declined to prosecute, and October 6, 2014, when Employee received his advance notice of termination. After adding the two business days that lapsed prior to Woodson’s initiation of her investigation, the AJ held that a total of ninety days passed between when Agency became aware of the acts allegedly constituting cause and the date on which Agency issued its advance notice of removal. Therefore, he opined that Agency did not violate the 90-day rule. The AJ also held that the substantive charges

against Employee should be sustained. Consequently, Agency’s termination action was, again, upheld.

Employee disagreed and filed a second Petition for Review with the OEA Board on April 22, 2021. He argues that the Initial Decision should be reversed because the termination action was commenced on the ninety-first day after Agency received notice of Employee’s infraction. Thus, Employee submits that Agency’s notice was untimely. He also states that contrary to the AJ’s findings, Woodson did not testify that she commenced her investigation on September 16, 2013, and that the evidence supports a finding that Woodson could not remember the exact date when her criminal investigation began. Since Employee believes that Agency committed a reversible procedural error, he asks that the Board grant his Petition for Review.

In response, Agency contends that the Initial Decision on Remand is supported by substantial evidence. It explains that the AJ reasonably determined that Woodson initiated a criminal investigation into Employee’s conduct on September 16, 2013. Agency believes that Employee’s argument that disciplinary action was commenced on the ninety-first, not the ninetieth business day, is misguided because he erroneously excludes September 16, 2013, the date the criminal investigation started, from the tolling period. In the alternative, Agency suggests that even if the AJ erroneously concluded that the ninety-day clock began to run on September 16, 2013, any error should be construed as *de minimus*. As a second alternative, it surmises that if the Board finds that the criminal investigation into Employee’s misconduct did not begin on September 16, 2013, and the Board finds that the error was not *de minimus*, its termination action should nonetheless be upheld related to Employee’s untruthful statements in September of 2014. Accordingly, Agency request that Employee’s Petition for Review be denied.

C. Deliberations – After the summaries were provided, Patricia Hobson Wilson 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. Employee v. District of Columbia Department of Public Works, OEA Matter No. 1601-0038-20

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

Four Board Members voted in favor of granting Agency’s Petition for Review and remanding the matter. Therefore, the petition was granted and the matter was remanded to the Administrative Judge for consideration on its merits.

2. Employee v. D.C. Alcoholic Beverage Regulation Administration, OEA Matter No. 1601-0006-20

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

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

3. Employee v. Metropolitan Police Department, OEA Matter No. 1601-0049-15R21

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

Four Board Members voted in favor of denying Employee’s Petition for Review. Therefore the petition was denied.

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

VI. Adjournment – Peter Rosenstein moved that the meeting be adjourned; Patricia Hobson Wilson seconded the motion. All members voted affirmatively to adjourn the meeting. Clarence Labor, Jr. adjourned the meeting at 11:59 a.m.

Respectfully Submitted,
Wynter Clarke
Paralegal Specialist