

Minutes

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

Thursday, December 17, 2020

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), and Wynter Clarke (OEA Paralegal).

- I. **Call to Order** – Clarence Labor, Jr. called the meeting to order at 11:09 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. Peter Rosenstein seconded the motion. The Agenda was adopted by the Board.
- IV. **Minutes from Previous Meeting** – The November 18, 2020 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. **Hugh Long v. University of the District of Columbia, OEA Matter No. 1601-0026-18R20** — This matter has been previously before the Office of Employee Appeals' Board. In its May 19, 2020 Opinion and Order on Petition for Review, the Board held that the Administrative Judge ("AJ") erroneously relied on the District Personnel Manual ("DPM") when reversing Agency's action. It ruled that the terms of the Collective Bargaining Agreement ("CBA"), not the DPM, should have been used by the AJ to assess if there were any due process violations. Furthermore, the Board found that contrary to the AJ's ruling, the record showed that Agency did adhere to the notice terms of the CBA. Consequently, the Board remanded the matter to the AJ for a decision on the merits.

An Initial Decision on Remand was issued on June 18, 2020. The AJ determined that Employee achieved the required score to pass the firearms qualifications completed on January 13, 2017 and June 29, 2017, in compliance with 6-A DCMR 1200.8(e). However, she relied on Agency's January 31, 2017 remedial report, the September 2017 remedial report, and the October 2017 report to determine that Agency had sufficient cause to remove Employee for lack of consistent proficiency in marksmanship and firearms handling. Similarly, the AJ relied on the September and October 2017 reports to hold that Agency had cause to remove Employee for integrity violations. As it related to Employee's retaliation argument, the AJ held that Employee did not establish that Agency's termination action was in retaliation to him filing a grievance. Furthermore, she opined that on the issue of relevant factors, the record was void of an analysis of the factors in *Douglas v. Veterans Administration*, but the AJ reasoned that this was harmless error. The AJ found that Agency "conscientiously"

considered relevant Douglas factors to strike a responsible balance within tolerable limits of reasonableness. Accordingly, the AJ upheld Agency's removal action.

Employee disagreed with the Initial Decision on Remand and filed a Petition for Review on July 23, 2020. He reiterates many of the arguments raised throughout the appeal. Employee asserts that the AJ did not base her decision on substantial evidence and did not address material issues of law. Additionally, he contends that the AJ's admission that the record void of the Douglas factors should be considered a serious error. Employee explains that he had a valid Campus Special Police Commission that was current at the time of his termination. He states that he qualified, at least twice in 2017, pursuant to the appropriate regulation. Moreover, Employee provides that there was no documentation that indicates that he was disqualified or failed the weapons handling portion of the qualification tests. Employee also argues that there are no General Orders, collective bargaining terms, or regulations that provide that an officer must qualify at a specific firearms range, or terms that address the integrity violations on the firearms range. Therefore, Employee requests that the Initial Decision on Remand be vacated; that he be reinstated to his position; and that his back pay and benefits be restored.

Agency filed its Response to Employee's Petition for Review on Remand on August 27, 2020. It asserts that when Employee was terminated, it was ". . . in the process of revising and improving its qualification and testing requirements [] but had not reduced its processes to writing." Therefore, Agency explains that its requirements ". . . are based on District of Columbia Metropolitan Police Department requirements and all University police officers are required to qualify on the Protective Services Training Academy. . . ." Agency provides that in addition to a numerical score measuring firearm proficiency and accuracy, employees must also demonstrate weapon competence and safety skills and complete forty hours of classroom training. Agency concedes that Employee completed the 40-hour instruction mandated by the Security Officers Management Branch of the MPD. However, it contends that Employee did not earn the required 43 out of 50 score for the graded numerical mandated requirement. As it relates to the January 13, 2017 exam, Agency claims that Employee failed the target score and safety aspects of the test. Therefore, remedial classroom and range training were recommended for Employee to improve his score. As for the June 2017 exam, Agency asserts that although Employee achieved the minimum score for qualification, he did not take the exam on a PSTA range. Agency went on to note that Employee failed a September 9, 2017 and an October 24, 2017 attempt to satisfy the weapons qualifications. As a result, it requests that this Board affirm the Initial Decision on Remand.

- 2. William Henderson v. Department of Public Works, OEA Matter No. 1601-0004-20**—Employee worked as a Heavy Mobile Equipment Mechanical Helper with the Department of Public Works. The AJ issued her Initial Decision on August 6, 2020. Regarding Employee's alleged inability to carry out the duties of his position, the AJ held that Agency met its burden of proof with respect to this charge. She stated that the District Personnel Manual provides that an inability to carry out duties includes "any circumstance that prevent an employee from carrying out the essential functions of his or her position." According to the AJ, Employee's position description required him to possess a valid driver's license. However, on July 5, 2019, Employee's license became invalid as a result of several traffic violations which culminated in the accrual of multiple points over a two-year period. The AJ stated that Employee failed to notify

Agency of the revocation and continued to report to work, in violation of Agency policy. Additionally, despite Employee's contention that he was unaware of the status of his license, the AJ held that maintaining a valid driver's license was a condition of employment. Accordingly, she concluded that Employee's failure to do so prevented him from carrying out the functions of his position. For the same reasons, she also held that Agency met its burden of proof as it related to Employee's neglect of duty, noting that the charge should be levied where there is a "failure to carry out official duties and responsibilities as would be expected of a reasonable person." Consequently, the AJ held that Agency established the requisite cause to initiate an adverse action against Employee.

With respect to the penalty, the AJ determined that Employee's termination was appropriate under the circumstances. Highlighting the holding in *Stokes v. District of Columbia*, she stated that OEA is tasked with determining whether the penalty imposed was within the range allowed by law, regulation, and any applicable Table of Illustrative Actions as prescribed by the DPM; whether the penalty was based on a consideration of relevant factors; and whether there was a clear error of judgment by the agency. The AJ reasoned that termination was an allowable penalty in this case because under Chapter 16, Section 1607.2(n) of the DPM, the penalty for a first occurrence for the Inability to Carry Out Assigned duties is removal. Moreover, she noted that the penalty for a first offense of neglect of duty ranges from counseling to removal. Consequently, the AJ opined that Agency properly exercised its managerial discretion and that it considered the relevant Douglas factors in selecting the appropriate penalty. Therefore, she upheld Agency's termination action.

Employee disagreed and filed a Petition for Review with the OEA Board on September 10, 2020. In his petition, Employee argues that he was not aware that his license was in jeopardy of being suspended or revoked. He states that after being informed that his driver's license was revoked, he attempted to cure the defect, to no avail. Employee reasons that he could have been placed in a different position which does not require the maintenance of a valid license. He notes that he took pride in his position as a Heavy Mobile Equipment Mechanical Helper, as it provided him with the opportunity to give back to his community and the District. Thus, Employee asks that he be reinstated and afforded the opportunity to have his license re-issued so that he may continue to be a productive citizen.

Agency filed its response on October 15, 2020. It contends that Employee's submission fails to raise any substantive grounds contemplated under OEA Rule 633.3 as a basis for granting his Petition for Review. Agency states that Employee does not dispute the factual basis for the causes of action relied upon in the Advanced Written Notice of Proposed Removal, nor does he provide any indication that his driver's license has been reinstated, to date. Agency reiterates its previous position that Employee voluntarily signed the Government of the District of Columbia Vehicle Operator's Acknowledgement Form, which required that he maintain a valid driver's license to lawfully operate a vehicle as part of his duties. Agency also agrees with the AJ's conclusion that it considered the relevant Douglas factors in selecting the penalty of termination. Consequently, it requests that Employee's Petition for Review be denied.

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. Official 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. Hugh Long v. University of the District of Columbia

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED	REVERSED
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 Employee’s Petition for Review. Therefore, the Administrative Judge’s Initial Decision on Remand and Agency’s removal action were reversed. Employee shall be reinstated to the same, or a comparable position and reimbursed all back pay and benefits lost as a result of this removal action.

2. William Henderson v. Department of Public Works

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED	REVERSED
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 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; Jelani Freeman seconded the motion. All members voted affirmatively to adjourn the meeting. Clarence Labor, Jr. adjourned the meeting at 12:09 p.m.

**Respectfully Submitted,
Wynter Clarke
Paralegal Specialist**