

Minutes

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

Friday, December 17, 2021

Location: Virtual Meeting Via Webex

Persons Present: Lasheka Brown (OEA General Counsel), Sheila Barfield (OEA Executive Director), Sommer Murphy (OEA Deputy General Counsel), 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** – Dionna Maria Lewis called the meeting to order at 12:15 p.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. Jelani Freeman seconded the motion. The agenda was adopted by the Board.
- IV. **Minutes from Previous Meeting** – The November 8, 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. Department of Fire and Emergency Medical Services, OEA Matter No. 1601-0183-97C08R16** – Employee worked as an Emergency Medical Technician (“EMT”) with the D.C. Fire and Emergency Medical Services Department (“Agency”). According to Employee, he filed a previous appeal with the Office of Employee Appeals in 1997. In 2004, the OEA Administrative Judge ordered that Agency’s termination action be reversed; that Employee be reinstated to the position held prior to his removal; and that Agency reimburse Employee all pay and benefits lost as a result of the removal. Employee provided that although he was reinstated to his position from the 1997 appeal, Agency still had not finalized the calculations of his back pay and benefits. Accordingly, Employee filed a Petition for Appeal with OEA on November 5, 2013.

In a subsequent appeal to the Superior Court of the District of Columbia, the Court ordered Agency to comply with the AJ’s May 12, 2004 Initial Decision and awarded back pay from January 10, 1997 through June 16, 2004. After the Court considered worker’s compensation payments and requests for interest and the restoration of annual leave, it ordered that Agency to pay Employee \$97,452.79.

The matter was then appealed to the District of Columbia Court of Appeals which ultimately remanded the matter to OEA for further consideration. After multiple filings from the parties regarding Employee’s tax returns, the AJ issued an order referring the matter for mediation and issued a compliance briefing schedule. In his brief, Employee asserted that he should be paid \$800,000 in back pay and benefits to account for step or promotional increase. Agency countered that Employee’s argument for an \$800,000 award was not based on applicable back pay regulations. It reasoned that Employee

was entitled to no more than \$254,751 because he was not ready, willing, and able to return to his former position of an EMT from January 10, 1997 through August 5, 2012.

The AJ issued an Order Regarding Compliance on October 23, 2020. He determined that Employee was not entitled to \$800,000 in back pay. He found that, after the requisite reductions, a final back pay award of \$254,751 was appropriate. Accordingly, the AJ ruled that Agency reimburse Employee \$254,751 in back pay.

Thereafter, Employee filed a Motion to Reconsider on November 5, 2020. On November 23, 2020, Employee also filed a Petition for Review with the OEA Board. Moreover, Agency filed a Petition for Review on November 23, 2020. On December 11, 2020, the parties informed OEA's General Counsel that they were engaged in settlement negotiations. Subsequently, the parties requested that their respective Petitions for Review be held in abeyance pending mediation. After a successful settlement negotiation, a Joint Stipulation of Dismissal was filed on November 8, 2021, requesting that their respective petitions be dismissed with prejudice.

- 2. Employee v. D.C. Public Schools, OEA Matter No. 1601-0215-11R18R20C21** – This matter was previously before the Board. Employee worked as a School Psychologist with D.C. Public Schools (“Agency”). On July 15, 2011, Employee was notified that he would be terminated because he received a final IMPACT rating of “Minimally Effective” for the 2009-2010 and 2010-2011 school years. The effective date of his termination was August 12, 2011.

The AJ issued an Addendum Decision on Compliance on September 29, 2021. The issues addressed were whether Agency met its burden of proof in establishing that Employee failed to make reasonable efforts to mitigate his backpay damages following Agency's termination action and, if so, what was the proper amount of backpay damages to be awarded to Employee. The AJ explained that under District Personnel Manual (“DPM”) Chapter 11B, Part II, Subpart 8, § 8.11, an employee “who has been separated from his...position by an unwarranted or unjustified personnel action” must sufficiently attempt to mitigate his damages by seeking other employment. He provided that Employee's duty to mitigate included using reasonable diligence to obtain substantially equivalent employment. However, citing the holding in *Wisconsin nue Nursing Home v. District of Columbia Commission on Human Rights*, the AJ noted that once the employee establishes the amount of back pay he is entitled to receive, the burden shifts to the employer to prove what the employee could have earned by the exercise of reasonable diligence.

Based on Employee's courtroom demeanor, inconsistency of testimony, and documentary evidence, the AJ did not find Employee to be credible in establishing that his job search efforts were adequate. Additionally, the AJ reasoned that Employee failed to exercise reasonable and sufficient diligence in attempting to find substantially equivalent employment in his field from the time of his unwarranted separation in August of 2011. As a result, the AJ determined that Agency met its burden of proof in establishing that Employee failed to adequately mitigate his damages.

As it related to what amounts Employee would have earned had he tried to find equivalent employment for that period, the AJ calculated the following based on the evidence presented at the hearing: \$90,690 for 2011; \$90,020 for 2012; \$95,040 for 2013; \$94,780 for 2014; \$105,260 for 2015; \$109,150 for 2016; \$113,890 for 2017; \$113,890 for 2018; \$105,120 for 2018; \$114,150 for 2019; and \$115,060 for 2020. Thus, while Employee was required to be made whole by Agency for the entire period

of his unemployment because he was subject to an improper removal, the AJ determined that his backpay should be reduced by any amounts already paid by Agency, Employee's actual interim earnings, and the amounts Employee could have earned from August 2011 through the date he began working again for Agency.

Employee then filed a Petition for Review of the Addendum Decision on Compliance on or around October 28, 2021. He argues that the AJ misinterpreted the term "erroneous payment" as it relates to Chapter 6B, Section 1149.12 of the D.C. Municipal Regulations ("DCMR"). Employee states that the hearing testimony of Agency's primary witness Debbie Moreau ("Moreau") should have been disqualified because she was not a licensed vocational counselor in the District of Columbia; Moreau was biased; and there was no evidence presented to support a finding that she had any personal knowledge of the matter. According to Employee, the AJ failed to consider all of his testimony related to his efforts in obtaining employment following Agency's termination action. Employee also takes issue with several of the AJ's findings of fact in the Addendum Decision on Compliance. Moreover, he opines that the AJ should not have granted Agency an evidentiary hearing on the backpay issue. He notes that Agency failed to comply with the AJ's orders because he was only reinstated for ninety days before Agency allegedly falsely claimed that he submitted a letter of resignation. As a result, Employee contends that the Addendum Decision on Compliance is not based on substantial evidence.

Agency filed its response on November 12, 2021. It asserts that OEA lacks jurisdiction to review the Addendum Decision on Compliance because there is no procedural avenue within this Office's rules providing for such. It submits that the AJ's decision was based on substantial evidence in the record and that its request for an evidentiary hearing on the issue of backpay was proper. According to Agency, the AJ was correct in allowing Moreau to testify as an expert witness. Lastly, it suggests that the AJ properly considered Employee's evidence presented at the backpay/mitigation hearing. Therefore, it asks that Employee's petition be dismissed on jurisdictional grounds. In the alternative, Agency requests that Employee's petition be denied if jurisdiction is established.

- 3. Employee v. Department of Youth Rehabilitation Services, OEA Matter No. 1601-0032-14AF21** – This matter was previously before the Board. On December 17, 2013, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") contesting the Department of Youth Rehabilitation Services' ("Agency") act of removing him from his position as a Motor Vehicle Operator. Employee was charged with "any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: incompetence" and "any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious: inability to perform the essential functions of the job."

The AJ issued a Second Initial Decision on Remand on October 31, 2018. He reversed Agency's termination action, finding that Employee was entitled to resume full-time employment with Agency because he overcame his workplace injury within two years after the commencement of compensation under D.C. Code § 1-623.45(b)(1). Agency disagreed with the AJ and filed a Petition for Review with the OEA Board on December 5, 2018. The Board issued its Second Opinion and Order on Remand on October 22, 2019. It held that under D.C. Code § 1-623.45, the commencement of compensation of Employee's benefits began on November 18, 2010 and that Employee overcame his work-related injury as of November 5, 2012, within the two-year statutory period. Since Employee suffered a recurrence of his injury after resuming his

full-time, unrestricted duties on November 5, 2012, the two-year period was reset. Accordingly, the Board opined that Agency did not have cause to initiate its termination action. Consequently, its Petition for Review was denied. Agency subsequently filed an appeal with Superior Court. Its petition was denied on September 21, 2020, and the OEA Board's Second Opinion and Order on Remand was affirmed. The matter was not appealed to the District of Columbia Court of Appeals and Employee was returned to work on December 20, 2020.

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 by 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.

C. Deliberations – After the summaries were provided, Jelani Freeman moved that the meeting be closed for deliberations. Peter Rosenstein seconded the motion. All Board members voted in favor of closing the meeting. Dionna Maria Lewis 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 – Dionna Maria Lewis provided that the Board considered all of the matters. The following represents the final votes for each case:

1. Employee v. Department of Fire and Emergency Medical Services, OEA Matter No. 1601-0183-97C08R16

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Jelani Freeman				X
Peter Rosenstein				X
Dionna Lewis				X

Three Board Members voted in favor of dismissing Employee’s and Agency’s Petition for Review. Therefore, both petitions were dismissed.

2. Employee v. D.C. Public Schools, OEA Matter No. 1601-0215-11R18R20C21

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Jelani Freeman		X		
Peter Rosenstein		X		
Dionna Lewis		X		

Three Board Members voted in favor of denying Employee’s Petition for Review of Addendum Decision on Compliance. Therefore, the petition was denied.

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

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Jelani Freeman		X		
Peter Rosenstein		X		
Dionna Lewis		X		

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

F. Public Comments

1. Andrew Johnson inquired about the denial of his Petition for Review. The Board informed Mr. Johnson that he would receive the decision in the mail.
2. Peter Rosenstein moved that the Board voted to use December 27, 2021, as the date that the OEA rules are final, barring any public comments requesting substantive changes by December 26, 2021, the deadline for the public to submit comments to the proposed rules. Jelani Freeman seconded the motion. The vote was unanimous that December 27, 2021, be used as the date that the OEA rules become final, barring any public comments.

- VI. Adjournment** – Peter Rosenstein moved that the meeting be adjourned; Jelani Freeman seconded the motion. All members voted affirmatively to adjourn the meeting. Dionna Maria Lewis adjourned the meeting at 12:56 p.m.

Respectfully Submitted,
Wynter Clarke
Paralegal Specialist