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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
STEPHANOS ULIS and)	
ALFRED RICHARDS,)	OEA Matter Nos. 1601-0092-04
)	1601-0063-04
Employees)	
)	Date of Issuance: September 19, 2006
v.)	
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Mr. Stephanos Ulis and Mr. Alfred Richards (“Employees”) both worked for the District of Columbia Public Schools (“Agency”) in the Department of Transportation (“DOT”). Mr. Ulis served as an Assistant Terminal Manager for Agency until he was terminated. Mr. Richards started out as a Terminal Manager and was then demoted to an Assistant Terminal Manager until he was terminated. The effective termination date for both Employees was on April 26, 2004. Likewise, both Employees received letters indicating “unsatisfactory performance” as the reason for their termination. Both

Employees challenged Agency's basis for terminating them. They wrote separate letters to Mr. David Gilmore, the Transportation Administrator, in response to their termination. The letters requested that they be able to participate in a hearing at the Agency level and be reinstated to their respective positions. Both Employees claimed that they did not receive specific, detailed documentation that justified their termination. Neither Employee received a response from Mr. Gilmore or Agency. Subsequently, Employees filed Petitions for Appeal with the Office of Employee Appeals ("OEA").¹

In their Petitions for Appeal, Employees raised the same arguments that were outlined in their request to Agency for a hearing. Agency's representative responded to the Petitions for Appeal by asserting that the matters would be better addressed by the attorney who represented DOT. The matter was then forwarded to DOT's outside firm by Agency.²

On October 22, 2004, the DOT filed a combined response and motion to dismiss Mr. Ulis' Petition for Appeal. DOT's response to Employee's adverse action claim provided that under Mr. Ulis' supervision, a six-year old, special education student was not returned home from school until after 7 p.m. DOT further argued that the student was not released to her parent when she arrived at home.³ Mr. Gilmore determined that this

¹ Richards' petition was filed on May 6, 2004; while Ulis filed his petition on June 10, 2004.

² *Agency's Response to Employee Petition of Appeal*, p. 2 (October 22, 2004).

³ According to the Transportation Monitoring Unit Incident Report provided by DOT, the student's bus driver and a radio dispatcher did not inform Mr. Ulis until 5:45 p.m. that the student was still en route to her home. The radio dispatcher was in contact with the student's mother. Employee learned that the bus driver was lost and could not locate the student's home. He then met the bus driver and escorted him to the student's home. Upon arriving in the neighborhood, Employee and the bus driver were prevented from walking the student directly to her house because there was a crime scene investigation taking place within the area. The bus attendant took the student to a roped-off area where he was met by a police officer who informed him that he knew the student and would escort her home.

was a gross violation of DOT's policy. He argued that Employee did not make an attempt to contact the student's mother to inform her that she was released to a police officer who escorted her home.⁴

As justification for its motion to dismiss, DOT argued that OEA lacked jurisdiction because Mr. Ulis was a temporary employee and still under his probationary period when he was terminated. It also argued that Employee failed to file a timely Petition for Appeal. Finally, DOT provided that there was no final agency decision regarding this matter. Therefore, Employee had no basis for an appeal.⁵

Similarly, DOT filed a combined response and motion to dismiss Mr. Richards' Petition for Appeal. DOT provided that Employee experienced performance problems from the onset of his employment. According to DOT, prior to Employee's appointment as Assistant Terminal Manager, he received both a written and oral reprimand on two separate occasions. However, DOT does not provide any specific examples of Employee's "unsatisfactory performance" after he was demoted to the Assistant Terminal Manager position. It only offers that "petitioner's poor performance continued after he was moved to the Assistant Terminal position."⁶ As for its motion to dismiss argument, DOT lays out the exact same legal analysis outlined in Mr. Ulis' case.⁷

⁴ DCPS – *Division of Transportation's Response and Motion to Dismiss Petitions for Appeal*, p. 2 (October 22, 2004).

⁵ *Id.*, 3-7.

⁶ DCPS – *Division of Transportation's Response and Motion to Dismiss Petitions for Appeal*, p. 3 (October 22, 2004).

⁷ Like in Ulis, DOT argued that OEA lacked jurisdiction because Employee was under a temporary appointment and was still under a probationary period when he was terminated. It also argued that Employee failed to file a timely Petition for Appeal. Finally, DOT provided that there was no final agency decision regarding this matter.

Because both Employees filed strikingly similar appeals against DOT, the appeals were combined. After combining their cases, Employees filed several motions to retrieve their personnel and adverse action files. Employees argued in a motion for limited discovery that despite their continued requests, DOT failed to provide them with their employment records.⁸

DOT stuck by its argument that OEA lacked the requisite jurisdiction over these matters. It provided that Mr. Gilmore was granted the authority in *Petties v. District of Columbia et al.*, Civil Action No. 95-0148 (2003), to act independently and not under a D.C. government agency. DOT asserted that because Mr. Gilmore was acting as an independent, court-appointed officer that Employees had no basis to appeal to OEA since OEA only heard issues specific to District government employees.⁹

The Agency's position soon changed on January 21, 2005, when the District of Columbia joined DCPS as a respondent in this matter.¹⁰ On the same day, attorneys for the District of Columbia filed a brief with OEA. The brief provided that although Mr. Gilmore was granted certain powers and authority as Transportation Administrator, he was still not above the District's laws. They argued that he could only carry out his duties in a manner consistent with the laws and regulations of the District.¹¹ Moreover, because DCPS is an agency under the D.C. government, employees of the DOT are

⁸ *Motion for Leave to Take Limited Jurisdictional Discovery and For Stay of Motion to Dismiss*, p. 4 (November 18, 2004).

⁹ *Memorandum of Points and Authorities in Support of Respondent's Motion to Dismiss for Lack of Jurisdiction* (December 15, 2004).

¹⁰ *Motion of the District of Columbia to Intervene and Join Respondent District of Columbia Public Schools* (January 21, 2005).

entitled to the protections outlined in the Comprehensive Merit Personnel Act ("CMPA"). In conclusion, the District provided that under the CMPA OEA has clear jurisdiction to hear the matters raised by Employees.¹²

On March 1, 2005, DCPS filed a similar motion. In its motion DCPS concurred with the District's brief and conceded that OEA had the authority to consider Employees' appeals pursuant to the CMPA. As a result, on March 7, 2005, OEA's Administrative Judge ("AJ") issued an order requiring Agency to produce both Employees' personnel files and their entire adverse action file, including all materials that supported the action taken against them. Instead of complying with the order, Agency filed yet another Motion to Dismiss.¹³

On April 14, 2005, the AJ issued an Order granting Employees jurisdictional discovery and requested that Agency comply with the March 7, 2005 Order. Agency finally addressed the jurisdictional discovery issue by responding to Employees' requests for admissions, interrogatories, and production of documents. In its responses, Agency admitted that both Employees appealed their terminations in writing and were both employed for more than one year at the time that they were terminated.¹⁴

On August 26, 2005, Employees filed a response to Agency's Motion to Dismiss. They argued that Agency's assertion that they were both employed for over one year but still either temporary or probationary employees was fatally flawed. They also argued

¹¹ *Brief of District of Columbia Public Schools and the District of Columbia in Response to Request for Briefing and Motion to Strike*, p. 8 (January 21, 2005).

¹² *Id.* at 10.

¹³ *DCPS Motion to Dismiss Petitions for Appeal* (April 5, 2005). The motion provided the same arguments previously outlined in prior motions to dismiss.

¹⁴ *DCPS' Amended Responses to Request for Admissions* (May, 23, 2005).

that Agency could not assert that their petitions were untimely filed and that they failed to provide final agency decisions. Employees contended that Mr. Gilmore's termination letter constituted the final agency decision. Moreover, Employees argued that Mr. Gilmore and/or DOT failed to follow the applicable laws and regulations of the District of Columbia when terminating them. A hearing at the Agency level was not scheduled nor did Agency respond to Employees' assertions that they were improperly terminated.¹⁵

On May 26, 2006, the AJ issued an Initial Decision. He found that both Employees were not serving in temporary or probationary positions at the time they were terminated.¹⁶ As for the issue of the timeliness of Employees' petitions, the AJ reasoned that Employees should have been given no less than 10 days advance notice of their terminations; they should have been advised of the appeal procedures and time limits; they should have received more detailed accounts of the reasons for their termination along with their personnel files; and they should have been provided with a copy of the regulations to properly address the adverse action filed against them.¹⁷

Finally, the AJ found that Mr. Gilmore's termination letter was the final Agency decision. Based on Mr. Gilmore's testimony, Employees were terminated immediately upon the receipt of the letters. Neither Mr. Gilmore nor DOT responded to either of the

¹⁵ *Petitioner Ullis' Memorandum in Opposition to DCPS's Motion to Dismiss Petition for Appeal* (August 26, 2005).

¹⁶ Agency was unable to provide any valid documentation showing either of the employee's hiring dates. However, it admitted that both were employed with Agency for more than one year at the time of their termination. Agency admits that Mr. Richards' employment commenced in August or September of 2002 and ended on April 26, 2004. Mr. Ullis was hired on April 18, 2003 and terminated on April 26, 2004. In both instances the Employees exceeded their one-year probationary periods.

¹⁷ The AJ uses the reasoning provided in *Plouffe v. D.C. Department of Employment Services*, 497 A.2d 464, 465 (D.C. 1985) and *Selk v. D.C. Department of Employment Services*, 497 A.2d 1056, 1058 (D.C. 1985) to show that Agency's notice was ambiguous and insufficient rendering it inadequate as a matter of law.

Employees' requests for a hearing. Therefore, the AJ reasoned that Agency did not intend to issue any other employment-related documents to the Employees – the termination letter was its final decision.

As a result of Agency's failure to comply with its own regulations and those established by the District of Columbia, the AJ ruled that both Employees be immediately reinstated with all back pay and benefits.

On July 10, 2006, Agency filed a Petition for Review with OEA. The petition provided that jurisdiction was the only ripe issue for decision when the AJ issued his Initial Decision. Agency argued that it was not allowed the opportunity to present evidence proving that Employees were properly terminated. It also claimed that it was waiting for the AJ's ruling on jurisdiction before addressing the merits of the appeals. Hence, it requested that the Initial Decision in both cases be vacated. Employees responded to the Petition for Review on July 13, 2006.¹⁸

The Initial Decision and orders preceding it, clearly established this Office's jurisdiction to hear these matters. D.C. Official Code §1-606.02 grants OEA with the authority to hear and adjudicate appeals received from D.C. government agencies and employees while section 1-606.03 provides OEA's authority over appeals of adverse action claims. Because Agency admitted that Employees were both employed past the

¹⁸ Among other things, Employees' response provided that Agency's Petition for Appeal was not filed in a timely manner. Agency was granted an extension by Deputy General Counsel for OEA. The extension was granted because the Agency's representative informed the Deputy General Counsel that she did not receive a copy of the Initial Decision until 10 days after it was issued. Upon confirming this information with the Administrative Judge and Administrative Assistant for OEA, Deputy General Counsel granted a 10-day extension in the interest of fairness to Agency. It is OEA's duty to ensure that all parties in a matter are served with a copy of the Initial Decision. See OEA Rule 632.5 and D.C. Official Code §1-606.03(c). Agency memorialized the extension terms and sent a copy by mail to Employees' counsel.

one-year probationary period, it is implausible that they were probationary employees at the time of their termination. Additionally, Agency provided no documentation to substantiate their claims that Employees were under a temporary appointment. Therefore, the AJ's assessment that neither Employee was under a temporary or probationary status at the time of termination is valid. It is clear that OEA has the requisite jurisdiction to consider these matters as provided by the AJ.

Although Mr. Gilmore claimed that he had the sole authority to terminate employees with or without cause, he still had to do so within the parameters outlined in the *Petties Order*.¹⁹ Agency failed to follow its own regulations under the District of Columbia Municipal Regulations ("DCMR") and those provided in the OEA Rules. Because Employees worked for DOT under DCPS, their adverse action claims fell under 5 DCMR §1400.1. Section 1400.1 provides that "the following adverse actions shall be subject to the rules and procedures set forth in this chapter: (a) dismissal; (b) suspension; and (c) demotion for cause." Hence, when dismissing the Employees by adverse action, Mr. Gilmore/Agency should have referenced the DCMR.

The DCMR specifically outlines the notice requirements for adverse actions taken against DCPS employees. The relevant provisions of this regulation provide the following:

"1403.1 An employee who is the subject of an adverse action shall have the right to receive written notice of the action prior to the effective date of the action, as set forth in this section.

¹⁹ The *Petties Order* clearly provided that if Gilmore found that the laws and regulations of the District prevented him from carrying out his duties and responsibilities, he could have such requirements waived if he petitioned the court. Therefore, he did not have free reign to ignore the regulations already in place. *Consent Order Appointing Transportation Administrator*, p. 7 (June 25, 2003).

- 1403.2 Notice of dismissal, demotion for cause, or suspension for more than thirty (30) days shall be received by the employee not less than ten (10) days prior to the effective date of the adverse action.
- 1403.3 Notice of adverse action shall contain at least the following:
- (a) The type of adverse action;
 - (b) The effective date of the adverse action;
 - (c) The specific grounds and reasons for the action;
 - (d) Notice of all procedures, rights of appeal, time limits, and other matters pertaining to the adverse action applicable to the affected employee;
 - (e) A copy of the provisions of this chapter; and
 - (f) The location and times when the employee or his or her representative may review the material in the adverse action file upon which the action is based.
- 1404.1 The employee or his or her representative shall be given access to the documents, reports, and other materials contained in the adverse action file, including all materials that support the adverse action being taken.
- 1404.2 Adverse action file materials that relate to the grounds and reasons for the adverse action shall be available for inspection by the employee or his or her representative not later than twenty-four (24) hours after the receipt of the notice of adverse action by the employee. These file materials shall be available at the times and places specified in the notice.
- 1404.3 An employee who is the subject of an adverse action shall be retained in active duty status during the notice period, except in the following instances:
- (a) When it is determined by the official effecting the adverse action that retention of the employee in an active duty status might result in damage to public school property; may result in injury or harm to students, other employees, or members of the public; or may be detrimental to the efficiency and discipline of the school system, the employee may be temporarily assigned to other duties where these conditions are not likely to occur or the employee may be placed on administrative leave with pay; and
 - (b) When the official effecting an adverse action also effects a separate action of suspension for thirty (30) days or less during the notice period.”

Agency violated nearly every outlined section of the DCMR. Employees were to receive at least 10 days notice; they did not. Employees did not receive written notice *prior* to their effective termination dates. The notice that Agency supplied stated that their termination was effective immediately, clearly violating sections 1403.1 and 1403.2.²⁰ Additionally, the notice violated section 1403.3 because it did not contain the specific reasons for the adverse action; it did not outline the appeal procedures and deadlines; it failed to include a copy of the regulation governing Agency's adverse actions procedures; and it did not provide Employees or their representative with a location and time to review their adverse action files.²¹

Despite these blatant notice violations, Agency argued in its Petition for Review that it was not allowed the opportunity to present evidence showing that Employees were properly terminated. Agency also claimed that it was waiting for the AJ's ruling on jurisdiction before addressing the adverse action issues on its merits.

According to OEA Rule 634.3, the Board may grant a petition for review when it establishes that:

- “(a) new and material evidence is available that, despite due diligence, was not available when the record closed;
- (b) the decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;

²⁰ As a consequence of Agency's failure to adhere to sections 1403.1 and 1403.2, they also violated 1404.3. Employees did not remain under active duty status following their termination because Agency did not provide a notice period.

²¹ Agency's failure to provide the adverse action file also violated sections 1404.1 and 1404.2. Furthermore, Agency violated OEA Rule 605.1. This rule provides that “when an agency issues a final decision to an employee on a matter appealable to the Office, the agency shall at the same time provide the employee with: (a) notice of the Employee's right to appeal to the Office; (b) a copy of the rules of the Office; (c) A copy of the appeal form of the Office; (d) notice of applicable rights to appeal under a negotiated review procedure; and (e) notice of the right to representation by a lawyer or other representative authorized by the rules.”

- (c) the findings of the Administrative Judge are not based on substantial evidence; or
- (d) the initial decision did not address all material issues of law and fact properly raised in the appeal.”

Agency did not raise any of these arguments. Despite its numerous jurisdiction debates, Agency had several opportunities to address the validity of adverse action issues in this case. Both Employees argued in their Petitions for Appeal that the adverse action claims filed against them were improper. Although Agency filed a response to the Petitions for Appeal it decided to devote most of its response to the jurisdiction issue and not the merits of the adverse action claim. This was done despite OEA Rules 610.1(c) and (d) which explicitly provide that “an agency answer in which the allegations of a petition are contested shall contain the following . . .

- (c) a statement of the appealed action the agency took against the employee and the reasons therefore; [and]
- (d) a specific response to each allegation of the petition admitting, denying, or explaining each in whole or in part. The Administrative Judge may assume that the agency concedes as fact an allegation in employee’s petition that the agency does not specifically explain or deny in the answer.”

Therefore, instead of focusing on the jurisdiction issue Agency should have focused its sights on the merits of its adverse action argument.

Agency also had an opportunity to address the issue on its merits after it conceded jurisdiction. At that point Agency should have presented evidence supporting the validity of Employees’ terminations. The AJ issued an Order on March 7, 2005, that unmistakably found that OEA had jurisdiction to adjudicate these cases. Because jurisdiction was determined, the AJ ordered that Agency provide all materials supporting

the adverse action taken against Employees. At this crucial point, Agency should have submitted a brief supporting the adverse action claim, but it instead filed another motion to dismiss for lack of jurisdiction. These back and forth filings of motions to dismiss and responses continued until the AJ issued his Initial Decision on May 26, 2006. The AJ found that OEA had jurisdiction over one year prior to issuing his Initial Decision. Agency blatantly disregarded the AJ's findings and continued to make its lack of jurisdiction argument. It cannot now argue that they were not afforded the opportunity to present evidence on the merits of the adverse action claim.²²

Furthermore, OEA Rule 634.4 states that "any objections or legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board." Because Agency presented such a mediocre case and sought to challenge an issue that it previously conceded, this Board cannot and will not consider any legal arguments that Agency failed to present to the Administrative Judge. Agency wasted a great deal of time by continuing to argue against OEA's jurisdiction. It made a series of mistakes in this case and never adequately proved that Employees were properly terminated. Therefore, Agency's Petition for Review is **DENIED**.


²² According to OEA Rule 629.3 agency had the burden of proving that it properly terminated Employees. It failed to do so.


ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review
is **DENIED**.


FOR THE BOARD:


Brian Lederer, Chair


Horace Kreitzman


Keith E. Washington


Jeffrey I. Stewart


Barbara D. Morgan

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.