THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
SAMUEL BROOKS,	)	
Employee	)	OEA Matter No. 1601-0316-10
	)	
v.	)	Date of Issuance: November 25, 2013
	)	
D.C. DEPARTMENT OF HEALTH,	)	
Agency	)	
	)	ERIC T. ROBINSON, Esq.
	)	Senior Administrative Judge

Leisha A. Self, Esq., Union Representative
Kevin Turner, Esq., Agency's Representative

INTIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On or about June 4, 2010, Samuel Brooks ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the District of Columbia Department of Health's ("DOH" or "the Agency") action of removing him from service. I was assigned this matter on or about July 10, 2012. Employee began service as a District of Columbia Resource Development Specialist for the D.C. Department of Health, Community Health Administration, CS – 301-13/1, on May 11, 2009. This appointment had a probationary period of one year, beginning on May 11, 2009, *id.*, and ending at the end of Employee's tour of duty on May 10, 2010. Employee contends that according to his Termination Letter dated April 29, 2010, the effective date of his removal from service was May 14, 2010. Of note, Employee acknowledged receipt of the Termination Letter as evidenced by his signature on page 2 of this letter. Conversely, DOH alleges that Employee was terminated on May 7, 2010, pursuant to a Notification of Termination During Probationary – Amended ("Amended Letter") addressed to Employee and also dated April 29, 2010. The Amended Letter was not signed by then Agency Director Dr. Pierre Vigilance, but rather it was signed by DOH Chief Operating Officer Dr. Kimberly Jeffries Leonard. Moreover, the Amended Letter did not have its receipt acknowledged by Employee.[1]

[1] According to Agency's Appendix of Documents (July 8, 2010) at Tab 10, Employee received the Amended Letter via United States Postal Service certified mail on May 6, 2010.

Initially, based on the documents of record, it appeared that Employee was a probationary employee when he was removed from service. If so, then the OEA would lack jurisdiction to adjudicate this matter. Accordingly, on July 11, 2012, I issued an order requiring Employee to address said issue in a written brief. Employee complied and his response compelled the undersigned to look at the facts and circumstances surrounding his removal. After multiple continuances, a status conference was scheduled for April 7, 2013. During the conference, it was noted that Employee may have completed his probationary period at the moment of his removal. If so, his removal, as carried out by the Agency, was in stark violation of his career service rights. The undersigned then asked the parties if they would willingly participate in mediation. Employee was willing to participate in mediation. After being afforded a generous amount of time to consider its options, the Agency decided against mediation. After learning of the Agency's decision to forego mediation, the undersigned conducted a status conference, via telephone on April 19, 2013. During this conference, the undersigned provided the parties with a briefing schedule. Both parties have submitted their briefs. After considering the record as a whole, I have determined that no further proceedings are warranted. The record is now closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.03 (2001).

ISSUE

Whether Employee was a probationary (at-will) employee at the moment of his removal from service. If not, whether the Agency had proper cause to remove Employee from service.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Agency's Position

By letter dated April 29, 2010, Dr. Pierre Vigilance, then Agency Director, informed Employee that his employment would be terminated effective May 14, 2010. The letter also informed Employee that his removal was not appealable or grievable because he was a probationary employee. After personally serving the letter on Employee, Agency staff realized that the termination date of May 14, 2010, was beyond the one-year probationary period, and thus, not consistent with Dr. Vigilance's intent to remove Employee during his probationary period. Accordingly, the Agency issued a Notification of Termination during Probationary Period – Amended ("Amended Letter"). The Amended Letter attempted to change Employee's last date of service to May 7, 2010. The Amended Letter was signed by Kimberly Jeffries Leonard, Ph.D., Chief Operating Officer. According to the Agency, Dr. Vigilance purportedly delegated his authority to Dr. Leonard in his absence.

Employee's Position

Employee admits that the Agency hand-delivered a letter signed by the Director of the Agency, Dr. Vigilance, and dated April 29, 2010, notifying him that his appointment was being terminated "effective at the close of business **on Friday May 14, 2010,**" and that the Agency was immediately placing him "on administrative leave [with pay] until the effective date of [his] termination." Moreover, Employee signed the Termination Letter on April 29, 2010, as having received this letter on that date. Employee contends that he did not receive the Amended Letter until May 6, 2010, as evidenced by his signature on the Certified Mail Return Receipt included with Agency Appendix of Documents at Tab 10 (July 8, 2010). Employee posits that the Amended Letter was improperly backdated in order to effectuate this removal during his probationary period. Employee further argues that he attained permanent career status as evidenced by the following:

1. The documentation of administrative leave pay through May 14, 2010, the receipt of that pay, the fact that the Agency has never sought reimbursement of that pay or corrected the pay record.

2. The Employee Separation Form signed by supervisor Nichols and Employee, the Agency's health insurance coverage through the pay period that included May 14, 2010, the Agency's contribution to Employee's 401(a) Retirement Plan, which occurs only after one year of continuous service.

3. The Agency's signed exit interview specifying that the separate date was May 14, 2010 and the step progression that occurred for Employee because he had worked 52 weeks of creditable service at the lower step establish that Employee's termination was effected on May 14, 2010, after his probationary period ended, and was not properly effected at any earlier date.

Analysis

District Personnel Manual § 813.2 provides in pertinent part that "a person hired to serve under a Career Service Appointment (Probational), including initial appointment with the District government in a supervisory position in the Career Service, shall be required to serve a probationary period of one (1) year…" It is well established that in the District of Columbia, an employer may discharge an at-will employee "at any time and for any reason, or for no reason at all". *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 30 (D.C. 1991). *See also Bowie v. Gonzalez*, 433 F.Supp.2d 24 (DCDC 2006). As an "at will" employee, Employee did not have any job tenure or protection. *See* Code § 1-609.05 (2001). Further, as an "at will" employee, Employee had no appeal rights with the OEA. *Davis v. Lambert*, MPA No. 17-89, 119 DWLR 204 (February 13, 1991). However, if an employee prevails in showing erroneous assumption of probationary status, for purposes of determining whether employee is entitled to substantive and procedural protections afforded full-time career employees of District of Columbia, Office of Employee Appeals proceeds to … *offer relief commensurate with career status. Fox v. District of Columbia,* C.A.D.C.1996, 83 F.3d 1491, 317 U.S.App.D.C. 443, on remand 990 F.Supp. 13.

It is well established that in order to terminate an employee as a probationary employee, the termination must be effected by someone with the authority to do so prior to the end of the probationary period. *See Vandewall v. Dep't of Transportation,* 52 MSPR 150, 91 FMSR 5736 (Dec. 20, 1991). Not only must the employee receive notice of the termination prior to the end of the probationary period, but the termination must **actually occur** prior to the end of the probationary period. *Holliday v. Metropolitan Police Department,* OEA Matter No. 1601-0046-09 (Nov. 6, 2009); DPM § 813.2; *Ahmed v. Environmental Protection Agency,* 10 MSPB 471, 11 M.S.P.R. 548, 550 (1982) (a separation in order to be effective before the end of the probationary period, must be made effective prior to completion of the employee's tour of duty). Also, intent to terminate an employee prior to the end of his probationary period without actually doing so is ineffective to meet the requirement that the employee's termination must be effected prior to the completion of the employee's tour of duty on the last day of the probationary period. *See Holliday v. Metropolitan Police Department,* OEA Matter No. 1601-0046-09 (Nov. 6, 2009) (Agency clearly intended to terminate Employee before completion of probationary period, but failed to do so, making the Employee a permanent, career status employee at the time of his termination, and therefore entitled to statutory and procedural protections involving for cause termination). Under District of Columbia Statute, "the retention of the probationer in the service after satisfactory completion of the probationary period shall be equivalent to a permanent appointment therein." D.C. Code § 5-105.04.

It is most revealing to the undersigned that the Agency did not attempt to refute any of Employee's arguments as noted above. The Agency explanation that Dr. Vigilance's vain attempt to remove employee *vis a vis* the Termination Letter is circumspect at best. I also note that the alleged delegation of authority that was done in Dr. Vigilance's absence is very circumspect. What is most concerning to the undersigned is that the Amended Letter which was allegedly created on April 29, 2010, was received by Employee on May 6, 2010, just one day prior to the alleged effective date of Employee's removal. I also take into account that the Agency paid Employee through May 14, 2010, and made payments into Employee's 401(a)

retirement plan. All of which is indicative of a District government employee who has attained permanent career service status. When an employee's livelihood is at stake, it is incumbent upon an agency to execute its actions with precision and in a manner that is above reproach. In this matter, Agency utterly failed in its execution. Moreover, the Agency's error was egregious and cannot be tolerated within the context of an employee seeking reinstatement. I find that DOH committed harmful error when it removed Employee from service. It is without question, that the last day of Employee's probationary period was May 10, 2010. I find that the Termination Letter was the only executed document that had the proper authority to provide written notice of Employee's termination. Moreover, I further find that based on the Termination Letter, the effective date of Employee's removal was May 14, 2010. Based on the breadth of Employee's arguments as noted above, I further find that Employee had achieved permanent, career status as of the date that the Agency terminated him, May 14, 2010.

Of note, as part of the briefing schedule ordered by the undersigned, DOH was afforded a full and fair opportunity to argue that it had cause to remove Employee. DOH, in its brief dated June 4, 2013, opted not to argue that point. OEA Rule 628.1, places the burden of proof on the Agency. Further, that burden is by a preponderance of evidence standard, which is defined as "that degree of relevant evidence, which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue." Since I have found that Employee had attained Career Service rights prior to his dismissal, it was the Agency's burden to show that it had proper cause to remove Employee. As I stated previously, the Agency made no credible argument in order to prove that it had proper cause to remove Employee. Accordingly, I further find that DOH did not meet its burden of proof in this matter. Considering as much, I conclude that Employee was improperly terminated.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of removing Employee from service is **REVERSED**; and

2. The Agency shall reinstate the Employee either to his last position of record or to a comparable position; and

3. The Agency shall reimburse the Employee all back-pay and benefits lost as a result of his removal; and

4. The Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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ERIC T. ROBINSON, Esq.
Senior Administrative Judge