**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

| | | |
|---|---|---|
| In the Matter of: | ) | |
| | ) | OEA Matter No.: 1601-0036-07R13 |
| DANA BROWN, | ) | |
| Employee | ) | |
| | ) | Date of Issuance: April 30, 2015 |
| v. | ) | |
| | ) | |
| DEPARTMENT OF YOUTH | ) | |
| REHABILITATION SERVICES | ) | |
| Agency | ) | Sommer J. Murphy, Esq. |
| | ) | Administrative Judge |

Angela Davis, Esq., Employee Representative
Margaret Radabaugh, Esq., Agency Representative

## INITIAL DECISION ON REMAND

### INTRODUCTION AND PROCEDURAL HISTORY

Dana Brown ("Employee") worked as a Juvenile Justice Institutional Counselor at the Department of Youth Rehabilitation Services ("Agency" or "DYRS"). On February 2, 2005, Employee sustained a serious injury while on duty at Agency's Oak Hill facility. Employee's injuries required her to undergo extensive medical treatment. The D.C. Disability Compensation Program determined that Employee was totally disabled by the injury, and on March 3, 2005, she was placed on Leave Without Pay ("LWOP") status so that she could receive Worker's Compensation.

On September 29, 2006, Agency issued Employee an Advance Notice of Proposed Removal because she was on LWOP for more than one (1) year and failed to provide medical certification regarding the status of her medical condition. The proposed notice further stated that Employee was unable to satisfactorily perform one or more major duties of her position. Employee submitted a response to a Hearing Officer on October 12, 2006, stating that "[a]s medical treatment is ongoing, it is undetermined as to the exact date that I will be able to resume my employment with [the Agency"].[1] On November 24, 2006, Agency issued its final decision, upholding the Hearing Officer's recommendation to terminate Employee from her position.

[1] Agency's Response to Petition for Appeal, Tab 3 (January 29, 2007)

On December 21, 2006, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") contesting Agency's decision to terminate her employment. Employee argued that Agency's action was improper because she submitted incapacitation certificates from her doctor on a weekly basis, and had several conversations with her supervisor regarding the status of her medical condition. In response to Employee's appeal, Agency contended that its decision should be upheld. In support of its position, Agency cited D.C. Official Code § 1-623.45(b)(1) (amended effective January 4, 2005), which provided that an employee who overcomes a disability within one (1) year has the right to immediately and unconditionally resume their former position or an equivalent position. According to Agency, Employee did not overcome her injury within the one year as prescribed in the aforementioned statute; therefore, she was not entitled to resume her former position or an equivalent position with Agency.[2]

On May 5, 2008, Administrative Judge ("AJ") Muriel Aikens-Arnold (ret.) issued an Initial Decision ("ID"), and held that there was cause to terminate Employee. The AJ agreed with Agency's position that the D.C. Official Code's language prevails over the District Personnel Manual ("DPM").[3] Moreover, the AJ stated that Employee failed to present evidence to support a finding that she was able to fully perform the functions of her duties.

Employee subsequently filed a Petition for Review with OEA's Board. According to Employee, the AJ failed to address whether the amended version of D.C. Code § 1-623.45 applied retroactively to her cause because Employee sustained an injury before the statute went into effect. On, March 1, 2010, the Board issued its Opinion and Order on Petition for Review, vacating Judge Aikens-Arnold's decision. The Board addressed the following issues: 1) whether D.C. Code § 1-623.45 (2001), which became effective on October 3, 2001, or D.C. Code § 1-623.45 (2006), which became effective on April 5, 2005 should be applied, 2) whether the 2005 Amended Statute could be applied retroactively to Employee's case; and 3) whether Agency had cause to remove Employee. The Board held that the 2005 Amended Statute could not be applied retroactively, and that Agency did not have cause to terminate Employee in applying the 2001 version of § 1-623.45.

Agency disagreed with the Board's decision and filed an appeal with the District of Columbia Superior Court, arguing that the Opinion and Order on Petition for Review should be reversed because it was based on an erroneous interpretation of law. On September 20, 2012, the Honorable Judge Erik Christian reversed the Board's decision and remanded the case back to OEA. Judge Christian determined that OEA correctly concluded that the 2001 Statute should be applied because the 2005 Amended Statute was not in effect at the time of Employee's injury or at the commencement of her worker's compensation benefits.[4] However, the Court held that OEA's Board erred as a matter of law as to its analysis of D.C. Code § 1-623.45(b)(1) and (b)(2). Under the 2001 Statute, subsection (b)(2) provides certain rights to employees who overcome an injury or disability "within a period of more than 1 year after the date of the commencement of

[2] Agency stated that the one year statutory period elapsed for Employee on March 22, 2006.
[3] Judge Aikens-Arnold relied upon the amended version of D.C. Code § 1-623.45(b)(1).
[4] 2010 CA 1842 P(MPA) (September 20, 2012). The Court also concluded that the 2005 Amended Statute could not be applied retroactively.

compensation." According to Judge Christian, the Board erred as a matter of law when it incorrectly ascribed a period of two (2) years under subsection (b)(2) of the 2001 Statute instead of a one (1) year period. Lastly, the Court held that OEA's Board failed to establish any findings of fact or substantial evidence to support a finding that Agency lacked cause to impose an adverse action against Employee. Accordingly, Employee's appeal was reversed and remanded to OEA for further proceedings consistent with the D.C. Superior Court Order.

On November 29, 2012, I issued an order scheduling a telephonic conference for the purpose of assessing the status of the remanded matter. On June 26, 2013, I issued a revised Order for the submission of written briefs.[5] On August 22, 2013, the parties submitted a Joint Motion for An Extension of Time to Submit Briefs. The motion was granted, and both parties submitted responses to the order. After a review of the briefs, the Undersigned has determined that an Evidentiary Hearing is not warranted. The record is now closed.

## JURISDICTION

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

## ISSUES

Whether Agency's removal of Employee should be upheld.

## 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.

[5] Employee's arguments that Agency's Hearing Officer erred by misapplying provisions of the D.C. Code and DPM are outside the scope of OEA's jurisdictional purview, as this Office conducted a de novo review of Employee's claims after she filed a Petition for Appeal . In addition, Employee's claims regarding failed settlement negotiations with Agency after the effective date of her termination will not be addressed, as OEA lacks jurisdiction over alleged violations of the Rules of Professional Conduct.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

In accordance with Section 1651 (1) of the CMPA (D.C. Official Code §1-616.51 (2001)), disciplinary actions may only be taken for cause. The relevant statute at issue in this case is D.C. § 1-623.45 (2001), which states:

> (b) Under rules and regulations issued by the Mayor the department or agency which was the last employer shall:
>
> > (1) Immediately and unconditionally accord the employee, if the injury or disability has been overcome within 1 year after the date of commencement of compensation or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the District of Columbia government, the right to resume his or her former, or an equivalent, position as well as all other attendant rights which the employee would have had or acquired in his or her former position had he or she not been injured or disabled, including the rights to tenure, promotion, and safeguards in reduction-in-force; and
> >
> > (2) If the injury or disability is overcome within a period of more than 1 year after the date of commencement of payment of compensation, make all reasonable efforts to place, and accord priority to placing, the employee in his or her former or equivalent position within such department or agency, or within any other department or agency.

> (c) Nothing in this provision shall excluded the responsibility of the employing agency to re-employee an employee in a full-duty or part-time status.

The 2001 version of § 1-623.45(b)(1) provided certain rights to employees who were receiving worker's compensation benefits and overcame their disability within one year. Those rights included the right to the immediate and unconditional resumption of the employee's prior position or an equivalent position. In this case, Employee suffered a work-related injury and began receiving Worker's Compensation benefits on March 3, 2005. On September 29, 2006, Agency issued Employee an Advance Notice of Proposed Removal, and the effective date of her termination was November 24, 2006. Subjection (b)(1) of the statute is only invoked *if the injury or disability has been overcome within one year*. (emphasis added). Both parties concede that Employee had not fully recovered from her injuries as of the effective date of her termination.[6] As such, § 1-623.45(b)(1) could not be invoked by Employee and does not apply in this case.

In the alternative, subsection (b)(2) of the 2001 statute may be utilized in cases where an employee overcomes his or her injury after a period of more than one year. In these cases, the agency is required to make reasonable efforts to place, and accord priority to placing, the employee in their former (or an equivalent) position. As stated in Judge Christian's September 20, 2012 opinion, "[b]ecause the rights provided [in subsection (b)(2)] are conditional upon the employee overcoming his or her injury, the plain language of the statute does not support the OEA's reading. Accordingly, Brown could not invoke subsection (b)(2) of the statute until after she recovered."[7] For the reasons stated below, I find that: 1) Agency had cause to remove Employee; and 2) Employee's attempt to invoke § 1-623.45(b)(2) (2001) after the effective date of her termination is a grievance that falls outside the scope of this Office's jurisdiction.

The September 20, 2012 Superior Court decision held that OEA's Opinion and Order on Petition for Review failed to establish that Agency lacked cause to terminate Employee. Specifically, the Board did not address the conflicting provisions of D.C. Code § 1-623.45 (2001) and DPM § 827. As a basis for cause, Agency's Fifteen Day Advance Notice of Proposed Removal cited to DPM Chapter 16, § 827.5, for "Inability to satisfactorily perform one or more major duties of your position."[8] Section 827, which applies to Career Service employees, provides in pertinent part:

---

[6] In her October 12, 2006 response to Agency's proposed removal, Employee stated that she was still unable to perform the functions of her position as a Juvenile Justice Institutional Counselor because of the severity of her injury. Employee further stated that "it is undetermined as to the exact date that I will be able to resume my employment with DYRS. See Agency Exhibit 2

[7] 2010 CA 1842 P(MPA) at 8. The opinion further states that OEA committed an error of law by ascribing a period of two years under subsection (b)(2) of the 2001 statute. In her November 1, 2013 brief, Employee argues that this Office should apply a two year period to subsection (b)(2). This contention is in direct conflict with the Superior Court order, remanding the matter back to OEA. Both subjection (b)(1) and (b)(2) of the 2001 statute provide for a period of one year

[8] Agency Answer to Petition for Appeal.

**Restoration of Duty**

> 827.2 Each employee covered by § 827.1(a) may resign, or may be either separated or furloughed at the option of his or her agency, except that a member of a reserve component of the Armed Forces, or a member of the National Guard, who is performing duty covered by § 1-613.3(m), D.C. Code (1981), shall be placed on military leave. Regardless of the nature of the action, all such employees shall be entitled to restoration to duty as provided in this section.
>
> 827.3 An agency shall carry an employee covered by § 827.1(b) on leave without pay for ***two (2) years*** from the date of commencement of compensation, or from the time compensable disability recurs if the recurrence begins after the employee resumes full-time employment with the District government, or, in the case of an employee holding a term, temporary, or TAPER appointment, until the expiration of the appointment, whichever shall occur first.
>
> 827.5 At the end of the ***two-year (2-year)*** period specified in § 827.3, an agency shall initiate appropriate action under Chapter 16 of these regulations. (emphasis added).

At the time Employee was terminated, there was undoubtedly a discrepancy between the time period afforded to employees under D.C. Code § 1-623.45(b)(2) and the time period afforded to employees under Section 827.3 and Section 827.5 of the DPM. As previously stated, the D.C. Superior Court held that a one (1) year period must be ascribed to subsections (b)(1) and (b)(2) of the 2001 statute in this case. At the time of Employee's termination, section 827.3 provided that an agency was required to carry eligible employees on LWOP for a period of two (2) years before initiating action under Chapter 16 of the DPM. The Undersigned recognizes that an analysis of Agency's actions under the DPM would result in a different outcome than an analysis of Agency's actions under the 2001 version of D.C. Code § 1-623.45.[9]

D.C. Code § 1-632.07(b) states that "[a]ny law, rule or regulation…or any administrative rule and regulation which is inconsistent with or contrary to the provisions of this chapter is repealed or superseded to the extent of such inconsistency on or after the effective date of this chapter." Moreover, it is a generally well known principle that the D.C. Official Code shall prevail over the DPM on the rare occasion when the two are inconsistent.[10] Any other regulation

[9] Under the 2001 version of D.C. Code § 1-623.45(b)(2), Employee's proposed termination was considered timely because she had not overcome her injuries within the one (1) year grace period. However, under Section 827.3 of the DPM, Agency's actions would be considered premature because Employee had a grace period of two (2) years to overcome her injury. Under Section 827.5, the two year period for overcoming Employee's injuries would not have lapsed until March 3, 2007.

[10] *See Sheetz v. District of Columbia*, 629 A.2d 515, 519 (D.C. 1993).

that would provide for a contrary outcome in this matter cannot be given greater weight than what is duly afforded under D.C. Official Code § 1-623.45 (2001).[11]

Agency argues that it had cause to terminate Employee because she was unable to perform the functions of her position after the one (1) year time period lapsed under § 1-623.45 (b)(1). According to Agency, Employee no longer had the retention rights afforded to eligible employees, and could not prove with certainty, a date on which she could return to work. Under § 1-623.45(b)(1) (2001), an employee who is receiving disability benefits *and* overcomes their injury within one (1) year has the immediate and unconditional right to reemployment in the same or similar position. (emphasis added). The corollary position is also true in this case. An employee who *does not* overcome their injury within one (1) year does not retain the right to immediate and unconditional employment. (emphasis added). Employee had not overcome her injuries at the time Agency issued its Advanced Notice of Termination. Accordingly, I find that Employee no longer had the right to continued employment after March 3, 2006. The Undersigned certainly sympathizes with Employee's position, as the time periods provided in the DPM and the Code conflicted at the time of her termination. However, there is no *credible* evidence in the record to support a finding that Agency "shirked its responsibility to re-employ Brown in violation of D.C. Code § 1-623.45(c)," as stated by Judge Christian. Accordingly, I find that Agency adequately complied with § 1-623.45(b)(1), and had cause to terminate Employee.

---

[11] *Joseph v. D.C. FEMS*, OEA Matter No. 1601-0030-06 (October 2, 2006). Even if the Undersigned were to analyze the relevant provisions of the DC Code and DPM in tandem, Agency's decision to terminate Employee would still be upheld. In cases where conflicts arise between the operation of two statutes or regulations, courts will attempt to harmonize the two so that both can be given effect if it can do so while preserving their sense and purpose. *See generally Watt v. Alaska*, 451 U.S. 259, 267 (1981); *See also Lewis v. Lewis & Clark Marine, Inc*., 531 U.S. 438 (2001).

The purpose of Section 827 of the DPM is to enumerate the restoration rights afforded to employees who: 1) enter military duty with restoration rights under §§ 2021 or 2024 of Title 38, U.S. Code; 2) are receiving disability compensation under Title 1, Chapter 6, Subchapter XXIV, D.C. Code (1981); and 3) are uniformed member of the Police or Fire Departments who have been retired for disability under Title 4, Chapter 6, D.C. Code (1981). Section 827 further details an agency's affirmative duties to employees who are entitled to restoration rights. Notably, the time period for overcoming a disability under the 2001 version of D.C. Code § 1-623.45 (subsections (b)(1) and (b)(2)) was not updated to be consistent with a reading of DPM § 827 until April of 2005.[11]

The relevant provisions of both the Code and the DPM may be read in harmony because their underlying purpose is similar. Both Section 827 of the DPM and the 2001 version of § 1-623.45 apply to employees receiving disability compensation. Both provisions also provide protections to employees if their injury is overcome before or after a certain time period. By ascribing a time period of one year (the time period afforded to overcome an injury at the time Employee began receiving disability benefits), instead of two years, to Section 827 of the DPM, I find that both the DPM and the Code can be given effect. Here, Employee sustained a work-related injury on February 2, 2005, and was terminated on November 24, 2006. Approximately twenty (20) months lapsed between the time of her injury and the date of her termination. Again, both parties concede that Employee was not able to perform one or more of the functions of her position as a Juvenile Justice Institutional Counselor at the time she was terminated. Under DPM § 827.5, Agency was within its right to initiate termination proceedings in accordance with Chapter 16 of the DPM. Accordingly, Agency had cause to terminate Employee.

The next issue to be addressed is whether Employee can invoke Subsection (b)(2) of D.C. Code § 1-623.45 (2001) after the effective date of her termination. Employee argues that OEA's jurisdiction extends to determining whether Agency was required to make all reasonable efforts to place, and accord priority to placing, Employee in her former or an equivalent position. As previously stated by Judge Christian in his September 20, 2012 opinion, Subjection (b)(2) could not be invoked until after Employee overcame her injury. In her September 13, 2013 brief, Employee provides an Independent Medical Evaluation from Louis E. Levitt, M.D. The letter, dated January 29, 2008, states that "Ms. Brown has the capacity to return to work at her pre-injury level of work performance and I see no justification for the patient remaining out of the work force any longer."[12] Agency submits that OEA does not have jurisdiction to determine whether Employee was entitled to the protections afforded under § 1-623.45(b)(2) because she did not overcome her injuries until after the effective date of her termination. In addition, Agency contends that Employee's desire to invoke Subjection (b)(2) is a grievance, which is outside the scope of OEA's jurisdiction. I agree. Section 827.23 of the DPM provides that:

> When an agency refuses to restore or determines that it is not feasible to restore an employee under the provisions of law and this section, it shall notify the employee in writing of the reasons for its decision and of his or her right to ***grieve*** such determination in accordance with the provisions of chapter 16 of these regulations. (emphasis added).

It is an established matter of public law that the OEA no longer has jurisdiction over grievance appeals.[13] This Office is primarily charged with determining whether an agency had cause to take adverse action against an employee, and whether the penalty was within the range allowed by law. With regard to the penalty imposed by Agency, it is well-settled that this Office will not substitute its judgment for that of an agency imposing the penalty, provided that "managerial discretion has been legitimately invoked and properly exercised."[14] Once the charge is sustained, the Office will not disturb the penalty provided it is "within the range allowed by law, regulation or guidelines and is clearly not an error of judgment."[15]

---

[12] Employee Brief, Appendix 33.

[13] Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124. Assuming *arguendo* that OEA's jurisdiction extends to making a determination of whether Agency was required to make reasonable efforts to place Employee in the same or similar position after she recovered from her injuries, DPM § 827.22 states that: "An employee who was separated because of compensable injury and whose recovery takes longer than [one (1) year] from the date compensation began (or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the District government) shall be entitled to priority consideration for restoration to the position he or she left or an equivalent one, provided he or she applies for reappointment within thirty (30) days of cessation of compensation." Any application for re-employment would not be considered by OEA, as this Office is not vested with jurisdiction over those matters.

[14] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

[15] *Employee v. Agency* OEA Matter No. 1601-0158-01, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

In this case, I find that there is substantial evidence in the record to support a finding that Agency had cause to terminate employee. I further find that Agency did not abuse its discretion in choosing termination as the appropriate penalty. Based on the foregoing, Employee's termination should be upheld.

ORDER

It is hereby **ORDERED** that Agency's action of terminating Employee is **UPHELD**.

FOR THE OFFICE:

_____
SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE