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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	
EMPLOYEE <sup>1</sup>	)	OEA Matter No. J-0009-18R20R21
	)	
v.	)	
	)	Date of Issuance: November 17, 2022
DEPARTMENT OF SMALL AND	)	
LOCAL BUSINESS DEVELOPMENT,	)	
Agency	)	
	)	

THIRD OPINION AND ORDER  
ON PETITION FOR REVIEW

This matter has been previously before the Office of Employee Appeals’ (“OEA”) Board. Employee worked as an Administrative Officer with the Department of Small and Local Business Development (“Agency”). On September 11, 2017, Employee received a notice of termination. According to Agency, Employee was removed from her position during her probationary period. The effective date of removal was October 9, 2017.<sup>2</sup>

On January 29, 2018, the Administrative Judge (“AJ”) issued her Initial Decision.<sup>3</sup>

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<sup>1</sup> Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

<sup>2</sup> *Petition for Appeal*, p. 5 (October 17, 2017).

<sup>3</sup> The AJ found that pursuant to the District Personnel Manual (“DPM”) §§ 823.8 and 813.9(c), Employee’s appointment was through open competition in a different line of work; thus, she was required to serve a second probationary period. She held that the second probationary period was from May 28, 2017, through May 27, 2018. However, because Employee was removed from her position effective October 9, 2017, the AJ found that Employee did not complete the second probationary period. Accordingly, she dismissed Employee’s Petition for Appeal for lack of jurisdiction. *Initial Decision*, p. 1-5 (January 29, 2018).

Employee filed a Petition for Review of the Initial Decision. In her petition, Employee submitted a document titled “Checklist for Submissions of Competitive & Non-Competitive Recruitment Actions to DCHR/Priority Consideration Clearance for Non-Competitive Term Appointments.” The OEA Board held that because the Administrative Officer’s position was listed as a non-competitive appointment, Employee’s appointment was not the result of open competition. Thus, the Board ruled that there was not substantial evidence in the record to support the AJ’s ruling regarding open competition. Therefore, it remanded the matter to the Administrative Judge for further consideration.<sup>4</sup>

The AJ issued an Initial Decision on Remand on May 29, 2020. She held that Agency did not have cause to terminate Employee, and it did not consider the relevant factors before removing her. As a result, she ordered that Agency’s action be reversed and that Employee be reinstated with back pay and benefits lost as the result of her removal.<sup>5</sup>

On September 21, 2020, Employee filed a Petition for Enforcement. She provided that Agency’s General Counsel informed her that she would not be reinstated because she was a term employee, and her term expired.<sup>6</sup> Subsequently, the AJ held a status conference to determine Agency’s compliance with the Initial Decision on Remand.

The Administrative Judge issued an Addendum Decision on Compliance on February 17, 2021. She explained that Employee contended that upon the expiration of her term appointment, she should have reverted to her previous permanent appointment status, which she acquired from the District of Columbia Human Resources (“DCHR”).<sup>7</sup> The AJ opined that the final order issued

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<sup>4</sup> *Employee v. Department of Small and Local Business Development*, OEA Matter No. J-0009-18, *Opinion and Order on Petition for Review* (May 19, 2020).

<sup>5</sup> *Initial Decision on Remand*, p. 2-4 (May 29, 2020).

<sup>6</sup> *Employee’s Motion for Enforcement* (September 21, 2020).

<sup>7</sup> The AJ disagreed with Employee’s assertion and found that the issue was not properly before her, as it was not raised prior to the issuance of her Initial Decision, the Board’s Opinion and Order, or the Initial Decision on Remand.

by OEA was to reinstate Employee to her previous position of record within the Department of Small and Local Business Development. She found that Employee forfeited her Career Service, permanent appointment at DCHR for a Career term appointment position with Agency. Consequently, the AJ held that because Agency decided not to extend Employee's term appointment past the designated end date, it was not required to reinstate Employee. She ordered that Agency reimburse Employee with back pay and benefits from the time she was wrongfully terminated until the expiration date of her term appointment.<sup>8</sup>

On March 23, 2021, Employee filed a Petition for Review. She argued that she previously worked at DCHR as a Career permanent employee. Subsequently, she accepted a new position with Agency with an increased salary, at a different work site, and as a term employee. However, Employee asserted that when her term appointment expired, she was entitled to revert to her previous Career permanent status. It was Employee's position that a promotion from one District government agency to another was considered an internal placement and triggered her Career permanent protections. As a result, she requested that this Board reverse the Addendum Decision on Compliance and order that she be reinstated to a Career permanent position.<sup>9</sup>

Agency filed an Opposition to Employee's Petition for Review on April 27, 2021. It argued that the OEA Board lacked jurisdiction to review Employee's petition. Agency contended that the Board could review initial decisions but not decisions on compliance. Moreover, Agency

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<sup>8</sup> *Addendum Decision on Compliance*, p. 4-9 (February 17, 2021). In response to the Addendum Decision on Compliance, Agency submitted a Statement Regarding Compliance on March 22, 2021. It acknowledged that it had not reimbursed Employee's back pay and benefits, although it had made every effort to do so. Agency argued that pursuant to DPM § 1149.12, it was required to deduct any amount earned by employee from other employment during the period covered by the corrected personnel action from the back pay and benefits award. As a result, it requested an affidavit of outside earnings and erroneous payment; a benefits restoration agreement; and a transcript of tax returns from Employee. However, Agency argued that Employee failed to provide the required documentation. Accordingly, it requested that it be excused from the thirty-day compliance deadline imposed in the Addendum Decision on Compliance. *Agency's Statement Regarding Compliance* (March 22, 2021).

<sup>9</sup> *Petition for Review of the Administrative Judge's Initial Decision* (March 23, 2021).

explained that Employee resigned from her position with DCHR and accepted a new position with Agency under a term appointment. It opined that in accordance with DPM §§ 823 and 826, an employee hired under a term appointment cannot be converted to a permanent appointment if the initial appointment was made non-competitively. Agency reasoned that given the previous decisions issued in this case, it is undisputed that Employee was hired non-competitively, under a term appointment. Therefore, it was required to reimburse Employee back pay and benefits through the expiration of her term appointment date. Accordingly, it requested that this Board deny Employee's petition.<sup>10</sup>

In its Second Opinion and Order on Petition for Review, the Board held that Employee was attempting to have it address issues that were decided in the Initial Decision on Remand. It reasoned that pursuant to OEA Rule 632.2, Employee had the opportunity to appeal the Initial Decision on Remand before the requisite deadline. She did not.<sup>11</sup> Thus, it ruled that Employee's Petition for Review be denied on the basis that the Initial Decision on Remand was final and was not appealed to the Board within a timely manner.<sup>12</sup>

Additionally, the Board found that it was not permitted to consider Petitions for Review of

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<sup>10</sup> *Agency's Opposition* (April 27, 2021). Employee filed a Motion to Reply to Agency's Opposition on May 7, 2021, where she argued that the AJ's Addendum Decision on Compliance was a Second Initial Decision because the AJ clarified her Initial Decision on Remand. As a result, she again requested that this Board reverse the Addendum Decision on Compliance and reinstate her to a Career permanent position. *Petitioner's Motion to File a Reply to the Agency's Opposition to the Petition for Review of the Administrative Judge's Decision* (May 7, 2021). On May 19, 2021, Agency filed its Opposition to Employee's Motion and contended that OEA rules do not permit this Board to consider Petitions on Addendum Decisions on Compliance or any replies to oppositions to petitions for review. Thus, it requested that the Board deny Employee's motion. *Agency's Opposition to Employee's Motion to File a Reply and Agency's Motion to Strike Employee's Reply* (May 19, 2021). On May 27, 2021, Employee filed an Opposition to Agency's Motion to Strike. She opined that the AJ's decision on compliance deviated from OEA standards, and the AJ's attempt to clarify the record reversed her own ruling in the Initial Decision on Remand. Accordingly, Employee requested that she be reinstated to a Career Service Permanent position. *Petitioner's Opposition to the Agency's Motion to Strike Petitioner's Reply to the Agency's Opposition to the Petition for Review of the Administrative Judge's Decision* (May 27, 2021).

<sup>11</sup> The Board further held that Employee filed a Petition of Review of the Initial Decision on March 23, 2021, which was nearly one year after the deadline to file a petition for review.

<sup>12</sup> *Employee v. Department of Small and Local Business Development*, OEA Matter No. J-0009-18, *Second Opinion and Order on Petition for Review*, p. 5 (July 17, 2021).

an Addendum Decision on Compliance because the OEA rules, related to compliance and enforcement, provided no procedural avenue for an employee to appeal an Addendum Decision on Compliance to the Board. It noted that the OEA Board previously denied Petitions for Review of Addendum Decisions on Compliance in *Employee v. D.C. Child and Family Services*, OEA Matter No. 1601-0058-01C07, *Opinion and Order on Petition for Review* (January 25, 2010); *Employee v. Department of Mental Health*, OEA Matter No. 1601-0046-12C16, *Opinion and Order on Compliance* (December 3, 2019); and *Employee v. Department of Health*, OEA Matter No. 2401-0020-10R17C19, *Opinion and Order on Petition for Review* (June 30, 2020). As a result, it ruled that the matter was improperly before the Board, and it also denied Employee's Petition for Review on that basis.<sup>13</sup>

Employee appealed the Board's Second Opinion and Order to the Superior Court of the District of Columbia. The Court found that the AJ's Addendum Decision on Compliance should have been designated as a modified or supplemental Initial Decision, which would have been subject to appeal to the OEA Board. It held that the Initial Decision on Remand did not address the question of which position Employee should be reinstated; however, the AJ did address the issue in her Addendum Decision on Compliance. The Court reasoned that because the AJ undertook a process similar to that involved in reaching an Initial Decision – requiring briefs and clarifying or modifying her conclusions – the Initial Decision on Remand was not completed until the AJ made additional findings in the Addendum Decision on Compliance. Thus, it found that the Addendum Decision on Compliance was a supplemental or amended Initial Decision and remanded the matter to OEA for further consideration of the merits of the March 23, 2021, Petition for Review.<sup>14</sup>

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<sup>13</sup> *Id.*, 5-7.

<sup>14</sup> *Employee v. Office of Employee Appeals*, 2021 CA 002345 P(MPA), p. 8-11 (D.C. Super. Ct. Sept. 8, 2022).

### Substantial Evidence

According to OEA Rule 633.3(c), the Board may grant a Petition for Review when the AJ's findings are not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then they must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.<sup>15</sup> After a review of the record, this Board believes that the AJ's ruling was based on substantial evidence.

### Career Service Rights

In her March 2021 Petition for Review, Employee argues that a promotion from one District government agency to another was considered an internal placement and triggered her Career permanent protections.<sup>16</sup> The relevant DPM sections are as follows:

833.2 Any internal placement of a Career Service appointee to a position with less rights and benefits shall not be effective unless the employee has waived the rights and benefits in writing; and the waiver shall be made a permanent part of the employee's Official Personnel Folder.

834.1 Except as waived in accordance with § 833.2, an employee's rights and benefits with respect to continued employment shall not be reduced by promotion, demotion, or reassignment.

Employee voluntarily resigned from a position with DCHR and accepted a position with Agency.<sup>17</sup> However, Agency correctly provided that this move did not impact Employee's designation as a Career Service employee. The record reflects that Employee was a Career Service

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<sup>15</sup>*Black's Law Dictionary*, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

<sup>16</sup> *Petition for Review of the Administrative Judge's Initial Decision* (March 23, 2021).

<sup>17</sup> *Agency's Opposition*, p. 11 (April 27, 2021).

appointee with DCHR who accepted a Career Service term appointment with Agency.<sup>18</sup> Employee's offer letter from Agency provided that employee was "selected . . . for the Career Service Term position of Administrative Officer, Career Service – Term Appt, Grade 12/Step 1. . . ."<sup>19</sup> DPM § 899.1 defines Career Service as "all positions, including part-time positions, of the District government that are not included in the Educational Service, Excepted Service, Management Supervisory Service, or Executive Service, or otherwise excluded by section 800 of this chapter." Term appointment positions are included in Chapter 8 of the DPM, which specifically covers Career Service employees.

Moreover, DPM § 826.3 provides that "after satisfactory completion of the probationary period, and prior to the expiration date of the appointment, separation of a term appointee for cause shall be in accordance with chapter 16 of these regulations." The analysis provided by the AJ in her Initial Decision on Remand focuses on Agency's failure to accord Employee the Career Service right protection that cause be established for her removal. Not only did Employee retain Career Service rights and benefits in this matter, the basis of her award of back pay and reinstatement were the result of those protections. Thus, contrary to Employee's contention, she retained Career Service rights and benefits and did not have less rights which would have required a waiver.

### Term Appointment

Employee argues that when her term appointment expired, she was entitled to revert to her previous Career permanent status.<sup>20</sup> DPM §§ 823.4 and 823.5 address term appointments through open competition and those made non-competitively. Appointments to positions through open competition or non-competitively matter greatly in determining the type of status an employee can

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<sup>18</sup> *Id.*

<sup>19</sup> *Agency's Answer to Employee's Petition for Appeal*, Exhibit #4 (November 16, 2017).

<sup>20</sup> *Petition for Review of the Administrative Judge's Initial Decision* (March 23, 2021).

hold and whether a term appointment conversion can occur.

The relevant sections of DPM § 823 provide the following:

823.4 Term appointments at and above grade level CS-13 or equivalent shall result from open competition. . . .

823.5 An agency may make a non-competitive term appointment to a position at or below grade level CS-12, or equivalent. . . .

823.8 An employee serving under a term appointment shall not acquire permanent status on the basis of the term appointment and shall not be converted to a regular Career Service appointment, unless the initial term appointment was through open competition within the Career Service and the employee has satisfied the probationary period.

823.9 Employment under a term appointment shall end automatically on the expiration of the appointment, unless the employee has been separated earlier.

Pursuant to DPM § 823.5, a non-competitive term appointment can be made for a Career Service position at or below a grade 12. This OEA Board previously ruled in its first Opinion and Order, and both parties concede, that Employee did not obtain her position through open competition; Employee held a non-competitive position.<sup>21</sup> The record clearly establishes that Agency offered Employee a non-competitive term appointment at a grade level CS-12, which is consistent with DPM § 823.5.<sup>22</sup> Therefore, DPM § 823.5 and not § 823.4 is applicable in this case.

Having ruled that Employee's position was obtained non-competitively, this Board can now determine if a conversion could occur. In its answer to Employee's Petition for Review, Agency contended that an employee hired under a term appointment could not be converted to a permanent appointment unless the initial appointment was through open competition within the

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<sup>21</sup> *Employee v. Department of Small and Local Business Development*, OEA Matter No. J-0009-18, *Opinion and Order on Petition for Review*, p. 7-8 (May 19, 2020).

<sup>22</sup> As previously provided, Employee's offer letter provided that she was "selected under Job Requisition No. JO-1704-8621, for the Career Service Term position of Administrative Officer, Career Service – Term Appt, Grade 12/Step 1. . . ." *Agency's Answer to Employee's Petition for Appeal*, Exhibit #3 (November 16, 2017).

Career Service.<sup>23</sup> DPM § 823.8 provides that an employee serving a term appointment shall not acquire permanent status and shall not be converted to a regular Career Service appointment, unless the initial term appointment was through open competition. Again, it is undisputed that Employee was hired non-competitively, under a term appointment. Therefore, given the plain language of this section of the regulation, Employee could not acquire permanent status based on her initial term appointment being obtained non-competitively. Likewise, she could not be converted to a regular Career Service appointment because her initial term appointment did not occur through open competition.

Finally, in accordance with DPM § 823.9, term appointments end automatically on the expiration of the appointment, unless the employee has been separated earlier. As provided in her offer letter, Employee's term was not to exceed beyond June 27, 2018.<sup>24</sup> The effective date of her removal was October 9, 2017, which was prior to the expiration of her term.<sup>25</sup> Therefore, Agency complied with the terms of DPM § 823.9.

Because Employee's position was obtained non-competitively, she could not have acquired permanent status on the basis of the term appointment. Furthermore, her position could not have been converted to a regular Career Service appointment because the initial term appointment was not obtained through open competition. Accordingly, the AJ correctly held that Agency was only required to reimburse Employee back pay and benefits through the expiration of her term appointment date. Thus, Employee's March 23, 2021, Petition for Review is denied.

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<sup>23</sup> *Agency's Opposition* (April 27, 2021).

<sup>24</sup> *Id.*

<sup>25</sup> *Petition for Appeal*, p. 5 (October 17, 2017).

**ORDER**

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

**FOR THE BOARD:**

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Clarence Labor, Jr., Chair

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Jelani Freeman

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Peter Rosenstein

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Dionna Maria Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.