THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
LaTonya Lewis	)	OEA Matter No. 1601-0046-08
Employee	)	
	)	Date of Issuance: February 22, 2012
v.	)	
	)	Senior Administrative Judge
D.C. Public Schools	)	Joseph E. Lim, Esq.
Agency	)	
	)	

Iris Barber, Esq., Agency Representative
Lathal Ponder, Esq., Employee Representative

INITIAL DECISION

INTRODUCTION AND BACKGROUND

On February 12, 2008, Employee, a Custodian Foreman Supervisor SW-1, filed a Petition for Appeal (PFA) of Agency's May 5, 2005, action to remove her effective October 14, 1995.

This matter was initially assigned to Judge Muriel Aikens-Arnold on April 21, 2008. She convened a hearing on August 6, 2009, but cancelled the hearing after Employee objected to Agency's tardy submission of documentary exhibits. This matter was then assigned to Senior Administrative Judge Rohulamin Quander after Judge Aikens-Arnold left the employ of this Office. After Judge Quander retired, this matter was reassigned to this Judge on November 14, 2011. I convened a Status Conference and ordered the parties to submit legal briefs after the parties signed a stipulation of facts. The record is closed.

JURISDICTION

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

ISSUES

Whether this appeal should be dismissed.

STATEMENT OF FACTS

The following facts are either undisputed or stipulated to by the parties:[1]

[1] See signed Stipulation of Facts dated November 28, 2011.

1. Employee was hired by Agency in 1988.
2. Employee suffered an on-the-job injury on March 9, 1992.
3. Employee became a Custodian Foreman on December 1, 1992. (Agency attachment 1)
4. Employee suffered another on-the-job injury on April 14, 1994.
5. Employee stipulates that she was still able to perform light duty from April 14, 1994, through April 6, 2003.
6. Despite Employee's stipulation that she could perform light duty, it is undisputed that Employee received benefits for temporary total disability from Worker's Compensation from April 1994 through 2003.
7. In the interim, because Employee had been receiving Workman Compensation for more than two years, Agency transferred her benefits to the Workers and Crime Compensation department on April 12, 1995. (Agency attachment 3)
8. By letter dated September 27, 1995, Employee filed a grievance against Agency, stating that management had not provided work for her because of her disability.
9. Effective October 14, 1995, Agency terminated Employee's employment. However, Agency signed this into action on May 5, 2005. (Agency attachment 5 of Agency's response to order.)
10. On February 26, 1996, Agency ruled that due to Employee's continuing medical disability, she could not be returned to her job. Agency denied Employee's grievance on the grounds that there is no such thing as a light duty assignment for Employee's position of Custodian Foreman. (Agency attachment 4)
11. Employee appealed the denial and on March 23, 1999, the Department of Employment Services upheld Agency's denial. (Agency attachment 6)
12. Despite this decision, Agency sought to find Employee a position suited to her disability and qualifications. On September 17, 1999, Agency concluded that there was no current position available that would meet Employee's needs and qualifications. (Agency attachment 7)
13. On December 2, 2002, Employee made a claim to the Disability Compensation Program for carpal tunnel syndrome. This claim was denied.
14. Employee appealed the 2002 denial to the D.C. Court of Appeals in docket no. 04-AA-1274.
15. In 2003, the District of Columbia Department of Employment Services (DCDOES) terminated her temporary total disability benefits based on the medical opinions derived from two independent medical evaluations.
16. After a January 9, 2004, evidentiary hearing, the denial of disability benefits for Employee was upheld by Administrative Law Judge Robert Middleton. (See page 2 of Agency's response to order.)
17. Employee also appealed the 2003 termination of benefits to the D.C. Court of Appeals in docket no. 04-AA-1275.
18. In a December 27, 2006, Memorandum Opinion and Judgment, the D.C. Court of Appeals upheld both decisions of the DCDOES denying disability benefits to Employee in both 04-AA-1274 and 04-AA-1275. (Agency attachment 2 of Agency's response to order.)
19. On February 12, 2008, Employee filed the instant appeal of Agency's termination of her position, claiming that she first received the termination notice in 2008.
20. Employee stipulates that the only thing she is appealing is her job termination by Agency

with an effective date of October 14, 1995. She stipulates that she is not appealing Agency's failure to place her in a light duty position appropriate to her qualifications.

21. Employee further stipulates that the Social Security Administration has determined her to be totally disabled from December 2005 to the present.

Positions of the Parties:

Employee's Position

Employee does not deny that she had presented medical evidence to the Office of Worker's Compensation to show that she was totally disabled from the date of her injury to the date of her October 14, 1995, termination and beyond. Nor does she deny that she is currently totally and permanently disabled and thus cannot return to her former position of record. Nonetheless, she contends that Agency's removal action is flawed and that she is entitled to back pay from the date that her disability payments were terminated in 2004 until the date she became totally disabled in December 2005.

Agency's Position.

Agency states that Employee has remained disabled for more than two years and has been unable to satisfactorily perform one or more of the major duties of her position. Agency contends that Employee was removed for cause pursuant to D.C. Official Code provisions and thus, its action should be upheld.

ANALYSIS AND CONCLUSIONS

D.C. Official Code §1-616.51 (2001) requires the Mayor, for employees of agencies for whom he is the personnel authority, to "issue rules and regulations to establish a disciplinary system that includes," *inter alia*, "1) A provision that disciplinary actions may only be taken for cause; [and] 2) A definition of the causes for which a disciplinary action may be taken." The action herein is under the Mayor's personnel authority. Said regulations were published by the D.C. Office of Personnel (DCOP) 47 D.C. Reg. 7094 *et seq*. (September 1, 2000).

In an adverse action, this Office's Rules and Regulations provide that an agency must prove its case by a preponderance of the evidence. "Preponderance" 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." OEA Rule 629.1, 46 D.C. Reg. 9317 (1999).

D.C. Official Code § 1-623.45[2] is relevant to this appeal and provides that:

> (a) In the event the individual resumes employment with the District government, the entire time during which the employee was receiving compensation under this subchapter shall be

[2] A subsequent amended version reduced the period in 1-623.45 (b)(2) from two years to one year.

credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service.

(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 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 had a disability, including the rights to tenure, promotion, and safeguards in reduction-in-force procedures, *provided that injury or disability had been overcome within two years after the date of commencement of compensation* and provision of all necessary medical treatment needed to lessen disability 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; or

(2) If the injury or disability is overcome within a period of more than 2 years after the date of commencement of payment of compensation or the provision of medical treatment by the Disability Compensation Fund, 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 another department or agency.

In essence, D.C. Official Code § 1-623.45(b)(1) states that an agency must provide an employee with their former or an equivalent position, with tenure and promotion rights and safeguards against RIF actions, if the employee overcomes their disability within two years. Section 1-623.45(b)(2) goes on to provide that if an employee takes more than two years to overcome their disability, then the agency is required to make a reasonable effort to place the employee in their former or equivalent position. Therefore, an employee is entitled to a host of rights and protections under section 1-623.45(b)(1) if they overcome their disability within two years, and even if they overcome their disability after a period of more than 2 years, the agency is still required to make a reasonable effort to place them in a position.

D.C. Official Code § 1-623.45 provided that an employee who overcame a disability within two years, has the right to immediately and unconditionally resume their former position or an equivalent position. Agency argued that the corollary to that position also applied. Hence, if an employee does not overcome their disability within two years, then they are not entitled to

resume their former position. Agency contends that as of October 14, 1995, the date of her termination, Employee still had not overcome her disability. Therefore, it was proper in terminating Employee because she was unable to satisfactorily perform one or more major job duties of her position.

Here, it is undisputed that at the October 14, 1995, effective date of her involuntary separation, Employee was still found to be totally disabled and indeed continued to receive total disability benefits from the Office of Worker's Compensation until 2003.[3] Since it is undisputed that Employee had not yet overcome her total disability in 1995, then D.C. Official Code § 1-623.45 does not apply.

Employee speculates that the only possible reason for Agency's involuntary separation of her in 1995 was because she applied for, and received, Worker's Compensation total disability benefits. Employee argues that such a retaliatory action by Agency entitles her to compensation under D.C. Official Code §32-1542.

D.C. Official Code, § 32-1542 (2001 Ed.) Retaliatory Actions by Employer Prohibited, in pertinent part reads as follows:

> It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter. Any employer who violates this section shall be liable to a penalty of not less than $100 or more than $1,000, as may be determined by the Mayor. All such penalties shall be paid to the Mayor for deposit in the special fund as described in § 32-1540, and if not paid may be recovered in a civil action brought in the Superior Court of the District of Columbia. Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination; *provided, that if such employee ceases to be qualified to perform the duties of his employment, he shall not be entitled to such restoration and compensation.* (Emphasis added).

Thus, Employee cannot avail herself of D.C. Official Code § 32-1542, as it explicitly states that if an employee ceases to be qualified to perform her duties of employment (such as being totally disabled), then said employee is not entitled to restoration and compensation.

I find that Employee's appeal should be dismissed for failure to state a claim for which she

[3] Although it was unseemly for Agency to retroactively separate an employee almost 10 years later, Employee did not bring up any statute or regulation that would prohibit Agency's action.

is entitled to relief.[4] Based on the undisputed facts on record and the parties' signed stipulation, Employee presents no set of facts which would entitle her to any relief that this Office can award.

It is undisputed that Employee was totally disabled at the time of her October 14, 1995, separation. At the present time, Employee stipulates to the fact that she is permanently disabled. Thus, assuming for the sake of argument that Employee is entitled to be returned to work, this remedy is no longer available.

Nor is Employee entitled to back pay and benefits, either during the time of her October 14, 1995, separation or for the period of 2004 through December 2005. It is undisputed that during the time of her October 14, 1995, separation, Employee was receiving temporary total disability payments from the Office of Workmen's Compensation. Employee cannot cite any statute that would entitle her to workers compensation and a salary (or backpay) at the same time. Chapter 15 of Title 32 of the District of Columbia Official Code discusses worker's compensation. Specifically, D.C. Official Code § 32-1503(b) states that an employer is liable for "compensation for injury or death without regard to fault as a cause of the injury or death." D.C. Official Code § 32-1504(b) further states that "[T]he compensation to which an employee is entitled under this chapter shall constitute the employee's *exclusive remedy against the employer* . . ." [Emphasis supplied.]

Finally, the compensation allocated depends on the type of disability, but generally speaking, ". . . payment of benefits shall be 66 2/3% of the employee's average weekly wage." *See* D.C. Official Code § 32-1508(7). Thus we can see that Chapter 15 of Title 32 emphatically states that an employee is *not* entitled to a regular salary or back pay in addition to worker's compensation benefits.

Employee cannot also plausibly claim back pay for the period of 2004 through December 2005. Although D.C. Official Code § 1-623.45 obligates Agency to try to make a reasonable effort to place the employee in their former or equivalent position, the record shows that Agency did try to do so.[5] In addition, D.C. Official Code § 1-623.45(b)(2) makes it clear that where the employee took more than two years to overcome her disability, Agency is no longer obligated to return her to her former position after a reasonable effort has been made to find her an equivalent position.

Agency initiated the removal action against Employee when the District Personnel Manual (DPM) contained a two-year provision. Based on a review of the entire record, this Judge concludes that Agency's removal action was allowed under the D.C. Official Code.

In conclusion, after considering all the undisputed facts and factual stipulations in this

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[4] A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (May 21, 2007).

[5] In addition, based on the signed Stipulation of Facts, Employee is *not* appealing Agency's failure to find her a light duty position.

matter, I find that Employee can prove no set of facts in support of her claim which would entitle her to a relief that this Office is empowered to provide. I must therefore dismiss this appeal for failure to state a claim which would entitle her to relief. .

ORDER

It is hereby ORDERED that Employee's Appeal is DISMISSED.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge