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

In the Matter of:	)	
	)	
ESTATE OF ALEXIS PARKER,	)	
Employee	)	OEA Matter No. J-0007-11R13R17
	)	
v.	)	
	)	Date of Issuance: February 26, 2019
DEPARTMENT OF HEALTH,	)	
Agency	)	
	)	

OPINION AND ORDER  
ON SECOND REMAND

This matter was previously before this Board. Alexis Parker (“Employee”) worked as a Public Health Outreach Technician with the Department of Health (“Agency”).<sup>1</sup> On April 8, 2010, Employee received a notice of termination from her position.<sup>2</sup> Employee challenged the termination by filing a Petition for Appeal with the Office of Employee Appeals (“OEA”) on October 7, 2010. She argued that because her position was a reinstatement, Agency improperly placed her in a probationary status.<sup>3</sup> Additionally, she contended that she did not receive

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<sup>1</sup> Prior to holding this position, Employee was a Community Relations Specialist with Agency. She was removed from the Community Relations Specialist position on September 4, 2009, pursuant to a Reduction-in-Force (“RIF”). Thereafter, on October 16, 2009, the Public Health Outreach Technician position became available with Agency. Since Employee was a part of Agency’s Reemployment Priority Placement Program (“ARPP”), she was given priority consideration for the Public Health Outreach position. She was hired to fill the position on February 16, 2010. *Agency’s Answer*, Tabs #2, 3, 6, and 7 (November 3, 2010).

<sup>2</sup> Employee was terminated while in her probationary period.

<sup>3</sup> Employee relied on D.C. Personnel Regulations (“DPR”), Chapter 8, Part I, § 816.1, which states:

Except for a person who has a retreat right to a position in the Career Service as provided in chapter 9 or 10 of these regulations, a person shall have reinstatement eligibility for three (3) years

information regarding her appeal rights to OEA; that her termination was without cause, prior notice, or due process; and that she should have been paid at a higher rate when she was reinstated in accordance with DPR § 1130.5.<sup>4</sup> Therefore, Employee requested that she be reinstated with back pay and benefits, damages, and attorney's fees.<sup>5</sup>

On January 10, 2011, the OEA Administrative Judge ("AJ") issued an order directing Employee to brief whether her appeal should be dismissed for lack of jurisdiction because she was in a probationary status at the time of her termination. In response, Employee asserted that since she completed a probationary period in her previous position, pursuant to DPR §§ 816.2 and 816.5, she was not required to complete a new probationary period upon reinstatement.<sup>6</sup> Employee did not believe that DPR § 813.8 required her to serve another probationary period.<sup>7</sup> She explained that the ARPP gave her priority consideration for reemployment, and thus, she was not hired through open competition. Finally, Employee reasoned that OEA had jurisdiction

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following the date of his or her separation if he or she meets both of the following requirements  
(a) The person previously held a Career Appointment (Permanent) and  
(b) The person was not terminated for cause under chapter 16 of these regulations.

<sup>4</sup> DPR § 1130.5 provides that:

[w]hen an employee is reinstated in accordance with Chapter 8 of these regulations, the agency may pay the employee at any rate of the grade that does not exceed his or her highest previous rate; however, if the employee's highest previous rate falls between two (2) rates of the new grade, the agency may pay the employee at the higher rate.

<sup>5</sup> *Employee's Petition for Appeal*, p. 3-6 (October 7, 2010).

<sup>6</sup> DPR § 816.2 states that:

A person having reinstatement eligibility under § 816.1 may be appointed competitively or noncompetitively to a position at a grade no higher than the grade last held under a Career Appointment (Probational) or a Career Appointment (Permanent) in the Career Service in a District agency, except that a reinstatement to a position with a promotion potential higher than the known promotion potential of the last position occupied shall be effected as provided in § 816.4.

DPR § 816.5 states that "[a] person who is reinstated under the provisions of § 816.2, 816.4, or 816.6 shall be given a Career Appointment (Permanent)."

<sup>7</sup> DPR § 813.8 provides that "except when the appointment is effected with a break in service of one (1)-workday or more, or as specified in subsection 812.2(a) of this chapter or subsection 813.9 of this section, an employee who once satisfactorily completed a probationary period in the Career Service shall not be required to serve another probationary period."

over her appeal because she was in a Career Permanent status at the time of her termination.<sup>8</sup>

Agency submitted its response on February 11, 2011. It argued that although the ARPP provided Employee priority consideration for reemployment, her appointment was the result of open competition. It explained that on October 16, 2009, a vacancy announcement for the position was issued, and it was open to the general public. Thereafter, pursuant to the ARPP, Employee's name was submitted for consideration for the appointment. However, because the appointment was in a different series and had different duties and responsibilities than Employee's previous position, she was required to serve a second probationary period.<sup>9</sup> Employee was still within her probationary period when she was terminated. Therefore, Agency believed that OEA lacked jurisdiction over the appeal and requested that the matter be dismissed.<sup>10</sup>

On April 28, 2011, the AJ issued her Initial Decision. She held that because Agency's vacancy announcement for the Public Health Outreach Technician position was open to the general public, Employee was required to apply for the position through open competition. Moreover, the AJ found that Employee's formal offer letter stated that she was subject to satisfactorily completing a one-year probationary period. Accordingly, she ruled that pursuant to DPR § 813.3, Employee was in a probationary status at the time of her termination. Thus, she held that OEA lacked jurisdiction over Employee's appeal, in accordance with DPR § 814.3.<sup>11</sup>

On June 2, 2011, Employee filed a Petition for Review and argued that the Initial Decision was not based in fact or law; that the AJ did not accurately examine the evidence of

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<sup>8</sup> *Employee's Brief on Jurisdiction* (February 1, 2011).

<sup>9</sup> Agency notes that Employee knew of this requirement because it was made clear in her offer letter and her Standard Form 50 ("SF-50"). Therefore, it believed that Employee's improper classification argument was a grievance, and as such, OEA lacked jurisdiction to consider it.

<sup>10</sup> *Agency's Response to Employee's Brief on Jurisdiction* (February 11, 2011).

<sup>11</sup> *Initial Decision*, p. 2-3 (April 28, 2011).

record; and that the AJ did not consider her arguments.<sup>12</sup> In response to the Petition for Review, Agency argued that there was substantial evidence to support the AJ's finding that Employee was in a probationary status when she was terminated. Therefore, Agency believed that the Board should affirm the Initial Decision.<sup>13</sup>

The OEA Board issued its Opinion and Order on September 18, 2012. It held that in accordance with DPR § 813.7, Employee was required to serve a second probationary period because there was a break in service. The Board found that the time between the RIF action and when Employee was hired for the new position was a break in service of five months and twelve days. Thus, the exception for not serving a second probationary period did not apply to Employee under the DPR. Additionally, the Board held that Employee was required to serve a second probationary period because she was appointed through open competition and her position was in a different line of work. Accordingly, it ruled that Agency properly removed Employee during her probationary period and denied Employee's Petition for Review.<sup>14</sup>

The matter was appealed to the Superior Court for the District of Columbia. The Court held that the AJ's decision was based on an incorrect reading of the record; a misunderstanding of the facts and arguments; and a failure to set out clearly the reasons for the decision reached. Therefore, the matter was remanded to the AJ for further findings.<sup>15</sup>

The AJ issued an Initial Decision on Remand on October 22, 2015. She explained that Agency posted a vacancy notice, which stated that it was open to the public, for two Public Health Outreach Technician positions. The notice provided that employees who were eligible

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<sup>12</sup> *Petition for Review* (June 2, 2011).

<sup>13</sup> *Agency's Answer to Employee's Petition for Review* (July 7, 2011).

<sup>14</sup> *Alexis Parker v. Department of Health*, OEA Matter No. J-007-11, *Opinion and Order on Petition for Review*, p. 5-7 (September 18, 2012).

<sup>15</sup> *Alexis Parker v. District of Columbia Department of Health*, 2012 CA 008265 P(MPA) (D.C. Super. Ct. November 13, 2013).

through ARPP would be given priority consideration, if they qualified. The AJ held that the vacancy announcement further noted that the posting would be cancelled upon the non-competitive selection of an eligible ARPP candidate. However, she found that Employee was not hired through a non-competitive selection process but through open competition. Thus, she ruled that Employee was required to serve a second, one-year probationary period because she was appointed as a result of open competition in a different line of work.<sup>16</sup> As the result, the AJ reasoned that Employee was terminated as an at-will employee during her probationary period. Accordingly, she ruled that because OEA lacked jurisdiction over at-will employees, Employee's appeal must be dismissed for lack of jurisdiction.<sup>17</sup>

Employee filed a second Petition for Review on November 25, 2015. She contended that the AJ erred in finding that she was given priority consideration and hired through open competition. It was Employee's position that an appointment through ARPP is not an appointment through open competition because ARPP does not permit Agency to consider applicants without regard to current or former District government employment. Additionally, she noted that she did not apply for the Public Health Outreach Technician position but was referred to the position based on her ARPP status. Employee also explained that all of the employees who were considered for the position were Displaced Employees in the ARPP. Thus, she believed that this proved that she was not hired through open competition. Moreover, Employee asserted that the AJ erred in finding that her new position and the previous position she held did not involve similar duties. She contended that in accordance with DPR § 813.8(c), the determination was to have been made by the appropriate personnel authority. Employee explained that Agency offered no evidence that the appropriate personnel classified the positions

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<sup>16</sup> The AJ found that Employee failed to provide evidence to support a finding that the two positions were substantially similar in their actual duties and responsibilities.

<sup>17</sup> *Initial Decision on Remand*, p. 6-9 (October 22, 2015).

differently. Therefore, she requested that OEA reverse the Initial Decision on Remand.<sup>18</sup>

On December 30, 2015, Agency filed its response to Employee's Petition for Review. It argued that Employee failed to provide evidence that she was hired through a non-competitive process. Agency contended that the AJ's reasoning that Employee was hired through open competition was supported by substantial evidence. It explained that just because Employee was hired through ARPP, does not automatically mean she was hired non-competitively. Additionally, Agency claimed that Employee was on notice of her need to serve a second probationary period. Furthermore, Agency opined that the Public Health Outreach Technician and Community Relations Specialist positions were in a different line of work. As a result, it provided that the AJ properly dismissed Employee's appeal for lack of jurisdiction. Therefore, it requested that Employee's Petition for Review be denied.<sup>19</sup>

On April 18, 2017, the OEA Board issued its Opinion and Order on Remand. The Board explained that the Electronic District Personnel Manual ("E-DPM") instructions regarding the ARPP program suggested that employees on the ARPP list were matched through open vacancy announcements. Thus, it appeared that vacancy announcements that are open to the public triggered the use of the ARPP list. Additionally, the Board found that the AJ failed to adequately address the issue of Career Service employment through reinstatement. It explained that the record, in its state at the time of its decision, did not provide the clarity needed to render a decision in the matter. Moreover, the Board recommended that the AJ address the complicated issues raised by the parties as it pertains to sections of the DPR. Consequently, the matter was remanded to the AJ for further findings.<sup>20</sup>

On March 12, 2018, the AJ held an evidentiary hearing. The AJ issued her Second Initial

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<sup>18</sup> *Petition for Review*, p. 1-12 (November 25, 2015).

<sup>19</sup> *Agency's Response to Employee's Petition for Review*, p. 1-11 (December 30, 2015).

<sup>20</sup> *Opinion and Order on Remand*, p. 9-12 (April 18, 2017).

Decision on Remand on July 23, 2018. She found that Employee was hired through open competition. The AJ determined that the Public Health Outreach Technician position was open to the public, without regard to current or former employment with the District government. She opined that the four ARPP candidates were matched to the vacancy and their qualifications were reviewed before those of the general public. The AJ determined that because Employee was appointed as a result of open competition and her new position was in a different line of work from her previous position, Employee was required to serve a second probationary period. Additionally, the AJ found that Employee had a break in service of more than one day from when her previous position ended to the start date of her new position. The AJ held that in accordance with DPM § 814.3, a termination during an employee's probationary period cannot be appealed to OEA. Accordingly, the AJ dismissed the matter for lack of jurisdiction.<sup>21</sup>

On August 13, 2018, Employee filed a Petition for Review of the Second Initial Decision on Remand. She contests the AJ's assertion that she was appointed through ARPP and not through open competition. Employee also argues that there is not substantial evidence in the record to support that she was hired or appointed through open competition. She asserts that the AJ did not have the authority to determine if the positions are in different lines of work, but she was responsible for making the finding that the appropriate personnel authority made the determination that the positions were in different lines of work. Furthermore, Employee contends that the AJ inaccurately assessed the testimony of the witness from the evidentiary hearing. Additionally, she claims that the witness provided untrue statements that are not based on the DPR. Finally, Employee argues that classification or job series have no impact on an employee having to serve another probationary period once having completed the required one-year probationary period. She explains that the difference in job series or classification series

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<sup>21</sup> *Second Initial Decision on Remand*, p. 5-9 (July 23, 2018).

was not a reason to change her Career Permanent Status to Probationary Status. Therefore, Employee requests that the Second Initial Decision on Remand be reversed.<sup>22</sup>

Agency filed its response to Employee's petition on September 17, 2018. It submits that the AJ was correct in finding substantial evidence to support the Second Initial Decision on Remand. Agency argues that Employee failed to establish that the witness's testimony was untruthful. It notes that Employee did not provide any witnesses of her own or any documents at the evidentiary hearing to rebut its witness's testimony. Additionally, Agency asserts that the evidence in the record clearly demonstrates that Employee was rehired through open competition in a different line of work and that although Employee had priority consideration through ARPP, the position was still subject to open competition because other individuals were competing for the position. Further, it explains that despite Employee's contentions, she was selected for the Public Health Outreach Technician position through reinstatement pursuant to DPM § 816.1. Agency asserts that the job announcement for the position for which Employee was hired was made available to the general public; therefore, the position was subject to open competition. Additionally, Agency reiterates that the SF-50, which reflects that Employee was hired for a second time by Agency on February 16, 2010, also shows that Employee was hired through open competition. Therefore, it requests that the OEA Board uphold the Second Initial Decision on Remand.<sup>23</sup>

On October 3, 2018, Employee filed a response to Agency's opposition to the petition. She argues that the job announcement and the SF-50 do not support that she was hired through open competition. Additionally, Employee explains that open competition is the receipt of applications and consideration of individuals who were never employees of the District

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<sup>22</sup> *Petition for Review of the Administrative Judge's Second Initial Decision on Remand*, p. 6-16 (August 13, 2018).

<sup>23</sup> *Agency's Opposition to Petition for Review of Second Initial Decision on Remand*, p. 8-14 (September 17, 2018).



government and there is no evidence of applications or consideration from individuals who were never employed by the District government. Further, Employee maintains her same arguments that she was not rehired in a different line of work and that she was eligible for Career Service reinstatement. She, again, asserts that a different classification series is not a factor in having to serve a probationary period. Accordingly, she requests that the AJ's decision be reversed.<sup>24</sup>

Employee filed a request for oral arguments on the Petition for Review on October 3, 2018.<sup>25</sup> Subsequently, on October 26, 2018, Employee filed Public Comments Before the OEA Board. She submits the same arguments that were filed throughout her appeal.<sup>26</sup> On October 29, 2018, Employee filed an addendum to her public comments. She, again, argues that the AJ must address the complicated issues raised by the parties as it pertains pursuant to DPR sections 816.1, 816.2, 816.4, and 816.5.<sup>27</sup> On December 3, 2018 and February 8, 2019, Employee filed updates to her public comments. She maintains that at all times she was Career Service status.<sup>28</sup>

#### Break in Service

As it relates to the AJ's ruling on open competition, DPR Section 813.2 provides 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 . . . ." Section 813.8 goes on to provide that "except when the appointment is effected with a break in service of one (1) workday or more, or as specified in sections 812.2 (a) of this chapter or section 813.9 of this section, an employee who once satisfactorily completed a probationary period in the Career Service shall

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<sup>24</sup> *Reply to Agency's Opposition to Petition for Review of Second Initial Decision on Remand*, p. 6-13 (October 3, 2018).

<sup>25</sup> *Decadent Parker's Request Oral Argument on the Petition for Review* (October 3, 2018).

<sup>26</sup> *Public Comments Before the OEA Board*, p. 1-11 (October 26, 2018).

<sup>27</sup> *Public Comments Before the OEA Board*, p. 1-4 (October 29, 2018).

<sup>28</sup> *Public Comments Before the OEA Board*, p. 6-7 (December 3, 2018) and *Public Comments Before the OEA Board* (February 8, 2019).

not be required to serve another probationary period.”<sup>29</sup> In the current matter, Employee argues that she was in a Career Permanent status at the time of termination because she completed her probationary period at another District agency prior to working at Agency. The record reflects that Employee was removed from the Community Relations Specialist position on September 4, 2009, pursuant to a RIF. Subsequently, she was hired as a Public Health Outreach Technician on February 16, 2010.<sup>30</sup> As this Board provided in its 2012 decision, there was a clear break in service in this matter of five months and twelve days.<sup>31</sup> Thus, the requirement for Employee to serve a secondary probationary period would be warranted under this regulation.

### Open Competition

However, *assuming arguendo* that there was no break in service, DPR Section 813.9(c) provides that “an employee who once satisfactorily completed a probationary period in the Career Service shall be required to serve another probationary period when the employee is appointed as a result of open competition to a position in a different line of work, as determined by the appropriate personnel authority based on the employee’s actual duties and responsibilities.” Agency proved that the position was the result of open competition. During the evidentiary hearing, Agency’s witness provided that the Public Health Outreach Technician position was open to the public, which designates that it is the result of open competition. The witness explained, and the AJ found convincing, that the position is still the result of open competition, even if it is filled through the Agency Re-employment Priority Program.<sup>32</sup> Moreover, Agency provided the Job Opening Announcement, which clearly provides that the

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<sup>29</sup> It appears that the AJ incorrectly cited to DPR Section 813.3 when outlining this language in the Initial Decision. This Board deems this mistake as *de minimus* because the content remains intact.

<sup>30</sup> *Agency’s Answer, Appendix of Documents* (November 3, 2010).

<sup>31</sup> *Alexis Parker v. Department of Health*, OEA Matter No. J-0007-11, *Opinion and Order on Petition for Review*, p. 5 (September 18, 2012).

<sup>32</sup> *OEA Hearing Transcript*, p. 37 and 65 (March 12, 2018).

area of consideration is “Open to the General Public.”<sup>33</sup> Thus, the requirement of DPR Section 813.9(c) has been met.

#### Different Line of Work

As it relates to the requirement that employee be appointed to a position within a different line of work, Agency’s witness also provided the clear differences between the Public Health Outreach Technician and the Community Relations Specialist positions. Additionally, it provided position descriptions for both positions. The witness explained that the Community Relations Specialist position was in the 301 series, which falls under the administrative and clerical grouping. She provided that in this position, Employee worked alongside Program Specialists to perform administrative work like arranging meetings and setting up charts.<sup>34</sup> Moreover, according to the position descriptions provided by Agency, as a Community Relations Specialist, Employee was charged with coordinating substance abuse prevent programs; responding to calls from the public, schools, government, and private organizations; scheduling activities; driving the Drugmobile, in the absence of subordinates; providing guidance on program operations; counseling individuals on substance abuse prevention; maintaining mileage and maintenance records; and developing resource materials, flip charts, lesson plans, etc.<sup>35</sup>

By contrast, Agency’s witness testified that the Public Health Outreach Technician position was under the 640 series, which fell under the technical and help support category. According to the witness, Public Health Outreach Technicians worked on maternal and child health cases. They performed home visits and conducted assessments of families and their needs. Public Health Outreach Technicians worked closely with Community Health nurses to

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<sup>33</sup> *OEA Hearing Exhibits*, Tab #5 (March 12, 2018).

<sup>34</sup> *OEA Hearing Transcript*, p. 13-17 (March 12, 2018).

<sup>35</sup> *OEA Hearing Exhibits*, Tab #1 (March 12, 2018).

devise action plans to ensure that mothers and children receive the services that they need.<sup>36</sup> Additionally, the position description provides that Public Health Outreach Technicians provide home visits and non-medical services to ensure that mothers and infants are healthy; conduct risk screenings; assist clients with making and keeping appointments and immunizations; observe parent-child interactions; collaborate with Case Manager/Community Health Nurses; participate in clinical conferences with nurse team leaders; and facilitate access to community resources.<sup>37</sup>

### Conclusion

As a result, there is substantial evidence to support the AJ's determination that Employee was appointed to the Public Health Outreach Technician position through open competition. Additionally, there is substantial evidence in the record to support the AJ's ruling that the Community Relations Specialist and the Public Health Outreach Technician positions are within a different line of work. Accordingly, this Board must deny Employee's Petition for Review of the Second Initial Decision on Remand.

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<sup>36</sup> *OEA Hearing Transcript*, p. 32, 34-36 (March 12, 2018).

<sup>37</sup> *OEA Hearing Exhibits*, Tab #4 (March 12, 2018).

**ORDER**

Accordingly, it is hereby ordered that Employee's Petition for Review of the Second Initial Decision on Remand is **DENIED**.

**FOR THE BOARD:**

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Clarence Labor, Chair

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Vera M. Abbott

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Patricia Hobson Wilson

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Jelani Freeman

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Peter Rosenstein

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.