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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0140-13
TOWANDA WHITE,)	
Employee)	
)	Date of Issuance: September 10, 2015
v.)	
)	
DEPARTMENT OF YOUTH)	
REHABILITATION SERVICES,)	
Agency)	Sommer J. Murphy, Esq.
_____)	Administrative Judge
Ardra M. O’Neal, Esq., Employee Representative		
Eric Huang, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 26, 2013, Towanda White (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) contesting the Department of Youth Rehabilitation Services’ (“Agency” or “DYRS”) action of terminating her employment. Employee, who originally worked as a Correctional Officer¹, was removed based on the following charges: 1) Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: incompetence; and 2) Any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious: inability to perform the essential functions of the job. On November 11, 2009, Employee was entering Agency grounds when her vehicle was struck by a deer. Employee applied for, and received workers’ compensation benefits from the Office of Risk Management (“ORM”). On July 18, 2013, Agency issued Employee an Advance Written Notice of Proposed Removal because she allegedly failed to update DYRS regarding her medical status or when she could return to her position as a YDR. The effective date of Employee’s termination was August 23, 2013.

I was assigned this matter in June of 2014. On June 11, 2014, I issued an Order, scheduling a Prehearing Conference for the purpose of assessing the parties’ arguments. During

¹ Employee’s position was later changed to a Youth Development Representative (“YDR”)

the conference, it was determined that there were no material issues of fact that warranted an Evidentiary Hearing. Thus, the parties were ordered to submit written briefs addressing whether Agency properly adhered to D.C. Code § 1-623.45 (2001) in making its decision to terminate Employee. Both parties responded to the order. 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.

Employee's Position

Employee argues that she was not terminated for cause because D.C. Official Code § 1-623.45 does not authorize an agency to initiate adverse actions against employees. Employee further submits that "[a]ny argument made by the Agency for having cause under the DPM to terminate Ms. White is therefore contingent upon Ms. White having previously violated § 1-623.45...However, the Agency—not Ms. White violated the statute."² Employee also states that the Office of Risk Management, which was responsible for handling workers' compensation benefits, contributed to her unlawful termination because of their problems with lack of staffing, communication, oversight, and case management deficiencies.

² Employee Brief at 4 (December 12, 2014).

Agency's Position

Agency argues that Employee was terminated because she did not resume her duties as a YDR within the time period established by D.C. Official Code § 1-623.45, nor did Employee communicate her ability and/or willingness to resume her duties until after Agency issued its Advance Notice of Proposed Removal. Agency contends that there is substantial evidence in the record to support a finding that Employee's removal was taken for cause. Agency further asserts that termination was the appropriate penalty under the circumstances.

Uncontested Facts

1. Employee was originally hired as a DS-007-5 Correctional Officer ("CO") with Agency. Her responsibilities as a CO included observing, accompanying, and monitoring all resident and non-resident activities within the correctional facility that she was assigned to.³ Employee also assisted with reporting and investigating resident-caused incidents, in addition to helping youth who resided at the facility.
2. In 2009, Employee's position as a CO was changed to Youth Development Representative ("YDR"). According to Agency, the change in position was facilitated "to reflect [its] rehabilitative, rather than punitive model."⁴
3. As a YDR, Employee was tasked with providing for the direct supervision of youth in Agency's care.
4. On November 11, 2009, while entering the Agency grounds, Employee's car was struck by a deer. Employee's on-the-job injuries deemed her eligible to apply for, and receive disability compensation benefits from the Office of Risk Management Disability Compensation Program. Employee was diagnosed with a cervical sprain and radiculopathy.⁵
5. On March 23, 2010, ORM issued a letter to Employee, stating that her Temporary Total Disability benefits were terminated effective March 14, 2010. Employee's treating physician, Dr. Viener, released her to return to light duty on March 15, 2010.⁶
6. Employee became disabled again on July 21, 2010. On August 9, 2010, ORM sent Employee a Notice of Determination Regarding Start or Resumption of Benefits. The notices stated that Employee's public sector workers' compensation benefits would be resuming at that time.⁷ Employee was again placed on leave.
7. On October 11, 2012, Director of the Office of Human Resources, Jamie Thomas, wrote Employee a letter to ascertain the current status of the injury she sustained in November

³ Agency Answer to Employee's Petition for Appeal, Exhibit 2 (October 18, 2013).

⁴ *Id.* at Exhibit 3.

⁵ *Id.* at Exhibit 4.

⁶ *Id.* at Exhibit 5.

⁷ *Id.* at Exhibit 6.

of 2009. The notice stated: “[a]s of the date of this letter, we have not been informed of your intent and ability to return to your position of record as a Youth Development Representative with the Department of Youth Rehabilitation Services....”⁸ Thomas requested that Employee advise Human Resources of her intent to return to duty by October 18, 2012. Employee was further advised that failure to respond to the letter may result in the termination of her employment.

8. Employee submitted a response to Agency’s letter on October 15, 2012, stating that she could no longer physically perform the duties of a CO because of the injuries she sustained in 2009. Employee requested that Agency retrain her in another position that required sedentary work.
9. In support of her request, Employee attached a letter from Dr. Robert S. Viener, M.D. Dr. Viener’s May 28, 2010 follow-up report stated that “Towanda is to continue modified duty sedentary work only with lifting restrictions to 10-15 pounds as a permanent change to her job. She may require retraining.”⁹
10. On April 23, 2013, the Office of Human Resource’s new Director, Timothy Howell, sent Employee a second letter to ascertain the status of her intent to return to work. Howell requested that Employee submit a response no later than May 2, 2013.¹⁰ The letter was mailed to Employee’s address of record.¹¹
11. On April 26, 2013, ORM issued a written notice to Employee, stating that her temporary disability benefits were terminated. The reason cited was Employee’s admission that she returned to work at Macy’s on or around November 7, 2011. Employee’s resumption of work deemed her ineligible to continue receiving disability benefits.¹²
12. On July 5, 2013, Agency issued Employee a Fifteen-Day (15-day) Advance Notice of Proposed Removal. Employee was charged with “incompetence” and “inability to perform the essential functions of the job.” The notice stated that Employee’s proposed termination was a result of her failure to advise Agency regarding her intent to return to work as a YDR. Employee was given an opportunity to submit a written response to Agency’s proposed removal.¹³
13. Employee submitted a response to the Advance Notice of Proposed Removal on July 25, 2013. In her response, Employee alleged that she did not receive Agency’s October 11, 2012 or April 23, 2013 requests for medical documentation. Employee further stated that Agency failed to provide her with reasonable accommodations in light of her injuries. At

⁸ *Id.* at Exhibit 9.

⁹ *Id.* at Exhibit 12.

¹⁰ *Id.* at Exhibit 13.

¹¹ *Id.* Both the October 11, 2012 and April 23, 2013 letters were mailed to Employee’s address of record (PO Box 574, Jessup, MD 20794).

¹² *Id.* at Exhibit 14.

¹³ *Id.* at Exhibit 16.

the conclusion of her response, Employee requested a face-to-face meeting with Agency and the Department of Human Resources.¹⁴

14. On August 6, 2013, Hearing Officer, Tony Saudek, issued his findings regarding Employee's proposed removal and recommended that the charges against her be sustained. Saudek stated that "[t]he issue of this administrative review is whether Employee is able to perform the essential functions of her position. The Hearing Officer concludes that the evidence support the Notice of Proposed Adverse Action."¹⁵
15. Agency issued a Notice of Final Decision on Proposed removal on August 15, 2013. Agency's Deputy Director, Sephen Luteran, agreed with the Hearing Officer's findings and sustained the proposed removal action against Employee.¹⁶
16. Employee's termination became effective on August 23, 2013. She subsequently filed a Petition for Appeal with this Office on August 26, 2013. Agency filed its Answer on October 18, 2013.

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, which states in pertinent part:

Career and Educational Services retention rights

b) Under rules and regulations issued by the Mayor the department or agency which was the last employer shall:

¹⁴ *Id.* at Exhibit 18. Employee's response to Agency provided her address of PO Box 574, Jessup, Maryland 20794.

¹⁵ *Id.* at Exhibit 19.

¹⁶ *Id.* at Exhibit 20.

(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 the injury or disability has 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 any other department or agency.

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

Section 827 of the District Personnel Manual (“DPM”), which applies to Career Service employees, further enumerates certain protections afforded to employees who are receiving compensable disability benefits:

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).

Employee argues that the language found in D.C. Code § 1-623.45 does not authorize an agency to initiate adverse actions against employees; therefore, Agency lacked cause to terminate her. In response, Agency contends that DPM § 827.5 explicitly provides that an agency shall initiate appropriate action under Chapter 16 of the DPM at the conclusion of the two (2) year period proscribed in § 827.3.

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.¹⁷ Any other regulation 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).¹⁸ However, the provisions of § 827.5 do not conflict with the language found in § 1-623.45 of the Code. 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.

Under § 1-623.45(b)(1), an employee who is receiving disability benefits and overcomes their injury within two (2) years has the immediate and unconditional right to reemployment in the same or similar position. The corollary position is also true—an employee who *does not* overcome their injury within two (2) years does not retain the right to immediate and unconditional employment. (emphasis added). Thus, after the two year period expires, § 827.5 required Agency to initiate appropriate action under Chapter 16 of the D.C. Personnel Regulations. I therefore find that Agency properly initiated termination proceedings against Employee in accordance with Chapter 16 and DPM § 827.5.

The next issue to be address is whether Employee could invoke D.C. Code § 1-623.45(b)(1), which authorizes the right to the immediate and unconditional resumption of an employee's prior position or an equivalent position. It is undisputed that Employee was not medically cleared to return to full duty when Agency issued its Fifteen Day Advance Notice of Removal on July 5, 2013. Accordingly, she was unable to invoke the protections provided to employees under § 1-623.45(b)(1) because she did not fully overcome her injuries within two (2) years from the recurrence of the compensable disability.

¹⁷ See *Sheetz v. District of Columbia*, 629 A.2d 515, 519 (D.C. 1993).

¹⁸ *Joseph v. D.C. FEMS*, OEA Matter No. 1601-0030-06 (October 2, 2006).

In the alternative, subsection (b)(2) may be utilized in cases where an employee overcomes his or her injury after a period of more than two (2) years. 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. In *D.C. Department of Youth Rehabilitation Services v. Office of Employee Appeals*, the agency sought a reversal of this Office's Opinion and Order on Petition for Review, which overturned the agency's decision to terminate employee Dana Brown.¹⁹ In his opinion, the Honorable Judge Erik Christian examined the 2001 and 2005 statutory predecessors to D.C. Code § 1-623.45. Judge Christian held that OEA's Board erred in its conclusion that DYRS was *required* to make reasonable efforts to place employee Brown in her former or equivalent position because it was contrary to the plain language of § 1-623.45(b)(2).²⁰ Moreover, Judge Christian noted that Brown could not invoke subsection (b)(2) of the statute until after she recovered from her injuries.²¹

Here, Employee sustained an on-the-job injury on November 11, 2009 and was eligible to receive workers' compensation benefits. When Employee became disabled again on July 21, 2010, ORM issued a notice to authorize the resumption of disability benefits. Agency did not request documentation from Employee regarding her intent to return to full duty as a YDR until October 11, 2012, more than two (2) years after Employee's disability benefits resumed. Employee responded by providing a May 28, 2010 letter from her treating physician, which did not authorize her to return to full duty. Employee only requested retraining and assignment to a sedentary position. Agency wrote Employee again on April 23, 2013, to ascertain the status of her ability to return to full duty status. However, Employee failed to provide a response. I find Employee's argument that she did not receive either notice from Agency to be unconvincing, as the address she provided in her Petition for Appeal is identical to the address of record that Agency provided in both letters.²²

Employee did not submit medical documentation evidencing an ability to return to full duty as a YDR until August 14, 2013—more than three (3) years after her disability benefits resumed.²³ It should also be noted that Employee's treating physician, Dr. E. Masoud Pour, M.D., did not authorize her to resume working at full duty until August 27, 2013, which was *after* the effective date of Employee's termination.²⁴ Thus, Employee's attempt to invoke § 1-623.45(b)(2) after the effective date of her termination is a grievance that falls outside the scope of this Office's jurisdiction. Likewise, Employee's arguments regarding ORM's alleged lack of staffing, communication, oversight, and case management deficiencies fall outside the purview of this Office's jurisdiction.²⁵

¹⁹ 2010 CA 1842 P(MPA) (September 20, 2012).

²⁰ *Id.* at 7. The 2001 version of § 1-623.45 allotted for a period of one (1) year for an employee to overcome injuries while retaining their retention rights.

²¹ *Id.*

²² See Agency Answer to Employee's Petition for Appeal, Exhibit 10 (October 18, 2013). The FedEx receipt and delivery confirmation reflects an address of P.O. Box 574, Jessup, MD 20704.

²³ *Id.* at Exhibit 21.

²⁴ *Id.* Dr. Pour's Status Form indicated that Employee was cleared to return to full work status or restricted work status effective August 27, 2013.

²⁵ Section 827.23 of the DPM provides that "[w]hen 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

Based on the foregoing, I find that Employee no longer retained the unconditional right to continued employment after July 21, 2012 because she was unable to perform the essential functions of her job. Moreover, 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). Accordingly, I find that Agency adequately complied with § 1-623.45, and has established that it had cause to terminate Employee, as required by D.C. Code §1-616.51.

With respect to Agency's decision to terminate Employee, any review by this Office of the agency decision selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.²⁶ Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."²⁷ Agency has the discretion to impose a penalty, which cannot be reversed unless "OEA finds that the agency failed to weigh relevant factors or that the agency's judgment clearly exceed the limits of reasonableness."²⁸ 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 is upheld.

ORDER

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

FOR THE OFFICE:

SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE

chapter 16 of these regulations. (emphasis added). See Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124. It is an established matter of public law that the OEA no longer has jurisdiction over grievance appeals. 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.

²⁶See *Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, Opinion and Order on Petition for Review (March 18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, Opinion and Order on Petition for Review (July 2, 1994).

²⁷ *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

²⁸ See *Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985).