

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
WILLIAM JOSEPH,)	
Employee)	OEA Matter No. 1601-0030-06
)	
v.)	Date of Issuance: October 2, 2006
)	
D.C. FIRE AND EMERGENCY)	
MEDICAL SERVICES)	
DEPARTMENT,)	
Agency)	ERIC T. ROBINSON, Esq.
)	Administrative Judge
_____)	

Dennis Gottesmann, Esq., Employee Representative
Pamela Smith, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 27, 2004, William Joseph (hereinafter “the Employee”) sustained a work related injury for which he applied for and started receiving disability compensation through the D.C. Disability Compensation Program Office of Worker’s Compensation. The Employee’s last position of record before sustaining this injury was with the D.C. Fire and Emergency Medical Services Department (hereinafter “the Agency”) as a Paramedic Instructor, DS-0699-10-02. The Employee has been on a leave without pay status with the Agency since September 18, 2004. On January 30, 2006, the Agency sent the Employee a Memorandum regarding its Final Decision to remove him from his position. The stated cause for removal was the Employee’s “[i]nability to satisfactorily perform one or more major duties of [his] position.” The effective date of Agency’s adverse action was February 18, 2006. Because of his injury, Employee does not deny that he is currently unable to perform his duties. He is currently awaiting approval for surgery that will hopefully correct his malady and allow him to return to duty.

On February 14, 2006, the Employee timely filed a petition for appeal with the Office of Employee Appeals (hereinafter “the Office”) contesting the Agency’s action of terminating his employment. As part of the petition for appeal process, the Agency was required to send an Answer to the Employee’s petition for appeal stating its legal justifications for its adverse action. The Agency complied and included with its Answer

a Motion to Dismiss, the crux of which I shall address *infra*. I was assigned this matter on March 23, 2006. On that same date, I issued an Order Convening a Prehearing Conference for May 11, 2006. The Prehearing Conference was rescheduled for May 17, 2006. Based on the parties positions as stated during the Prehearing Conference and the documents of records I determined that an Evidentiary Hearing would be unnecessary. Consequently, I ordered the parties to submit final legal briefs. Both parties have since complied. The record is now closed.

JURISDICTION

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

ISSUE

Whether Agency's action of terminating the Employee was done in accordance with all applicable laws, rules, and regulations.

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) 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 629.3 *id.* states:

For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

POSITION OF THE PARTIES

According to the Agency's Answer and its Motion to Dismiss, the stated cause for removing the Employee was his "inability to satisfactorily perform one or more major duties of his position." The Agency does not deny that the Employee suffered a work related injury that necessitated his being placed on a leave without pay status by the Agency while he attempted to recuperate from said injury. The Agency contends that pursuant to D.C. Official Code § 1-623.45 (b) (1) (2005 Repl.), it was only required to hold the Employee's position open for one year before starting the removal process. The Agency further contends that it did in fact start its removal action after the statutorily

mandated one year time period had elapsed. It also argues that some of the relief the Employee is seeking, namely, the Employee's request that I order the Agency to provide medical treatment and/or benefits, is outside of the jurisdiction of this Office. Considering all of the preceding, the Agency contends that it complied with all applicable statutory requirements and therefore its decision removing Employee should be upheld.

According to the Employee's Brief in Opposition of the Final Agency Action (hereinafter "Employee's Brief"), the Employee states that "[he] is not requesting this Board to order that he receives appropriate medical treatment, but rather has requested this Board to determine that the Department's refusal to either approve or deny his request in writing prevents him from getting the treatment he needs so he may be able to return to work." The Employee goes on to argue that the reason why he is unable to return to work is because some "department" within the District of Columbia government has yet to approve (or deny) his request for surgery. The Employee contends that the D.C. government "ignored" some sections of D.C. Act 15-685 (which, *inter alia*, amended portions of D.C. Official Code 1-623.45) when it relied on this statute to legally support its adverse action terminating the Employee. According to the Employee, the portions that were ignored dealt with how "the Mayor or his designee shall provide a claim with written authorization for payment of treatment of procedures within thirty days after the treating physician makes a written request. The Agency has failed to respond to the numerous requests and thus, its actions prevent the Employee from even being given an opportunity to appeal a decision to the Worker's Compensation Commission." Employee's Brief at 2. Considering all of this, the Employee requests that I reverse Agency's decision in this matter and/or require "the Agency (or some other agency within the D.C. government) to respond to the request for medical treatment by approving or rejecting the same so he can have his hearing knowing full well the Office of Employee Appeals cannot require the [Agency] to provide such medical benefits." Employee's Brief at 3.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSION

As was stated previously, the Employee contends that I should order the Agency to respond to his request for medical treatment. To buttress this argument, the Employee cited various portions of D.C. Official Code, which outline how the Agency (or the D.C. Government) should proceed under these circumstances. The Employee then provides argument that alleges that the Agency (and/or the D.C. Government) failed to follow all applicable laws when it has yet to approve or deny Employee's request for surgery. My only response to this argument is that this Office is not a forum of general jurisdiction. Furthermore, this Office has no authority to review issues beyond its jurisdiction. *See Banks v. District of Columbia Pub. Sch.*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (Sept. 30, 1992), __ D.C. Reg. __ (). 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 ("Appeal procedures") reads in pertinent part as follows:

- (a) An employee may appeal [to this Office] a final agency

decision affecting a performance rating which results in removal of the employee . . . , an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . . , or a reduction in force [RIF]...

Based on the preceding statute I may only adjudicate matters that squarely fall within the purview of D.C. Official Code § 1-606.03. The jurisdiction of this Office is limited to performance ratings that result in removals; final agency decisions that result in removals, reductions in grade or suspensions of ten days or more; or reductions in force. OEA Rule 604.1, 46 D.C. Reg. 9299 (1999). I find that under this set of circumstances, the requested relief in the form of ordering the Agency (or the D.C. Government) to respond to Employee's request for medical treatment or any other request that deals squarely with "medical benefits" are outside the jurisdiction of this Office and therefore must be summarily denied¹.

The Agency contends that its removal action was legally justified. Agency relies on D.C. Code § 1-623.45 (b) (1) (2005 Repl.), which states in relevant part that:

Career and Educational Services retention rights [Formerly § 1-624.45]

(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 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 disabled, including the rights to tenure, promotion, and safeguards in reduction-in-force procedures, *provided that the injury or disability has been overcome within one 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*; or

(2) If the injury or disability is overcome within a period of more

¹ There are other judicial and quasi-judicial forums that have the statutory authority to adjudicate this issue. Hopefully, the Employee has (or will) avail himself of these forums.

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 exclude the responsibility of the employing agency to re-employ an employee in a full-duty or part-time status.

(emphasis added).

Generally speaking, the preceding portion of the D.C. Code provides that, *inter alia*, a D.C. government agency may institute a removal action if the Employee is physically unable (or unwilling) to resume his work related duties after one year has elapsed since that Employee was placed on a leave without pay status. Such is the case in this matter.

The Agency instituted the removal action against the Employee even though the District Personnel Manual (hereinafter “DPM”) provides for a different outcome under the circumstances. DPM § 827.3 states that “[a]n agency shall carry an employee covered by § 827.1(b)² on leave without pay for *two (2) years* from the date of commencement of compensation.” (Emphasis added). Under the circumstances as presented in the instant matter, Agency’s action is considered timely according to the Code, while its adverse action would be considered premature (by at least one year) according to the DPM. It is a generally well known principle that the D.C. Official Code shall prevail over the DPM³ on the rare occasion when the two are inconsistent. *See generally, Sheetz v. District of Columbia*, 629 A.2d 515, 519 (D.C. 1993). 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 (b) (1). Consequently, this decision will follow what is contemplated under that Code section even though DPM § 827.1(b) would provide for a different result in this matter. Consequently, I conclude that D.C. Official Code § 1-623.45 (b) (1), shall be considered mandatory authority over the instant matter.

² DPM § 827.1 (b) states the following:

The provisions of this section shall apply to the following:

(b) An employee holding any type of appointment in the Career Service who is receiving disability compensation under Title 1, Chapter 6, Subchapter XXIV, DC Code (1981);

³ This is also true for any other similar published regulations, e.g., the D.C. Register and the D.C. Municipal Regulations.

While I empathize with the Employee's predicament, I find that the Agency adequately complied with D.C. Official Code § 1-623.45 (b) (1) when it removed the Employee from service. Reluctantly, I must uphold Agency's action in this matter.

ORDER

It is hereby ORDERED that Agency's Motion to Dismiss is GRANTED and it is FURTHER ORDERED that Agency's adverse action of removing the Employee from service is hereby UPHELD.

FOR THE OFFICE:

Eric T. Robinson, Esq.
Administrative Judge