THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
LINDA DUNCAN,	)	
Employee	)	OEA Matter No. 1601-0142-13
	)	
v.	)	Date of Issuance: July 13, 2015
	)	
DISTRICT OF COLUMBIA DEPARTMENT OF YOUTH REHABILITATION SERVICES,	)	MONICA DOHNJI, Esq.
Agency	)	Administrative Judge
	)	

Johnnie Louis Johnson III, Esq., Employee Representative
Frank McDougald, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 28, 2013, Linda Duncan ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Youth Rehabilitation Services' ("DYRS" or "Agency") decision to terminate her from her position as a Youth Development Representative ("YDR") effective August 16, 2013. Employee was terminated pursuant to sections 1603.3(f)(5) and 1603.3(g) of the District of Columbia Personnel Manual ("DPM").[1] On March 11, 2014, Agency submitted its Answer to Employee's Petition for Appeal.

Following a failed mediation attempt, this matter was assigned to the undersigned Administrative Judge ("AJ") on June 24, 2014. A Status/Prehearing Conference was held on March 4, 2015. Both parties were in attendance. On March 13, 2015, I issued a Post Status/Prehearing Conference Order requiring the parties to submit written briefs addressing the issues raised at the Status/Prehearing Conference. Both parties complied. After considering the parties' arguments as presented in their submissions to this Office, I decided that an Evidentiary Hearing was not required. The record is now closed.

[1]DPM § 1603.3(f) (5): Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, specifically: Incompetence; and DPM § 1603.3(g): 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.

JURISDICTION

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

ISSUES

1) Whether Agency's action of terminating Employee was done for cause; and

2) If so, whether the penalty of termination is within the range allowed by law, rules, or regulations.

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:

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

FINDINGS OF FACTS, ANALYSIS AND CONCLUSION

According to the record, Employee was a YDR with Agency. As a YDR, Employee's duties included, but not limited to maintaining visual contact with youth at all times; maintaining the level of security and safety necessary to protect youth and to prevent escape; engaging youth in a positive and developmentally appropriate manner; have the physical capability to carry or drag an individual weighing one hundred and twenty-five (125) pounds or more, a minimum of seventy-five (75) feet; as well as fully perform Agency's restraint techniques.

Employee injured her shoulder on the job on July 23, 2008. She began receiving Workers' Compensation benefits for temporary total disability in August of 2008. On January 23, 2011, Agency placed Employee on light duty; however, Employee stopped working on June 3, 2011, and was placed on leave without pay ("LWOP"), and started receiving Workers' Compensation benefits for temporary total disability. On April 23, 2013, Agency notified Employee via mail that pursuant to D.C. Code § 1-623.45 (2001), Employee was entitled to return to work as a YDR or in an equivalent position of record if she could show that she had overcome her injury within a two-year period after the commencement of receipt of workers'

compensation benefits.[2] The April 23, 2013, letter noted that Employee's response was due by May 2, 2014. It also requested that Employee note her intent to return to work, as well as provide proper medical certification regarding her injury, along with a clearance stating that she is capable of performing the duties of her official position. On April 30, 3013, Employee responded to the April 23, 2013 letter noting that, while she intended to return to her position, she could not get cleared to return to work in her position of record.[3] Employee did not submit any medical documentation as requested by the April 23, 2013, letter from Agency.

On July 10, 2013, Agency issued an Advance Written Notice of Proposed Removal to Employee, followed by a revised Advance Written Notice of Proposed Removal on July 18, 2013. Pursuant to the Revised Advance Written Notice of Proposed Removal, Employee was terminated for:

1. DPM § 1603.3(f) (5): Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, specifically: Incompetence;
2. DPM § 1603.3(g): 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.[4]

The July 18, 2013, notice informed Employee that she could submit a written request to a Hearing Officer who would conduct an administrative review of the proposed removal. Employee submitted a response to the Hearing Officer.[5] Thereafter, the Hearing Officer issued a report upholding Agency's proposed removal.[6] On August 6, 2013, Agency issued a Notice of Final Decision on Proposed Removal, removing Employee from her YDR position effective August 16, 2013.[7]

Employee's Position

Employee believes that she was not terminated for cause and her removal was not in accordance with District Code. She explains that her April 30, 2013 response to Agency noted that she intended to return to work at her official position of record. Employee also notes that it is the responsibility of the Office of Risk Management to provide Agency with supporting medical documents regarding Employee.

Further, Employee highlights that Agency did not have cause to impose the harsh adverse action of removal against her because the adverse action was not in accordance with District of Columbia statute, regulations and law. Agency's removal was based on erroneous allegations that Employee did not satisfactorily perform one of more of her job duties – she failed to submit medical documents regarding her medical status. Employee submits that Agency knew that she could not provide the medical documents because the medical documents and the release of

[2] Agency's Answer at Exhibit 9 (November 4, 2013).
[3] *Id*. at Exhibit 10.
[4] *Id*. at Exhibits 11 and 12.
[5] *Id*. at Exhibit 14.
[6] *Id*. at Exhibit 15.
[7] *Id*. at Exhibit 16.

Employee from total temporary disability to return to work is the responsibility of the Office of Risk Management.

Employee argues that contrary to Agency's assertions that D.C. Code does not provide that if an employee does not overcome her disability, then she could not retain her position and Agency could commence adverse action against her, D.C. Code 1.623.45(c) expressly provideS that the statute cannot be used by Agency as a tool or device not to re-employ an employee who has been on total temp disability. Therefore, Agency did not have cause to remove Employee.

Additionally, Employee submits that while Agency cites to D.C. Code 1-623.45(b)(3), it fails to mention that D.C. Code 1-623.45(b)(1) provides that Agency must provide an employee with her former or an equivalent position if the employee overcomes disability within two (2) years. Employee also points out that D.C. Code 1-623.45(b)(2) states that if the employee overcomes the disability more than two (2) years after the date of commencement of payment of compensation, Agency must make all reasonable efforts to place employee to his or her former or equivalent position.

Employee also submits that Agency did not consider all the Douglas factors in taking the adverse action of removal against Employee.[8]

Agency's Position

Agency submits that it had cause to remove Employee because Employee 1) failed to resume her duties as a YDR within two (2) years period required by D.C. Code § 1-623.45; and 2) Employee failed to notify Agency of her ability and willingness to resume her duties as a YDR within that time period. Agency explains that Employee was entitled to return to work if she could demonstrate that she had overcome her injury or disability within two (2) years after the commencement of receipt of workers' compensation benefits, and she failed to do so. Agency further notes that Employee responded to the April 23, 2015 letter that she would like to return to work, but that she could no longer fully perform the essential functions of her job. She admitted that she was not cleared to return to work, and she could not provide an estimated time for when she could return. Agency notes that Employee failed to provide any medical documents requested by the April 23, 2013, letter. Agency further notes that, Employee's response to the Advanced Written Notice on July 17 and 24, 2013, also noted that she did not have the ability to fully perform the essential functions of her job, and she offered no reason to believe that she would be able to return to Agency as a YDR.[9]

Additionally, Agency states that Employee no longer possesses retention rights to her position. She had two (2) years retention rights from the date of commencement of compensation from workers compensation program. After two (2) years, Agency's only obligation is to "make all reasonable efforts to place and accord priority to placing Employee in his or her former or equivalent position. Agency further explains that once the two (2) year period is over, it can initiate appropriate removal action under Chapter 16. Agency maintains that Employee no longer retained her rights to resume her position after June of 2013. She did not contact Agency or

[8] Claimant Linda Duncan's Memorandum in opposition to Respondent District of Columbia (June 4, 2015).
[9] Agency's Answer (November 4, 2013).

worked a single day after June of 2011. She failed to provide any medical documents clearing her for work or indication that she had overcome her disability, or that she was willing, and able to fully carry out her duties as a YDR. Agency states that, by July of 2013, Employee had received workers' compensation benefits for two (2) years, and therefore, Agency had no reason to believe that Employee had overcome her injury/disability within the two (2) years period after receiving workers' compensation benefits. As such, Agency notes that it was under no obligation to make any reasonable effort to place her in her former or equivalent position. Agency also asserts that Employee's recent medical documents indicate that she has not overcome her injury/disability; she does not have the ability to return to Agency as a YDR; and it provides no indication that Employee will be able to resume, as well as perform the essential functions of her YDR position. Agency argues that due to the prolonged unavailability for duty and her inability to perform the essential functions of her job, Employee was considered incompetent. Agency also notes that it considered the Douglas factors, to include the mitigating and aggravating circumstances in reaching its decision to remove Employee.[10]

Analysis

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. Code § 1-623.45 (2005), which states:

> (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 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

[10] Agency's Brief (May 15, 2015).

> 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.

The D.C. Code § 1-623.45(b)(1) provided certain rights to employees who were receiving worker's compensation benefits and overcame their disability within two (2) years. Those rights included the right to the immediate and unconditional resumption of the employee's prior position or an equivalent position. In this case, Employee suffered a work-related injury and began receiving Worker's Compensation benefits in June of 2011. On July 18, 2013, Agency issued Employee an Advance Notice of Proposed Removal, and the effective date of her termination was August 16, 2013. Subjection (b)(1) of the statute is only invoked *provided that the injury or disability has been overcome within two years after the date of commencement of compensation* (emphasis added). Both parties concede that Employee had not fully recovered from her injuries as of the effective date of her termination. As such, I find that § 1-623.45(b)(1) could not be invoked by Employee and does not apply in this case.

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 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. As stated in *Dana Brown v. Office of Employee Appeals*, "[b]ecause the rights provided [in subsection (b)(2)] are conditional upon the employee overcoming his or her injury, the plain language of the statute does not support the OEA's reading. Accordingly, Brown could not invoke subsection (b)(2) of the statute until after she recovered."[11] As of the effective date of her termination, Employee had not overcome her injury/disability. Thus, in accordance with the reasoning in *Brown*, I find that Employee cannot invoke subsection (b)(2). For the reasons stated below, I find that: 1) Agency had cause to remove Employee; and 2) Employee's attempt to invoke § 1-623.45(b)(2) (2005) after the effective date of her termination is a grievance that falls outside the scope of this Office's jurisdiction.

Citing to D.C. Municipal Regulations ("DCMR") Title 6-B § 827.1, 3, 5, Agency highlights that; an agency shall initiate appropriate action under Chapter 16. As a basis for cause Agency's Advance Notice of Proposed Removal, as well as its Notice of Final Decision on Proposed Removal cites to DPM Chapter 16 for Inability to perform the essential functions of the job and incompetence. Section 827, which applies to Career Service employees, provides in pertinent part:

> **Restoration of Duty**
>
> **827.1** The provisions of this section shall apply to the following:

[11] 2010 CA 1842 P(MPA) at 8.

(a) An employee holding an appointment in the Career Service, other than a term, temporary, or TAPER appointment, who enters on military duty with restoration rights under §§ 2021 or 2024 of Title 38, U.S. Code;
(b) An employee holding any type of appointment in the Career Service who is receiving disability compensation under Title 1, Chapter 6, Subchapter XXIV, D.C. Code (1981); and
(c) A uniformed member of the Police or Fire Departments who has been retired for disability under Title 4, Chapter 6, D.C. Code (1981).

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.

At the time of Employee's termination, Employee held a Career Service appointment; she was on LWOP and receiving disability compensation. Section 827.3 provides that an agency was required to carry eligible employees on LWOP for a period of two (2) years before initiating action under Chapter 16 of the DPM. I find that under section 827.3, Employee's proposed termination was considered timely because she had not overcome her injuries within two (2) years.

Agency argues that it had cause to terminate Employee because she was unable to perform the functions of her position after the two (2) years time period lapsed under § 1-623.45 (b)(1). According to Agency, Employee no longer had the retention rights afforded to eligible employees, and could not prove with certainty, a date on which she could return to work. 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. (emphasis added). The corollary position is also true in this case. An employee who *does not* overcome their injury within two (2) years does not retain the right to immediate and unconditional employment. (emphasis added). Employee had not overcome her injuries at the time Agency issued its Advanced Notice of Termination. Accordingly, I find that Employee

no longer had the right to continued employment after June of 2013. Accordingly, I find that Agency adequately complied with § 1-623.45(b)(1), and had cause to terminate Employee.

The next issue to be addressed is whether Employee can invoke Subsection (b)(2) of D.C. Code § 1-623.45 (2001) after the effective date of her termination. Employee argues that OEA's jurisdiction extends to determining whether Agency was required to make all reasonable efforts to place, and accord priority to placing, Employee in her former or an equivalent position. As previously stated, Subjection (b)(2) could not be invoked until after Employee overcame her injury. Throughout this appeal process, the parties have asserted that Employee has not been cleared to return to work. She is currently unable to perform the essential functions of her YDR position. *Assuming arguendo* that Employee overcame her injury/disability after the effective date of her termination, and was willing and able to carry out the essential functions of her YDR position, I find that OEA does not have jurisdiction to determine whether Employee was entitled to the protections afforded under § 1-623.45(b)(2) because she only overcame her injury after the effective date of her termination. I further find that invoking Subsection (b)(2) is a grievance, which is outside the scope of OEA's jurisdiction. Section 827.23 of the DPM provides that:

> **827.23** When 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 chapter 16 of these regulations (emphasis added).

It is an established matter of public law that the OEA no longer has jurisdiction over grievance appeals.[12] 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. With regard to the penalty imposed by Agency, it is well-settled that this Office will not substitute its judgment for that of an agency imposing the penalty, provided that "managerial discretion has been legitimately invoked and properly exercised."[13] Once the charge is sustained, the Office will not disturb the penalty provided it is "within the range allowed by law, regulation or guidelines and is clearly not an error of judgment."[14]

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[15] Employee argues that Agency did not

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[12] Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124. *Assuming arguendo* that OEA's jurisdiction extends to making a determination of whether Agency was required to make reasonable efforts to place Employee in the same or similar position after she recovered from her injuries, DPM § 827.22 states that: "An employee who was separated because of compensable injury and whose recovery takes longer than two (2) years from the date compensation began (or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the District government) shall be entitled to priority consideration for restoration to the position he or she left or an equivalent one, provided he or she applies for reappointment within thirty (30) days of cessation of compensation." Any application for re-employment would not be considered by OEA, as this Office is not vested with jurisdiction over those matters.

[13] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

[14] *Employee v. Agency* OEA Matter No. 1601-0158-01, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

[15] *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985).

discuss the all the Douglas factors. The evidence does not establish that the penalty of removal constituted an abuse of discretion. Agency presented evidence that it considered relevant factors as outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching the decision to remove Employee.[16] Moreover, this Office has held that a Final Agency Decision that specifically lacks discussion of the *Douglas* factors does not amount to reversible error, where there is substantial evidence in the record to uphold the Initial Decision.[17] 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 should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of terminating Employee is **UPHELD**.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

[16] The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3) the employee's past disciplinary record;
4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7) consistency of the penalty with any applicable agency table of penalties;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10) potential for the employee's rehabilitation;
11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[17] *See Christopher Lee v. D.C. Department of Transportation*, OEA Matter No. 1601-0076-08, *Opinion and Order on Petition for Review* (January 26, 2011).