THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ROBIN HALPRIN,	)	
Employee	)	
	)	OEA Matter No.: 1601-0107-08
v.	)	
	)	Date of Issuance: June 21, 2016
DEPARTMENT OF	)	
MENTAL HEALTH,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Robin Halprin ("Employee") worked as a Psychologist with the Department of Mental Health ("Agency") at Saint Elizabeths hospital. On June 13, 2008, Agency issued a written notice to Employee informing her that she was being terminated for "Incompetence (Medical): Inability to satisfactorily perform one or more major duties of your position…due to medical incapacitation." The effective date of her termination was June 20, 2008.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on July 14, 2008. In her appeal, Employee argued that Agency failed to provide her with an advance written notice of her proposed removal. Employee explained that she was out of work as a result

of an injury she sustained while on duty.[1] Employee asked that she be reinstated with back pay and benefits.[2]

Agency filed its answer to the Petition for Appeal on August 15, 2008. It argued that Employee was terminated for cause because she was still unable to satisfactorily perform one or more major duties of her position since December 9, 2004.[3] Agency stated that she was aware that in order to maintain her position, she had to perform all of the required duties in a satisfactorily manner.[4] Moreover, it argued that Employee was on leave without pay and received workers' compensation for more than three years. Agency contended that it was required to terminate Employee in accordance with D.C. Municipal Regulation ("DCMR"), Chapter 6, Sections 827.3 and 827.5, as discussed *infra*.[5] According to Agency, Employee's termination was lawful because it complied with all relevant rules, laws, and regulations.[6]

This matter was assigned to an OEA Administrative Judge ("AJ") for adjudication on October 7, 2008. On October 14, 2008, AJ Quander issued an order convening a Prehearing Conference for the purpose of assessing the parties' arguments.[7] The Prehearing Conference was rescheduled on November 3, 2008. The parties engaged in unsuccessful settlement talks from 2008 through 2012. On January 9, 2013, the matter was reassigned to AJ Hochhauser after AJ Quander left OEA's employ. In April of 2013, the case was again reassigned to AJ Robinson.[8] The parties subsequently engaged in a second and third round of mediation in August of 2013 and June of 2014, respectively.[9] The parties were unable to reach a settlement agreement and

[1] *Petition for Appeal* (July 14, 2008).
[2] *Id*.
[3] *Answer to Petition for Appeal*, p. 2 (August 15, 2008).
[4] *Id*.
[5] *Id*. at 3.
[6] *Id*.
[7] *Prehearing Order* (October 14, 2008).
[8] *Status Conference Order* (January 9, 2013) and *Order Convening a Status Conference* (April 25, 2013).
[9] *Order Referring Matter for Mediation* (August 15, 2013), *Order Referring Matter for Mediation* (June 19, 2014).

were ordered to submit legal briefs addressing whether Employee was terminated for cause.[10]

An Initial Decision was issued on February 23, 2015. The AJ held that Employee received Agency's Final Notice of Termination and that any procedural error that Agency may have committed in providing advance notice was harmless.[11] In addition, the AJ determined that Agency complied with D.C. Official Code § 1-623.45 because Employee was receiving disability compensation benefits for four years before Agency initiated her removal action.[12] As discussed *infra*, the AJ further noted that D.C. Official Code § 1-623.45(b) was amended in both 2001 and 2005 regarding the time period within which an employee must overcome his or her disability to invoke their retention rights.[13] However, he held that Employee was not entitled to invoke D.C. Official Code § 1-623.45(b)(2001) or § 1-623.45(b)(2005) because it was uncontroverted that she was still unable to perform the essential duties of her job as a psychologist at the time she was terminated. The AJ, therefore, held that Agency's removal action should be upheld.[14]

Employee subsequently filed a Petition for Review with OEA's Board on March 17, 2015. In her petition, Employee argues that the AJ committed reversible error in concluding that Agency's failure to provide her with advance notice of her termination was harmless.[15] She also asserts that Agency's decision that she was incapable of performing the functions of her job was not supported by substantial evidence.[16] Employee states that the AJ failed to consider her argument that Agency refused, without good cause, to allow her to continue to work as other psychologists worked, then proceeded to contrive and "manipulate grounds to terminate

[10] *Briefing Order* (January 8, 2015).
[11] *Initial Decision*, p. 4 (February 23, 2015).
[12] *Id*. at 5.
[13] *Id.*
[14] *Id*. at 6.
[15] *Petition for Review*, p. 5 (March 17, 2015).
[16] *Id*. at 10.

her…."[17] Lastly, she submits that the AJ erred in holding that termination was within the range of penalties allowed by laws, rules, or regulation.[18] Employee, therefore, asks this Board to reverse the Initial Decision and determine whether she received Agency's Advanced Notice of Termination, and whether she was actually competent to perform the duties of her position.[19]

Agency filed a Reply to Employee's Petition for Review on April 15, 2015. It argues that the AJ's findings are supported by substantial evidence in the record and asks the Board to uphold the Initial Decision. Agency states that Employee's allegation that she failed to receive its Advance Notice of Termination would not have altered its final decision to terminate her and that Employee was not substantially prejudiced by the alleged error.[20] Moreover, Agency believes that the AJ Robinson correctly concluded that it acted with the proper managerial discretion in choosing the penalty of termination.[21] Employee subsequently filed a Reply to Agency's Opposition to Petition for Review on April 27, 2015, reiterating her previous arguments as presented in her appeal to this Board.[22]

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

> The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:
>
> (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
>
> (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;

[17] *Id*.
[18] *Id*. at 11.
[19] *Id*. at 13.
[20] *Reply to Petition for Review*, p. 3 (April 15, 2015).
[21] *Id*. at 4.
[22] *Reply to Agency's Opposition to Petition for Review of Initial Decision* (April 27, 2015).

(c) The findings of the Administrative Judge are not based on substantial evidence; or

(d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[23] In *Baumgartner v. Police and Firemen's Retirement and Relief Board*, the D.C. Court of Appeals held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding.[24]

Accommodations

In this case, Employee was removed based on the following cause: "Medical Incompetence—Inability to satisfactorily perform one or more major duties of your position as a Psychologist, due to a medical incapacitation." Employee sustained an injury to her leg while on duty on December 9, 2004 and began receiving workers' compensation benefits. According to the Compensation Order issued by the Office of Hearings and Adjudication—Administrative Hearings Division ("OHA"), Employee was cleared to return to work, with restrictions, on June 13, 2005.[25] Employee returned to work on June 20, 2005, but she was instructed by her supervisor not to return to duty until she could be released from light duty.[26] The Compensation Order further stated that Agency did not have a position that could accommodate Employee's

[23] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).
[24] 527 A.2d 313 (D.C. 1987).
[25] *Agency Brief*, Tab 1 (January 30, 2015). The restrictions included "no stairs, no slippery surfaces, no carrying, limited walking and standing, and accommodations to permit elevation and icing of the left ankle.
[26] *Id*.

restrictions.[27] Therefore, Employee remained on workers' compensation through the effective date of her termination because a probable date for her return to duty was unknown to Agency at that time.[28]

Employee argues that the AJ's finding that Agency sufficiently demonstrated that she was incompetent and therefore, unable to perform the essential duties of her job was not supported by substantial evidence.[29] She contends that the AJ failed to consider her argument that Agency refused to allow her to return to work "in her sedentary position with limited medical restrictions that required ADA accommodations or waivers."[30] The issue of whether Agency had a position that could accommodate Employee's physical restrictions has already been adjudicated by the OHA in the aforementioned Compensation Order. Moreover, the AJ was correct in concluding that Employee's claims regarding requiring Agency to respond to her request for medical treatment, workplace accommodations/restrictions for sedentary work, or other requests that deal with medical benefits, are outside the scope of OEA's jurisdiction.[31]

Cause

In accordance with D.C. Official Code §1-616.51(2001), disciplinary actions may only be taken for cause. Agency utilized D.C. Official Code § 1-623.45 and DPM, Chapter 8, Section 827 as its basis for terminating Employee. Under D.C. Official Code § 1-623.45, a District employee receiving disability benefits is afforded an unconditional right to resume his or her

[27] *Id*.
[28] *Agency Brief*, Tab 3 (January 30, 2015).
[29] *Petition for Review*, p. 10 (March 17, 2015).
[30] *Id*. ADA is the abbreviation for Americans with Disabilities Act.
[31] *Initial Decision* at 4. OEA Rule 604.1 provides that any District of Columbia government employee may appeal 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 ten (10) days or more; or a reduction-in-force.

employment if the disability is overcome within either a one- or two-year time period. [32]

Employee began receiving workers' compensation benefits in December of 2004, yet Agency did not initiate a termination action until April of 2008. Thus, she received benefits for approximately four years. Under DPM § 827.3, an agency is required to carry an employee who is receiving workers' compensation benefits on leave without pay for two (2) years. DPM § 827.5 provides that "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 she was terminated, Agency had more than satisfied it statutory obligation to Employee under § 1-623.45. However, she no longer had the retention rights afforded to eligible employees, and she could not prove with certainty, a date upon which she could return to full duty with no restrictions for sedentary work. Accordingly, this Board finds that the Initial Decision was supported by substantial evidence and that Agency established the requisite cause to take adverse action against Employee. Therefore, based on Employee's pleadings, there is insufficient evidence in the record to support a finding that Agency contrived and manipulated grounds to prevent her from returning to work.

Advance Written Notice

In his decision, the AJ determined that Employee received Agency's Final Notice effectuating her removal and that she was able to file a timely Petition for Appeal with OEA.[33] He further held that any error that Agency may have committed in delivering Employee's Advance Notice of Proposed Removal was harmless in nature.[34] Employee argues that she was deprived of her due process because she did not receive Agency's April 25, 2008 Advance

[32] D.C. Official Code § 1-623.45(2001), which became effective on October 3, 2001, prescribed a one-year period for overcoming an injury. The statute was subsequently amended, effective on April 5, 2005, and prescribed a two-year period.
[33] *Initial Decision,* p. 4 (February 23, 2015).
[34] *Id*.

Notice of Proposed Removal. She posits that she was unjustly deprived of the right to respond to the charges against her and that the AJ incorrectly concluded that Agency's failure to inform her of the proposed termination action constituted harmful error.

DPM § 1608.1(a) addresses the right of an employee to receive advance notice of their termination, providing the following in pertinent part:

> Except in the case of a summary suspension action pursuant to § 1615 or a summary removal action pursuant to § 1616, an employee against whom corrective or adverse action is proposed shall have the right to an advance written notice, as follows:
>
> (a) In the case of a proposed adverse action, an advance written notice of fifteen (15) days . . . .

Thus, Agency was required to provide Employee with fifteen days' advance written notice before rendering a final decision. On June 2, 2008, a Hearing Officer issued an Administrative Review of Adverse Personnel Action in the Matter of Robin Halprin.[35] In her decision, the Hearing Officer stated that there was no confirmation evidencing Employee's receipt of the Advance Notice because it was returned to St. Elizabeths on May 12, 2008.[36] She further noted that Employee failed to submit a response to the charges against her as provided in the advance notice, as of May 28, 2008.[37]

After reviewing the record, this Board finds that Agency terminated Employee, effective June 20, 2008, without providing credible evidence that it provided her with fifteen days' written notice as required under § 1608.1(a) of the DPM. However, we believe that Agency's failure to provide Employee with the requisite advance notice of her termination constituted a harmless procedural error which does not warrant a retroactive reinstatement. OEA Rule 631.3 defines harmless procedural error as an error in the application of the agency's procedures, which did not

[35] *Agency Brief*, Tab 3 (January 30, 2015).
[36] *Id.*
[37] *Id.*

cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action.

We agree with Agency's contention that even if Employee did not receive the advance notice of her termination, this error did not cause substantial harm or prejudice her rights. The Advance Notice of Proposed Removal was assigned to a Hearing Officer for the purpose of administrative review prior to the issuance of the Final Notice of Removal. Moreover, Employee concedes that she received the final notice and, was, therefore, able to file a timely Petition for Appeal with OEA. She was also able to obtain legal counsel to represent her before this Office. This Board finds that the lack of advance notice did not significantly affect Agency's final decision to terminate Employee and that the error constituted a harmless procedural error. However, Employee was nevertheless entitled to fifteen days' advance written notice under "DPM" § 1608.1(a). Accordingly, Agency is required to reimburse Employee fifteen (15) days' pay and benefits commensurate with her last position of record to correct this error.

Appropriateness of Penalty

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). According to the holding in *Stokes*, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties. The Court in *Stokes* reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised."[38] As a result, OEA has consistently held that the primary responsibility for managing

[38] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). Additionally, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that although selection of a penalty is a management prerogative, the penalty cannot exceed the parameters of reasonableness. Moreover, the Merit Systems

and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[39]

In this case, Employee was charged with Medical Incompetence in the Advance Notice of Termination. The Table of Appropriate Penalties, found in Section 1619 of the DPM, provides general guidelines for imposing disciplinary sanctions when there is a finding of cause. While Employee is correct in stating that a first offense of incompetence only carries a penalty of suspension for five to fifteen days, Agency initiated the termination action pursuant to D.C. Official Code § 1-623.45 based on her inability to perform the duties of her job without restrictions. The aforementioned statute, in addition to DPM Sections 827.3 and 827.5, authorized Agency to remove Employee because she did not overcome her disability within the appropriate time period. The Table of Appropriate provides *general* guidelines for progressive discipline. This Board agrees with Agency's position that progressive discipline cannot be applied to the circumstances of this case because Employee was not working at all due to medical incapacitation.[40] As a result, we find that Agency levied a proper charge of Medical Incompetence against Employee.

Protection Board ("MSPB") in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981), provided the following:

> [OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness.

[39] *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, Opinion and Order on Petition for Review (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).

[40] *Answer to Petition for Review* at 6.

Duties of Psychologist

It is Employee's position that Agency failed to state the major duties of her clinical psychologist. This assertion is incorrect, as evidenced in the Hearing Officer's June 2, 2008 Administrative Review of Adverse Personnel Action in the Matter of Robin Halprin. The Hearing Officer assigned to the matter specifically stated that the duties of a clinical psychologist included "assessing and evaluat[ing] patients at St. Elizabeths, running group sessions, participating in treatment teams, and supervising students.[41] The physical requirements of Employee's position required "sitting, standing, walking, talking, and climbing stairs when the elevators are not available."[42]

Conclusion

After reviewing the record, this Board can find no credible evidence to indicate that Agency abused its discretion in selecting the penalty of termination. Based on the foregoing, I find that Employee's termination was taken for cause, and the penalty of termination was appropriate under the circumstances.

[41] *Agency Brief*, Tab 3 (January 30, 2015).
[42] *Id.*, Tab# 1.

ORDER

Accordingly, it is hereby ordered that Employee's Petition for Review is **GRANTED** in part and **DENIED** in part. Agency's termination action is upheld; however, Agency is ordered to reimburse Employee fifteen (15) days' pay and benefits commensurate with her last position of record. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE BOARD**:**

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Sheree L. Price, Interim Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. 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.