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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	OEA Matter No.: J-0014-18
KYANNA FELICIANA,)	
Employee)	
)	Date of Issuance: September 4, 2018
v.)	
)	
DEPARTMENT OF)	
BEHAVIORAL HEALTH,)	
Agency)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Kyanna Feliciano (“Employee”) worked as a Forensic Mental Health Coordinator with the Department of Behavioral Health (“Agency”). On September 22, 2017, Employee was issued a Notice of Expiration of Term Appointment. The notice provided that the expiration date of Employee’s appointment to Agency was September 30, 2017.¹

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on November 15, 2017. She argued that she was promised the position of Forensic Outreach Counselor by Agency’s Director. Employee further stated that she asked Agency on several occasions to verify that her position was permanent, and Agency gave her verbal assurances

¹ Agency Answer to Petition for Appeal, Exhibit 2 (December 15, 2017).

that she was operating in a permanent capacity. Consequently, she requested to be reinstated to the position of Forensic Mental Health Coordinator.²

Agency filed its answer on December 15, 2017. It contended that OEA lacked jurisdiction over this matter because appeals from term appointments are not actions encompassed under Chapter 6, Section B604 of the D.C. Municipal Regulations (“DCMR”). Agency also provided that there was no evidence to support Employee’s assertion that she was converted to a permanent position. Alternatively, Agency opined that even if it was determined that the Employee obtained permanent status, OEA still lacked jurisdiction because her appeal was untimely. Accordingly, it requested that Employee’s petition be dismissed.³

An OEA Administrative Judge (“AJ”) was assigned to the matter in December of 2017. On December 19, 2017, the AJ issued an order requiring Employee to submit a brief addressing the jurisdictional issues.⁴ In her brief, Employee contested Agency’s position that OEA lacked jurisdiction over her appeal. Employee argued that she was told by Agency that she would be converted to a Career Service employee. Furthermore, she provided that Agency “took constructive actions to accommodate such a transition from a term to a permanent position.” Lastly, Employee believed that she provided both a factual basis and sufficient legal authority to establish OEA’s jurisdiction.⁵

On January 24, 2018, the AJ issued an Initial Decision. He concluded that Employee failed to meet her burden of proof in establishing jurisdiction before this Office because she was a term employee at the time Agency issued its Notice of Expiration of Term Appointment. The AJ explained that Chapter 8, Sections 823 and 826 of the DPM applied to the current case because Employee was placed on notice that her position as a Forensic Mental Health

² *Petition for Appeal* (November 15, 2017).

³ *Agency’s Response to Employee’s Petition for Appeal* (December 15, 2017).

⁴ *Order to Employee* (December 19, 2017). Agency did not file a response brief.

⁵ On December 22, 2017, Employee’s newly-obtained attorney filed a Motion of Time to Reply. *See also Employee’s Response* (January 16, 2018).

Coordinator was a term appointment. He noted that both term and temporary employees are specifically excluded from the jurisdictional authority of OEA. Additionally, the AJ agreed with Agency's position that the law does not guarantee a term employee a permanent position after the expiration of an appointment. Relying on the language of D.C. Official Code § 1-606.03(a), the AJ opined that Employee's complaint was more of a grievance, which is no longer covered under OEA's jurisdiction. As a result, he concluded that OEA lacked jurisdiction to consider Employee's substantive arguments. Consequently, Employee's Petition for Appeal was dismissed.⁷

On February 28, 2018, Employee filed a Petition for Review with the OEA Board. She argues that the Initial Decision failed to address material issues of law and fact properly raised in her appeal. Specifically, Employee contends that the AJ failed to address her claim that there was a verbal promise made by the Director of Forensic Services that her position was permanent. Employee also states that the AJ did not address her argument that she relied on Agency's reinforcements that position was permanent, or whether Agency's actions amounted to an enforceable contractual agreement. Employee contends that she "manifested an acceptance of the Agency's offer of full-time permanent employment both by verbally promising to perform the duties of the position on a permanent basis [,] as well as actual performance of the duties required by a Full-Time Forensic Health Counselor/Coordinator." Thus, Employee submits that she had an employment contract with Agency at the time of her termination. Accordingly, she requests that the Board reverse the Initial Decision.⁸

Agency filed its response to Employee's Petition for Review on April 4, 2017. It maintains that the Initial Decision addressed all material issues of fact and law; therefore, Employee's arguments are meritless. Agency notes that the AJ acknowledged Employee's

⁷ *Initial Decision* (January 24, 2018).

⁸ *Petition for Review* (February 28, 2018).

argument that the Director of Forensic Services made a verbal promise to her regarding a permanent position. Moreover, Agency agrees with the AJ's assessment that Employee's complaint is grievance over which OEA lacks jurisdiction. Lastly, Agency contends that the AJ properly dismissed Employee's appeal for lack of jurisdiction. Accordingly, it requests that her Petition for Review be denied.⁹

Standard of Review

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;
- (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.

Jurisdiction

This Office's jurisdiction is conferred upon it by law and was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Official Code §1-601-01, et seq. (2001). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which took effect on October 21, 1998. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions.

⁹ Agency's Response to Employee's Petition for Review (April 4, 2018)

According to 6-B, Section 604.17 of the DCMR, this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting:

- (a) A performance rating resulting in removal;
- (b) An adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more; or
- (c) A reduction-in-force; or
- (d) A placement on enforced leave for ten (10) days or more.

Moreover, OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), states that “[t]he employee shall have the burden of proof as to issues of jurisdiction....” Under this rule, the burden of proof is by a preponderance of the evidence which is defined as “[t]hat 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.” This Office has no authority to review issues beyond its jurisdictional authority.¹⁰ Accordingly, issues regarding jurisdiction may be raised at any time during the course of the proceeding.¹¹

Term Employment

This Board agrees with the AJ’s determination that Employee was serving in a term capacity at the time of her termination. Employee argues that this Office should retain jurisdiction over her appeal because she should have been converted to a permanent Forensic Mental Health Counselor/Coordinator based on Agency’s actions and repeated verbal reassurances. We disagree.

Chapter 8 of the DPM addresses an agency’s ability to terminate employees who are serving under term appointments. Under DPM § 823.1, a personnel authority may make a term

¹⁰ *Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

¹¹ *Brown v. District of Columbia Public Schools*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (January 22, 1993); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).

appointment for a period of more than one (1) year when the needs of the service so require and the employment need is for a limited period of four (4) years or less. The DPM further provides the following with respect to term employees:

- 823.3 If an employee is serving in a term appointment supported by grant funds, the conversion of his or her position shall be determined by the personnel authority.
- 823.8 An employee serving under a term appointment shall not acquire permanent status on the basis of the term appointment, and shall not be converted to a regular Career Service appointment, unless the initial term appointment was through open competition within the Career Service and the employee has satisfied the probationary period.
- 823.9 Employment under a term appointment shall end automatically on the expiration of the appointment, unless the employee has been separated earlier
- 824.10 A temporary appointment shall not confer eligibility to be moved noncompetitively to another position. The placement of a temporary employee to another position shall be accomplished by a new appointment through conversion actions
- 826.1 The employment of an individual under a temporary or term appointment shall end on the expiration date of the appointment, on the expiration date of an extension granted by the personnel authority, or upon separation prior to the specified expiration date in accordance with this section.

It is clear from the record that Employee was appointed to a term position in October of 2016.¹² The record includes a document titled “Conditions of Employment Under Term Appointment” form, in which Employee certified that she accepted a term appointment that would expire on September 30, 2017. Specifically, the form indicated that Employee understood that her appointment may be terminated sooner, if necessary, due to lack of work, and that her

¹² Employee was initially hired as a Forensic Mental Health Coordinator on August 11, 2014, under a term position. Employee’s term was then extended on October 1, 2015, for one year until September 30, 2016. Employee’s term was further extended on October 1, 2016, until September 30, 2017.

continued employment after expiration of the appointment will be contingent upon availability of a position.¹³

On September 22, 2017, Employee received a Notice of Termination Upon Expiration of Term Appointment. The notice provided the following:

In accordance with Section 826 of Chapter 8 of the D.C. personnel regulations, this letter serves as official notification that your term appointment to the position of Forensic Mental Health Coordinator, CS-0301-12, with the Department of Behavioral Health, to which you were appointed on October 1, 2016, will expire on September 30, 2017, and will not be extended after its expiration date. Accordingly, you will be terminated effective September 30, 2017. Please be advised that this termination is not appealable or grievable.¹⁴

Agency also generated a Notification of Personnel Action, Standard Form 50 (SF-50), on October 12, 2017, which stated that Employee's term appointment had a Not to Exceed ("NTE") date of September 30, 2017. Additionally, Employee listed "Term Appointment" on her Petition for Appeal with respect to the type of service that she held.¹⁵

Regarding Employee's argument that she should have acquired permanent status, DPM § 823.8 provides that if an employee is serving a term appointment supported by grant funds, the conversion of his or her position shall be determined by the personnel authority as stated under DPM § 823.3. In this case, Employee stated in her Petition for Review that she was initially hired under the Second Chance Grant on August 11, 2014.¹⁶ Because Employee's appointment was supported by grant funds, the conversion of her position from term to permanent was not automatic and was at the discretion of the appropriate personnel authority. Although Employee

¹³ *Agency Answer to Petition*, (December 15, 2017).

¹⁴ *Petition for Appeal*, (November 15, 2017)

¹⁵ *Id.*

¹⁶ Second Chance Grant is a nonprofit organization funded by the U.S. Department of Justice's Office of Justice Programs. Second Chance Act Grant Program, <https://csgjusticecenter.org/nrrc/projects/second-chance-act/> (Last visited July 31, 2018).

states that Agency verbally stated that she would be converted to permanent status, there is no documentary evidence in the record to support a finding that Employee was officially converted to a permanent position by Agency's appointed personnel authority.

Based on the foregoing, the Board finds that Employee consented to work in a one-year term capacity on October 1, 2016, as evidenced by her signed Conditions of Employment Under Term Appointment letter. Employee's term ended on September 30, 2017, following several extensions of her initial term appointment. There is no legal authority or evidence in the record to prove that Agency was required to reappoint Employee, or that she should have automatically been converted to permanent status.

Additionally, we agree with the AJ's conclusion that OEA lacks the jurisdictional authority to address Employee's argument that she was given verbal assurances that her position was permanent. Employee was properly classified as a term Forensic Mental Health Coordinator. OEA has consistently held that it lacks jurisdiction over term employees.¹⁷ Agency properly removed Employee prior to the expiration of her term pursuant to DPM § 826. Consequently, we cannot address the merits, if any, of Employee's substantive arguments.

Did the Administrative Judge Address each of Employee's Arguments?

Employee next argues that the AJ failed to address each of her arguments in his Initial Decision. Specifically, she states that the Initial Decision did not address Agency's alleged verbal promises, or its and repeated assurances that Employee would become permanent. Additionally, Employee states that the AJ did not address her contention that she had an enforceable contractual

¹⁷ See *Carolynn Brooks v. D.C. Public Schools*, OEA Matter No. J-0136-08, *Opinion and Order on Petition for Review* (July 30, 2010); *Roxanne Smith v. D.C. Department of Parks and Recreation*, OEA Matter No. J-0103-08, *Opinion and Order on Petition for Review* (May 23, 2011); *Carla Norde v. Department of Human Resources*, OEA Matter No. J-0103-16, *Initial Decision* (January 06, 2017); *Carol F. Barbour v. District of Columbia Public Schools*, OEA Matter No. J-0137-08, *Initial Decision* (September 30, 2008).

agreement with Agency to reflect that she was converted to a permanent position. This Board disagrees and finds that the AJ adequately addressed the issues raised by Employee.

In his Initial Decision, the AJ acknowledged Employee's assertions regarding the existence of verbal assurances given by the Director of Forensic Services. He also recognized Employee's claim that she was misled to believe that her position was permanent for well over eight months. However, the AJ concluded that such complaints constituted grievances that are outside of OEA's jurisdictional purview.¹⁸ This Board finds that the AJ adequately addressed Employee's arguments raised on appeal. Moreover, Employee provides no credible evidence to support a finding that she had a binding contractual agreement with Agency. Therefore, we find her arguments to be unpersuasive.

Conclusion

Based on the foregoing, the AJ correctly concluded that Employee was a term employee at the time of her termination. Agency properly removed Employee in accordance with the DPM on September 30, 2017, when her term expired. As previously stated, OEA lacks jurisdiction over term employees. Therefore, Employee's Petition for Review must be dismissed.

¹⁸ *Initial Decision*, (January 24, 2018).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DISMISSED**.

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

Jelani Freeman

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.