THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ROXANNE CROMWELL,	)	
Employee	)	OEA Matter No. J-0009-18R20C20
	)	
v.	)	Date of Issuance: February 17, 2021
	)	
DEPARTMENT OF SMALL AND LOCAL BUSINESS DEVELOPMENT,	)	MONICA DOHNJI, Esq. Senior Administrative Judge
Agency	)	
	)	

David Branch, Esq, Employee Representative
Stephen Milak, Esq., Agency Representative

ADDENDUM DECISION ON COMPLIANCE[1]

INTRODUCTION AND PROCEDURAL HISTORY

On October 17, 2017, Roxanne Cromwell ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the Department of Small and Local Business Development's ("Agency") decision to terminate her from her position as an Administrative Officer, effective October 9, 2017. I was assigned this matter on October 23, 2017. On November 16, 2017, Agency filed its Answer to Employee's Petition for Appeal, stating that Employee was still in her probationary period at the time of her termination and as such, OEA lacked jurisdiction over this matter. Thereafter, Employee was ordered to address the jurisdiction issue raised by Agency and Agency had the option to submit a reply brief. Both parties submitted their respective briefs. Because this matter could be decided on the basis of the documents of record, no proceedings were conducted. The undersigned issued an Initial Decision ("ID") in this matter on January 29, 2018, dismissing Employee's Petition for Appeal for lack of jurisdiction.

Employee filed a Petition for Review on July 26, 2019. She argued that OEA had jurisdiction over the matter because she was in a Career Permanent status at the time of her termination; therefore, she could have only been terminated for cause. On May 19, 2020, the OEA Board issued an Opinion and Order ("O&O") in this matter noting that "… in the interest

[1] This decision was issued during the District of Columbia's COVID-19 State of Emergency.

of justice, we must remand the matter to the Administrative Judge for consideration of the case on its merits."[2]

Thereafter, on May 28, 2020, I issued an Initial Decision on Remand ("IDR") reversing Agency's decision to terminate Employee. Agency did not appeal the IDR. Accordingly, the IDR became the final decision in this matter. The May 28, 2020, IDR ordered Agency to reinstate Employee and reimburse her all back-pay, and benefits lost as a result of her removal.

On August 07, 2020, Employee's representative entered his appearance in this matter. Thereafter, on September 21, 2020, Employee, through her attorney filed a Petition for Enforcement, noting that Agency had not complied with the May 28, 2020, IDR. Agency filed a response to Employee's Petition for Enforcement on October 13, 2020. A Status Conference was held in this matter on January 7, 2021. Thereafter, I issued a Post Status Conference Order requiring the parties to submit briefs addressing the issue of whether Employee had reversion rights back to her prior career service permanent position that she held in a different District agency prior to accepting the career service term position with Agency. Both parties have submitted their respective briefs. The record is now closed.

JURISDICTION

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

ISSUE

Whether Agency has complied with the May 28, 2020, Initial Decision on Remand.

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.

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[2] *See Roxanne Cromwell v. Department of Small and Local Business Development*, OEA Matter No. J-0009-18, *Opinion and Order on Petition for Review* (May 19, 2020).

ANALYSIS AND CONCLUSIONS OF LAW[3]

Employee filed a Petition for Enforcement seeking enforcement of the Initial Decision on Remand because the Agency had not complied with the order to reinstate her to her employment and reimburse her all back-pay and benefits lost as a result of her removal.[4] Employee notes that Agency elected not to file a Petition for Review with the OEA's Board or with the Superior Court of the District of Columbia. Therefore, the May 28, 2020 Initial Decision on Remand became the final decision of OEA.[5] Employee argues that Agency is in open defiance of the Orders issued by the OEA Board and the undersigned's Initial Decision on Remand because Agency's General Counsel has taken the position that Employee was a term employee and that she will not be reinstated because her term expired even though the OEA Board and Initial Decision on Remand both found that Employee was a career service permanent employee at the time of her termination and she could only be terminated for cause.[6] Employee also requested additional time to gather the documents requested by Agency for the calculation of her back pay. However, she stated that she should be immediately reinstated.[7] Employee concluded that because Agency has not complied with the Initial Decision on Remand which became final and is openly defying the Order, the Petition for Enforcement should be granted, and Agency be sanctioned for its non-compliance and ordered to pay Employee's attorney's fees.[8]

Agency on the other hand asserts that regardless of whether Employee was on probation at the time of her termination, Employee was, nonetheless, a term employee controlled by Chapter 8 of the District Personnel Manual (DPM) § 823, titled "Term Appointment."[9] Agency explained that the OEA Board's and AJ's finding that Employee was not probationary does not change the circumstance of Employee's term appointment."[10] Agency further explained that Employee's offer letter stated that the position Employee accepted was a term appointment Not-to-Exceed (NTE) 396 days. The NTE date of the term appointment was June 27, 2018.[11] Agency also highlights that Employee, in her Petition for Appeal, acknowledged that she was "Career permanent [(when she was employed by DCHR)] converted to Career Term."[12] In addition, Agency provides that the Funding Certificate, which was attached as an exhibit to Employee's Reply to Agency Response to Petition for Review of the Initial Decision, clearly lists "Term" under "Type of Appt." Accordingly, Agency maintained that based on the above, there is

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[3] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").
[4] Employee's Petition for Enforcement (September 21, 2020).
[5] *Id*.
[6] *Id*.
[7] *Id*.
[8] *Id*.
[9] Agency's Response to Employee's Petition for Enforcement (October 13, 2020).
[10] *Id*.
[11] *Id.* According to the Offer Letter, the NTE date is June 27, 2018, not May 27, 2018. *See* Agency's Response to Petition for Appeal at Exhibit 3 (November 16, 2017).
[12] *Id.*

conclusive evidence that Employee's position of record at the time of her termination was a term appointment.[13]

Citing to DPM Chapter 8, Agency avers that the regulations therein, makes it clear that (1) an employee hired under a term appointment *will not* be converted to a permanent appointment automatically; and (2) an employee hired under a term appointment *cannot* be converted to permanent appointment if the initial term appointment was made non-competitively.[14] Citing to the O&O, Agency maintains that, the OEA Board determined that Employee was not probationary at the time of her termination because she was hired non-competitively.[15] It explained that if Employee was hired non-competitively, then there is no means by which Employee's term position would have converted to a permanent position.[16] Agency reasoned that Employee's term appointment was NTE May 27, 2018.[17] Therefore, the finding that Employee was not probationary does not affect Employee's status as a term appointee, and Agency is not required to reinstate Employee beyond the expiration date of her term.[18] Agency states that it has made every effort to comply with the AJ's Order to reimburse Employee for all back pay and benefits lost because of her removal. Agency asserts that, on July 9, 2020, it served onto Employee a request for the following: a Transcript of Tax Return; an Affidavit Covering Outside Earnings and Erroneous Payments; and, a Benefits Restoration Agreement so that it could calculate Employee's back pay and benefits. Agency maintains that as of October 13, 2020, it has not received the requested documentation from Employee so that it can fully comply with the AJ's Order regarding back pay and benefits.[19]

Analysis

Employee argued during the Status Conference that Agency was required to return her to her permanent employment status upon the termination of her term position. She explained that she was hired as a permanent employee and had completed her probationary period. As such, even though her employment with Agency was a term appointment, upon expiration of the term appointment, Agency was required to return her to her previously held career service permanent appointment status which she acquired from her previous agency (District of Columbia Department of Human Resources ("DCHR")). The undersigned, in the Post Status Conference Order required Employee to provide briefs along with any applicable laws, rules and regulations in support of that assertion. However, Employee argued in her brief that the undersigned, by requesting that Employee provide evidence in support of her own position, shifted the burden of proof from Agency to Employee.[20] In response to this issue, Agency stated that it disagreed with Employee's burden shifting assessment. Agency explains that "during that status conference, Employee made various representations of law that allegedly support the proposition that

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[13] *Id.*
[14] *Id*. *See* DPM § 823.8.
[15] Employee's Petition for Review of the Administrative Judge's Initial Decision at Document 2 (July 26, 2019).
[16] *Id*. Citing DPM § 823.8. Pursuant to DPM § 823.9, "[e]mployment under a term appointment shall end automatically on the expiration of the appointment unless the employee has been separated earlier."
[17] According to the Offer Letter, the NTE date is June 27, 2018, not May 27, 2018. *See* Agency's Response to Petition for Appeal at Exhibit 3 (November 16, 2017).
[18] *Id.*
[19] *Id*.
[20] Employee's Response to Post Status/Prehearing Order (January 28, 2021).

Agency was required to reinstate Employee, a term appointee, to a CS permanent position; SAJ Dohnji merely ordered Employee to substantiate those representations, which, as discussed below, she has failed to do."[21]

The undersigned disagrees with Employee's assertion. The undersigned finds that just because the burden of proof is on Agency, does not imply that Employee is not required to submit evidence in support of her position. Agency is only required to prove its case. It is not required to prove Employee's case as well. Because Employee raised the specific issue regarding whether Agency was required to revert her to her previous employment status, I find that it is Employee's responsibility to direct this court to the specific information she was referring to during the Status Conference. Consequently, I find that Employee's argument as it relates to this issue is without merit.

Employee further asserts that the issue of whether she had reversion rights is not properly before OEA. She maintains that the only issue the Administrative Judge may consider is whether the Agency complied with the Initial Decision on Remand on May 28, 2020.[22] Agency on the other hand noted that Employee cannot argue that the issue was never properly before OEA, but that Agency, regardless, must reinstate Employee, a term appointee, to a CS permanent position with Agency. It continued that if the issue was properly before OEA, then SAJ Dohnji may consider the arguments made by Employee in her Response and by Agency in its Reply, respectively; if it is not, then Employee cannot request OEA to enforce an issue that was not "litigated in the initial proceeding," namely Employee's reinstatement to a position she never held within Agency.[23]

Employee asserted for the first time during the Status Conference that her appointment reverted to a career service permanent appointment upon the expiration of the NTE appointment. She noted in her Post Status/Prehearing Order brief that "as a HR professional for the District of Columbia Government, you are to look at an employee's record in its entirety from hire to separation. You cannot disregard an employee's record/history to one appointment alone."[24] While it is incumbent on the undersigned to address all issues raised by the parties in deciding whether Agency has complied with an Order, the undersigned in this instance agrees with Employee that this issue is not proper before OEA at this time. This was not an issue that was raised prior to the issuance of the ID, O&O or IDR, and the purpose of the Motion for Enforcement is to ensure that Agency complies with the final order in the matter. In this case, the final Order issued by OEA was to reinstate Employee to her previous position of record within *Agency*, and not to reopen the record to include other parties (agencies that are not parties) to the claim. Because the record is clear with regards to Employee's appointment status (Career Term appointment) at the time of her termination, and without any information to contradict this assertion, I conclude that the undersigned cannot go any further into this issue.

Employee also asserted, and Agency acknowledged that the IDR was the final order in this matter. The IDR ordered Agency to reinstate Employee to *her previous position of record*

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[21] Agency's Reply to Employee's Response to Post Status/Prehearing Order (February 11, 2021).
[22] Employee's Response to Post Status/Prehearing Order, *supra*.
[23] Agency's Reply to Employee's Response to Post Status/Prehearing Order, *supra*.
[24] *See* Employee's Response to Post Status/Prehearing Order.

(emphasis added). Employee argues that she should have been reinstated to a career permanent position pursuant to the IDR. She explained that if Agency had an issue with doing so, it should have appealed the IDR. In making this assertion, Employee relied on the fact that she was hired by another agency as a permanent career employee, the ruling in the O&O, and a general statement in the IDR which stated that "[a]s a permanent Career Service employee, Employee may only be subject to adverse action for cause, along with the right to appeal any adverse action that leads to termination."[25] Agency countered this argument by stating that, Employee has requested relief not provided to her in the IDR and, therefore, Agency was not required to appeal the IDR to the Superior Court.

The OEA Board in its O&O concluded that Employee did not have to serve a second probationary period because she was hired non-competitively.[26] However, the OEA Board did not assert that because Employee was hired noncompetitively and did not have to serve another probationary period, her employment status changed from a term appointment to a permanent appointment. In addition, the undersigned acknowledges the error in the IDR which referenced the rights afforded to permanent career service appointment within an agency. While this might have been confusing, the undersigned did not in any way intend to imply in the IDR that Employee's position of record changed from a Term appointment to a permanent appointment. Furthermore, the undersigned stated in the same paragraph in the IDR that "[a]ccordingly, I further find that Employee's termination should be reversed, and Employee restored to her *previous position of record*" which Employee was aware was a Term NTE position (emphasis added). Thus, I find that Employee is being disingenuous in arguing that the IDR afforded her a permanent career service appointment, when she voluntarily accepted a career term appointment; she was aware that the same IDR instructed Agency to return Employee to her previous position of record; and Employee was also fully aware that her previous position of record with Agency was a Term NTE appointment.

Employee provided the undersigned with several DPM provisions in response to the Post Status/Prehearing Order regarding whether she had reversion rights to her previous employment status to include DPM section 834.1 which provides that "[e]xcept as waived in accordance with 833.2[27] an employee's rights and benefits with respect to continued employment shall not be reduced by promotion, demotion or reassignment." The undersigned finds that this applies to continued employment within the same agency wherein, the employee has not specifically waived their rights in writing to relinquish the career service rights.

Employee in the current matter accepted a new position at a *different agency* (emphasis added). Prior to accepting this position, she worked at DCHR. She voluntarily accepted a term position with DSLBD and waived her career service permanent rights and benefits. This is evidenced by her signature in the job acceptance letter. Moreover, because this section of the DPM references section 833.2, which only applies to internal placements, it can be reasonable

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[25] Initial Decision on Remand at pg. 3 (May 28, 2020).
[26] Employee's Petition for Review of the Administrative Judge's Initial Decision at Document 2 (July 26, 2019).
[27] DPM § 833.2: Any *internal placement* of a Career Service appointee to a position with less rights and benefits shall not be effective unless the employee has waived the rights and benefits in writing; and the waiver shall be made a permanent part of the employee's Official Personnel Folder (emphasis added). This does not apply to Employee because her placement with Agency was not an internal placement.

assumed that section 834.1, was also intended for position changes within the *same agency* (emphasis added). Consequently, by knowingly and voluntarily accepting a term career position at another agency, I find that Employee forfeited her career service permanent appointment for a term career appointment.

Employee also cited to DPM section 812.3 which provides that, "[u]pon completion of the probationary period of a Career Appointment (probation), an employee shall be converted to a Career Appointment (permanent)." The record in the current matter reflects that Employee was serving a term career appointment and not a permanent career appointment with the current Agency. DPM §823.9, specifically states that "[e]mployment under a term appointment shall end automatically on the expiration of the appointment, unless the employee has been separated earlier." Therefore, Employee's term appointment would have automatically expired when the term appointment expired (NTE 396 days from May 27, 2017 unless it was extended by Agency) had she not been terminated by Agency. Based on the record, Agency decided not to extend Employee's term appointment. Furthermore, DPM § 823.3 highlights that "[i]f 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." There is evidence in the record to support the fact that Employee's term appointment was supported by grant funds. Therefore, I find that Agency, and not the undersigned is tasked with the decision of whether to extend or to convert Employee's position from a term to a permanent position.

Employee argued throughout the appeal process that she was not required to serve a second probationary period. In support thereof, Employee cited DPM sections 813.8; and 813.9 (a)(b)(c) in her Post Status/Prehearing Order Briefs. I find that this issue of whether Employee was a probationary employee at the time of her termination, as well as whether Employee was required to serve a second probationary period is moot. The OEA Board addressed this issue in its O&O. The OEA Board found that Employee's initial appointment to Agency was not through open competition. Employee herself acknowledged in her January 28, 2021, brief that her appointment to Agency was not through open competition. Because the OEA Board found that Employee's initial appointment to Agency was not through open competition but rather noncompetitively, it held that Employee was not required to complete a second probationary period. Accordingly, I will not delve any further into this issue.[28]

While Employee vigorously argued throughout the appeal process that she was not required to serve a second probationary period, at no point did she assert that she did not hold a Term Career Service appointment with Agency at the time of her termination. Moreover, the complete record before the undersigned shows that Employee was hired at Agency as a Career Term employee. The position Employee accepted at DSLBD was a *Term* career service appointment (emphasis added). She was a Term employee when she was terminated by her current Agency. The current adverse action before the undersigned was against the current Agency (DSLDB) and not her previous agency (DCHR). Thus, the undersigned's scope of review is limited to what happened at DSLBD and not what happened at another agency that is not a party to this matter. Moreover, Employee herself has asserted that this issue is now improper before OEA, and she has also failed to provide the undersigned with any supporting

[28] *See Roxanne Cromwell v. Department of Small and Local Business Development*, OEA Matter No. J-0009-18, *Opinion and Order on Petition for Review* (May 19, 2020).

documentation, case law, rules, and regulations stating that she retained her career service permanent status after she knowingly and voluntarily accepted a term position with another agency. Consequently, I find that Employee did not retain her career service permanent appointment status when she accepted the Term position with Agency. I also find that Employee did not have any reversion/retreat rights to her previous career service permanent status upon her acceptance of the career service term position with Agency.

As previously stated, the OEA Board in its O&O made no determination as to whether Employee had a permanent or term appointment. The OEA Board, in the O&O only discussed the issue of whether Employee was required to serve a second probationary period. After it concluded that Employee did not have to serve a second probationary period because her position with Agency was acquired non-competitively, it ordered the undersigned to proceed with this matter on the merits. Pursuant to DPM § 826.3 "[a]fter satisfactory completion of the probationary period, and prior to the expiration date of the appointment, *separation of a term appointee for cause shall be in accordance with chapter 16 of these regulations*." (Emphasis added). Employee was a term employee who had satisfied the probationary period. As such, she could only be separated for cause, in accordance with chapter 16 of the DPM. Since Agency did not provide cause for its decision to terminate Employee, the undersigned reversed the instant adverse action. This reversal in no way, was an attempt to grant Employee career service permanent appointment status. Moreover, Employee acknowledged in her Petition for Appeal that she had a "Career permanent *converted to career term* position" with Agency (emphasis added).[29] Further, there is sufficient evidence in the record to prove that Employee's previous position of record with Agency was a term appointment, with a NTE 396 days.

Additionally, DPM § 823.8 provides that, 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* (emphasis added). In the instant matter, Employee's initial appointment with DSLBD was a term appointment. She was offered and she accepted a Term appointment on May 10, 2017. Employee acknowledged that she had a "career permanent converted to career term" appointment at the time of her termination.[30] When asked the question "What type of appointment do you have?" on the Petition for Appeal form, Employee circled "Term".[31] Employee also stated in her Petition for Appeal that "I *served* in a career service permanent and was *promoted to a term* position … (emphasis added)."[32] Employee's offer letter further states that, the position Employee accepted was a term appointment with a Not-to-Exceed (NTE) 396 days.[33] The NTE date of the Term appointment is June 27, 2018. Therefore, I find that, Employee was aware of the term appointment and she was serving as a term employee at the time of her termination. Additionally, the OEA Board found that Employee's initial appointment to Agency was not through open competition. Employee herself acknowledged in her January 28, 2021, brief that her appointment to Agency was not through open competition. With this

[29] Petition for Appeal at pg. 3 (October 17, 2017).
[30] *Id*.
[31] *Id*. at pg. 4
[32] *Id.*
[33] Agency's Answer to Petition for Appeal at Exhibit 3 (November 16, 2017)

conclusion, Employee cannot acquire a permanent status on the basis of the term appointment and her appointment cannot be converted to a regular permanent career service appointment because her initial appointment was not through open competition.

Pursuant to the above, I conclude that Employee was a term career service employee at the time of her termination, and she was aware of this fact. In addition, there is evidence in the record to prove that Employee's initial appointment with Agency was done noncompetitively and as such, her term appointment cannot be converted to a permanent appointment.[34] Moreover, Agency is within its right not to extend Employee's term appointment, as well as not to convert Employee's appointment from a term to a permanent appointment. Consequently, I conclude that Agency has partially complied with the May 28, 2020, IDR.

ORDER

Since Employee's term appointment has expired and Agency has decided not to extend the term appointment, I find that Agency does not have to reinstate Employee. However, because Agency has not reimbursed Employee's backpay and benefits in compliance with the IDR, I conclude that Agency is not in full compliance with the May 28, 2020, IDR. Agency is hereby **ORDERED** to reimburse Employee's back pay and benefits covering the **period from when she was terminated to the expiration date of Employee's term NTE appointment date.** Agency has **30 days** from the date of the issuance of this decision to comply (emphasis added).

FOR THE OFFICE:

/s/ *Monica N. Dohnji*
MONICA DOHNJI, Esq.
Senior Administrative Judge

[34] Employee's Petition for Review of the Administrative Judge's Initial Decision at Document 2 (July 26, 2019). This document also highlights that Employee was hired into a non-competitive term appointment.