THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DANA BROWN,	)	
Employee	)	OEA Matter No. 1601-0036-07R12
	)	
v.	)	
	)	Date of Issuance: September 13, 2016
DEPARTMENT OF YOUTH	)	
REHABILITATION SERVICES,	)	
Agency	)	
	)	

OPINION AND ORDER
ON REMAND

This matter has been previously before the Office of Employee ("OEA") Board. By way of background, Dana Brown ("Employee") worked as a Juvenile Justice Institutional Counselor at the Department of Youth Rehabilitation Services ("Agency"). On February 2, 2005, Employee fell on ice at Agency's Oak Hill facility. She was totally disabled and had to undergo rehabilitative treatment. She was placed on leave without pay ("LWOP") on March 3, 2005, so that she could receive Worker's Compensation.[1]

On September 29, 2006, Employee received an advance notice of proposal to remove her from her position. The notice provided that Employee failed to submit any medical certification regarding her medical status. Additionally, it provided that she was on LWOP for more than one

[1] *Petition for Appeal,* p. 8 (December 21, 2006).

year and failed to show documentation to prove that she could carry out the functions of her position. As a result, Agency removed Employee because of her "inability to satisfactorily perform one or more major duties of [her] position." After Employee offered a response to these claims, Agency issued a final decision removing her from her position on November 24, 2006.[2]

The OEA Administrative Judge ("AJ") ruled that Agency's action was proper and upheld Employee's termination.[3] However, this Board found that the AJ used the wrong version of D.C. Official Code §§ 1-623.45(b)(1) and (b)(2). Accordingly, it reversed Agency's action and ordered that Employee be reinstated to her position with back pay and benefits.[4]

Agency appealed the matter to the Superior Court for the District of Columbia. The Court held that the OEA Board was proper in its analysis regarding the applicable Code section and that Agency could not apply the Code retroactively. However, it ruled that there was not substantial evidence for the Board to conclude that Agency had cause to remove Employee. Therefore, it remanded the matter to OEA for further determinations.[5]

In her Initial Decision on Remand, the AJ found that Agency had cause to remove Employee. She reasoned that in accordance with D.C. Official Code § 1-623.45(b)(1), Employee could have resumed employment in her position if she overcame her injury or disability within one year. However, Employee was still disabled one year after she started to receive disability benefits. Additionally, the AJ opined that Employee did not provide documentation that she overcame her disability until January 29, 2008. Because she provided that documentation after Agency properly terminated her, the AJ held that Employee's argument that D.C. Official Code

[2] *Respondent's Responses to Appellant's Petition for Appeal,* Tabs 3 and 4 (January 29, 2007).
[3] *Initial Decision* (May 5, 2008).
[4] *Dana Brown v. Department of Youth Rehabilitation Services,* OEA Matter No. 1601-0036-07, *Opinion and Order on Petition for Review* (March 1, 2010).
[5] *District of Columbia Department of Youth Rehabilitation Services v. District of Columbia Office of Employee Appeals,* No. 2010 CA 1842 P(MPA) (D.C. Super. Ct., September 20, 2012).

§ 1-623.45(b)(2) amounted to a grievance, over which OEA lacked jurisdiction to consider. Accordingly, she ordered that Employee's removal action be upheld.[6]

Employee filed a Petition for Review on June 1, 2015. She argues that the Initial Decision on Remand failed to address if Agency had cause to terminate her. Employee provides that Agency removed her because she "did not satisfactorily perform one or more of her job duties because she failed to submit medical documentation certifying her medical status." However, she contends that – despite Agency's assertion – she did provide medical documentation certifying her medical status. Thus, it is her position that the AJ should have conducted an evidentiary hearing. Additionally, she asserts that the AJ improperly held that her desire to invoke D.C. Official Code § 1-623.45(b)(2) was a grievance. Moreover, she claims that Agency never provided notice of her right to grieve. Thus, Employee requested that this Board reinstate her to her position.[7]

Agency disagreed and filed an Opposition to the Petition for Review on July 2, 2015. It provides that because Employee did not overcome her disability within one year, she no longer had retention rights to her former position. Therefore, it had cause to remove her because she could not perform her job functions.[8]

Cause

As the Superior Court and AJ provided, D.C. Official Code § 1-623.45(b)(1) provides that an agency must accord employee the right to resume their former or equivalent position if they overcome their injury or disability within one year after the date compensation commences. The record supports the AJ's holding that Employee's Worker's Compensation benefits started

[6] *Initial Decision on Remand*, p. 4-9 (April 30, 2015).
[7] *Petition for Review*, p. 3-7 (June 1, 2015).
[8] *Agency's Opposition to Petition for Review,* 6-9 (July 2, 2015).

on March 23, 2005.[9] Therefore, Employee had until March 22, 2006, to overcome her disability and invoke the right to be reinstated to her position or one that was comparable. Employee provided documentation on January 29, 2008, that she overcame her disability and could return to work. This documentation was provided well after the March 22, 2006 deadline. Therefore, Employee no longer had retention rights to her former position.

This Board supports the AJ's reasoning that if an employee does not overcome their injury within one year, then they do not have the right to immediate and unconditional employment. Moreover, we agree that DPM § 827 vests Agency with the right to initiate adverse action proceedings. The AJ offered a detailed analysis that is consistent with the Superior Court's position that although there is a conflict with the timing of when proceedings can commence, the D.C. Official Code trumps the DPM regulation. Therefore, Agency had cause to start adverse action on March 23, 2006, one year after Employee failed to overcome her disability.

Medical Documentation

Employee argues that she was removed for her inability to satisfactorily perform one or more of her job duties due to lack of medical documentation.[10] She contends that she provided medical documentation to Agency. However, a thorough review of the record yielded six medical documents from Employee. The documents provided that Employee was unable to return to work from February 7, 2005 – July 7, 2005 and on January 12, 2006. As previously

[9] A notice from the Office of Risk Management, Disability Compensation Program dated March 3, 2005, stated that Employee's disability claim was accepted. *Employee Brief,* p. 42 (September 13, 2013). However, Agency contends that payments commenced on March 23, 2005. Therefore, in an abundance of caution, this Board will rely on the later date to give Employee the benefit of the doubt.

[10] This Board must note that Employee misstates the cause of action taken against her by Agency. In its final notice of removal, Agency clearly provides that Employee was removed for "inability to satisfactorily perform one or more major duties of [her] position." *Petition for Appeal,* p. 10 (December 21, 2006). Although the lack of documentation is mentioned in subsequent filings, the final notice only mentions her inability to perform one or more duties.

stated, Employee was cleared to return to work on January 29, 2008.[11] The record shows no medical documents between July 8, 2005 and January 11, 2006. The January 12, 2006 document simply provides "[a]s far as work capacity, I believe the patient should be off work." No time frame is offered by the physician, so it assumed that the notice only covered that particular day.[12] Thereafter, Employee presented no medical documentation from January 12, 2006 until January 29, 2008.

Agency contacted Employee after the March 22, 2006 deadline to inquire of her ability to return to work. On June 2, 2006, the Office of Personnel sent a letter requesting a date when Employee would be cleared to work. Employee informed the Office of Personnel that at that time she was still unable to work.[13] Additionally, on September 29, 2006, Agency informed Employee that it was proposing removal because she was unable to perform one or more of her job functions.[14] On October 12, 2006, in response to that notice, Employee – again – provided that she was unable to state when she would return to work.[15] Therefore, Agency properly inquired of Employee's ability to return to work for her to retain her position. Unfortunately, she was unable to do so within the statutory timeframe. Thus, Agency did have cause to remove Employee for inability to satisfactorily perform one or more major duties of her position.

Evidentiary Hearing

As for Employee's claim that the AJ should have conducted an evidentiary hearing, this Board has held that those decisions are left solely to the AJ. This Board relies on OEA Rule 624.2, which provides that "if the Administrative Judge grants a request for an evidentiary hearing, or makes his or her own determination that one is necessary, the Administrative Judge

[11] *Brief of Employee,* p. 35-36, 38, 48-49, and 55-57 (September 13, 2013).
[12] *Id.* at 49.
[13] *Respondent's Responses to Appellant's Petition for Appeal,* Tab # 1 (January 29, 2007).
[14] *Id.*, Tab # 3.
[15] *Id.*, Tab # 2.

will so advise the parties and, with appropriate notice, designate the time and place for such hearing and the issues to be addressed." Thus, it is the Administrative Judge's prerogative to hold an evidentiary hearing when it is deemed necessary.[16]

Grievances

Employee's final argument is that the AJ improperly held that her desire to invoke D.C. Official Code § 1-623.45(b)(2) amounts to a grievance. This Board has held in other matters that when removal is effective, employees are no longer District government employees.[17] Employee's removal was effective on November 24, 2006. Therefore, she was no longer a government employee on January 29, 2008, when she overcame her disability and was cleared to return to work. Therefore, the AJ correctly held that OEA did not have jurisdiction to consider her argument related to D.C. Official Code § 1-623.45(b)(2) because it constituted a grievance.

As it pertains to grievances, the OEA Board has consistently held that OEA lacks jurisdiction to consider those matters.[18] OEA's authority was established by D.C. Official Code §1-606.03(a). It provides that:

> "[a]n employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIIII-A of this chapter), an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more (pursuant to subchapter XXIV of this chapter), or a reduction-in-force

[16] *Metrice Jones v. D.C. Public Schools, Department of Transportation,* OEA Matter No. 1601-0077-09, *Opinion and Order on Petition for Review* (September 18, 2012); *Linda DuBuclet v. D.C. Public Schools,* OEA Matter No. 2401-0245-10, *Opinion and Order on Petition for Review* (December 17, 2013); *Yordanos Sium v. Office of State Superintendent of Education,* OEA Matter No. 1601-0135-13, *Opinion and Order on Petition for Review* (May 10, 2016).

[17] *Jessica Edmond v. D.C. Department of Consumer and Regulatory Affairs,* OEA Matter No. 2401-0344-10, *Opinion and Order on Petition for Review* (April 15, 2014) and *Charlotte Clipper v. D.C. National Guard,* OEA Matter No. 1601-0125-11, *Opinion and Order on Petition for Review* (December 10, 2014)(citing *Bagenstose v. District of Columbia Office of Employee Appeals*, 888 A.2d 1155, 1158 (2005)).

[18] *Rebecca Owens v. Department of Mental Health,* OEA Matter No. J-0097-03, *Opinion and Order on Petition for Review* (January 25, 2006); *Lillian Randolph v. District of Columbia. Water and Sewer Authority,* OEA Matter No. 2401-0085-02, *Opinion and Order on Petition for Review* (July 16, 2006); *Mark James v. Office of the Chief Technology Officer,* OEA Matter No. J-0003-08, *Opinion and Order on Petition for Review* (November 23, 2009); and *Rebecca Owens-Williams v. Department of Mental Health,* OEA Matter No. J-0128-09, *Opinion and Order on Petition for Review* (March 15, 2011).

> (pursuant to subchapter XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action."

Therefore, OEA can only consider those issues listed. Grievances are not one of the actions over which this Office has jurisdiction.[19]

Agency proved that it had cause to remove Employee. Despite Employee's contention, the AJ was not required to conduct an evidentiary hearing in this matter. Moreover, Employee did not invoke D.C. Official Code § 1-623.45(b)(2) prior to the effective date of her termination. Therefore, any claims arising from this section are grievances over which OEA lacks jurisdiction to consider. As a result of the aforementioned, this Board must deny Employee's Petition for Review.

[19] OEA's jurisdiction over grievances changed on October 21, 1998. According to OEA Rule 604.3, the Office only had jurisdiction over grievances if the appeal was filed with the Office *before* October 21, 1998. Employee's Petition for Appeal was filed in June of 2015, well past the 1998 deadline. Therefore, OEA does not have jurisdiction to consider her argument.

ORDER

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

FOR THE BOARD:

_____
Sheree L. Price, Interim Chair

_____
Vera M. Abbott

_____
A. Gilbert Douglass

_____
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.