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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
EMPLOYEE ¹)	OEA Matter No. J-0009-18R20
)	
v.)	
)	Date of Issuance: June 17, 2021
DEPARTMENT OF SMALL AND)	
LOCAL BUSINESS DEVELOPMENT,)	
Agency)	
)	

SECOND OPINION AND
ORDER ON
PETITION FOR REVIEW

This matter has been previously before the Office of Employee Appeals’ (“OEA”) Board. Employee worked as an Administrative Officer with the Department of Small and Local Business Development (“Agency”). On September 11, 2017, Employee received a notice that she would be terminated by Agency. According to Agency, Employee was removed from her position during her probationary period. The effective date of her removal was October 9, 2017.²

On January 29, 2018, the Administrative Judge (“AJ”) issued her Initial Decision.³

¹ Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

² *Petition for Appeal*, p. 5 (October 17, 2017).

³ The AJ found that pursuant to the District Personnel Manual (“DPM”) §§ 823.8 and 813.9(c), Employee’s appointment was through open enrollment in a different line of work; thus, she was required to serve a second probationary period. She held that the second probationary period was from May 28, 2017 through May 27, 2018. However, because Employee was removed from her position effective October 9, 2017, the AJ found that Employee

Employee filed a Petition for Review of the Initial Decision. In her petition, Employee submitted a document titled “Checklist for Submissions of Competitive & Non-Competitive Recruitment Actions to DCHR/Priority Consideration Clearance for Non-Competitive Term Appointments.” The OEA Board held that because the Administrative Officer position was listed as a non-competitive appointment, Employee’s appointment may not have been the result of open competition. Thus, the Board ruled that there was not substantial evidence in the record to support the AJ’s ruling regarding open competition. Therefore, it remanded the matter to the Administrative Judge for consideration of the case on its merits.⁴

The AJ issued an Initial Decision on Remand on May 29, 2020. She held that Agency did not have cause to terminate Employee, and it did not consider relevant factors before removing Employee. As a result, she ordered that Agency’s action be reversed and that it reinstate Employee and provide back pay and benefits lost as the result of her removal.⁵

On September 21, 2020, Employee filed a Petition for Enforcement. She provided that Agency’s General Counsel informed her that she would not be reinstated because she was a term employee, and her term expired.⁶ Subsequently, the AJ held a status conference to determine Agency’s compliance with the Initial Decision on Remand.

The Administrative Judge issued an Addendum Decision on Compliance on February 17, 2021. She explained that Employee contended that even though her employment with Agency was a term appointment, upon the expiration of the term, she should have reverted to her previous permanent appointment status, which she acquired from the District of Columbia

did not complete the second probationary period. Accordingly, she dismissed Employee’s Petition for Appeal for lack of jurisdiction. *Initial Decision*, p. 1-5 (January 29, 2018).

⁴ *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).

⁵ *Initial Decision on Remand*, p. 2-4 (May 29, 2020).

⁶ *Employee’s Motion for Enforcement* (September 21, 2020).

Human Resources (“DCHR”).⁷ The AJ opined that the final order issued by OEA was to reinstate Employee to her previous position of record within the Department of Small and Local Business. She found that Employee forfeited her Career Service, permanent appointment at DCHR for a term appointment position with Agency. Consequently, the AJ held that because Agency decided not to extend Employee’s term appointment past the designated end date, it was not required to reinstate Employee. Accordingly, she ordered that Agency reimburse Employee back pay and benefits from the time she was wrongfully terminated until the expiration date of her term appointment date.⁸

In response to the Addendum Decision on Compliance, Agency submitted a Statement Regarding Compliance on March 22, 2021. It acknowledged that it had not reimbursed Employee’s back pay and benefits, although it had made every effort to do so. Agency argued that pursuant to DPM § 1149.12, it was required to deduct any amount earned by employee from other employment during the period covered by the corrected personnel action from the back pay and benefits award. As a result, it requested an affidavit of outside earnings and erroneous payment; a benefits restoration agreement; and a transcript of tax returns from Employee. However, Agency argued that Employee failed to provide the required documentation. Accordingly, it requested that it be excused from the thirty-day compliance deadline imposed in the Addendum Decision on Compliance.⁹

On March 23, 2021, Employee filed a Petition for Review. She argues that she previously worked at DCHR as a Career permanent employee. Subsequently, she accepted a new position with Agency with an increased salary, at a different work site, and as a term

⁷ The AJ disagreed with Employee’s assertion and found that the issue was not properly before her, as it was not raised prior to the issuance of her Initial Decision, the Board’s Opinion and Order, or the Initial Decision on Remand.

⁸ *Addendum Decision on Compliance*, p. 4-9 (February 17, 2021).

⁹ *Agency’s Statement Regarding Compliance* (March 22, 2021).

employee. However, Employee asserts that when her term appointment expired, she was entitled to revert to her previous Career permanent status. It is Employee's position that a promotion from one District government agency to another was considered an internal placement and triggered her Career permanent protections. As a result, she requests that this Board reverse the Addendum Decision on Compliance and order that she be reinstated to a Career permanent position.¹⁰

Agency filed an Opposition to Employee's Petition for Review on April 27, 2021. It argues that the OEA Board lacks jurisdiction to review Employee's petition. Agency contends that the Board can review initial decisions but not decisions on compliance. Moreover, Agency explains that Employee resigned from her position with DCHR and accepted a new position with Agency under a term appointment. It opines that in accordance with DPM sections 823 and 826, an employee hired under a term appointment cannot be converted to a permanent appointment if the initial appointment was made non-competitively. Agency reasons that given the previous decisions issued in this case, it is undisputed that Employee was hired non-competitively, under a term appointment. Therefore, it is required to reimburse Employee back pay and benefits through the expiration of her term appointment date. Accordingly, it requests that this Board deny Employee's petition.¹¹

¹⁰ *Petition for Review of the Administrative Judge's Initial Decision* (March 23, 2021).

¹¹ *Agency's Opposition* (April 27, 2021). Employee filed a Motion to Reply to Agency's Opposition on May 7, 2021, where she argues that the AJ's Addendum Decision on Compliance was actually a Second Initial Decision because the AJ clarified her Initial Decision on Remand. As a result, she again requests that this Board reverse the Addendum Decision on Compliance and reinstate her to a Career permanent position. On May 19, 2021, Agency filed its Opposition to Employee's Motion and contends that OEA rules do not permit this Board to consider petitions on addendum decisions on compliance or any replies to oppositions to petitions for review. Thus, it requests that the Board deny Employee's motion. On May 27, 2021, Employee filed an Opposition to Agency's Motion to Strike. She opines that the AJ's decision on compliance deviated from OEA standards, and the AJ's attempt to clarify the record reversed her own ruling in the Initial Decision on Remand. Accordingly, Employee requests that she be reinstated to a Career Service Permanent position. *Petitioner's Opposition to the Agency's Motion to Strike* *Petitioner's Reply to the Agency's Opposition to the Petition for Review of the Administrative Judge's Decision* (May 27, 2021).

Finality of Initial Decision

OEA Rule section 632 addresses the finality of decisions issued by the Administrative Judge. Specifically, OEA Rule 632.1 provides that “the initial decision shall become final thirty-five (35) calendar days after issuance.” In her Motion for Enforcement, Employee correctly provided that because Agency elected not to file a Petition for Review, the Initial Decision on Remand became OEA’s final decision.¹² However, through her Petition for Review, Employee is attempting to have this Board address issues that were decided in the Initial Decision on Remand. Pursuant to OEA Rule 632.2, “the initial decision shall not become final if *any* party files a petition for review . . . within thirty-five (35) calendar days after issuance of the initial decision (emphasis added).” Because either party may file a petition of the Initial Decision, Employee also had the opportunity to appeal the Initial Decision on Remand before the requisite deadline. She did not. The AJ issued the Initial Decision on Remand on May 29, 2020. Employee filed a Petition of Review of the Initial Decision on March 23, 2021. This was nearly one year after the deadline to file a petition for review. Thus, Employee’s Petition for Review must be denied on the basis that the Initial Decision on Remand was final and was not appealed to the Board within a timely manner.

Addendum Decision on Compliance

OEA Rule 633.1 provides that “any party to the proceeding may serve and file a petition for review of an *initial decision* with the Board within thirty-five (35) calendar days of issuance of the initial decision (emphasis added).” Thus, a party is permitted to file a Petition for Review of an Initial Decision. Although Employee has captioned her filing as Petition for Review of Administrative Judge’s Initial Decision, she requests that the OEA Board “reverse the

¹² *Employee’s Motion for Enforcement*, p. 2-3 (September 21, 2020).

Addendum Decision on Compliance.”¹³ As Agency contends, the OEA Board is not permitted to consider Petitions for Review of an Addendum Decision on Compliance. Section 635 of the OEA rules, related to compliance and enforcement, provides no procedural avenue for an employee to appeal an Addendum Decision on Compliance to the OEA Board.¹⁴ There is no mention of the OEA Board within any of the provisions of OEA Rule 635. Consequently, the OEA Board has previously denied Petitions for Review of Addendum Decisions on Compliance in *Delores Junious v. D.C. Child and Family Services*, OEA Matter No. 1601-0058-01C07, *Opinion and Order on Petition for Review* (January 25, 2010); *Willie Porter v. Department of Mental Health*, OEA Matter No. 1601-0046-12C16, *Opinion and Order on Compliance* (December 3, 2019); and *Laura Jackson v. Department of Health*, OEA Matter No. 2401-0020-

¹³ *Petition for Review of Administrative Judge's Initial Decision*, p. 4 (March 23, 2021).

¹⁴ OEA Rules 635.1 through 635.11 provide the following:

635.1 Unless the Office's final decision is appealed to the Superior Court of the District of Columbia, the District agency shall comply with the Office's final decision within thirty (30) calendar days from the date the decision becomes final.

635.2 If any agency fails to comply with the final decision of the Office within the time period specified in § 635.3, the employee may file a motion to enforce the final decision. The motion shall be directed to the Administrative Judge who decided the appeal.

635.3 An agency must file an answer within twenty (20) calendar days of receipt of the employee's motion.

635.4 The employee, with specificity, shall explain in the motion how the agency has failed to comply with the Office's decision. The agency shall include in its answer a statement which admits or denies each allegation in the employee's motion.

635.5 The parties shall serve the motion and answer on each other.

635.6 Failure by the agency to file an answer to the motion for enforcement shall be construed as an admission of the employee's allegations.

635.7 The Administrative Judge shall take all necessary action to determine whether the final decision is being complied with and shall issue a written opinion on the matter.

635.8 The Administrative Judge may, for good cause shown, allow the agency additional time to submit proof of compliance with the initial decision.

635.9 If the Administrative Judge determines that the agency has not complied with the final decision, the Administrative Judge shall certify the matter to the General Counsel. The General Counsel shall order the agency to comply with the Office's final decision in accordance with D.C. Official Code § 1-606.02 (2006 Repl.).

635.10 No additional filings are permitted once the General Counsel certifies the final decision.

635.11 If the agency fails to comply with the order, the General Counsel may take such actions as are necessary to secure compliance with the order.

10R17C19, *Opinion and Order on Petition for Review* (June 30, 2020). As a result, this matter is improperly before the Board and must also be denied on this basis.¹⁵

Conclusion

Employee's Petition for Review is denied as untimely. Moreover, this Board lacks jurisdiction to consider Petitions for Review of Addendum Decisions on Compliance. Consequently, Employee's petition is also denied on this basis.

¹⁵ The only outstanding issue from the Initial Decision on Remand is the restoration of Employee's back pay and benefits. OEA Rule 635.1 provides that "unless the Office's final decision is appealed to the Superior Court of the District of Columbia, the District agency shall comply with the Office's final decision . . ." Moreover, OEA Rule 635.7 provides that "the Administrative Judge shall . . . determine whether the final decision is being complied with and shall issue a written opinion on the matter." Therefore, when addressing matters on compliance, it is the AJ's responsibility to determine if Agency complied with their order. In accordance with OEA Rule 635.9, "if the Administrative Judge determines that the agency has not complied with the final decision, the Administrative Judge shall certify the matter to the General Counsel." In the AJ's Addendum Decision on Compliance, she explained that because Agency chose not to extend Employee's term appointment, it does not have to reinstate Employee. Furthermore, she found that Agency did not fully comply with her Initial Decision on Remand order because it had not reimbursed Employee's back pay and benefits. However, the AJ has not certified this matter to the General Counsel's Office for compliance.

This Board assumes that that this matter has not been certified to the General Counsel's Office because Agency submitted evidence to OEA of its attempts to comply with the order and requested an extension to comply. As provided in its March 22, 2021 Statement Regarding Compliance, Agency emailed Employee on February 24, 2021 and March 15, 2021 requesting that she complete an affidavit of outside earnings and erroneous payment; a benefits restoration agreement; and a transcript of tax returns. *Agency's Statement Regarding Compliance*, Attachment #1 (March 22, 2021). Prior to these attempts by Agency, the record shows that Employee sought additional time to gather the requested documents back in September of 2020, as evidenced in her Petition for Enforcement. *Employee's Petition for Enforcement*, p. 3 (September 21, 2020). However, to date Employee has still failed to provide documents of outside earnings which are required for Agency to accurately calculate her back payment. Accordingly, Agency requested an extension of time in which to comply with the order because Employee has not submitted the necessary documents in a timely manner. Although this matter is not currently certified to the Board for compliance, it would implore Employee to submit the required documentation to Agency for it to effectively comply with the AJ's Initial Decision on Remand.

ORDER

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

FOR THE BOARD:

Clarence Labor, Jr., Chair

Patricia Hobson Wilson

Jelani Freeman

Peter Rosenstein

Dionna Maria Lewis

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.