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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: J-0007-11R13
ALEXIS PARKER,)	
Employee)	
)	Date of Issuance: October 22, 2015
v.)	
)	
DEPARTMENT OF HEALTH,)	
Agency)	Sommer J. Murphy, Esq.
_____)	Administrative Judge
Louise Ryder, Esq., Employee Representative)	
William Dansie, Esq., Employee Representative)	
David Branch, Esq., Employee Representative)	
Rahsaan Dickerson, Esq., Agency Representative)	

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL HISTORY

On October 7, 2010, Alexis Parker (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) contesting the Department of Health’s (“Agency” or “DOH”) decision to terminate her employment as a Community Relations Specialist (“CRS”). Agency’s notice informed Employee that she was being separated from service as a result of a Reduction-in-Force (“RIF”). Her termination under the RIF became effective on September 4, 2009. Employee was subsequently appointed as a Public Health Outreach Technician (“PHT”) under Agency’s Displaced Employee Program on February 16, 2010. On April 8, 2010, Employee received written notice that she was being terminated from her position as a PHT, effective April 23, 2010.

The matter was assigned to the Undersigned in January of 2011. On January 14, 2011, I issued an Order, directing Employee to present legal and factual arguments to support her argument that this Office has jurisdiction over her appeal. Employee submitted a response to the Order on January 28, 2011. Agency filed a response brief on February 11, 2011. After reviewing the documents of record, the Undersigned determined that an Evidentiary Hearing was not warranted.

On April 28, 2011, I issued an Initial Decision (“ID”), finding that OEA lacked jurisdiction over Employee’s appeal because she was in probationary status at the time she was terminated. Employee subsequently filed an appeal with D.C. Superior Court. On November 13, 2013, the Honorable Judge Natalia Combs Greene issued a Memorandum Opinion and Order, remanding the case back to OEA for further review and findings.¹

On October 7, 2014, a Status Conference Order was issued for the purpose of ascertaining the posture of the case. A rescheduled telephonic Status Conference was held on December 22, 2014. On February 5, 2015, the parties were ordered to submit written briefs addressing the issues as enumerated in Judge Greene’s Opinion and Order. On February 26, 2015, Employee filed a Consent Motion for Extension of Briefing Schedule. Employee’s motion was granted. Agency subsequently filed, and was granted, an extension of time in which to file its brief. Both parties submitted written briefs in accordance with the Undersigned’s Amended Order. The record is now closed.

JURISDICTION

As will be explained below, the jurisdiction of this Office has not been established.

ISSUE

Whether OEA has jurisdiction over Employee’s appeal.

FINDINGS OF FACT

Employee was initially hired as a Community Relations Specialist (“CRS”) with the Addiction Prevention and Recovery Administration (“AAPA”) within the Department of Health. The position was classified as Series DS 301, Grade 9, under the District’s job classification structure.² On July 31, 2009, Agency issued Employee written notice that her position as a CRS was being abolished as a result of a RIF pursuant to Chapter 24 of the District’s Personnel Regulations.³ Employee’s termination became effective on September 4, 2009. Agency’s RIF notice stated the following:

Employees in tenure groups I and II who have received a notice of separation by reduction in force have a right to priority placement consideration through the Agency Reemployment Priority Program (“ARPP”). Placement assistance through the D.C. Department of Human Resources Displaced Employee Program for vacancies in other District agencies will also be provided to employees in tenure groups I and II. You may also receive placement assistance

¹ 2012 CA 008265 P (MPA) (November 13, 2013). Employee passed away in April of 2013. Her current attorneys subsequently filed a Motion for Substitution for the purpose of representing her interest in the prosecution of this appeal.

² Agency Answer to Petition for Appeal, Tab 1 (November 3, 2010).

³ *Id.* at Tab 2.

through the Department of Employment Services Dislocated Worker Program.⁴

On October 16, 2009, Agency posted a position opening for two (2) Public Health Outreach Technicians positions via Vacancy Announcement 14559. Under the General Job Information section of the posting, Agency listed the position's "Pay Plan, Series & Grade" as a CS-640-07.⁵ The posting further stated that "Eligibles for the District of Columbia's Displaced Employee Program (DEP) and Agency Reemployment Priority Placement Program (ARPP) will be given priority consideration for this position if found qualified." The Posting Cancellation provision provided that the non-competitive selection of an eligible candidate from the Agency's ARPP or DEP would result in the cancellation of the announcement.⁶

On February 4, 2010, Agency issued a letter confirming Employee's verbal acceptance of its offer of employment as a PHT. The letter stated that "[p]ersons appointed in the Career Service are subject to the satisfactory completion of a one year (1 year) probationary period that will begin February 16, 2010."⁷ A Notification of Personnel Action Form (SF-50) was generated to reflect Employee's appointment as a PHT.⁸

On April 8, 2010, Agency issued Employee a letter of termination, stating that she was being removed from her position as a PHT pursuant to Chapter 8, Section 814, of the D.C. Personnel Regulations. The notice stated that termination during an employee's probationary period is not appealable or grievable unless the appeal was based on violations of public policy, whistleblower protection laws, and/or alleged violations of anti-discrimination law.⁹ Employee's termination became effective on April 23, 2010.

In her appeal to D.C. Superior Court, Employee argued that Agency's action of terminating her employment should be reversed because: 1) Employee was a Career Service employee at the time of her termination, 2) she completed the requisite probationary period during her initial appointment as a Community Relations Specialist, 3) Agency improperly terminated Employee pursuant to a RIF; and 4) Employee was placed in the position of Public Health Outreach Technician via reinstatement under Agency's Priority Reemployment Program. The instant Initial Decision on Remand shall address the issues as enumerated in Judge Greene's November 13, 2013 Memorandum Opinion and Order.

ANALYSIS AND CONCLUSIONS OF LAW

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office's jurisdiction. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

⁴ *Id.*

⁵ *Id.* at Tab 5.

⁶ *Id.*

⁷ *Id.* at Tab 6.

⁸ *Id.* at Tab 7. Employee's Service Computation Date ("SCD") was listed as July 14, 1987.

⁹ *Id.* at Tab 8.

(a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

Under OEA Rule 628.1, the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.¹⁰ Preponderance of the evidence is defined as “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 states that the employee shall have the burden of proof as to issues of jurisdiction. The agency shall have the burden of proof as to all other issues.

Whether Employee was appointed to the position of Public Health Outreach Technician through open competition.

Chapter 8 of the DC Personnel Regulations applies to Career Service employees as set forth in Section 801 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (CMPA).¹¹ Under Section 813.8 of the District Personnel Manual (“DPM”), “[e]xcept when the appointment is effected with a break in service of one (1)-workday or more, or as specified in subsection 812.2(a) of this chapter or subsection 813.9 of this section, an employee who once satisfactorily completed a probationary period in the Career Service shall not be required to serve another probationary period.”

Section 813.9 of the DPM states the following:

An employee who once satisfactorily completed a probationary period in the Career Service shall be required to serve another probationary period when the employee:

- (a) Is appointed as a result of open competition to a position with a positive educational requirement from a position with no positive educational requirement or a different educational requirement;
- (b) Is appointed as a result of open competition to a position with licensure, certification, or other such requirement, in addition to a positive educational requirement, from a position without such requirements; or

¹⁰ 59 DCR 2129 (March 16, 2012).

¹¹ (D.C. Law 2-139; D.C. Official Code § 1-608.01 (2006 Repl. & 2011 Supp.)).

(c) Is appointed as a result of open competition to a position in a different line of work, as determined by the appropriate personnel authority based on the employee's actual duties and responsibilities.

Chapter 6, Section 899.1 of the D.C. Municipal Regulations (“DCMR”) defines open competition as a process of appointment that considers “all persons without regard to current or former employment within the District government.” Employee argues that she had “reinstatement eligibility” under DPM § 816.1 because she was a permanent Career Service employee at the time Agency issued its notice of termination, and that Agency failed to establish that she was terminated for cause.¹² Employee also contends that she was not appointed to the position of PHT through open competition because she was eligible for reinstatement under Agency’s ARPP after being separated pursuant to a 2009 RIF. Employee believes that her previous employment with the District government serves as a basis for finding that she was not appointed through open competition. In support of her position, Employee cites to 6 DCMR § 2428.1, which states:

2428.1 When a qualified person is available on the agency reemployment priority list, including a lesser competitive area reemployment priority list, as appropriate, a Career Service position within the competitive area shall not be filled except as provided in Chapter 8 of these regulations concerning priority placement categories and order of priority, and shall not be filled by the following:

- (a) A new appointment;
- (b) Transfer; or
- (c) Reemployment of a person not on the appropriate agency reemployment priority list.

Employee also asserts that she had “reinstatement eligibility” under DPM § 816.2, which provides in pertinent part the following:

A person having reinstatement eligibility under § 816.1 may be appointed competitively or noncompetitively to a position at a grade no higher than the grade last held under a Career Appointment (Probational) or a Career Appointment (Permanent) in the Career Service in a District agency, except that a reinstatement to a position with a promotion potential higher than the known promotion potential of the last position occupied shall be effected as provided in § 816.4.

¹² Employee Brief at 3 (March 20, 2015).

In this case, it is undisputed that Agency posted an employment opening for two (2) Public Health Outreach Technicians via Vacancy Announcement 14559. The announcement stated that the vacancies were open to the general public; however, employees who were eligible for the DEP or ARPP would be given priority consideration for the position *if* they were determined to be qualified. (emphasis added). Vacancy Announcement 14559 also included a provision that would result in the cancellation of the posting, contingent upon the *non-competitive* selection of an eligible candidate from the DEP or the ARPP. (emphasis added).

However, Employee has failed to submit any evidence to support a finding that she was selected for the PHT (CS-640-07) position through a non-competitive hiring process. While 6 DCMR § 2428.1 *requires* an Agency to appoint an eligible employee when they are deemed qualified for a position, DPM § 816.2 states that eligible employees *may* be appointed either “competitively or noncompetitively to a position at a grade no higher than the grade last held under a Career Appointment (Probational) or a Career Appointment (Permanent) in the Career Service in a District agency....” (emphasis added). Thus, Employee’s argument that Agency was mandated to reinstate her non-competitively under the ARPP is in direct conflict with her position that Agency also reinstated Employee under DPM § 816.2. Section 816 allows an agency the option of selecting an eligible employee for hire via a competitive or a non-competitive selection process.

When Employee was hired as a PHT in February of 2010, a Notification of Personnel Action Form (SF-50) was generated by Agency to reflect her new position.¹³ The SF-50 stated that the action was being taken as a result of Vacancy Announcement 14559, dated October 16, 2009. The “Nature of Action” section denotes that Employee occupied a Career Appointment pursuant to D.C. Official Code 1-608.1(a)(5). In the “Remarks” section, Agency states that Employee’s position was subject to the completion of a one (1) year probationary period beginning on February 16, 2010.¹⁴ Most notably, the SF-50 listed the position occupied as “Competitive.”¹⁵ In sum, Vacancy Announcement 14559 was open to the general public, and Employee was required to compete with other candidates for the PHT position. The Undersigned recognizes that Employee’s eligibility under the ARPP required DOH to accord her priority consideration for purposes of reemployment (if deemed qualified). However, there is no credible evidence in the record to demonstrate that Agency shirked its responsibility in considering Employee’s prior employment history with the District government as part of the hiring process. There is also no evidence in the record to illustrate that Vacancy Announcement 14559 was cancelled as a result of Employee’s non-competitive hiring as a PHT. Based on a review of the documents of record and the arguments presented by the parties, I find that Employee was hired as a result of open competition.

¹³ *Id.* at Tab 7. Employee’s Service Computation Date (“SCD”) was July 14, 1987.

¹⁴ *Id.*

¹⁵ *Id.*

Whether the positions of Community Relations Specialist and Public Health Outreach Technician are in different lines of work as outlined in § 813.9(c) of the DPM.

According to the Job Description submitted by Agency, a Community Relations Specialist, DS-301-09, is responsible for the following (non-exhaustive) duties:

1. Coordinating and implementing primary substance abuse prevention mobile education programs.
2. Receiving requests from the public, schools, governments, and private organizations for the Drugmobile.
3. Providing advice and guidance to service assistants relative to program operations.
4. Providing technical assistance, prevention and education to community organizations interested in substance abuse prevention and education programs.
5. Conducting lectures and counseling individuals and groups on substance abuse prevention and education.¹⁶

A Public Health Outreach Technician, CS-640-7, is tasked with the following (non-exhaustive) duties.

1. Providing regular home visits (independent of the nurse) and providing non-medical services to address the needs of the mother and infant to ensure that each is safe and healthy.
2. Conduct risk screens (substance abuse, depression, domestic violence, and infant developmental screens) on program participants.
3. Collaborate with the Case manager/Community Health Nurse to determine the level of family functioning and family needs.
4. Participates in clinical case conferences with nurse team leader and immediate supervisor.¹⁷

In analyzing the aforementioned job descriptions, the Undersigned finds that the position of Community Relations Specialist is in different line of work than the position of a Public Health Outreach Technician. While both positions fall within the health industry, the specific duties of the jobs are distinctive for the purpose of analysis under Section 813.9 of the DPM. In her previous position as a CRS, Employee was tasked with the implementation and execution of Agency's substance abuse prevention mobile education programs. Employee's responsibilities were specifically targeted towards the education and prevention of substance abuse within the District as a whole. A CRS is also required to have knowledge of the applicable Federal and District government regulations and law pertinent to illegal drug use and other operational plans as set by DOH and the Addiction Prevention and Recovery Administration.

¹⁶ Agency Answer to Petition for Appeal, Tab 1 (November 3, 2010).

¹⁷ *Id.* at Tab 4.

However, as a PHT, Employee was responsible for “providing intensive home visiting services to high-risk pregnant and parenting wom[en].”¹⁸ According to the job description provided by Agency, Employee was required to collaborate with a team of other employees (including nurses and/or the DOH Case Worker) in order to determine the needs and functional efficiency of specific families within the District. In her position as a PHT, Employee worked with families to provide specific and individualized needs based on an assessment of risk factors. Individuals who are hired as PHTs are required to have knowledge of the D.C. Health Start Program and the Community Health Administration. Moreover, the positions of CRS (DS-301-09) and PHT (CS-640-7) fall within different job series and classifications. Employee has failed to provide evidence to support a finding that the two positions were substantially similar in their actual duties and responsibilities. Accordingly, Agency is correct in its assertion that DPM § 813.9(c) should be invoked as a basis for requiring an employee to serve a second probationary period in cases where the individual is: 1) appointed as a result of open competition; and 2) the position is in a different line of work as determined by the employee’s actual duties and responsibilities.

Based on the foregoing, the Undersigned finds that Employee was required to serve a second one (1) year probationary period beginning on February 16, 2010 because she was appointed to the position of PHT as a result of open competition in a different line of work. Agency made Employee aware of this requirement in its February 4, 2010 letter, which confirmed her verbal acceptance of the position. It should further be noted that there is no evidence in the record to suggest that Employee contested Agency’s requirement that she serve a second probationary period because she had previously obtained permanent Career Service status prior to being RIF’d in September of 2009.

This Office has consistently held that a probationary employee may be removed without cause during their probationary period.¹⁹ An appeal to OEA by an employee serving in a probationary status must therefore be dismissed for lack of jurisdiction.²⁰ In this case, Employee has not met her burden of proof with regard to jurisdiction. At the time she was terminated, Employee had failed to obtain Career Service status and remained an “at-will.” OEA does not have jurisdiction matter over “at-will” employees; thus, this matter must be dismissed.

¹⁸ Public Health Outreach Technician Job Description, Vacancy Announcement 14958, *Id.* at Tab 5.

¹⁹ *Codling v. Office of the Chief Technology Officer*, OEA Matter No. J-0151-09, Opinion and Order on Petition for Review (December 6, 2010); *Wallace v. D.C. Public Schools*, OEA Matter No. J-0009-05 (January 31, 2006); and *Parker v. Department of Health*, OEA Matter No. J-0007-11, Opinion and Order on Petition for Review (September 12, 2012).

²⁰ *See, e.g., Day v. Office of the People’s Counsel*, OEA Matter No. J-0009-94, *Opinion and Order on Petition for Review* (August 19, 1991) D.C. Reg. ().

ORDER

It is hereby **ORDERED** that Employee's Petition for Appeal is **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE