THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 1601-0032-14
SAMUEL MURRAY,	)	
Employee	)	
	)	Date of Issuance: September 18, 2015
v.	)	
	)	
DEPARTMENT OF YOUTH	)	
REHABILITATION SERVICES,	)	
Agency	)	
	)	
	)	Arien P. Cannon, Esq.
	)	Administrative Judge

Johnnie Louis Johnson, III, Esq., Employee Representative
Frank McDougald, Esq., Agency Representative[1]

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On December 17, 2013, Samuel Murray ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("Office" or "OEA") challenging the Department of Youth Rehabilitation Services' decision to terminate him. At the time of his termination, Employee was a Motor Vehicle Operator. Employee was terminated for: (1) Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: incompetence; and (2) Any other on-duty or employment related reason for corrective or adverse action that is not arbitrary or capricious: inability to perform the essential functions of the job. The effective date of Employee's termination was November 29, 2013.

I was assigned this matter on June 16, 2014. A Prehearing Conference was convened on September 10, 2014. At the request of the parties, this matter was referred back to mediation. Mediation did not prove fruitful and the parties were ordered to submit briefs on the issues. A second Prehearing Conference was convened on May 27, 2015 to seek additional information

[1] Initially Ms. Lindsey Appiah was Agency's counsel on this case. Mr. McDougald entered his appearance on behalf of Agency on May 21, 2015.

from the parties. Subsequently, both parties submitted supplemental briefs. Based on the filings of both parties, I determined that an Evidentiary Hearing is not warranted. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and

2. If so, whether the penalty of removal was appropriate under the circumstances.

Agency's Position

Agency asserts that it had cause to terminate Employee for incompetence and for his inability to perform the essential functions of the job. Agency further asserts that Employee began receiving workers' compensation benefits for his July 30, 2010, on-the-job injury, on August 26, 2010.[2] Agency acknowledges that Employee returned to work for a brief period of time at the end of 2012.[3] Agency asserts that Employee has failed to indicate that he is medically willing or able to perform the essential duties of the position as a Motor Vehicle Operator. On April 23, 2013, Agency sent Employee a letter attempting to ascertain whether or not he had overcome the injury he sustained on July 30, 2010. Agency requested Employee's response to this letter by May 2, 2013. Agency maintains that Employee failed to provide a response to its letter and issued an Advance Notice of Proposed Removal on September 23, 2013. Agency contends that Employee failed to ever indicate a time period in which he anticipated he would return to work.[4]

Agency relies on D.C. Code § 1-623.45 (2007)[5] to argue that an employee with a Career Service appointment may retain his or her position or its equivalent for a period of two (2) years from the date of commencement of compensation from the District's Public Sector Worker's Compensation Program. Agency further asserts that although Employee no longer retained his right to resume his position after August 2012, he was provided approximately nine (9) additional months to demonstrate that he was medically capable of resuming his position as a motor vehicle operator.

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[2] Agency's Answer at 4 (February 14, 2014); *See also* Agency's Brief, at 4 (November 10, 2014).
[3] *Id*.
[4] *Id*.
[5] *See* also D.C. Mun. Regs. Tit. 7, § 139. Agency cites to D.C. Code § 1-623.45 (*2001*) in its Answer and November 10, 2014 Brief; however, based on the language it cites, it is clear that it intended to use the more current version, which went into effect on April 24, 2007. The older 2001 version of the statute provided a one year grace period, rather than a two year grace period.

Employee's Position

Employee asserts that he was wrongfully terminated for the following reasons: (1) retaliation because he filed sexual harassment claim against his supervisor; (2) Agency considers him disabled; and (3) because Agency has a disability animus against him for filing a worker's compensation claim.[6]

Employee argues that the facts set forth by Agency in its Answer and briefs leading up to Employee's termination are erroneous. Specifically, Employee avers that he has only submitted two (2) workers' compensation claims against Agency, rather than "a number of on-the-job injuries" claimed by Agency in its brief. Employee also states that Agency's contention that Employee was placed on Leave Without Pay ("LWOP") and "thereafter received worker's compensation benefits" is also inaccurate. Rather, Employee states that he has been denied workers' compensation benefits. Employee further maintains that Agency's assertion that he "resumed receiving workers' compensation benefits" after he returned to work for a short period of time from November 5, 2012, through December 17, 2012, is inaccurate.[7]

Employee asserts that Agency's contention that it sent Employee a letter attempting to ascertain whether Employee had overcome his injury he sustained on July 30, 2010, is unworthy of belief. Employee contends that this assertion is a pretext and subterfuge because Agency knew that the decision on when Employee could return to worker was a medical decision made by the Office of Risk Management. Employee maintains that he has always been ready and willing to return to work with Agency.

Employee further argues that Agency's reliance on D.C. Code §1-623.45 (2007) is misplaced. Employee maintains that he resumed work during the two year period in which Agency is relying upon in D.C. Code §1-623.45(b)(2). As such, Employee argues that the two year period should have started over again in December of 2012, after Employee's brief return to duty.

In his response to the Advance Notice of Proposed Removal, Employee maintained that he stopped coming to work in December 2012 because his physician told him that he could not continue to work because of his injury.[8]

Undisputed facts

Employee began working with Agency on February 25, 2002 as a Motor Vehicle Driver. Throughout the course of his employ, Employee filed two separate workers' compensation claims as a result of two separate incidents.[9] On July 30, 2010, Employee sustained an on-the-

[6] Employee's Brief (December 15, 2014).
[7] *See Id*. at 4.
[8] *See* Agency Answer, Tab 6 (February 14, 2014); *See also* Employee's Brief, at 2 (June 17, 2015).
[9] Agency asserts in its brief that Employee sustained "a number of on-the-job injuries resulting in him filing workers' compensation claims." Agency points to Tab 2 of its Answer in support of this assertion. There are only two attachments under Tab 2 which indicate that Employee suffered an on-the-job injury. The other attachment

job injury, and filed a workers' compensation claim, which is the relevant claim in the instant matter. Employee returned to work for a brief period of time after his injury from November 5, 2012, through December 17, 2012. On September 23, 2013, Agency issued an Advance Written Notice of Proposed Removal. On November 15, 2013, after an administrative review, Agency issued a Notice of Final Decision on Proposed Removal for Employee.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSION

Agency's removal of Employee was based on: (1) Any on-duty on employment related act or omission that interferes with the efficiency and integrity of government operations: incompetence[10]; and (2) Any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious[11]: inability to perform the essential functions of the job.

The briefs submitted by both parties made narrowing down the issues which needed to be addressed more complicated than necessary in rendering a decision in this matter. In Agency's Answer and November 14, 2014 brief,[12] it asserts that Employee began receiving workers' compensation benefits for his July 30, 2010, on-the-job injury, on August 26, 2010.[13] This assertion is directly controverted in Agency's July 14, 2015 brief, where it acknowledges that Employee was issued two Temporary Total Disability ("TTD") payments: one on November 18, 2010 and the other on July 18, 2013.[14] The November 18, 2010 check covered TTD benefits from October 30, 2010, through November 2, 2010, in the amount of $355.66. The July 18, 2013 check covered TTD benefits from August 26, 2010, through November 2, 2010, in the amount of $5,766.89. Agency cannot claim that Employee began receiving worker's compensation benefits for his injury on August 26, 2010, simply because the check that was issued on July 18, 2013, retroactively covered payment for August 26, 2010, through November 2, 2010. It is unclear from the record why the July 18, 2013 check was issued nearly three years after the date in which it was supposed to cover Employee's TTD benefits.

The record is clear that although Agency accepted Employee's worker's compensation claim, it did not issue full payment of the claim until well after the period it was supposed to cover. Agency's Amended Notice of Determination form, issued on August 8, 2013, indicated that Employee's temporary disability benefits were resuming for the period of August 26, 2010, through October 29, 2010.[15] This payment was not made until July 18, 2013.[16] While Agency

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under Tab 2 is a letter from Agency to Employee requesting medical documents from his doctor, which appear unrelated to the instant case.

[10] DPM § 1603.3(f)(5).

[11] DPM § 1603.3(g).

[12] It is noted that Agency's Answer and its November 14, 2014 Brief are nearly identical.

[13] Agency's Answer at 4 (February 14, 2014); *See also* Agency's Brief at 4 (November 10, 2014).

[14] Agency's Brief at 4 (July 14, 2015); *See also* Agency's Brief, Attachment 5 (July 14, 2015).

[15] Agency's Answer, Tab 3 (February 14, 2014).

[16] Agency's Brief, Attachment 5 (July 14, 2015).

may have intended to pay Employee well before it actually issued payment, it is clear that it did not do so until nearly three years after Employee's claim.[17]

Any on-duty on employment related act or omission that interferes with the efficiency and integrity of government operations: incompetence.

The District's personnel regulations provide that incompetence includes the following: (1) careless work performance; (2) serious or repeated mistakes after giving appropriate counseling or training; or (3) failing to complete assignment timely.[18] Agency also cites an OEA decision which defined "Incompetent" as, "the physical inability to satisfactorily perform the major duties of his or her position."[19] Additionally, Agency relies on D.C. Code § 1-623.45 (2007), which provides that an employee with a Career Service appointment may retain his or her position or its equivalent for a period of two (2) years from the date of commencement of compensation from the District's Public Sector Workers' Compensation Program.[20] Agency correctly asserts that following this two (2) year period, an agency shall "make all reasonable efforts to place, and accord priority to place the employee in his or her former or equivalent position," within either the employing agency or within any other department or agency in the District government, "if the [employee's] injury or disability is overcome."[21]

I find that Agency's primary argument under D.C. Code § 1-623.45 (2007)[22] is defective. Despite Agency's acknowledgment that Employee returned to work for a brief period of time in late 2012, it seems to ignore the fact that Employee's return to work indicates that Employee overcame his injury, albeit temporarily. 7 DCMR § 139 provides, in pertinent part:

> 139.2 If the employee resumes employment with the District government within two (2) years of the first date the employee received compensation or medical treatment, the employee's pre-injury agency shall immediately and unconditionally accord the employee the right to resume his or her former, or an equivalent, position as well as all other attendant rights which the employee would have had or acquired in his or her former position had he or she not been injured, including rights to tenure, promotion, and safeguards in reduction-in-force procedures.
>
> 139.3 In the event an employee resumes regular full time employment within two (2) years pursuant to § 139.2, and the employee suffers a recurrence of his or her injury that causes him or her not to be able to work, the two year period shall begin to

[17] In Employee's May 27, 2015 Brief, Exhibit E, he attaches a Compensation Order on Remand from the Department of Employment Services which also addresses the confusion regarding TTD payments to Employee and the time frame in which Agency actually issued the compensation payments to Employee. (See p. 3-4)
[18] *See* D.C. Mun. Regs. tit. 16 § 1619.1(6)(e). Table of Appropriate Penalties.
[19] *Brown v. Dep't of Mental Health*, Initial Decision, OEA Matter No. 1601-0104-11 (January 31, 2014).
[20] *See* also D.C. Mun. Regs. Tit. 7 § 139.
[21] *See* Agency's Brief at 4 (November 10, 2014); *Id.*
[22] *See* also D.C. Mun. Regs. Tit. 7 § 139.

> accrue again after the first date the employee receives compensation or medical treatment following the recurrence of the injury.

Here, it is undisputed that Employee temporarily returned to work on November 5, 2012, through December 17, 2012. Employee was issued his first compensation check for his TTD benefits on November 18, 2010, covering the periods of October 30, 2010, through November 2, 2010.[23] The issue now becomes whether Employee returned to work within the two years as set forth in D.C. Code § 1-623.45 and 7 DCMR § 139. I find that Employee's temporary return to work on November 5, 2012, was within two years of being issued his first TTD benefit compensation check. Because Employee returned to work within two years of being issued his first TTD compensation check on November 18, 2010, the pre-injury agency (here, DYRS) was required to "immediately and unconditionally accord [Employee] the right to resume his…former, or equivalent position as well as all other attendant rights which [Employee] would have had or acquired in his…former position had he…not been injured…"

Pursuant to 7 DCMR § 139.3, Employee's return to work within the two (2) year period, and suffering a recurrence of his injury, caused the two year period to begin to accrue again after receiving medical treatment. Employee temporarily resumed worked on November 5, 2012, until his doctor's visit on December 17, 2012, at which time Dr. Sankara Kothakota instructed Employee not to go back to his regular work until problems with his neck and shoulder were resolved.[24] Employee received medical treatment well before he was issued a TTD benefits compensation check again on July 18, 2013, regarding the injury in the instant case.[25] Thus, the two year period in which Employee was entitled to return to work was reset in December 2012 when he received medical treatment from Dr. Kothakota.

Agency issued its Notice of Final Decision on Proposed Removal for Employee on November 15, 2013. The effective date of Employee's termination was November 29, 2013. Thus, I find that Agency failed to provide Employee the proper two year grace period to return to work after the recurrence of his injury, as set forth in D.C. Code § 1-623.45 and 7 DCMR § 139. Agency prematurely took adverse action against Employee when the two year time period was reset in December of 2012. Accordingly, I find that Agency did not have cause to take adverse action against Employee for "Incompetence" or "the physical inability to satisfactorily perform the major duties of his position."[26]

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[23] It is noted that Employee's continuation of pay after filing his workers' compensation claim ended on August 25, 2010. (See Agency's Answer, Tab 2 (February 14, 2014)). Although Employee may have received continuation of pay after filing his workers' compensation claim, pursuant to D.C. Code § 1-623.18(d), continuation of pay is not considered compensation for purposes of determining when the two year grace period begins. As such, the undersigned must look at when Employee received his first compensation payment, as defined in D.C. Code § 1-623.01(12), in determining when the two year period under D.C. Code § 1-623.45 starts to run.

[24] *See* Employee's Brief, Exhibit A (June 17, 2015)

[25] Agency's Brief, Attachment 5 (July 14, 2015).

[26] *See Brown v. Dep't of Mental Health*, Initial Decision, OEA Matter No. 1601-0104-11 (January 31, 2014).

Any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious: inability to perform the essential functions of the job.

Agency's charge of "[a]ny on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious" in its Notice of Final Decision on Proposed Removal is a "catchall" phrase which may include any activities for which an investigation can sustain that is not "de minimis."[27] Agency's incompetence charge and its charge of "inability to perform the essential functions of the job" are overlapping causes in this matter. Thus, the analysis set forth above in the "incompetence" section of this decision also applies to Agency's charge of "inability to perform the essential functions of the job."

Whether the penalty of removal was appropriate under the circumstances.

Because I have found that Agency did not have cause to take adverse action against Employee, I will not address the appropriateness of the penalty.

ORDER

Accordingly, it is hereby **ORDERED** that:

1. Agency's termination of Employee is **REVERSED**; and
2. Agency shall reinstate Employee to the same or comparable position prior to his termination;
3. Agency shall immediately reimburse Employee all back-pay and benefits lost as a result of his removal; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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Arien P. Cannon, Esq.
Administrative Judge

[27] *See* D.C. Mun. Regs. tit. 16 § 1619.1(7). Table of Appropriate Penalties.