THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DANA BROWN,	)	OEA Matter No. 1601-0036-07
Employee	)	
	)	Date of Issuance: March 1, 2010
	)	
	)	
DEPARTMENT OF YOUTH	)	
REHABILITATION SERVICES,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

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. Employee 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

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

on LWOP for more than one 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]

On December 21, 2006, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). She indicated that she submitted weekly doctor incapacitation certificates and a disability certificate from her treating physician to Agency's Superintendent and its Disability Compensation Adjuster. She also stated that she had regular conversations with her supervisor about her medical treatment. It was Employee's position that Agency's removal action against her was not supported by the facts. Therefore, she requested that OEA reinstate her to her position or a similar position.[3]

Agency disagreed and filed several responses to substantiate its removal action against Employee. In its Response to Employee's Brief, Agency relied on D.C. Official Code § 1-623.45 to support its decision to remove Employee. According to Agency, D.C. Official Code § 1-623.45 provided that an employee who overcame a disability within one year, has the right to immediately and unconditionally resume their former position or an equivalent position.[4] Agency argued that the corollary to that position also applied. Hence, if an employee does not overcome their disability within one year, then

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[2] *Respondent's Responses to Appellant's Petition for Appeal,* Tabs 3 and 4 (January 29, 2007).
[3] *Petition for Appeal* (December 21, 2006).
[4] Agency argued that D.C. Official Code § 1-623.45(b)(1) was amended *effective* January 4, 2005, to reflect that an employee has the right to be restored to their position if they overcame their disability in one year

they are not entitled to resume their former position.[5] Agency reasoned that Employee was on leave without pay starting on March 23, 2005.[6] Thus, she had until March 22, 2006, to overcome her disability and resume working in her former position. Agency contends that as of November 24, 2006, the date of her termination, Employee still had not overcome her disability, therefore, it was proper in terminating Employee because she was unable to satisfactorily perform one or more major job duties of her position.

Employee believed that Agency erroneously provided that D.C. Official Code § 1-623.45(b)(1) was amended with an effective date of January 4, 2005. She asserted that the effective date of the statute was actually April 5, 2005 -- two months after Employee sustained her injuries. She highlighted that the amended provision did not address injuries which occurred prior to the effective date. Thus, it was her argument that the amended Code language cannot be applied retroactively to her case. Therefore, she requested that Agency's removal action be reversed.[7]

On May 5, 2008, the Administrative Judge ("AJ") issued her Initial Decision. She relied on the amended version of D.C. Official Code § 1-623.45(b)(1) and held that Agency's action was justified. She agreed with Agency that the D.C. Official Code's language prevails over the District Personnel Manual ("DPM"). She found that because

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pursuant to the Disability Compensation Effective Administration Act of 2004, D.C. Official Code § 1-623.01 *et seq*. The previous Code language afforded employees a two year period to overcome their disability. Agency went on to note that although the District of Columbia Municipal Regulations conflicted with the amended D.C. Official Code on the issue of years afforded, the D.C. Official Code prevails over any regulations. Therefore, its action to remove Employee was proper. *Employer's Response to Employee's Brief,* p. 3-4 (August 29, 2007).

[5] *Id.*

[6] In reviewing the record, it appears that Employee went on leave without pay on March 3, 2005, not March 23, 2005, as Agency indicates.

[7] *Reply Brief of Employee,* p. 1-5 (September 21, 2007).

Employee presented no medical evidence reflecting her ability to perform her duties, Agency's removal action against her should be upheld.[8]

Employee appealed the Initial Decision to the OEA Board. She argued that the AJ failed to address whether the amended D.C. Official Code § 1-623.45(b)(1) retroactively applied to her case since she sustained her injuries before the statute went into effect. Moreover, she stated that Agency failed to gather independent medical evidence to substantiate that she was not able to satisfactorily perform one or more of her job duties. Therefore, she requested that the Board reverse the Initial Decision and reinstate her.[9]

This Board will address the effective date of the amended D.C. Official Code §1-623.45 to determine if the previous language of the Code or the amended version should be applied to Employee's case. We will also evaluate if the statute could be applied retroactively to Employee's case, as Agency seems to suggest. Finally, we will determine if Agency had cause to remove Employee for failure to satisfactorily perform one or more major duties of her position.

Effective Date of Amended Code and Code Applicability

Agency insists that the amended D.C. Official Code § 1-623.45 was effective on January 4, 2005, one month before Employee's injury.[10] In contrast, Employee argues

[8] *Initial Decision,* p. 4 (May 5, 2008).
[9] *Petition for Review,* p. 3-5 (June 6, 2008).
[10] The amended D.C. Official Code § 1-623.45, on which Agency relies provides that:
(a) In the event the individual resumes employment with the District government, the entire time during which the employee was receiving compensation under this subchapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service.

that the statute's enactment date was January 4, 2005. However, she contends the effective date was not until April 5, 2005, two months after Employee was injured.[11]

According to all of the legislative evidence provided by Agency and Employee, the amended version of D.C. Official Code § 1-623.45 listed an enactment date of January 4, 2005, and an effective date of April 5, 2005. Therefore, the amended version of D.C. Official Code § 1-623.45, on which Agency relies, was not in effect when Employee was injured on February 2, 2005, nor was it effective when she went on LWOP on March 3, 2005. Consequently, the prior version of D.C. Official Code § 1-623.45 is applicable in this case.

The applicable version of D.C. Official Code § 1-623.45 provides that:

> (a) In the event the individual resumes employment with the District government, the entire time during which the employee was receiving compensation under this subchapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service.

(b) Under rules and regulations issued by the Mayor the department or agency which was the last employer shall:

(1) 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 or disabled, including the rights to tenure, promotion, and safeguards in reduction-in-force procedures, provided that injury or disability had been overcome within one year after the date of commencement of compensation or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the District of Columbia government; or

(2) If the injury or disability is overcome within a period of more than 2 years after the date of commencement of payment of compensation or the provision of medical treatment by the Disability Compensation Fund, make all reasonable efforts to place, and accord priority to placing the employee in his or her former or equivalent position within such department or agency, or within and other department or agency.

(c) Nothing in this provision shall exclude the responsibility of the employing agency to re-employ an employee in a full-duty or part- time status.

[11] *Black's Law Dictionary,* Eighth Edition provides that to enact is "to make into law by authoritative act; to pass." Effective date is defined as "the date on which a statute . . . becomes enforceable or otherwise takes effect, which sometimes differs from the date on which it was enacted or signed."

(b) Under rules and regulations issued by the Mayor the department or agency which was the last employer shall:

(1) 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 or *had a disability*, including the rights to tenure, promotion, and safeguards in reduction-in-force procedures, provided that injury or disability had been overcome within *two years* after the date of commencement of compensation *and provision of all necessary medical treatment needed to lessen disability* or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the District of Columbia government; or

(2) If the injury or disability is overcome within a period of more than 2 years after the date of commencement of payment of compensation or the provision of medical treatment by the Disability Compensation Fund, make all reasonable efforts to place, and accord priority to placing the employee in his or her former or equivalent position within such department or agency, or within and other department or agency.

(c) Nothing in this provision shall exclude the responsibility of the employing agency to re-employ an employee in a full-duty or part-time status.[12]

In essence, D.C. Official Code § 1-623.45(b)(1) states that an agency must provide an employee with their former or an equivalent position, with tenure and promotion rights and safeguards against RIF actions, if the employee overcomes their disability within two years. Section 1-623.45(b)(2) goes on to provide that if an employee takes more than two years to overcome their disability, then the agency is required to make a reasonable effort to place the employee in their former or equivalent position. Therefore, an employee is entitled to a host of rights and protections under

[12] The differences between this version and the amended version are italicized.

Section 1-623.45(b)(1) if they overcome their disability within two years, and even if they overcome their disability within a period of more than 2 years, the agency is still required to make a reasonable effort to place them in a position.

Retroactivity of Code

Because the amended version of D.C. Official Code section 1-623.45 was not effective until April 2005, Agency is essentially asking the Board to apply this statute retroactively to Employee's case. However, the Supreme Court in *Landgraf v. USI Film Productions*, 511 U.S. 244, 114 S.Ct. 1482 (1994), held that there is a presumption against statutory retroactivity. It reasoned that considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. The Court noted that for that reason, there is a timeless and universal appeal that the legal effect of one's conduct should be assessed under the law that existed when the conduct took place. Therefore, the presumption against statutory retroactivity has consistently been explained by a reference to the unfairness of imposing new burdens on people after the fact. Accordingly, because the amended version of D.C. Official Code § 1-623.45 was not effective at the time of Employee's injury or when she was on LWOP, it would be improper to apply it retroactively.

Assuming arguendo that the amended version of D.C. Official Code § 1-623.45 was in effect, giving the Employee one year to overcome her disability, Agency still did not properly follow the statute. It completely ignores D.C. Official Code § 1-623.45 (b)(2) which provides that if Employee's injury was overcome more than 2 years after the date of commencement of payment of compensation, Agency still had to "make all

reasonable efforts to place, and accord priority to placing [Employee] in . . . her former or equivalent position within . . . agency or . . . any other department or agency."

Cause for Adverse Action

Having addressed those issues raised on appeal, it is our belief that the real issue in this case is that Agency did not have cause to impose an adverse action against Employee. In its notice of proposal to remove Employee, Agency makes clear that it derived at its decision that Employee did not satisfactorily perform one or more of her job duties because she failed to submit medical certification regarding her medical status. Specifically, Agency asserted that Employee did not provide an approximate date when she would return to work.[13]

After closely assessing Agency's basis for the adverse action against Employee, it is clear that Agency is using selected sections from the DPM and the D.C. Official Code to justify its action. This is evident because Agency contends that although Section 827 of the DPM allows for Employee to remain on LWOP for 2 years, the amended language in D.C. Official Code § 1-623.45 supersedes the DPM and only allows for her to resume her job after one year. However, D.C. Official Code § 1-623.45 does not address disciplinary actions, but the DPM section 827.5 does provide that disciplinary action can be taken.[14] Therefore, Agency is attempting to use some sections of the law and reject others as cause to remove Employee.

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[13] *Respondent's Responses to Appellant's Petition for Appeal,* Tab 2 (January 29, 2007).

[14] District Personnel Manual Section 827.3 provides that "an agency shall carry an employee . . . on leave without pay for two (2) years from the date of commencement of compensation . . ." Section 827.5 goes on to provide that "at the end of the two-year (2-year) period specified in § 827.3, an agency shall initiate appropriate action under chapter 16 of these regulations." Section 16 of the DPM details disciplinary action that can be taken against District government employees.

Applying the language of D.C. Official Code § 1-623.45 to the facts in the current case, demonstrates that Agency did not have cause to remove Employee. The applicable statute provides that Agency had to accord "the employee the right to resume . . . her former, or an equivalent, position . . . provided that the injury or disability [was] overcome within two years after the date of commencement of compensation . . . ."[15] Employee went on leave without pay on March 3, 2005, therefore, she had until March 3, 2007, to overcome her disability. Agency terminated her on November 24, 2006, while she still had four months of the right to resume her position.

Additionally, the statute does not provide, as Agency suggests, that if Employee does *not* overcome her disability within one year, then she could *not* retain her position and it could then commence an adverse action against her. Neither the amended Code nor the original Code authorizes Agency to impose an adverse action against Employee. Neither version addresses any disciplinary action to be taken against an employee. Moreover, section 1-623.45(c) of both versions expressly provides that the statute cannot be used by an agency as a tool not to re-employ an employee.

Agency applied the wrong version of D.C. Official Code § 1-623.45 to this case, and more importantly, it lacked cause for an adverse action to remove Employee. Accordingly, Employee should be reinstated to her former position or an equivalent position with back pay and benefits from November 24, 2006. The Initial Decision and Agency's removal action against Employee are reversed.

[15] It should be noted that the applicable version of the Code and the DPM both give employees 2 years to overcome their disabilities.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **GRANTED.** The Initial Decision is **VACATED**.

FOR THE BOARD:

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Sherri Beatty-Arthur, Chair

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Barbara D. Morgan

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Richard F. Johns

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Hilary Cairns

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Clarence Labor, Jr.

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.