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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	
SYLVIA JOHNSON,	)	
Employee	)	OEA Matter No. J-0145-15
	)	
v.	)	
	)	Date of Issuance: June 6, 2017
D.C. FIRE AND EMERGENCY	)	
MEDICAL SERVICES,	)	
Agency	)	
	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Sylvia Johnson (“Employee”) worked as a Management Liaison Specialist with the D.C. Fire and Emergency Medical Services (“Agency”). On August 12, 2015, Agency issued a notice terminating Employee from her position.<sup>1</sup> Employee challenged her termination by filing a Petition for Appeal with the Office of Employee Appeals (“OEA”) on September 21, 2015. She argued that she was improperly terminated while she was on Family Medical Leave Act (“FMLA”).<sup>2</sup>

On October 30, 2015, Agency filed a Motion to Dismiss. It explained that Employee was

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<sup>1</sup> Agency provided that Employee failed to demonstrate her suitability and qualifications for continued employment. It explained that Employee’s unsatisfactory performance included her failure to accurately and timely complete work assignments; failure to receive constructive criticism for improvement; and insubordination toward her supervisor and colleagues.

<sup>2</sup> *Petition for Appeal*, p. 2 (September 21, 2015).

still serving in her probationary period when she was terminated. Thus, Agency asserted that OEA did not have jurisdiction because it could not consider appeals of probationary employees. Because Employee was terminated while in a probationary status, Agency reasoned that it did not need cause to terminate her. Therefore, it requested that Employee's Petition for Appeal be dismissed.<sup>3</sup>

Employee filed an Opposition to Agency's Motion to Dismiss on November 23, 2015. She argued that she was not a probationary employee at the time of her termination. Employee asserted that in its offer letter, Agency did not note that she was required to satisfy a probationary period for employment.<sup>4</sup> It was Employee's position that when an employee returns to government service and assumes the same grade, step, series, and salary, they are not required to undergo a new probationary period. She maintained that although there was a break in service, the imposition of a new one-year probationary period was unwarranted because she returned to government service in the same grade, step, and salary as the position she held before her break in service. Additionally, Employee opined that Agency did not commence corrective or adverse action within ninety days, as required by D.C. Official Code § 5-1031.<sup>5</sup> Therefore, Employee requested that Agency's Motion to Dismiss be denied.<sup>6</sup>

On December 16, 2015, the OEA Administrative Judge ("AJ") issued an order directing Employee to brief whether her appeal should be dismissed for lack of jurisdiction. In response, Employee asserted that she completed a probationary period for the Management Liaison

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<sup>3</sup> *D.C. Fire and Emergency Medical Services Department's Motion to Dismiss Employee's Petition for Appeal*, p. 2-3 (October 30, 2015).

<sup>4</sup> According to Employee, Agency's June 27, 2014 offer letter was not the offer which she accepted. Employee attached an August 26, 2014 offer letter which did not mention a probationary period. *Opposition to D.C. Fire and Emergency Medical Services Department's Motion to Dismiss Employee's Petition for Appeal*, Attachment #1 (November 23, 2015).

<sup>5</sup> Employee provided that Agency concluded its investigation of one of the charges levied against her in December of 2014. However, her termination action occurred well after the ninety-day period in which to bring action in accordance with the D.C. Official Code.

<sup>6</sup> *Id.*

Specialist position. Therefore, it is her position that pursuant to DPR §§ 816.1, 816.2 and 816.5, she was not required to complete a new probationary period upon reinstatement in the Management Liaison Specialist position.<sup>7</sup> Additionally, Employee stated that her Standard Form 50 (“SF-50”) did not indicate that her appointment was probationary.<sup>8</sup>

Agency replied to Employee’s response on January 29, 2016. As it related to DPR §816, Agency provided that the law required that an employee serve a probationary period of one year after there is a break in service of more than one day. Moreover, it provided that Employee did not hold a permanent Career Service position prior to her separation; thus, she was not eligible for reappointment pursuant to DPR §816. Additionally, Agency asserted that Employee’s SF-50 did use the term “probational,” when referring to her employment status. Therefore, it reasoned that Employee’s argument on her probationary status was factually false. As a result, Agency argued that OEA lacked jurisdiction over the appeal and requested that the matter be dismissed.<sup>9</sup>

On February 11, 2016, the AJ issued his Initial Decision. He found that Employee was hired under a term appointment by Agency on July 20, 2009. According to the AJ, Employee’s term appointment was extended on September 22, 2011 and July 20, 2013. However, on March

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<sup>7</sup> DPR § 816.1 provides the following, as it relates to Career Service employment by reinstatement:  
Except for a person who has a retreat right to a position in the Career Service as provided in chapter 9 or 10 of these regulations, a person shall have reinstatement eligibility for three (3) years following the date of his or her separation if he or she meets both of the following requirements

- (a) The person previously held a Career Appointment (Permanent); and
- (b) The person was not terminated for cause under chapter 16 of these regulations.

DPR § 816.2 states that:

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.

DPR §816.5 states that “[a] person who is reinstated under the provisions of § 816.2, 816.4, or 816.6 shall be given a Career Appointment (Permanent).”

<sup>8</sup> *Petitioner’s Supplemental Brief* (January 19, 2016).

<sup>9</sup> *Agency’s Reply Brief* (January 29, 2016).

30, 2014, at the expiration of her term appointment, Employee was terminated from her position. The AJ held that Employee was subsequently rehired on September 22, 2014, as a probational Career Service employee.<sup>10</sup>

Moreover, the AJ found that the record did not support Employee's contention that she previously held a Career Service position and completed a probationary period. He reiterated that Employee held a term appointment that was extended on a number of occasions, but she was not a Career Service employee. The AJ also found that Employee's SF-50 contained an error, which stated that she was reinstated based on her Career appointment with Agency from March 30, 2014 through September 22, 2014. He determined that the statement was an error because Employee was not employed by Agency during this time period.<sup>11</sup>

As it related to the offer letter, the AJ determined that Agency and Employee each provided offer letters. According to the AJ, Agency's offer letter provided that Employee was required to serve a probationary period; Employee's offer letter did not. However, he found that despite the discrepancy, Employee did not offer any case law, rule, or regulation that requires Agency to include language of a probationary period in its offer letter. Finally, he provided that because there was a break in service and pursuant to DPR § 813, Employee was required to serve a one-year probationary period. Thus, the AJ ruled that OEA lacked jurisdiction and dismissed Employee's appeal.<sup>12</sup>

On March 17, 2016, Employee filed a Petition for Review of the Initial Decision with the OEA Board. She argues that the AJ mischaracterized her initial appointment as a term appointment. It is Employee's position that in accordance with DPR § 823, a term appointment should be in excess of one year but not exceed four years. She reasons that because her

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<sup>10</sup> *Initial Decision*, p. 2-3 (February 11, 2016).

<sup>11</sup> *Id.*, 3-4.

<sup>12</sup> *Id.* at 4.

appointment was from July of 2009 through March of 2014, it exceeded the four-year term. Employee contends that when her four-year period ended in July of 2013, she was converted to a Career Service employee. Additionally, she reiterates that there was no probationary designation on her SF-50. Finally, she provides that she was reinstated to her position under DPR § 816.5, and accordingly was converted to Career Service permanent. Therefore, she requests that OEA reinstate her to her position with back pay.<sup>13</sup>

On April 19, 2016, Agency filed its response to Employee's Petition for Review. It argues that the record clearly indicates that the nature of Employee's tenure from July of 2009 through March of 2014, was a series of term appointments. As it relates to Employee's claim that she achieved Career Service permanent status, Agency contends that because she was hired six months after being terminated, there was a break in service. Therefore, Employee was required to serve a probationary period in accordance with D.C. Official Code § 1-608.01(a)(5). Accordingly, it requests that the Board deny Employee's Petition for Review.<sup>14</sup>

### Term Appointment

DPR § 823 pertains to term employees. The relevant sections of the regulation provide the following:

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<sup>13</sup> *Petition for Review*, p. 2-5 (March 17, 2016).

<sup>14</sup> *Agency's Reply to Employee's Petition for Review*, p. 3-4 (April 19, 2016). Employee responded to Agency's Reply on May 2, 2016. She argues that she was on an approved leave status under FMLA. She explains that whenever an employee is approved for paid family leave, the FMLA coordinator must submit approval notifications to the employee's immediate supervisor, Agency Head, and D.C. Human Resources ("DCHR"). Employee states that the information compiled did not indicate that she was in a probationary period, until her termination letter was issued. She reasons that the termination letter should not have trumped the Notice of Designation and Approval of Paid Family Leave that was extended to her. *Employee's Reply to Agency's Reply to Petition for Review* (May 2, 2016).

On May 6, 2016, Agency filed a Motion to Strike. It relies on OEA Rule 633.4 and provides that Employee failed to raise her FMLA argument before the OEA Administrative Judge; therefore, the argument is waived. OEA Rule 633.4 states that "any objections or legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board." Accordingly, it requests that the Board deny Employee's Petition for Review. *Agency's Motion to Strike Employee's Reply to Agency's Reply to Petition for Review* (May 6, 2016).

823.1 A personnel authority may make a term appointment for a period of more than one (1) year when the needs of the service so require and the employment need is for a limited period of four (4) years or less.

823.2 Unless supported by grant funds, an employee continuously serving in a term appointment four (4) years or more, which is acquired through open competition, shall:

- (a) Be separated from District government service; or
- (b) Have his or her position converted to a regular Career Service appointment with permanent status.

823.8 An employee serving under a term appointment shall not acquire permanent status on the basis of the term appointment, and shall not be converted to a regular Career Service appointment, unless the initial term appointment was through open competition within the Career Service and the employee has satisfied the probationary period.

Employee argues that because her appointment was from July of 2009 through March of 2014, it exceeded the four-year term. She contends that when the four-year period ended in July of 2013, she was converted to a Career Service employee. Employee's argument aligns with the language provided in DPR § 823.2. However, based on the record in its current form, this Board is unable to determine if the requirements of DPR § 823.2 have been met in this matter.

The first section of the regulation provides that an employee's term appointment must not have been supported by grant funds. There is nothing in the record that addresses that issue. Thus, this matter must be remanded to determine how Employee's position was funded.

Secondly, DPR § 823.2 provides that Employee must have continuously served in the term appointment for four years or more. In Agency's Reply Brief, it explains that "Employee held a Career Service appointment when employed by the Agency from July 20, 2009 to March 30, 2014."<sup>15</sup> Agency's contention seems to suggest that Employee may have held the term appointment continuously. However, the record provides a number of SF-50 documents.

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<sup>15</sup> *Agency's Reply Brief*, p. 3 (January 29, 2016).

Unfortunately, the Board cannot determine if Employee's service was continuous based on the SF-50 documents provided.<sup>16</sup> Thus, although Agency suggests that Employee held her position from July 20, 2009 through March 30, 2014, the SF-50 documents provided as evidence do not support that there was continuous service, as it contends. Based on the documents provided, there is a break in service of one year or more among the SF-50 documents.<sup>17</sup> We know that based on the statements provided by both parties, Employee's break in service was not in excess of one year. Thus, it appears that not all of the SF-50s are included in the record. Accordingly, we must remand this matter for further consideration of this issue because there are obviously documents missing from the record.<sup>18</sup>

Additionally, as it relates to the four-year period, there is language in the July 20, 2013 SF-50 which seems to suggest that Agency intentionally extended Employee's appointment past the four-year limit. The July 20, 2013 SF-50 states that an "extension of term appointment beyond the four-year limit approved by DCSF-11B-10 dated 07/30/2013."<sup>19</sup> As Employee provided in her Petition for Review, the four-year period would have ended in July of 2013. The remarks of the SF-50 suggest that Agency was aware of the requirement to terminate Employee's term appointment, but it instead opted to extend it beyond the four-year period. If the AJ determines that Employee served in her position beyond the four years; that her position was not supported by grant funds; and that her position was acquired through open competition, then Employee's position was converted to Career Service, permanent status in July of 2013, as she

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<sup>16</sup> The record consists of an SF-50 with an effective date of July 20, 2009, with a not to exceed date of August 21, 2010. The next SF-50 in the record bears an effective date of September 22, 2011, with a not to exceed date of October 21, 2012. Finally, there is a SF-50 with an effective date of July 20, 2013, and a not to exceed date of January 19, 2014. *Id.*, Attachment #1.

<sup>17</sup> Employee concedes that there was a break in service. *Opposition to D.C. Fire and Emergency Medical Services Department's Motion to Dismiss Employee's Petition for Appeal*, Attachment #1 (November 23, 2015).

<sup>18</sup> Finally, DPR §§ 823.2 and 823.8 requires that Employee's appointment must have been acquired through open competition. The record does not address this matter. Therefore, we are remanding the case to the AJ for consideration on this issue as well.

<sup>19</sup> *Id.*

contends. Accordingly, Employee could have only been removed from her position for cause.

### Probationary Period

Employee contends that there was no probationary designation on her SF-50. However, it is clear that the August 22, 2014 SF-50 provides the term “probational.”<sup>20</sup> It must be noted by this Board that it is not clear that Employee was actually required to serve a second probationary period if the above-mentioned requirements are met and she served for four years or more continuously as a term employee.

DPR § 823.10 provides the following:

823.10 Except as specified in Subsection 813.2 of this chapter in the case of correctional officers, a term employee shall serve a probationary period of one (1) year upon initial appointment.

Therefore, if the AJ concludes that Employee was converted to a Career Service, permanent appointment, then Employee may have already served her one-year probationary period with her initial term appointment.

### Conclusion

In its current state, this Board is unable to rule that the AJ’s decision was based on substantial evidence in the record.<sup>21</sup> Several issues on appeal depend on the AJ’s determination of whether Employee converted from a term employee to a Career Service permanent employee. Thus, we must remand this matter to the AJ for further consideration.

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<sup>20</sup> *Petitioner’s Supplemental Brief*, p. 4 (January 19, 2016).

<sup>21</sup> Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. The Court in *Baumgartner v. Police and Firemen’s Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding.



**ORDER**

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **GRANTED**, and the matter is **REMANDED** to the Administrative Judge for further consideration.

FOR THE BOARD:

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Sheree L. Price, Chair

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Vera M. Abbott

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Patricia Hobson Wilson

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P. Victoria Williams

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.