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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ESTATE OF ALEXIS PARKER,)	
Employee)	OEA Matter No.: J-0007-11R13R17
)	
v.)	Date of Issuance: July 23, 2018
)	
DEPARTMENT OF HEALTH,)	Monica Dohnji, Esq.
_____)	Senior Administrative Judge
William Dansie, Esq., Employee's Representative		
Abraham Davis, Employee's Representative		
Jhumur Razzaque, Esq., Agency's Representative		

SECOND INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL BACKGROUND

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 Reemployment Priority Placement 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. This matter was originally assigned to former Administrative Judge (“AJ”) Sommer Murphy. On April 28, 2011, former AJ Murphy issued an Initial Decision (“ID”), finding that OEA lacked jurisdiction over Employee’s appeal because Employee was in probationary status at the time she was terminated. Employee filed a Petition for Review with the OEA Board. On September 12, 2012, the OEA Board denied Employee’s Petition for Review. Subsequently, Employee filed an appeal with the 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. On October 22, 2015, former AJ Murphy issued an Initial Decision on Remand (“IDR”), again dismissing Employee’s Petition for Appeal for lack of jurisdiction. Employee appealed the IDR to the OEA Board. On April 17,

2017, the OEA Board issued an Opinion and Order on Petition for Reviewing, remanding this matter to the AJ, noting that:

“This Board does not believe that the AJ’s ruling that Employee was hired through open competition is based on substantial evidence... the AJ’s conclusion that the position was the result of open competition because the announcement was open to the public appears to be misguided... Therefore, contrary to the AJ’s findings, this does not prove that the positions were secured through open competition, but instead that they were filled through the ARPP[Agency Reemployment Priority Placement program (“ARPP”)]/Displaced Employee program... we will note that DPM § 813.9(c) requires that the employee be hired through open competition and serve in a different line of work. The AJ must have the parties adequately address this issue... There are still genuine factual disputes in this case that the AJ did not adequately address. In *Dupree v. D.C. Office of Employee Appeals*, 36 A.3d 826, 832 (D.C. 2011), the D.C. Court of Appeals held that when a review of the administrative record obfuscates, rather than clarifies the material issues, it is difficult to decide these issue on the record and an evidentiary hearing is warranted. The record – in its current state – does not provide the clarity needed to render a decision in this matter.... the AJ must address the complicated issues raised by the parties as it pertains to the above-mentioned sections of the DPR [DPR § 816.1-5]. ... there are still outstanding issues pertaining to the issue of Career Service employment through reinstatement.”¹

Following former AJ Murphy’s promotion to Deputy General Counsel for OEA, this matter was reassigned to the undersigned AJ. Subsequently, several conferences were held in this matter. Thereafter, an Evidentiary Hearing was held on March 12, 2018. Both parties were present for the Evidentiary Hearing. On April 6, 2018, the undersigned AJ issued an Order requiring the parties to submit written closing arguments. Both parties have submitted their written closing arguments. The record is now closed.

JURISDICTION

The jurisdiction of this Office has not been established.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

¹ *Alexis Parker v. Department of Health*, OEA Matter No. J-0007-11R13, *Opinion and Order on Petition for Review* (April 18, 2017).

SUMMARY OF MATERIAL TESTIMONY*Agency's Case in Chief***Donna Harrison Scott (Transcript pages 10-120)**

Donna Harrison Scott ("Scott") worked as a Lead Management Liaison Specialist for the Department of Health ("Agency"). She was responsible for recruitment, terminations, and working with individuals to ensure that they followed all policies and procedures outlined by the D.C. Human Resources ("DCHR"). Tr. 10-12.

Scott explained that the District Government follows the Federal Government Office of Personnel classification guidelines. Each position that is classified has a series number that corresponds with the position. Scott stated that the 301 series fell under the Administrative and Clerical grouping of positions, under the classification standards. Tr. 14.

Scott testified that a thirty-day notice was given to Alexis Parker ("Employee"), on July 31, 2009, notifying her that Agency was conducting a reduction-in-force ("RIF"). The notice provided that her position would be impacted, and the instant RIF was effective on September 4, 2009. Tr. 20-21. Scott explained that when an agency conducted a RIF, the impacted employees were given priority for any positions that might subsequently come open. She further explained that the employee remained on the priority placement list for two years, or until they were made whole. Scott stated that if an agency conducted a RIF and subsequently had a vacant position that opened after the RIF took place the agency was required to review the employees who were impacted by that list. Additionally, the employees' qualifications were reviewed to determine if they qualified for that position. There may have been more than one person who qualified, but an agency would determine the highest eligible person for that position. Scott further explained that when an employee was RIF'd, the employee interviewed with a representative at DCHR and filled out an application to be part of the Agency Reemployment Priority Placement program ("ARPP"). This allowed the hiring manager to see how the employee performed as an individual. Tr. 22-27.

Scott testified that if a job was in a different series and an individual was on the ARPP list and was employed after being RIF'd in another series, the individual would have to serve a second probationary period. She explained that the rule was part of DCHR's guidelines. Scott asserted that the Displaced Employee Priority Placement program were all employees throughout the District of Columbia for Agencies under the authority of the Mayor, who were RIF'd. She stated that ARPP were employees in an agency who were impacted by a RIF. Scott testified that Employee was subjected to ARPP. Tr. 32-39.

Scott explained that employees were asked to fill out an application and when the employees were interviewed, the employees were competing for the position against other ARPP candidates. The ARPP list was open to any individual whose job was terminated due to a RIF. In order to be placed on ARPP, the employee met with a representative from DCHR, filled out an application, and provided a resume. When an agency posted a vacancy announcement, an HR specialist kept a list of who was on the ARPP list, as well as DCHR to see who was still eligible

on the list. Tr. 40-43. Scott testified that Employee was eligible for priority consideration through ARPP. Once her priority placement under ARPP expired, only then could her three years for reinstatement begin. Tr.56.

Scott testified that Employee accepted a position as a Public Health Technician, Grade 7. She stated that Employee accepted an offer for a position that was under the same job announcement that was reviewed for the Public Health Outreach Technician position. According to the offer letter, the effective date of Employee's employment was February 16, 2010. Scott further stated that the letter explicitly stated that Employee was required to serve a probationary period of one year. Scott attested that it was appropriate that Employee served a probationary period because the position that Employee held prior was in a different classification series than the position she was being offered. Additionally, she explained that Agency followed DCHR regulations that stated when an employee switched series, the employee must serve a new probation period. Scott stated that Employee accepted the position because she signed and dated documents pertaining to her new position. Furthermore, Employee's Form 50 Notice of Personnel Action ("Form 50") was for a Career Appointment, where Employee was hired into a Probational position of Public Health Technician effective on February 16, 2010. Tr. 46-48.

On April 8, 2010, Employee was terminated as a probationary employee. According to the termination letter, the termination was neither appealable nor grievable. The effective date of termination was April 23, 2010. At the time Employee was terminated, the position was an open competition position. Tr. 58. Scott testified that Employee had a break in service because the effective date of her termination was separated in time from her effective date of being placed in the Public Health Technician position, which was more than one day. Tr. 67-68.

On cross-examination, Scott testified that Employee was rehired through open competition and in a different line of work. She explained that the position was posted as open to the public, which was considered open competition. Scott further explained that placement into a position that were not open competition occurred when a specific individual was selected to hold the position, or a reassignment into position. Tr. 75-76. Scott testified that the vacancy announcement and the Form 50 supported that Employee was hired through open competition. She explained that the Form 50 supported the fact that it was a competitive appointment into that position. Tr. 103.

Scott explained that Employee was not reinstated because she was processed as a hire through open competition, for which she had to serve a probation period. She stated that Employee was a Grade 9 when she left her career position, and the position she occupied as a public health official was a Grade 7. However, Employee's break in service was a result of the RIF. Scott stated that Employee served a probationary period because she changed from one job category to another. Employee previously served under a 301 series in the Administrative and Clerical Support classification section under OPM standards. She then moved into the Technical and Health Support series of jobs in the OPM standards. Additionally, Scott stated that another reason Employee would have served a probationary period was because there was a break in service of at least one day. Tr. 87-94.

Scott stated that her interpretation of Section 816.1 of the career service employment was that career service employees were eligible for reinstatement, but it did not mean that the employee had to be reinstated. She explained that under section 816.2, reinstatement eligibility under 816.1 may be appointed competitively or non-competitively, not shall. Further, she affirmed that section 816.3 was an explanation of when the three year restriction began as it applied to career appointment permanent Group 1 Employees who were separated by a RIF after January 1, 1988. Scott stated that Employee was grouped in that category because she was separated after January 1, 1980. Moreover, Scott opined that the ARPP list was for two years, and stated that Employee's reinstatement eligibility would not begin until after ARPP coverage ended. Tr. 111-113.

Scott reiterated that the Public Health Technician position that Employee applied to was subject to open competition because the position was an open competition vacancy announcement. She explained that multiple ARPP candidates were considered for the position, not just one individual. Tr. 114.

Scott testified that the ARPP process was not generated by an agency, but generated by an open competition announcement, open to the public. Scott explained that the ARPP employees were reviewed prior to reviewing the other candidates from the public. Tr. 116-117.

ANALYSIS AND CONCLUSIONS OF LAW

As part of the appeal process within this Office, I held an Evidentiary Hearing on the issue of whether this Office had jurisdiction over Employee's Petition for Appeal. During the Evidentiary Hearing, I had the opportunity to observe the poise, demeanor and credibility of the witness. In a nutshell, I find that the testimony of Agency's witness was very compelling.

Analysis

The threshold issue in this matter is one of jurisdiction. This Office has no authority to review issues beyond its jurisdiction.² Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.³ This Office's jurisdiction is conferred upon it by law, and was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Official Code §1-601-01, *et seq.* (2001). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which took effect on October 21, 1998. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions not relevant to this case, of permanent employees in Career and Education Service who are *not serving in a probationary period*, or who have successfully completed their probationary period (emphasis added).

² See *Banks v. District of Columbia Public School*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

³ See *Brown v. District of Columbia Public School*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (January 22, 1993); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).

Chapter 8, § 813.9 (c) of the District Personnel Manual (“DPM”) highlights in pertinent parts that, “[a]n employee who once satisfactorily completed a probationary period in the Career Service shall be required to serve another probationary period when the employee... 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.” (Emphasis added).

In the instant matter, Employee successfully completed her probationary period in the Community Relations Specialist position prior to being RIF’d on September 4, 2009. Agency argues that because Employee was rehired through open competition and in a different line of work effective April 8, 2010, Employee was required to serve a second probationary period. Employee on the other hand argues that she was not hired through open competition. She avers that an appointment through ARPP is not an appointment through open competition because ARPP does not permit Agency to consider applicants without regard to current or former District government employment. Employee, through counsel maintains that she did not apply for the Public Health Outreach Technician position but was referred to the position based on her ARPP status. Employee further explained that all of the employees who were considered for the position were Displaced Employees in the ARPP.

Open Competition

Open Competition is defined as the use of examination procedures which permit application and consideration of all persons without regard to current or former employment with the District government.⁴ The OEA Board opined that, it does not believe that former AJ Murphy’s ruling that Employee was hired through open competition was based on substantial evidence. The Board explained that the AJ’s conclusion that the position was the result of open competition because the announcement was open to the public appears to be misguided. The Board further noted that an Evidentiary Hearing was warranted to clarify the record. As such, I held an Evidentiary Hearing on March 12, 2018. The only witness that testified during the Evidentiary Hearing was Ms. Scott, the Lead Management Liaison Specialist at Agency. Scott is responsible for recruitment, terminations, and working with individuals to ensure that they followed all policies and procedures outlined by the D.C. Human Resources. Tr. 10-12.

Scott testified that the ARPP process was not generated by an agency, but rather by an open competition announcement open to the public. Scott explained that the ARPP employees were reviewed prior to reviewing the other candidates from the public. Tr. 116-117. She maintained that Employee’s position was posted as open to the public, which was considered open competition. Scott reiterated that the Public Health Outreach Technician position that Employee applied to was subject to open competition because the position was an open competition vacancy announcement. Multiple ARPP candidates were considered for the position, not just Employee. Tr. 114.

Scott explained that when an employee was RIF’d, the employee interviewed with a representative at DCHR and filled out an application to be part of the Agency Reemployment Priority Placement program (“ARPP”). According to Scott’s testimony, the ARPP list was open

⁴ See DPM § 899.1.

to any individual whose job was terminated due to a RIF. She explained that employees were asked to fill out an application and when the employees were interviewed, the employees were competing for the position against other ARPP candidates. In order to be placed on the ARPP list, the employee met with a representative from DCHR, filled out an application, and provided a resume. When an agency posted a vacancy announcement, an HR specialist kept a list of who was on the ARPP list, as well as DCHR to see who was still eligible on the list. Tr. 40-43. The agency is required to review the employees who were impacted by that list. The employees' qualifications were reviewed to determine if they qualified for that position. If more than one person qualified, the agency would determine the highest eligible person for that position.

Based on Scott's testimony, I find that the Public Health Outreach Technician position was open to the public, without regard to current or former employment with the District government. The Public Health Outreach Technician job opening specifically highlighted under 'Area of Consideration' section that 'Open to the General Public.' Moreover, Employee does not dispute that the vacancy was open to the public. She simply argues that an appointment through ARPP is not an appointment through open competition because ARPP does not permit Agency to consider applicants without regard to current or former District government employment. I disagree with this assertion. Scott explained that the procedure was to review the qualifications of the ARPP employees prior to reviewing the other candidates from the public. Tr. 116-117. The fact that employees on the ARPP register were given priority over the other candidates does not negate the fact that this vacancy was open to everyone, irrespective of whether they were current or former District government employees. Further, I find that the fact that the candidates competing for the vacancy with Employee were all ARPP candidates does not also negate the fact that the vacancy was opened to all, regardless of current or former employment with the District government.

Employee stated that she was not hired through open competition because she did not apply for the job. Scott explained that before being placed on the ARPP register, employees filled out a general job application and interviewed with a DCHR representative. She also stated that once an ARPP candidate is matched with a vacancy, they are asked to fill out an application, a qualification analysis is done, and the highest qualified candidates are brought in for interview, as is done with other candidates. And by interviewing with the manager, the ARPP candidates are competing for the job.

The Electronic District Personnel Manual ("E-DPM") instructions regarding the ARPP program seem to suggest that employees on the ARPP list were matched through open vacancy announcements. E-DPM(5) also provides in part that ". . . Displaced employees are 'matched' with open job requisitions (vacancies) based on occupational series and grade . . . (including [the] lowest grade acceptable to each displaced employee)." However, E-DPM(10)(c) provides that DCHR "generate *Lists of Eligibles for priority consideration based on job requisitions 'Open to the General Public* (emphasis added)." Read together, E-DPM (5) and (10)(c) seem to suggest that employees on the ARPP and DEP register can only be matched to positions that are open to the public – Everyone, without regard to former or current District government employment, and this is the exact definition of *open competition* (emphasis added). The use of the word "matched" does not imply that the job is not open to the public or that the employees on the ARPP or DEP lists do not compete with others. These employees are simply matched to a vacancy and not to a specific job. Upon being matched to a vacancy, employees on the ARPP lists such as Employee in this matter, still have to compete with

other candidates. Here, the Public Health Outreach Technician position was open to the public, without regard to current or former employment with District government. Four ARPP candidates were matched to this vacancy. Their qualifications were reviewed before those of the general public. Employee and one other candidate were offered the two (2) Public Health Outreach Technician positions based on a qualification analysis. Accordingly, I find that Employee was hired through open competition.

Different line of work

DPM § 813.9 (c) also provides that “[a]n employee who once satisfactorily completed a probationary period in the Career Service *shall be required to serve another probationary period when the employee...* 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.

Here, Employee was initially hired as a Community Relations Specialist. After she was RIF’d, she was rehired as a Public Health Outreach Technician. Scott testified that the position that Employee held prior was in a different classification series than the position she was being offered. Additionally, she explained that Agency followed DCHR regulations that stated when an employee switched series, the employee must serve a new probation period. Further, Scott stated that if a job was in a different series and an individual on the ARPP list was employed after being RIF’d in another series, the individual would have to serve a second probationary period. Scott testified that Employee previously served under a 301 series in the Administrative and Clerical Support classification section under OPM standards. She then moved to series 640 which was the Technical and Health Support series of jobs under OPM standards. Thus, since the job series and category for both jobs were different, they are in different lines of work and as such, Employee was required to serve a second probationary period. Scott highlighted that in some cases, even employees moving within the same series may be required to serve another probationary period because they are moving into a new line of work. Based on the job description provided by Agency, and Scott’s testimony, I find that these two positions are in different lines of work. Consequently, I agree with Agency’s assertion that Employee was required to serve a second probationary period.

Probationary Period

Because Employee was appointed as a result of open competition and her new position – Public Health Outreach Technician- was in a different line of work from her previous position of Community Relations Specialist, Employee was required to serve a second probationary period. Furthermore, Employee had a break in service of more than one day from when her previous position ended to the start date of her new position.

Employee was RIF’d from her Community Relations Specialist position in September of 2009. She was hired as a Public Health Outreach Technician effective February 16, 2010, through open competition and in a different line of work. As such, Employee was required to serve a second one-year probationary period. The span of the second probationary period was from February 16, 2010 to February 15, 2011. Employee was terminated from this position effective

April 23, 2010. Accordingly, I find that Employee did not complete the second probationary period.

Section 814.3 of the DPM states that a termination during an employee's probationary period cannot be appealed to this Office. Additionally, this Office has consistently held that an appeal by an employee serving in a probationary status must be dismissed for lack of jurisdiction.⁵ While Employee argues that she was not required to serve a second probationary period, DPM § 813.9(c) provides otherwise. Accordingly, in compliance with DPM §§§ 813.9(c), 817.1, and 823.8, I find that Employee was required to serve a second probationary period and since she was terminated prior to completing the second probationary period, I conclude that this Office lacks jurisdiction in this matter. Furthermore, Career service employees who are serving in a probationary period are precluded from appealing a removal action to this Office until their probationary period is over. The record shows that Employee was hired effective February 16, 2010, and terminated effective April 23, 2010. Accordingly, I find that Employee was removed from service when she was still within her probationary period. For these reasons, I conclude that Employee is precluded from appealing her removal to this Office.

Employee has the burden of proof on issues of jurisdiction, pursuant to OEA Rule 628.2.⁶ Employee must meet this burden by a "preponderance of the evidence" which is defined in OEA Rule 628.1, *id.*, 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." Based on the foregoing, I find that Employee did not meet the required burden of proof, and that this matter must be dismissed for lack of jurisdiction. Consequently, I am unable to address the factual merits, if any, of this matter.⁷

ORDER

It is hereby **ORDERED** that the petition in this matter is **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Senior Administrative Judge

⁵ 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); *Alexis Parker v. Department of Health*, OEA Matter No. J-0007-11 (April 28, 2011).

⁶59 DCR 2129 (March 16, 2012).

⁷ With regards to the issue of Reinstatement, Scott explained that Employee was not reinstated because she was processed as a hire through open competition. Pursuant to Section 816, career service employees were eligible for reinstatement competitively or non-competitively. She also explained that according to section 816.3, career appointment permanent Group 1 employees separated by a RIF after January 1, 1988 such as the Employee had to remain on the ARPP list for two years. And only after the expiration of the two (2) years period would their reinstatement eligibility commence. Therefore, Employee's priority placement under ARPP spanned from 2009-2011 and it was only upon expiration of the ARPP lists that Employee's three years reinstatement eligibility began.