**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| SAMUEL MURRAY, | ) | |
| Employee | ) | OEA Matter No. 1601-0032-14 |
| | ) | |
| v. | ) | |
| | ) | Date of Issuance: March 7, 2017 |
| DEPARTMENT OF YOUTH REHABILITATION SERVICES, | ) | |
| Agency | ) | |
| | ) | |

OPINION AND ORDER
ON
PETITION FOR REVIEW

Samuel Murray ("Employee") worked as a Motor Vehicle Operator with the Department of Youth Rehabilitation Services ("Agency"). On November 15, 2013, Agency issued a final notice of removal to Employee. The causes of action alleged were "any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: incompetence" and "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 removal was November 29, 2013.[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on

[1] *Petition for Appeal,* p. 7-8 (December 17, 2013).

December 17, 2013. Employee argued that the final notice was not properly served at his new address, even though he provided his current address to the Office of Human Resources. He also indicated that he was discriminated against due to a disability. Additionally, he contended that his removal was an act of retaliation because he filed a complaint with the Equal Employment Opportunity Commission. Therefore, Employee requested that he be reinstated with attorney fees.[2]

Agency filed its response to Employee's Petition for Appeal on February 14, 2014. It provided that Employee received Workers' Compensation benefits for an injury he sustained on July 30, 2010. Moreover, it explained that in the more than three years since he sustained his injury, Employee failed to offer proof that he was medically cleared to perform his essential duties as a Motor Vehicle Operator. Agency argued that after August 2012, Employee no longer had the right to resume his position and that his removal was reasonable and consistent with the District Personnel Regulations ("DPR"). According to Agency, under D.C. Official Code § 1-623.45, an employee with a Career Service appointment may retain his or her position or its equivalent for a period of two years from the date of commencement of compensation from the District Public Sector workers' compensation program. Agency opined that Employee's conduct was a continuous offense that lasted more than two years. Therefore, it requested that Employee's removal be upheld.[3]

The OEA Administrative Judge ("AJ") issued an Initial Decision on September 18, 2015. He held that Agency's argument under D.C. Official Code § 1-623.45 was defective because

[2] *Id.* at 3. In a subsequent filing, Employee provided that he was injured on the job on July 30, 2010. He explained the he received medical and wage benefits from July 31, 2010 through November 3, 2010. However, Employee asserted that he returned to work from November 5, 2012 through December 17, 2012. *Claimant Samuel Murray's Memorandum in Opposition to Respondent District of Columbia Department of Youth Rehabilitation Services' Illegal Adverse Removal Action*, p. 1-4 (December 15, 2014).
[3] *Id.*, 4-10.

Agency acknowledged that Employee temporarily returned to work on November 5, 2012, which was within two years of the commencement of Employee's Workers' Compensation benefits. The AJ explained that because Employee returned to work within the two-year period and suffered a reoccurrence of injury, a new accrual was then initiated. Accordingly, he found that the two-year period in which Employee was given to return to work was reset in December of 2012 when he received medical treatment. Because the effective date of Employee's termination was November 29, 2013, the AJ reasoned that Agency did not have cause to take adverse action against Employee. Accordingly, he reversed Agency's decision to remove Employee and ordered that he be reinstated to the same or a comparable position.[4]

Agency disagreed with the AJ's decision and filed a Petition for Review with the OEA Board on October 23, 2015. It explains that the AJ erred when considering 7 DCMR § 139 which included a return to work provision. Agency asserts that Employee failed to show proof that he overcame his injury within the two-year period after the date of commencement of compensation payments, as required by D.C. Official Code § 1-623.45. Therefore, it requests that the OEA Board grant its Petition for Review.[5]

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. 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. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. Therefore, if there is substantial evidence to support the AJ's decision that Employee overcame his

[4] *Initial Decision*, p. 4-7 (September 18, 2015).
[5] *Agency's Petition for Review,* p. 6 (October 23, 2015).

disability and Agency lacked cause to remove him, then this Board must accept it.

D.C. Official Code § 1-623.45(b)(1) provides the following:

> (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 the injury or disability has 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;

The relevant section of D.C. Official Code § 1-623.45(b)(1) provides that Agency must accord Employee with the right to resume his position ". . . provided that the injury or disability has been overcome within two years after the date of commencement of compensation and provision of all necessary medical treatment needed to lessen disability . . . ." Although the record shows that Employee returned to work from November 5, 2012 through December 17, 2012, it is not clear that Employee actually overcame his disability, as is required by the Code. In *Department of Youth Rehabilitation Services v. District of Columbia Office of Employee Appeals*, p. 7-8, 2010 CA 1842 P(MPA)(D.C. Super. Ct. September 20, 2012), the Superior Court for the District of Columbia held that if the injury or disability is overcome, then certain protections apply. The Court reasoned, however, that the rights provided are conditional upon the employee overcoming his or her injury.

A review of the record seems to suggest that Employee appeared at work and that

Agency allowed him to work for a little over one month.[6] However, there is no evidence in the record establishing that Employee was medically cleared or deemed to have overcome his disability. There is no documentation from Employee's physician, for example, which states that he overcame his injury in November of 2012. Likewise, there was no evidence presented which establishes that necessary medical treatments were performed to lessen Employee's disability. This Board is under the assumption that such documentation must exist for Agency to have allowed Employee to return to work from November 5, 2012 through December 17, 2012.[7] The only documentation in the record from Employee's physician is a note dated December 17, 2012. The notice specifically states "patient cannot go back to his regular work until problems with neck and shoulder are resolved . . . ." Because the record – in its current state – does not show that Employee actually overcame his disability in November of 2012, we must remand the matter to the AJ to make further determinations.

[6] *Petition for Appeal*, p. 15-16 (December 17, 2012) and *Agency's Answer to Petition for Appeal,* p. 2 (February 14, 2014); *Agency's Brief,* p. 2 (November 10, 2014).

[7] Moreover, Employee asserted that in order for him to ". . . return to work in his official position[,] a medical decision . . . must come from the District of Columbia['s] Office of Risk Management *after* a medical doctor makes that certification (emphasis added)." *Claimant Samuel Murray's Memorandum in Opposition to Respondent District of Columbia Department of Youth Rehabilitation Services' Illegal Adverse Removal Action,* p. 5 (December 15, 2014).

**ORDER**

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

FOR THE BOARD:

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Sheree L. Price, Interim Chair

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Vera M. Abbott

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Patricia Hobson Wilson

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P. Victoria Williams

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. 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.