

Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals’ website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

In the Matter of:	)	
	)	
NANCY WILLSON,	)	OEA Matter No. 1601-0170-13
Employee	)	
	)	
v.	)	Date of Issuance: June 9, 2015
	)	
DEPARTMENT OF TRANSPORTATION,	)	
Agency	)	
	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Nancy Wilson (“Employee”) was a Staff Assistant with the District Department of Transportation (“Agency”). On August 2, 2013, Agency issued a letter to Employee informing her that she would be terminated from her position during her probationary period. On August 8, 2013, Agency issued a revised termination letter to Employee explaining that the previous letter contained inaccurate information. The letter went on to provide that the effective date of separation was August 23, 2013. Subsequently, on August 15, 2013, Agency issued another letter to Employee informing her that the August 8, 2013 letter “contained a typographical error in regards to [the] effective date of separation.” It explained that the effective date of separation should have been August 13, 2013.<sup>1</sup>

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

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<sup>1</sup> *Petition for Appeal*, p. 6-23 (September 30, 2013).

September 30, 2013. She argued that Agency's termination action was improper. Employee reasoned that in two separate notices, Agency stated that her effective date of separation was eleven days after her probationary period ended. She further submitted that in its August 15, 2013 letter, Agency attempted to back date her effective separation date. Employee opined that once her probationary period ended, she became a Career Service Employee, and as a result, Agency needed cause to terminate her. Therefore, Employee requested reinstatement with back-pay and benefits restored.<sup>2</sup>

Agency filed a Motion to Dismiss the Petition for Appeal on November 1, 2013. It argued that OEA lacked jurisdiction over the appeal because Employee was terminated during her probationary period. Agency explained that its first two notices contained incorrect effective dates of separation. It asserted that Employee's effective date of separation was August 13, 2013.<sup>3</sup>

On November 22, 2013, the OEA Administrative Judge ("AJ") issued an order directing Employee to brief whether the appeal should be dismissed for lack of jurisdiction due to her probationary status at the time of her termination. The order also required Agency to submit Employee's SF-50 and pay stubs from August 13, 2013 to September 20, 2013.<sup>4</sup> In response, Employee provided that she began her employment on August 13, 2012, and her probationary period ended at 11:59 p.m. on August 12, 2013. Employee asserted that after August 12, 2013, she was still employed as evidenced by her pay stubs. Thus, she requested that OEA consider her appeal.<sup>5</sup>

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<sup>2</sup> *Id.*, 3-41.

<sup>3</sup> *Agency's Motion to Dismiss Employee's Petition for Appeal* (November 1, 2013).

<sup>4</sup> *Order on Jurisdiction* (November 22, 2013).

<sup>5</sup> *Employee's Response to Order on Jurisdiction* (December 4, 2013). Agency subsequently filed a brief in response to the AJ's Order which included Employee's pay stubs and SF-50. *Agency's Response to OEA Order Dated November 22, 2013* (December 16, 2013).

On January 22, 2014, the AJ issued her Initial Decision. She found that “[b]ased on Employee’s paystub, Agency continued paying Employee long after the purported August 13, 2013 termination effective date.”<sup>6</sup> The AJ was not convinced by Agency’s argument that its first two termination notices contained typographical errors with regard to Employee’s termination effective date. Furthermore, she reasoned that even if the August 15, 2013 letter contained the correct termination effective date, Agency’s termination action against Employee was still in error because at 12:00 a.m. on August 13, 2013, Employee became a Career Service employee. As a result, the AJ ruled that Agency needed cause to remove Employee. Accordingly, Agency’s motion to dismiss was denied, and its termination action was reversed.<sup>7</sup>

On February 24, 2014, Agency filed a Petition for Review of the Initial Decision with the OEA Board. It submits that the AJ’s findings were not based on substantial evidence. Agency explains that after Employee’s probationary period ended, she was not paid for actual work and that she was on Administrative Leave with Pay. It went on to provide that Employee’s Retroactive Pay and Terminal Leave Pay were for work performed during her probationary period. It asserts that as early as August 2, 2013, Employee was aware that she was to be terminated during her probationary period and that she was being placed on Administrative Leave with Pay.<sup>8</sup> Therefore, it requests that the Initial Decision be reversed and that its termination action be sustained.<sup>9</sup>

In response to the Petition for Review, Employee argues that the Initial Decision correctly stated the facts and correctly applied the law. She provides that after 11:59 p.m. on August 12, 2013, she became a Career Service employee who was on Administrative Leave with

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<sup>6</sup> She found that Employee was paid until August 24, 2013. *Initial Decision*, p. 3 (January 22, 2014).

<sup>7</sup> *Id.* at 4.

<sup>8</sup> Agency argues that it had discretion to place Employee on Administrative Leave with Pay for up to ten work days.

<sup>9</sup> *Petition for Review* (February 24, 2014).

Pay. Therefore, she requests that the Board deny Agency's Petition for Review.<sup>10</sup>

### Substantial Evidence

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. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.<sup>11</sup> 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. After a thorough review of the matter before us, this Board believes that the AJ's ruling was based on substantial evidence in this case.

### Probationary Period

District Personnel Manual ("DPM") § 813.2 provides that "a person hired to serve under a Career Service Appointment (Probational) . . . shall be required to serve a probationary period of one (1) year. . . ." The AJ in this matter offered a clear analysis that Employee was not removed from her position prior to the expiration of her one year probationary period. Employee started her position with Agency on August 13, 2012. The first two removal notices provided that she would be terminated effective August 23, 2013. This is obviously beyond the one-year probationary period. Moreover, Agency blatantly attempted to correct its error by offering a final notice dated August 15, 2013, which provided that Employee's termination date was two days prior on August 13, 2013. Agency's haphazard attempts to correct its error were not only shocking but disturbing to the members of this Board.

In this matter, Agency's Petition for Review also attempts to improperly shift the burden

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<sup>10</sup> *Response to Petition for Appeal* (March 28, 2014).

<sup>11</sup> *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

to Employee. It argues that Employee was “aware” of her termination and that she was “apprised that her employment was being terminated prior to the expiration of the probationary period. . . .”<sup>12</sup> However, Agency was only able to offer evidence that supported Employee’s contention that her termination was effectuated after her probationary period ended. The AJ, Employee, and this Board can only rely on the documents presented to us which all clearly indicate that Employee was to be separated from her position ten days after her probationary period ended.

Moreover, Agency attempts to muddle the issue by providing that it only paid Employee until August 23, 2013, as a courtesy of its discretion. However, as was the AJ, this Board is unpersuaded by this argument. Paying Employee through August 23, 2013, is consistent with the effective dates listed in Employee’s first two removal notices. Therefore, we believe that August 23, 2013, is the date Agency truly intended to terminate Employee from her position. Because this is after the one-year probationary period, Employee was a Career Service employee with all of the rights afforded to her by that appointment. As a result, Agency required cause to remove her from her position.<sup>13</sup> Therefore, this Board must deny Agency’s Petition for Review and uphold the AJ’s decision that Agency reinstate Employee with back pay and benefits.

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<sup>12</sup> *Petition for Review*, p. 4 (February 24, 2014).

<sup>13</sup> This office recently addressed this issue in *Samuel Brooks v. Department of Health*, OEA Matter No. 1601-0316-10 (November 25, 2013). In that matter, the AJ reasoned that Employee’s termination must have actually occurred prior to the end of the probationary period. The AJ opined that after satisfactorily completing the probationary period, Employee had the equivalent of a permanent appointment therein. As the AJ did in this matter, the AJ in *Brooks* also considered that Agency paid Employee past his probationary period. Therefore, he ruled that Employee achieved permanent, career status. Accordingly, Agency’s action was reversed, and it was ordered to reinstate Employee with back pay and benefits. This case is on point with *Brooks*.

**ORDER**

It is hereby **ORDERED** that Agency's Petition for Review is **DENIED**. As provided in the Initial Decision, Agency's termination action is **REVERSED**. Accordingly, Agency shall reinstate Employee to her last position of record or a comparable position. Additionally, it must reimburse Employee all back-pay and benefits lost as a result of the termination action. Agency shall file with this Board within thirty (30) days from the date upon which this decision is final, documents evidencing compliance with the terms of this Order.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

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.