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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
STEPHANIE LINNEN)	OEA Matter No. 1601-0259-10
Employee)	
)	Date of Issuance: February 20, 2014
v.)	
)	Lois Hochhauser, Esq.
OFFICE OF THE STATE SUPERINTENDENT)	Administrative Judge
OF EDUCATION)	
Agency)	

Hillary Hoffman-Peak, Esq., Agency Representative
Gregory Sharma Holt, Esq., Employee Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Stephanie Linnen, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on December 21, 2009, appealing the decision issued by the Office of the State Superintendent of Education, Agency herein, to remove her from her position as Staff Assistant, effective “close of business” on November 17, 2009. In her petition, Employee stated she held a permanent appointment in the career service at the time of her removal.

Agency filed a motion to dismiss on January 28, 2010, arguing that this Office lacked jurisdiction to hear the appeal, because Employee was serving in a term appointment and was in “at will” status at the time of her removal. The decision letter issued by Agency removing her from her position, identified Employee as serving “without tenure.” In support of its position, Agency submitted a document signed by Employee on February 19, 2008, in which Employee accepted “reappointment without tenure” to her position.

The matter was assigned to me on May 2, 2012. Upon reviewing the submissions, I issued an Order on May 24, 2012, directing Employee to respond to Agency’s motion to dismiss. Employee filed a timely submission in which she asserted that that Agency had converted her to career service status on July 21, 2008, and that she remained in that status at the time of her removal. In support of her position, she submitted a document dated July 21, 2008 from Agency Deputy Superintendent John Parham and Agency Human Resource Manager Raeshawn Crosson to Employee stating that as

a result of a classification study, her position was being reclassified to a career service appointment. I then issued an Order directing Agency to respond to Employee's submission by November 2, 2012. Agency filed a timely response but did not submit any document postdating the July 21, 2008 document submitted by Employee.

By Order dated November 27, 2012, the parties were directed to appear at a prehearing conference on December 14, 2012; and to bring documents that supported their positions regarding Employee's status at the time of her removal. The parties were advised that they could present written and/or oral argument at the proceeding and that following their presentations, the Administrative Judge would rule on the issue of jurisdiction. They were notified that if it was determined that Employee met her burden of proof on the issue of jurisdiction, the parties would be invited to participate in mediation. At the request of Agency, and with the consent of Employee, the proceeding was rescheduled, and took place on January 25, 2013.

After considering the arguments raised by the parties in their oral and written presentations and reviewing the documents submitted by the parties to support their positions; the Administrative Judge notified the parties that she had determined that Employee had met her burden of proof on the issue of jurisdiction, noting that the most recent document presented by either party on that issue was the July 21, 2008 letter from Agency notifying Employee that her position was being reclassified to career service status. After being advised of this decision, the parties agreed to participate in mediation. The matter is therefore referred to mediation by Order issued on that date. The parties were directed to submit monthly status reports beginning on March 8, 2013.

On or about October 11, 2013, the Administrative Judge was advised that mediation efforts had not been successful. She issued an Order scheduling a prehearing conference for November 13, 2013. The matter was rescheduled for January 31, 2014.

The January 31, 2014 proceeding was attended by Employee; Gregory Sharma-Holt, Esq., her counsel; and Hillary Hoffman-Peak, Agency counsel. The Administrative Judge began by asking Agency counsel, if, in the intervening time, Agency found any document or evidence that would dispute that Employee was in career service status at the time of her termination. Counsel stated that no such documentation or evidence was found. The Administrative Judge then asked Agency counsel if Agency now conceded that Employee was in career service status at the time of her termination. Counsel responded that Agency no longer disputed that Employee was in career service status when she was removed. The Administrative Judge next asked Agency counsel if Agency had removed Employee for cause. Counsel stated that since, at the time it terminated Employee, Agency had in good faith believed her to be an "at will" employee, it had not removed her for cause.

The Administrative Judge stated that since employees in career status service could only be removed for cause, and since Agency conceded that Employee was in career service status at the time of her removal, and further conceded that it had not removed her for cause, it appeared that Agency would not be able to meet its burden of proof in this matter if an evidentiary hearing was held. She stated that the most reasonable course of action would be to give Agency the opportunity to show good cause why the removal should not be reversed based on the fact that it had removed a

career service employee without cause. Both attorneys agreed to the issuance of the Order. The Administrative Judge directed Agency to file its response by February 13, 2014 and stated that Agency's failure to respond to the Order would be considered as its concession that it could not establish good cause. The parties were advised that the record would close at that time, unless they were notified to the contrary. In the Order issued on February 3, 2014 memorializing these directives, the Administrative Judge commended Agency counsel for being candid in her responses, thereby avoiding the additional time and expense of proceeding with an evidentiary hearing. Agency did not submit a response and the record closed on February 13, 2014.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Code Ann. §1-606.3 (1999 repl.).

ISSUES

Did Agency comply with the requirements for removing a career service employee? If not, what relief, if any, should be awarded?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The threshold issue in this matter was one of jurisdiction. OEA Rule 629.2, 46 D.C. Reg. 9317 (1999) states that employees filing appeals with this Office have the burden of proof on all jurisdictional issues. According to OEA Rule 629.1, this burden must be met by a "preponderance of the evidence" which is defined as "[t]hat 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."

This Office's jurisdiction is conferred upon it by law. Pursuant to the Omnibus Personnel Reform Amendment Act, (OPRAA), D.C. Law 12-124 (1998), this Office is authorized to hear appeals of permanent employees in the career service who have successfully completed their probationary periods. Permanent employees who serve in the career service are entitled to removal for cause. Term employees and other employees who serve "at will" are not entitled to this protection and Agency does not need cause to remove these employees. *See* D.C. Code §1-617.1(b).

For the reasons discussed above, the Administrative Judge determined that Employee had met her burden of proving that at the time she was terminated, she had permanent and career status, and therefore this Office had jurisdiction to hear her appeal. However, since jurisdiction can always be raised, the Administrative Judge queried the Agency representative on January 25, 2014, whether, in the intervening year while the parties were engaged in mediation, Agency had located a document or any evidence that established that Employee was not in career service status at the time of her removal. To her credit, Agency counsel was forthright, stating that no document or evidence had been found, and that Agency no longer challenged Employee's status as career service.

As stated above, this Office is authorized to hear appeals of permanent employees in the career service. Employee was in permanent status and held a career service appointment, and therefore this

Office has jurisdiction to hear this matter. As a career service employee in permanent status, Employee could only be removed for cause. *See* D.C. Code §1-617.1(b). Agency conceded that it did not have cause when it removed Employee because of its mistaken, but good faith belief that she was “at will” and could be terminated without cause. Since Agency concedes that it removed Employee without cause, and would not be able to meet its burden of proof in this matter by a preponderance of evidence, as defined above, if an evidentiary hearing was held.¹

Agency removed Employee, a career service employee, without cause in violation of the D.C. Code, cited above. As relief, Employee seeks, and is entitled, to be reinstated and to be “made whole” as directed in the second provision of this Order.

ORDER

It is hereby

ORDERED:

1. Agency’s decision is to remove Employee is reversed.
2. Agency is directed to reinstate Employee, issue her the back pay to which she is entitled and restore any benefits that she lost as a result of the removal, no later than 45 calendar days from the date of issuance of this Decision.
3. Agency is directed to file a document with OEA certifying that it has complied with this Order no later than 60 calendar days from the date of issuance of this Decision.

FOR THE OFFICE:

Lois Hochhauser, Esq.
Administrative Judge

¹The issue of the timeliness of this appeal is not being addressed, because even if the petition was filed beyond the statutory 30 day limit, this Board will excuse a late filing if an agency has failed to provide the employee with “adequate notice of its decision and the right to contest the decision through an appeal.” *McLeod v. D.C. Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003). It is undisputed that Agency failed to advise Employee of her right to appeal to OEA since, at the time Agency removed her, it did not believe she had the right to appeal to this Office.