THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ROBIN HALPRIN,	)	
Employee	)	OEA Matter No. 1601-0107-08
	)	
v.	)	Date of Issuance: February 23, 2015
	)	
D.C. DEPARTMENT OF MENTAL HEALTH,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Senior Administrative Judge

Harold Levi, Esq., Employee Representative
Andrea Comentale, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

According to the documents of record, Dr. Robin Halprin ("Employee") worked for the District of Columbia Department of Mental Health ("DMH" or "the Agency") as a DS-13 Clinical Psychologist at Saint Elizabeth's Hospital. On December 9, 2004, Employee sustained a work-related injury. Because of this injury, Employee applied for benefits from the District of Columbia Disability Compensation Program ("DCP") pursuant to the provisions of Subchapter XXIII of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 1-623.01 *et seq.* (2001 Ed.). Employee was intermittently off work due to her injury beginning December 30, 2004. Following surgery on April 22, 2005, Employee was released to return to light duty, with restrictions, including limited standing, with rest fifteen (15) minutes every hour, no slippery surfaces and no stairs. *See* Statement of Material Facts Not in Dispute (November 15, 2013). On June 20, 2005, Employee returned to work and was instructed by her supervisor, Dr. Michelle Washington, that DMH could not modify her position to accommodate her medical restrictions and therefore Employee could not return to work until she could perform her job without restrictions. *Id.*

On June 29, 2005, an evidentiary hearing was convened on Employee's claim for disability compensation benefits at the Department of Employment Services, Labor Standards Bureau - Administrative Hearings Division. *Id.* During this hearing, Dr. Washington testified

that Agency had no alternative position or job modification that could be made to Employee's position to accommodate her medical restrictions. On March 7, 2006, the Department of Employment Services' Administrative Law Judge issued a Compensation Order granting Employee's claim for benefits, finding her temporarily totally disabled and awarding wage loss and causally-related medical benefits from the date of Employee's injury to the present and continuing. Employee continued to receive wage loss and medical benefits for over two (2) years from the date of her injury. Employee was removed from service on June 20, 2008. It is uncontroverted that Employee's wage loss and medical benefits payments continue through present and are ongoing.

On July 7, 2008, Employee filed a petition for appeal with the Office of Employee Appeals contesting her removal from service. On or about October 7, 2008, this matter was originally assigned to Senior Administrative Judge Rohulamin Quander. In late December 2012/early January 2013, this matter was reassigned to Administrative Jude Lois Hochhauser. In April of 2013, this matter was reassigned to the Undersigned. Throughout the history of this matter, the parties have been in constant settlement talks. The same has been true for the duration of this matter while under my supervision. In January 2015, after a renewed round of settlement negotiations, the parties informed the undersigned that settlement of this matter is not a viable option. On January 8, 2015, I issued an Order requiring the parties to provide legal briefs on whether the Agency had cause to remove Employee from service. The parties have complied with this order. After reviewing the documents of record, it is clear to the undersigned that no further proceedings are warranted. The record is now closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > 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.

OEA Rule 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

ISSUE

Whether Agency's action of removing the Employee from service was done in accordance with applicable law, rule, or regulation.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

Position of the Parties

According to the Agency's Brief, the stated cause for removing the Employee was her inability to satisfactorily perform one or more major duties of his position. The Agency does not deny that the Employee suffered a work related injury that necessitated her being placed on a leave without pay status by the Agency while she attempted to recuperate from said injury. The Agency contends that pursuant to D.C. Official Code § 1-623.45 (b) (1) (2005 Repl.), it was only required to hold the Employee's position open for one year before starting the removal process. The Agency further contends that it did in fact start its removal action well after the statutorily mandated one year time period had elapsed. It also argues that some of the relief the Employee is seeking, namely, the Employee's request that I order the Agency to provide medical treatment and/or provide her with a modified duty position, is outside of the jurisdiction of this Office. Considering all of the preceding, the Agency contends that it complied with all applicable statutory requirements and therefore its decision removing Employee should be upheld.

Employee contends that she should be afforded a modified duty positon and that the District government should cover her medical costs associated with further corrective surgery. Employee also contends that her position is sedentary and that Agency would have little trouble with providing her with workplace accommodations. On a related note, Employee posits that Agency has provided similar accommodation to unnamed colleagues in the place. Lastly, Employee contends that the Agency did not give her advanced written notice of its intent to remove her from service.

Analysis

The following findings of facts, analysis and conclusions of law are based on the documentary evidence as presented by the parties during the course of the Employee's appeal process with this Office. It must be stressed that the OEA is not a forum of general jurisdiction. Moreover, this Office has no authority to review issues beyond its jurisdiction. *See Banks v. District of Columbia Pub. Sch.*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (Sept. 30, 1992), __ D.C. Reg. __ ( ). Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") reads in pertinent part as follows:

> (a) An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . ., an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . .,

or a reduction in force [RIF]…

Based on the preceding statute, I may only adjudicate matters that squarely fall within the purview of D.C. Official Code § 1-606.03. The jurisdiction of this Office is limited to performance ratings that result in removals; final agency decisions that result in removals, reductions in grade or suspensions of ten days or more; or reductions in force. OEA Rule 604.1, 59 DCR 2129 (March 16, 2012). I find that under this set of circumstances, the requested relief in the form of ordering the Agency (or the D.C. Government) to respond to Employee's request for medical treatment, workplace accommodations, or any other request that deals with "medical benefits" are outside the jurisdiction of this Office and therefore must be summarily denied[1].

Employee also contends that she did not receive advance notice of the proposal to remove her from her position. It is plainly evident from the documents of record that Employee received her Final Notice effectuating her removal and that she was able to timely file her petition for appeal with the OEA. Given the instant circumstances, I find that any error that Agency *may* have committed was harmless.

D.C. Code § 1-623.45(b) prescribes the time period in which an employee must overcome his or her injury or disability to invoke this retention right. D.C. Code § 1-623.45 (b). Subsection (b) has been amended over the years; notably, and relevant to this proceeding, in 2001 and 2005. Effective October 3, 2001, D.C. Code § 1-623.45, subsections (b)(1) and (b)(2) were amended to read as follows:

…

(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, **if the injury or disability has been overcome within 1 year after the date of commencement of compensation** 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 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 disabled, including the rights to tenure, promotion, and safeguards in reduction-in-force procedures; and

(2) If the injury or disability is overcome within a period of more than 1 year after the date of commencement of compensation, make all reasonable efforts to place, and accord priority to placing, the employee in his or her former or equivalent position within such department or agency, or within any other department or agency.

[1] There are other judicial and quasi-judicial forums that may have the authority to adjudicate this issue. Hopefully, the Employee has (or will) avail herself of these forums.

D.C. Code § 1-623.45 (2001) (emphasis added).

This statute remained in effect until April 5, 2005, when the 2005 Amended Statute rewrote parts (1) and (2) of subsection (b) to read:

…

> 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 disabled, including the rights to tenure, promotion, and safeguards in reduction-in-force procedures, **provided that the injury or disability has been overcome within <u>one year</u> after the date of commencement of compensation** 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; or
> >
> > (2) If the injury or disability is overcome within a period of more than 2 years after the date of commencement of payment of compensation or the provision of medical treatment by the Disability Compensation Fund, make all reasonable efforts to place, and accord priority to placing the employee in his or her former or equivalent position within such department or agency, or within any other department or agency.
>
> D.C. Code § 1-623.45 (2006) (emphasis added).

Thus, under either the 2001 Statute or the 2005 Amended Statute, an employee had to overcome an injury or disability within one year of the date disability benefits commenced in order to retain a right to be restored to his or her former position. It is undisputed that Employee was receiving disability compensation benefits for more than one year before the Agency instituted the instant removal action. It is also uncontroverted that at the time that Employee was removed from service she was unable to perform her essential job functions without workplace modifications that the Agency was unable to provide for her. While I empathize with Employee's predicament, based on D.C. Code § 1-623.45, I find that the Agency adequately complied with all applicable laws when it removed the Employee from service. Reluctantly, I must uphold the Agency's action in this matter.

The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office. *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994). Therefore, when assessing the appropriateness of a penalty, this

Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). When an Agency's charge is upheld, this Office has held that it will leave the Agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. *Id.*

ORDER

Based on the foregoing, it is hereby ORDERED that Agency's adverse action of removing the Employee from service is hereby UPHELD.

FOR THE OFFICE:

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ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE