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:	)	
[redacted]	)	
Employee	)	OEA Matter No. J-0009-18
v.	)	
	)	Date of Issuance: May 19, 2020
DEPARTMENT OF SMALL AND LOCAL BUSINESS DEVELOPMENT, Agency	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Roxanne Cromwell ("Employee") worked as an Administrative Officer with the Department of Small and Local Business Development ("Agency"). On September 11, 2017, Employee received a notice that she would be terminated by Agency. According to Agency, Employee was removed from her position during her probationary period. The effective date of her removal was October 9, 2017.[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on October 17, 2017. She argued that she served in a Career Service permanent appointment and was promoted to a term position without a break in service. Additionally, Employee claimed that she

[1] *Petition for Appeal*, p. 5 (October 17, 2017).

served in two capacities, as a Human Resources Liaison and as an Administrative Officer. Accordingly, Employee requested that she be reinstated to her position and made whole.[2]

On November 16, 2017, Agency filed its Answer to Employee's Petition for Appeal. It asserted that pursuant to the District Personnel Manual ("DPM") § 814.1, an agency shall terminate an employee during the probationary period whenever his or her work performance or conduct fails to demonstrate his or her suitability and qualifications or continued employment. Agency explained that on May 5, 2015, Employee was hired as a Human Resources Assistant within the D.C. Department of Human Resources ("DCHR"). On May 10, 2017, Employee was offered a term appointment, as an Administrative Officer with Agency. Agency explained that the offer specified that Employee would be subject to complete a one-year probationary period beginning on May 28, 2017. As a result, it contended that because OEA lacked jurisdiction over probationary employees, the appeal should be dismissed.[3]

On November 20, 2017, the OEA Administrative Judge ("AJ") issued an order directing the parties to brief whether Employee's appeal should be dismissed for lack of jurisdiction.[4] Employee asserted that OEA had jurisdiction over the matter because she previously completed her probationary period in June of 2016, prior to her accepting a promotion with Agency in May 2017. It was Employee's position that she remained under the same hiring authority with no break in service from May 2015 through October 2017.[5]

Agency replied to Employee's brief and argued that Employee was serving a probationary period at the time of her removal; therefore, she did not have a right to appeal her removal to OEA. As for Employee's claim that she remained under the same hiring authority, Agency explained

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[2] *Id.* at 2.
[3] *Agency's Answer to Employee's Petition for Appeal*, p. 1-4 (November 16, 2017).
[4] *Order* (November 20, 2017).
[5] *Employee's Brief* (December 7, 2017).

that her argument was flawed because DPM § 813.9 provides that an employee is required to serve another probationary period when the position is in a different line of work. It reasoned that as a Human Resources Specialist, Employee provided advice and assistance on human resources recruitment and placement matters. Additionally, she advised and assisted in the development of staffing methods, recruiting sources, and methodologies; special employment programs; and staffing regulations. However, as an Administrative Officer, she was responsible for financial management, information systems development, data management, contract administration, and grants management. Moreover, Employee's duties included promulgating policies and procedures. Thus, Agency contended that the Administrative Officer position was properly subject to another probationary period. It noted that Employee was aware of the probationary period requirement as evidenced by her offer letter and the Notification of Personnel Action (Standard Form-50). As a result, it requested that the matter be dismissed.[6]

On January 29, 2018, the AJ issued her Initial Decision. She found that pursuant to the DPM, Employee was required to serve a second probationary period. The AJ explained that DPM § 823.8 provides that an employee serving a term appointment shall not acquire permanent status on the basis of a term appointment and shall not be converted to a regular Career Service appointment, unless the initial term was through open competition within the Career Service, and the employee satisfied the probationary period. Additionally, the AJ found that DPM § 813.9(c) noted that an employee who once satisfied a probationary period in the Career Service shall be required to serve another probationary period when the employee is appointed as the result of open competition to a position in a different line of work. The AJ held that neither party disputed that Employee's appointment was through open competition. Moreover, after reviewing the job

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[6] *Agency's Response to Employee's Brief on Jurisdiction*, p. 1-4 (January 22, 2018).

descriptions of both positions, the AJ ruled that the positions were in a different line of work. As a result, it was the AJ's finding that Employee was required to serve a second probationary period. She held that the second probationary period was from May 28, 2017 through May 27, 2018. Because Employee was removed from her position effective October 9, 2017, the AJ found that Employee did not complete the second probationary period. Additionally, the AJ relied on DPM § 814.3 which provides that a termination during an employee's probationary period cannot be appealed to OEA. Accordingly, she dismissed Employee's Petition for Appeal for lack of jurisdiction.[7]

Employee filed a Petition for Review on July 26, 2019. She contends that OEA has jurisdiction over the matter because she was in a Career Permanent status at the time of her termination; therefore, she could have only been terminated for cause. Additionally, Employee asserts that there is no evidence in the record to establish that she competed with others for the position through open competition. It is Employee's position that she was promoted non-competitively to backfill the Administrative Officer role. As evidence, Employee provided a document titled "Checklist for Submissions of Competitive & Non-Competitive Recruitment Actions to DCHR/Priority Consideration Clearance for Non-Competitive Term Appointments" which indicates a non-competitive appointment. Therefore, Employee requests that the Initial Decision be reversed.[8]

On August 30, 2019, Agency filed its Answer to Employee's Petition for Review. It maintains that the AJ's findings are based on substantial evidence and that the AJ correctly held that Employee was a probationary employee. Further, Agency argues that Employee's petition is untimely. It explains that pursuant to OEA Rule 633.1, a party may file a Petition for Review

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[7] *Initial Decision*, p. 1-5 (January 29, 2018).
[8] *Petition for Review of the Administrative Judge's Initial Decision*, p. 1-5 (July 26, 2019).

within thirty-five calendar days of the issuance of the Initial Decision. Agency asserts that Employee filed her Petition for Review over sixteen months after the Initial Decision became final. As for the open competition issue, Agency contends that Employee did not assert that her appointment was non-competitive, nor did she present any evidence to support the assertion in her Petition for Appeal or in her brief on jurisdiction. According to Agency, it presented evidence that the appointment was through open competition by providing two Standard Form-50s, the Career Service term letter, the DCHR acknowledgment of the offer acceptance, the job requisition number, and the E-DPM Instruction Nos. 8-55 & 38-14. Moreover, Agency alleges that the Human Resource Specialist and Administrative Officer positions are within a different line of work. Finally, it argues that Employee was serving in a probationary period at the time of removal. Therefore, Agency requests that Employee's Petition for Review be dismissed.[9]

On September 13, 2019, Employee filed a Reply to Agency's Response to Petition for Review. Most notably, Employee provided a copy of the funding certificate from Agency to the Office of the Chief Financial Officer. The document provides that the Administrative Officer position number 004287 was non-competitive.[10] Agency filed a Motion to Strike Employee's Reply and reasoned that the OEA Rules does not allow for a party to file a reply to an answer.[11]

Agency argued that Employee's Petition for Review was untimely filed. Agency is correct that OEA has consistently held that in accordance with OEA Rule 633.1 and D.C. Code § 1-606.03(c), any party to the proceeding may serve and file a petition for review of an initial decision with the Board within thirty-five (35) calendar days of issuance of the initial decision. However, in *Bagenstose v. District of Columbia Office of Employee Appeals*, 888 A.2d 1155, 1157 (D.C.

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[9] *Agency's Answer to Employee Roxanne Cromwell's Petition for Review*, p. 3-9 (August 30, 2019).
[10] *Roxanne Cromwell Reply to Agency's Response to Petition for Review of the Initial Decision*, Attachment #1 (September 13, 2019).
[11] *Agency's Motion to Strike Reply Brief of Employee on Petition for Review* (September 26, 2019).

2005), the D.C. Court of Appeals held that a ruling on the merits of a case may occur without deciding the more complex jurisdictional question. Moreover, the court in *Stevens v. Quick*, 678 A.2d 28, 31 (D.C.1996) reasoned that "when the merits of a case are clearly against the party seeking to invoke the court's jurisdiction, the jurisdictional question is especially difficult and far-reaching, . . . we may rule on the merits without reaching the jurisdictional question."

In her Petition for Review, Employee submitted a document titled "Checklist for Submissions of Competitive & Non-Competitive Recruitment Actions to DCHR/Priority Consideration Clearance for Non-Competitive Term Appointments." This Board is not aware of when Employee secured the document, or if the document was available before the record was closed before the AJ. However, it is obvious that the document was created either by DCHR or Agency and should have been a part of Agency's personnel records for Employee. Additionally, the funding certificate, also provided by Employee, was drafted by Agency to the Office of the Chief Financial Officer on March 28, 2017. This document was certainly a part of Agency's personnel records for Employee that it failed to include in the record to OEA. Accordingly, Agency's argument regarding the untimeliness of Employee's petition, is questionable given its failure to provide all of Employee's personnel records while the case was pending before the Administrative Judge. Given the documents submitted by Employee, it appears that the merits of the case are against Agency, as it attempts to invoke Employee's untimely filing. As the court in *Stevens* held, when the merits of a case are clearly against the party seeking to invoke jurisdiction, we may rule on the merits without reaching the jurisdictional question.

Additionally, Agency claims that Employee's arguments regarding the non-competitive nature of her position that were not made before the Administrative Judge, are waived before the Board. The D.C. Court of Appeals held in *Hahn v. University of the District of Columbia*, 789

A.2d 1252 (D.C. 2002)(citing *Goodman v. District of Columbia Housing Commission*, 573 A.2d 1293 (D.C. 1990)) that "contentions not urged at the administrative level may not form the basis for overturning the decision on review." However, it went on to provide that "the case law recognizes a narrow exception to this rule on a showing of exceptional circumstances . . . when the interests of justice so require."

This Board is struck by the evidence offered by Employee in the Checklist for Submissions of Competitive & Non-Competitive Recruitment Actions to DCHR/Priority Consideration Clearance for Non-Competitive Term Appointments and the funding certificate. We believe that these documents go to the merit of this case. Contrary to Agency's contention, both documents indicate that the Administrative Officer, position number 0042487, was listed as a non-competitive appointment.[12] In its brief, Agency submitted DPM Instruction Nos. 8-55 & 38-14 which defines a non-competitive appointment as "an appointment to or placement in a position that is *not* made thru competitive recruitment (emphasis added)."[13] Thus, given the DPM Instructions and the evidence offered by Employee, it appears that Employee's appointment may not have been the result of open competition.

Equally as troubling as the evidence submitted by Employee, is that although the AJ ruled that Employee's position was obtained through open competition, there is not substantial evidence in the record to support this contention.[14] Open competition is defined as the use of examination procedures which permit application and consideration of all persons without regard to current or

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[12] *Petition for Review of the Administrative Judge's Initial Decision*, Exhibit #2 (July 26, 2019); *Agency's Answer to Employee's Petition for Appeal*, Exhibit #2 (November 16, 2017); and *Roxanne Cromwell Reply to Agency's Response to Petition for Review of the Initial Decision*, Attachment #1 (September 13, 2019).
[13] *Agency's Response to Employee's Brief on Jurisdiction*, Exhibit #2 (January 22, 2018).
[14] Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. *Black's Law Dictionary*, Eighth Edition; *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).

former employment with the District government.[15] Agency asserts that it presented evidence of open competition in two Standard Form-50s; the Career Service term letter; the DCHR acknowledgement of the offer acceptance; job requisition number; and the DPM Instruction Nos. 8-55 & 38-14. However, a review of these documents offered as evidence, do not indicate that Employee's appointment was through open competition. There is no mention of open competition anywhere on the documents. This Board addressed a similar issue in *Chantel Harris v. Department of Youth Rehabilitation Services*, OEA Matter No. J-0017-18, *Opinion and Order on Petition for Review* (December 18, 2018) and held that an offer letter that mentions the job requisition number, does not establish that the position was the result of open competition.

In the current case, Agency fails to provide the actual vacancy announcement, the job opening announcement, or any similar documentation to prove an open competition designation. Instead it highlights the requirements for open competition given Employee's movement from an intra-agency promotion from a Grade 9 Human Resources position to a Grade 12 Administrative Officer position.[16] However, simply alleging the requirements for an open competition appointment does not equate to proof that Employee's appointment was the result of open competition.[17] Hence, this Board does not believe that there is substantial evidence in the record to support the AJ's ruling regarding open competition.

Absent exceptional circumstances, as those presented in the current matter, this Board has traditionally not entertained untimely filed petitions or evidence presented after the closing of an OEA record. However, the interest of justice requires it in this matter. In *Willie Porter v.*

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[15] *See* DPM § 899.1.

[16] *Agency's Answer to Employee Roxanne Cromwell's Petition for Review*, p. 6-9 (August 30, 2019).

[17] As it relates to the requirement that the positions are in a different line of work, the Board believes that there is adequate evidence in the record for the Administrative Judge to provide a more detailed analysis of this issue than the conclusory statement provided in the Initial Decision.

Department of Mental Health, OEA Matter No. 1601-0046-12, *Opinion and Order on Petition for Review* (April 14, 2015), this Board allowed some flexibility on the timeliness of the filing of the Petition for Review because Employee was a *pro se* litigant, and he provided compelling evidence to the Board on appeal. Similarly, we believe that the documentation provided by Employee in the current matter regarding open competition is equally as compelling. We also recognize, as in *Hahn*, that a narrow exception to the rule that must be made given the exceptional circumstances of this case. Accordingly, in the interest of justice, we must remand the matter to the Administrative Judge for consideration of the case on its merits.

ORDER

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

FOR THE BOARD: