THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
SYLVIA JOHNSON, Employee	OEA Matter No.: J-0145-15R20
v.	Date of Issuance: October 8, 2020
D.C. FIRE & EMERGENCY MEDICAL SERVICES, Agency	ARIEN P. CANNON, ESQ. Administrative Judge

Johnny M. Howard, Esq., Employee Representative
Frank McDougald, Esq., Agency Representative

SECOND INITIAL DECISION ON REMAND FROM SUPERIOR COURT OF DISTRICT OF COLUMBIA[1]

INTRODUCTION AND PROCEDURAL HISTORY

This matter is before the undersigned for consideration of the Superior Court of the District of Columbia's Remand Order issued on April 2, 2020. Previously, an Initial Decision was issued by the undersigned on February 11, 2016, dismissing this matter before OEA for lack of jurisdiction. Employee filed a Petition for Review with the OEA Board on March 17, 2016, asserting that the Initial Decision mischaracterized her initial appointment as a "term appointment" and erroneously concluded that Employee never satisfied a probationary period between July 2009 and March 2014. The OEA Board issued an Opinion and Order on Petition for Review on June 6, 2017, remanding this matter to the undersigned for further consideration. An Initial Decision on Remand was issued by the undersigned on December 12, 2017, this time reversing Agency's action of removing Employee from her position. On February 1, 2018, Agency filed a Petition for Review in the Superior Court of the District of Columbia. This matter is once again before the undersigned to address the issues set forth in the April 2, 2020 Superior Court remand Order.

[1] This decision was issued during the District of Columbia's COVID-19 State of Emergency.

JURISDICTION

As explained below, the jurisdiction of this Office has not been established.

ISSUE

1. Whether as a matter of law, that Ms. Johnson [Employee] was converted to a Career Service Appointment in 2013 after her Term Appointments exceeded four-years, when the undersigned relied upon § 823 of the 2014 version of the DPM that was not in effect at the time Ms. Johnson was terminated in March 2014 and then later hired in September 2014?

BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.[2] "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.

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.[3]

ANALYSIS AND CONCLUSIONS OF LAW

The Superior Court Order remanded this matter to the undersigned to determine "whether the [undersigned] properly concluded, as a matter of law, that Ms. Johnson [Employee] was converted to a Career Service Appointment in 2013 after her Term Appointments exceeded four-years, when [the undersigned] relied upon § 823 of the 2014 version of the DPM that was not in effect at the time Ms. Johnson was terminated in March 2014 and then later hired in September 2014?" The Court held that the undersigned's findings were not supported as a matter of law because the language of § 823 of the 2014 DPM was not in effect at the time Employee was terminated in March 2014 and then rehired by Agency in September 2014.[4] The Court further instructed that the 2000 version of the DPM should be relied on and used to resolve the issues surrounding Employee's term appointments and conversion to a career appointment in determining her appointment status when hired in September of 2014.[5]

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[2] 59 DCR 2129 (March 16, 2012).
[3] OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).
[4] The 2014 version of the subsections in Chapter 8 discussed throughout this decision became effective December 5, 2014. Employee's term appointments ran from July 2009 through March 2014. Her Career Service appointment was effective September 22, 2014, after a nearly six-month break in service.
[5] The argument that the incorrect version of the DPM was utilized before OEA was raised for the first time before the Superior Court of the District of Columbia in Agency's Petition for Review.

The relevant sections of the 2000 version of the DPM provide the following:

> **823.1** A personnel authority may make a term appointment for a period of more than one (1) year when the needs of the service so require and the employment need is for a limited period of four (4) years or less.
>
> **823.2** Term appointments may be extended beyond the four-year (4-year) limit with the prior approval of the personnel authority.

The same sections of the 2014 version of the DPM state:

> **823.1** A personnel authority may make a term appointment for a period of more than one (1) year when the needs of the service so require and the employment need is for a limited period of four (4) years or less.
>
> **823.2** Unless supported by grant funds, an employee continuously serving in a term appointment four (4) years or more, which is acquired through open competition, shall:
>
> (a) Be separated from District government service; or
>
> (b) Have his or her appointment converted to a regular Career Service appointment with permanent status.

Section 823.1 in both the 2000 and 2014 version of the DPM are identical. However, the disparity between the two versions is in § 823.2. The two options found in the 2014 version of § 823.2 of the DPM for when an employee serves in a term appointment four (4) continuous years or more are not found in the 2000 version of § 823.2 the DPM. As the Superior Court's Order on Remand instructs, the undersigned is tasked with performing an analysis under the 2000 version of the DPM.

Employee's position

Employee contends that there is no provision in the 2000 or 2014 version of the DPM that allows for an appointment beyond four continuous years of a term appointment without the approval from the Personnel Authority—in this case DCHR's Director or the designee. The 2014 version of the DPM requires that an employee who continuously serves in term appointments continuously four (4) years or more shall be separated from government service or have their position converted to a regular Career Service appointment with permanent status. While there is no requirement for such a conversion in § 823 of the 2000 version of the DPM, Employee asserts that the 2000 version also does not preclude such a conversion.[6] Employee

[6] *See* Opposition to Agency's Brief, pp. 3-4 (August 28, 2020).

further maintains that it was a "well-established custom and practice of the [DCHR] before the December 2014 version of the DPM became law to convert an employee's status to career service…" if an employee worked beyond the four-year continuous time period, as described in in § 823 of both the 2000 and 2014 versions of the DPM..[7]

Agency's position

Agency maintains that under the 2000 version of the DPM § 823, a term appointment may be extended beyond four years with the approval of the personnel authority. Agency asserts that it received the necessary approval to extend Employee's term appointments beyond four years through a Request for Superior Qualifications/Exceptions Form ("Exceptions Form") which was approved by then-Director (or Designee) of the District of Columbia Department of Human Resources ("DCHR") on July 30, 2013.[8] Agency notes that this approval form does not include a specific time period for which approval was provided.[9] The approval of this form permitted Agency to extend Employee's term appointments beyond four continuous years. A SF-50 was also issued with an effective date of July 20, 2013, which indicates that Employee's term appointment was extended through January 19, 2014.[10] Another SF-50 was issued with an effective date of January 20, 2014, which again extended Employee's term for a period not to exceed March 30, 2014.[11]

Agency further notes that the regulations do not limit the number of times a term appointment may be extended following an approval by the personnel authority for an extension of term appointments beyond four years.[12] Pursuant to the July 30, 2013 approval of the Exceptions Form, Agency elected to approve Employee for two extensions beyond four years' worth of term appointments. The first extension was from July 20, 2013 to January 19, 2014. The second extension was for January 20, 2014 through March 30, 2014.

Discussion

The undersigned disagrees with Employee's arguments in this matter. While it may have been a "well-established custom and practice" of DCHR to convert term appointments that exceed four continuous years to Career Service, it was not mandated by any identifiable statute, rule, or regulation during the relevant time period. Furthermore, Employee seems to acknowledge that the Exceptions Form was approved by DCHR's Director or designee on July 30, 2013, which permitted Agency to extend Employee's continuous term appointments beyond four years. However, Employee contends that this approval only permitted Agency to extend the term appointment beyond four years from July 20, 2013 to January 19, 2014.

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[7] *Id*. at 4.
[8] *See* Agency's Brief, Attachment 1 (July 13, 2020). This document is dated for July 16, 2013, and signed by Agency's Designated Authority on July 17, 2013. However, DCHR did not approve the request until July 30, 2013.
[9] *See* Agency's Reply Brief, at 3 (September 18, 2020).
[10] *Id*., Attachment 2.
[11] Opposition to Agency's Brief, Exhibit 8 (August 28, 2020).
[12] *See* Agency's Reply Brief, at 2 (September 18, 2020).

Employee contends that the second extension—from January 20, 2014 through March 30, 2014—lacked a second required approval from the personnel authority. Agency contends that the approval in the July 30, 2013 Exceptions Form applied to any subsequent term appointments beyond the continuous four years that ended on July 19, 2013. Employee asserts that the second extension beyond January 19, 2014, required a separate second approval from the personnel authority (DCHR). Employee does not cite any rule or regulation requiring approval by the appropriate personnel authority for each subsequent extension of a term appointment beyond a continuous four years, or that would require the personnel's authority's approval be included in the remarks section of a personnel action (SF-50) when a term is extended beyond four years. While the record is devoid of a separate approval of an Exceptions Form by DCHR pertaining specifically to an extension beyond January 19, 2014, the undersigned finds that the Exceptions Form approved on July 30, 2013, suffices for Agency to extend more than one term appointment that exceeds four continuous years of appointments. Furthermore, I find that the Exceptions Form approved by DCHR's Director (or Designee) on July 30, 2013, also applied to Employee's term appointment which ran from January 2014, through March 30, 2014. Because Agency was granted authority to extend Employee's term appointments beyond four continuous years via the Exceptions Form, it avers that Employee's term appointments were never converted to regular a Career Service status in 2013 once Employee's term appointments exceeded four (4) continuous years. The undersigned agrees.

Chapter 8 of the DPM was amended effective December 5, 2014. The Final Rulemaking Notice for the December 2014 amended regulation states that, "[t]he purpose of these rules are to amend Section 823 (Term Appointment). . ., to allow agencies to noncompetitively convert employees serving in term appointments to a regular Career Service appointment."[13] The purpose set forth in the rulemaking notice indicates that there were no regulations prior to the implementation of the December 2014 amendments that instructed agencies to convert employees serving in term appointments into a regular Career Service appointments after four continuous years.

Here, although Employee served in term appointments continuously for more than four (4) years, the 2000 version of the regulation, which was applicable to the relevant time periods, did not require that her term appointments be converted into a regular Career Service appointment. Accordingly, applying the 2000 version of DPM § 823, I find that Employee's position was not converted to a Career Service appointment in 2013 after her term appointments exceeded four continuous years. As such, I find that Employee was required to serve a probationary period when she was rehired in September of 2014. OEA's jurisdiction is generally limited to permanent employees who are serving in the career or educational services and who have successfully completed their probationary periods.[14] Because Employee had not satisfied her probationary status when she was terminated on August 21, 2015, the jurisdiction of this Office has not been established.

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[13] *See* Notice of Final Rulemaking, 6-B DCMR § 823 (December 5, 2014).
[14] *See Roxanne Smith v. D.C. Department of Parks and Recreation*, Opinion and Order on Petition for Review, OEA Matter J-0103-08 (May 23, 2011).

Motion to Strike

On September 21, 2020, Employee filed a Motion to Strike Agency's Exhibits and Attendant Arguments associated with its September 18, 2020 Reply Brief. The exhibits which Employee seems to request have struck from the record include the Request for Superior Qualifications/Exceptions form and two SF-50s, with effective dates of July 20, 2013 and January 20, 2014.[15] The basis for Employee's motion calls into question the authenticity and integrity of Agency's exhibits. Employee's motion argues that in previous stages of litigation before the undersigned, Agency failed to provide complete documents which led the undersigned to make findings that were subsequently reversed in later proceedings. However, the undersigned's findings were not reversed, but rather the matter was remanded for further consideration.

Additionally, and for the first time, Employee questions the authenticity of the SF-50s with effective dates of July 20, 2013 and January 20, 2014.[16] In particular, Employee highlights that in "Box 50" of both forms the "Signature/Authentication and Title of Approving Official" is electronically signed by Ventris Gibson, as Director, on June 10, 2016. Ms. Gibson was appointed by Mayor Muriel Bowser on August 3, 2015.[17] In essence, Employee questions the authenticity of these SF-50s because they are electronically signed by the current DCHR Director who did not hold the position on the effective date of the personnel actions. It is noted that these same documents were provided and included as attachments in previous filings in this matter before OEA and not called into question by Employee until now.[18] While Employee's concerns are valid, they do not warrant the SF-50s nor the Exceptions form being struck from the record. Ironically, the exhibits that Employee seeks to have struck from the record are also used to support her position throughout her Opposition to Agency's Brief in addressing the remand order from Superior Court.[19]

Employee further seems to place the sole responsibility on Agency to provide documents which support her position. Employee suggests that her full personnel case files have not been produced. Employee seeks these records to support her arguments. However, Agency cannot be held responsible for documents which may support Employee's position if there has not been a request—or otherwise mandated by law—for such documents. Employee has proffered no discovery requests, Freedom of Information Act request, a simple request for her personnel records, or any other type of request served upon Agency in which it failed to produce documents to her satisfaction. Based on the aforementioned, Employee's Motion to Strike is **DENIED**.

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[15] *See* Agency's Reply Brief, Exhibits 1-3 (September 18, 2020).
[16] *See* Agency's Reply Brief, Exhibits 2 and 3 (September 18, 2020).
[17] https://dchr.dc.gov/biography/ventris-c-gibson
[18] *See* Agency's Reply Brief, Attachments 7 and 8 (September 13, 2017).
[19] Opposition to Agency's Brief (August 28, 2020).

ORDER

Accordingly, it is hereby **ORDERED** that this matter be dismissed for lack of jurisdiction.

FOR THE OFFICE:

/s/ Arien P. Cannon
ARIEN P. CANNON, ESQ.
Administrative Judge