THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
LATONYA LEWIS,	)	
Employee	)	OEA Matter No. 1601-0046-08
	)	
v.	)	Date of Issuance: April 15, 2014
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

LaTonya Lewis ("Employee") worked as a Custodian Foreman Supervisor with D.C. Public Schools ("Agency"). On May 5, 2005, Agency issued a Form 1 Personnel Action which provided that Employee was involuntarily separated from her position. The effective date of her separation was October 14, 1995.[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on February 12, 2008. She asserted that she was terminated while she was disabled and on Worker's Compensation; that the termination violated the D.C. Personnel Manual ("DPM") and D.C. statutory laws; and that she did not receive a termination notice or an opportunity to appeal the decision. Therefore, Employee requested reinstatement, back-pay and benefits, damages for

[1] *Petition for Appeal*, p. 7 (February 12, 2008).

emotional distress, and attorney's fees.[2]

In its response to the Petition for Appeal, Agency argued that its actions were in accordance with D.C. Official Code § 1-623.45(b)(2). It reasoned that Employee did not overcome her on-the-job injury within two years after the commencement of Worker's Compensation, and it could not find an alternative position in which to place her.[3] Accordingly, Agency requested that that the appeal be dismissed.[4]

After the matter was assigned to an OEA Administrative Judge ("AJ"), a Status Conference was scheduled. During the conference, Employee provided that she was not notified of her termination until January of 2008. As a result, she was ordered to provide a detailed explanation of events and the reason for filing her untimely appeal.[5]

In her submission, Employee explained that her appeal was timely because pursuant to D.C. Official Code § 1-617.1(b-1)(1), Agency's action should have been initiated within forty-five days from the date it knew or should have known of the action or occurrence constituting cause. Employee explained that it was not until January of 2008 that the Form 1 Personnel Action was provided to her, and it was not until February of 2008 that she became aware of her appeal rights with OEA. Therefore, she believed that she had established OEA's jurisdiction

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[2] *Id.* at 3.

[3] Agency explained that Employee was injured on the job in March of 1992 and received temporary, total disability benefits from Worker's Compensation. By 1995, Employee was still receiving Worker's Compensation. It claimed that Employee later pursued the grievance process with her union to secure a light-duty position with Agency. During the grievance procedures, Employee alleged that her injury rendered her incapable of ever being able to resume her SW-01 Custodian Foreman position. As a result, Employee requested that she be given a sedentary position that did not require heavy lifting. A decision was issued on February 26, 1996. Agency provided, *inter alia*, that it would make efforts to place Employee in another position for which she was qualified. However, it explained that a light duty status did not exist for the SW-01 Custodian Foreman position and emphasized that the likelihood of finding a light duty assignment was remote.

[4] *Agency Response to Employee Petition for Appeal*, p. 3-7 (March 27, 2008).

[5] Agency was directed to submit additional documents reflecting Employee's notice of termination. *Order Convening a Status Conference* (May 19, 2008) and *Order for Employee to File Submission Regarding Jurisdiction* (June 25, 2008).

over her appeal.[6]

Thereafter, the AJ advised the parties that OEA would retain jurisdiction over the matter to determine whether Agency's removal was taken for cause and in accordance with the applicable laws.[7] The parties were further ordered to file status reports with the office.[8] An evidentiary hearing was held on August 6, 2009. During the hearing, the AJ learned that Agency had additional documents that had not been disclosed to Employee prior to the hearing. As a result, the hearing was closed, and the AJ noted that it would be continued at a later date.[9]

The matter was reassigned to a new AJ, who held two Status Conferences and ordered the parties to submit a timeline of events regarding the appeal.[10] The AJ also ordered the parties to submit legal arguments addressing whether Agency's termination should be upheld and if not, what the proper remedy should be for its action.[11] In her brief, Employee provided that she

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[6] Employee also reiterated her position that Agency did not follow the District's laws and provided that Agency did not follow the Collective Bargaining Agreement procedures between the Board of Education and her union. *The Employee's Submission Concerning Jurisdiction,* p. 2-5 (July 25, 2008). Subsequently, the AJ issued an order scheduling a Pre-hearing Conference and ordered the parties to file Pre-hearing Statements. Employee filed her Pre-hearing Statement on October 23, 2008. Her brief provided the history of her claims for temporary total disability benefits. Agency's Pre-hearing Statement reiterated the previous statements it provided in response to the Petition for Appeal.

[7] *Memorandum to the Record,* p. 2 (November 14, 2008).

[8] Employee submitted a brief on December 5, 2008, which noted that although the Personnel Action Form provided by Agency did not cite a reason for termination, during the Pre-hearing Conference, Agency stated that the removal was based on her disability and the fact that she could not work. However, she noted that since 1995, Agency has stated that she is not disabled, and ". . . Agency cannot argue for years that [she] is not disabled and now argue [before OEA] that she is disabled." *The Employee's Brief,* p. 6-7 (December 5, 2008).

Agency submitted in its submission that the issue was whether Employee had retention rights under Worker's Compensation. Further, it explained that the matter was subject to a grievance procedure, and Employee should not have two opportunities to be heard. Therefore, Agency, again, requested that the appeal be dismissed. *Agency's Pre-hearing Statement,* p.3 (August 5, 2009).

[9] *Memorandum to the Record* (August 10, 2009).

[10] *Order Requesting Timeline and Scheduling a Second Status Conference* (November 22, 2011). The parties filed a document titled Stipulation of Facts. The document provided facts jointly agreed on by the parties and facts stipulated by Employee. Employee stipulated that she was able to perform light duty from April 14, 1994 to April 6, 2003; that her Worker's Compensation Benefits were terminated on April 6, 2003; that from April 6, 2003 to December, 2005, she was able to work full-duty in her position; and that the Social Security Administration determined that she was totally disabled from December 2005 to the present. Both parties stipulated that Employee only appealed to OEA, her job termination that was effective October 14, 1995. Additionally, they agreed that Agency terminated Employee from her position effective October 14, 1995, but it processed and signed the Form 1 Personnel Action in May of 2005. *Stipulation of Facts* (November 28, 2011).

[11] *Order Requesting Legal Briefs* (November 28, 2011).

received disability payments from 1994 until 2003.[12] However, she argued that " . . . since there was no record of any formal proceeding to terminate [her] . . . [the] termination was due to . . . [her] being on Worker's Compensation" which violated D.C. Official Code § 32-1542.[13] Further, Employee provided that she was able to work from April, 2003[14] until 2005, when she became totally disabled. Therefore, she contended that she ". . . should be compensated for the period of time that she was able to work . . . ."[15]

Agency reiterated that it followed the rules provided in D.C. Official Code § 1-623.45. It explained that Employee was subject to temporary, total disability until 2003, and it made reasonable efforts to find her another position.[16] Further, Agency provided that although Employee opined that she received the notice of involuntary separation in 2008, she actually received the notice on June 27, 2005.[17]

The Initial Decision was issued on February 22, 2012. The AJ found that Employee suffered an on-the-job injury on March 9, 1992, and another on April 14, 1994. The AJ noted that by October 14, 1995, Employee was still found to be totally disabled and continued to receive temporary disability benefits from the Office of Worker's Compensation until 2003. He held that pursuant to D.C. Official Code § 32-1504(b), the compensation Employee received from Agency for her injury constituted her exclusive remedy against Agency.[18] As a result, the

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[12] *The Employee's Brief*, p. 9 (December 27, 2011).
[13] *Id.* at 8.
[14] Employee provided that this was the date the D.C. Government Disability Compensation Program terminated her benefits. The decision to terminate her benefits was later affirmed on March 31, 2004, by an Administrative Law Judge. *Id.* at 3.
[15] *Id.* at 9.
[16] Additionally, Agency provided that the D.C. Court of Appeals affirmed that Employee was subject to temporary, total disability until 2003.
[17] Agency explained that Employee went to the personnel office and filled out a Service Request Form to pick up her Personnel Action Form. It provided that the Service Request Form was date stamped June 27, 2005. *Agency Response to Order*, p. 2-3 (December 27, 2011).
[18] The AJ also found that although Employee was not contesting the issue of whether Agency found her a light duty position, the record proved that Agency attempted to do so. Further, he found that Employee could not cite any statute that would allow her to receive Worker's Compensation and her salary at the same time.

AJ held that Employee failed to state a claim for which she was entitled relief, and her appeal was dismissed.[19]

Employee filed a Petition for Review of the Initial Decision on December 5, 2012. She asserts that the AJ's ruling is based on erroneous information. Employee contests a number of stipulated and undisputed facts provided in the Initial Decision.[20] She submits that since March, 1992, her doctor's statements have provided that she may work in a moderate to light duty capacity, but Agency did not provide her an opportunity to do so. Employee provides that although Agency's retroactive separation may have been improper, the issue was never argued. Therefore, she requests that her Petition for Review be granted so that she can provide documentation that will dispute the information within the Initial Decision.[21]

In response to Employee's petition, Agency provides that the Petition for Review was filed ten months after the Initial Decision and thus, untimely. It also claims that Employee failed to state permissible grounds for review by the Board. Agency argues that although Employee submitted that she is in possession of documents that will contradict information it provided, " . . . [she] fails to attach any documentation to her Petition . . . [and] she does not assert that the documents provide new and material evidence that was unavailable when the record closed."[22] Therefore, Agency requests the Board dismiss the matter and declare that the termination was proper.[23]

Because Agency raised Employee's late filing as an issue, this Board must address it.

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[19] *Initial Decision* (February 22, 2012).
[20] Specifically, Employee contests facts 3, 6, 8, 9, 12, 15, 17 and 21 provided in the Initial Decision. She states that she did not receive temporary, total disability benefits on a continuous basis from April 1994 through 2003, and Agency did not contact her to inform her that it was seeking a position that was compatible to her disability status. Further, she disputes that the termination of her temporary, total disability benefits was based on the medical opinions of two independent medical evaluations. *Petition for Review*, p. 2-6 (December 5, 2012).
[21] *Id.* at 7.
[22] Agency argues that none of the statements that Employee disputed were essential to the AJ's Initial Decision. *District of Columbia Public Schools' Response to Employee's Petition for Review,* p. 1-2 (January 8, 2013).
[23] *Id.* at 4.

D.C. Official Code § 1-606.03(c) provides that "the initial decision of the Hearing Examiner *shall* become final 35 days after issuance, unless a party files a petition for review of the initial decision with the Office within the 35-day filing period (emphasis added)." Moreover, OEA Rule 633.1 provides that "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."

D.C. Official Code § 1-606.03(c) uses mandatory language regarding the filing of a Petition for Review. Therefore, OEA must adhere to the strict guidelines outlined. The Initial Decision was issued on February 22, 2012. In accordance with the D.C. Official Code, it became final on March 28, 2012. Employee did not file her Petition for Review until December 5, 2012. This is more than eight months after the Initial Decision was deemed the final decision from this office. In adhering with the statutory requirements of the D.C. Official Code, this Board must deny Employee's Petition for Review.

Moreover, Employee's Petition for Review must be denied because it failed to set forth any actual objections to the Initial Decision. In accordance with OEA Rule 633.3, the Board may grant a Petition for Review when the petition establishes that:

(a) new and material evidence is available that, despite due diligence, was not available when the record closed;
(b) the decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation, or policy;
(c) the findings of the Administrative Judge are not based on substantial evidence; or
(d) the initial decision did not address all material issues of law and fact properly raised in the appeal.

Employee offers none of the above-mentioned reasons as a basis for her appeal. OEA Rule 633.3(b) provides that a Petition for Review would be granted if the AJ's decision was based on an erroneous interpretation of statute, regulation, or policy. Employee's Petition for

Review offers no such violations.

Moreover, she raised issues on Petition for Review that were not raised before the AJ. In Employee's Brief to the AJ, she stated that she sought to be compensated for the period of time she was able to work from April 2003 until 2005.[24] On Petition for Review, she chose to highlight that the AJ based his decision on erroneous information provided by Agency. Additionally, Employee provided that she was in possession of documents that would validate her position. However, no such documents were included in her Petition for Review.[25]

OEA Rule 633.4 provides that "any . . . legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board." Employee had many opportunities to object to any evidence offered by Agency before the Initial Decision was issued. However, the record does not provide any such objections. For the above-mentioned reasons, this Board must DENY Employee's Petition for Review.

[24] *The Employee's Brief,* p. 9 (December 27, 2011).
[25] Assuming that the documents were included, this Board still would not have been able to consider them because they were not presented to the Administrative Judge prior to issuing his Initial Decision.

ORDER

Accordingly, it is **ORDERED** that Employee's Petition for Review is **DENIED**.

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

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.