

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. 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: |) | |
| |) | |
| ALEXIS PARKER, |) | OEA Matter No. J-0007-11 |
| Employee |) | |
| |) | Date of Issuance: September 18, 2012 |
| |) | |
| DEPARTMENT OF HEALTH, |) | |
| Agency |) | |
| |) | |

OPINION AND ORDER
ON
PETITION FOR REVIEW

Alexis Parker (“Employee”) worked as a Public Health Outreach Technician with the Department of Health (“Agency”).¹ On April 8, 2010, Employee received a notice of termination from her position.² Employee challenged the termination by filing a Petition for Appeal with the Office of Employee Appeals (“OEA”) on October 7, 2010. She argued that her position was a reinstatement and that Agency improperly placed her in a probationary status;³

¹ Prior to holding this position, Employee was a Community Relations Specialist with Agency. She was removed from the Community Relations Specialist position on September 4, 2009, pursuant to a Reduction in Force (“RIF”). Thereafter, on October 16, 2009, the Public Health Outreach Technician position became available with Agency. Since Employee was a part of Agency’s Reemployment Priority Placement Program, she was given priority consideration for the position. She was hired on February 16, 2010. *Agency’s Appendix of Documents*, November 3, 2010.

² Employee was terminated while in a probationary period.

³ Employee relied on D.C. Personnel Regulations, Chapter 8, Part I, § 816.1, which states:

Except for a person who has a retreat right to a position in the Career Service as provided in chapter 9 or 10 of these regulations, a person shall have reinstatement eligibility for three (3) years following the date of his or her separation if he or she meets both of the following requirements

- (a) The person previously held a Career Appointment (Permanent); and
- (b) The person was not terminated for cause under chapter 16 of these

she did not receive information regarding her appeal rights to OEA; her termination was without cause, prior notice, or due process; and when she was reinstated, she should have been paid at a higher rate in accordance with D.C. Personnel Regulations (“DPR”) § 1130.5.⁴ Therefore, Employee requested reinstatement with back pay and benefits, damages, and attorney’s fees.⁵

Agency responded to Employee’s Petition for Appeal on November 3, 2010. It argued that Employee was not reinstated but was hired pursuant to open competition.⁶ Agency relied on 6 DCMR § 813.8 and contended that because the Public Health Outreach Technician position was in a different line of work than Employee’s previous position, she needed to complete another probationary period.⁷ Since Employee was terminated during the probationary status, Agency reasoned that it did not need cause to terminate her and the termination was not appealable to OEA. Moreover, although Employee’s rate of pay was higher in her previous position, Agency believed that it was not required to pay her at a higher rate for the Public Health Outreach Technician position.⁸

On January 10, 2011, the OEA Administrative Judge (“AJ”) issued an order directing

regulations.

⁴ DPR § 1130.5 provides that:

[w]hen an employee is reinstated in accordance with Chapter 8 of these regulations, the agency may pay the employee at any rate of the grade that does not exceed his or her highest previous rate; however, if the employee’s highest previous rate falls between two (2) rates of the new grade, the agency may pay the employee at the higher rate.

⁵ *Employee’s Petition for Appeal*, p. 3-6 (October 7, 2010).

⁶ Open competition is defined as “the use of examination procedures which permit application and consideration of all persons without regard to current or former employment with the District government.” *See* DPR § 899.1.

⁷ 6 DCMR § 813.8 provides that:

An employee who once satisfactorily completed a probationary period in the Career Service shall be required to serve another probationary period when the employee:

- (a) Is appointed as a result of open competition to a position with a positive educational requirement from a position with no positive educational requirement or a different educational requirement;
- (b) Is appointed as a result of open competition to a position with licensure, certification, or other such requirement, in addition to a positive educational requirement, from a position without such requirements; or
- (c) Is appointed as a result of open competition to a position in a different line of work, as determined by the appropriate personnel authority based on the employee’s actual duties and responsibilities.

⁸ *Agency’s Answer* (November 3, 2010).

Employee to brief whether the appeal should be dismissed for lack of jurisdiction due to her probationary status at the time of her termination. In response, Employee asserted that since she completed a probationary period in her previous position, pursuant to DPR §§ 816.2 and 816.5, she was not required to complete a new probationary period upon reinstatement.⁹ Additionally, Employee disagreed with Agency's contention that 6 DCMR § 813.8 required her to serve another probationary period. She explained that Agency's Reemployment Priority Program ("the ARPP") gave her priority consideration for reemployment, and thus, she was not hired through open competition. Employee reasoned that OEA had jurisdiction over her appeal because she was in a Career Permanent status at the time of her termination.¹⁰

Agency replied to Employee's response on February 11, 2011. It argued that although the ARPP program provided Employee priority consideration for reemployment, her appointment was the result of open competition. It explained that on October 16, 2009, a vacancy announcement for the position was issued, and it was open to the general public. Thereafter, pursuant to the ARPP, Employee's name was submitted for consideration for the appointment. However, because the appointment was in a different series and had different duties and responsibilities than Employee's previous position, she had to serve a second probationary period.¹¹ Employee was still serving out her probationary period when she was

⁹ DCPR § 816.2 states that:

A person having reinstatement eligibility under § 816.1 may be appointed competitively or noncompetitively to a position at a grade no higher than the grade last held under a Career Appointment (Probational) or a Career Appointment (Permanent) in the Career Service in a District agency, except that a reinstatement to a position with a promotion potential higher than the known promotion potential of the last position occupied shall be effected as provided in § 816.4.

DCPR § 816.5 states that "[a] person who is reinstated under the provisions of § 816.2, 816.4, or 816.6 shall be given a Career Appointment (Permanent)."

¹⁰ *Employee's Brief on Jurisdiction* (February 1, 2011).

¹¹ Agency notes that Employee knew of this requirement because it was made clear in her offer letter and the Notification of Personnel Action (Form 50). Therefore, it believed that Employee's improper classification argument was a grievance, and as such, OEA lacked jurisdiction to hear it. *Agency's Response to Employee's Brief on Jurisdiction*, p. 4 (February 11, 2011).

terminated. Therefore, Agency believed OEA lacked jurisdiction over the appeal and dismissal of the matter was proper.

On April 28, 2011, the AJ issued her Initial Decision. She held that because Agency's vacancy announcement for the Public Health Outreach Technician position was open to the general public, Employee was required to apply for the position through open competition. The AJ found that Employee's formal offer letter stated that she was subject to satisfactorily completing a one-year probationary period. Accordingly, pursuant to DPR § 813.3, the AJ ruled that Employee was in a probationary status at the time of her termination, and pursuant to DPR § 814.3, OEA lacked jurisdiction over Employee's appeal.¹²

On June 2, 2011, Employee filed a Petition for Review of the Initial Decision with the OEA Board. She argued that the Initial Decision was not based in fact or law; the AJ did not accurately examine the evidence of record; and the AJ did not consider her arguments.¹³ Thus, Employee believed that the Initial Decision failed to meet the substantial evidence standard, and therefore, it must be reversed.

In response to the Petition for Review, Agency asserted that Employee's argument regarding ARPP was not considered by the AJ because it lacked merit. Additionally, it argued that there was substantial evidence to support the AJ's finding that Employee was in a probationary status. Therefore, it believed that the Board should affirm the Initial Decision.¹⁴

¹² *Initial Decision*, p. 2-3 (April 28, 2011).

¹³ Employee reasoned that the AJ pointed to no regulation or case law which supported that a job posting is determinative of an employee's application status. It was Employee's position that the AJ's reliance on the vacancy announcement was not rationally considered because the vacancy announcement stated that "a non-competitive selection of an eligible candidate from the Agency Reemployment Priority Program (ARPP) . . . will result in the cancellation of this announcement." In addition, Employee posited that the AJ failed to accurately examine the evidence of record when she ruled that Agency terminated her pursuant to a RIF. Further, Employee believed that the AJ disregarded her argument that she was hired through the ARPP and not through open competition and that she was in a Career Permanent status at the time of her termination. *Petition for Review* (June 2, 2011).

¹⁴ *Agency's Answer to Employee's Petition for Review* (July 7, 2011).

This Board must determine if the Initial Decision was based on substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.¹⁵ The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding.

DPR Section 813.2 provides that “a person hired to serve under a Career Service Appointment (Probational), including initial appointment with the District government in a supervisory position in the Career Service, shall be required to serve a probationary period of one (1) year” Section 813.7 goes on to provide that “except when the appointment is effected with a break in service of one (1) workday or more, or as specified in sections 812.2 (a) of this chapter or section 813.9 of this section, an employee who once satisfactorily completed a probationary period in the Career Service shall not be required to serve another probationary period.”¹⁶ In the current matter, Employee argues that she was reinstated. However, the record clearly reflects that she was hired, RIFed, and hired again for a different position. Employee was initially hired by Agency in 1987. She was terminated through RIF procedures on September 4, 2009. Subsequently, she was hired by Agency on February 16, 2010. The time between the RIF action and when she was hired for the new position was a break in service of five months and twelve days. Thus, the exception for not serving a second probationary period does not apply to Employee under the DPR.

¹⁵*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).

¹⁶ It appears that the AJ incorrectly cited to DPR Section 813.3 when outlining this language in her Initial Decision. This Board deems this mistake as *de minimus* because the content remains intact.

Moreover, DPR Section 813.8(c) notes that “an employee who once satisfactorily completed a probationary period in the Career Service shall be required to serve another probationary period when the employee is appointed as a result of open competition to a position in a different line of work, as determined by the appropriate personnel authority based on the employee’s actual duties and responsibilities.” Agency provided evidence that the position was posted in open competition.¹⁷ Agency also described, in great length, the difference between Employee’s Community Relations Specialist position and that of Public Health Outreach Technician.¹⁸ Furthermore, the plain language of Section 813.8 is clear and does not offer an exception for AARP hires versus other hired employees. Accordingly, Employee was required to serve a second probationary period because she was appointed through open competition and her position was in a different line of work.

We must look to § 814 of the DPR to determine if Agency properly terminated Employee during her probationary period. DPR §§ 814.1-814.3 provide that:

814.1 Except for an employee serving a supervisory or managerial probationary period under section 815 of this chapter, 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 for continued employment.

814.2 An employee being terminated during the probationary period shall be notified in writing of the termination and its effective date.

814.3 A termination during a probationary period is not appealable or grievable. However, a probationer alleging that his or her termination resulted from a

¹⁷ *Agency’s Appendix of Documents*, Exhibit #5 (November 3, 2010).

¹⁸ As a Community Relations Specialist, Employee was tasked with coordinating and implementing a substance abuse prevention, mobile education program. She received calls from the public, schools, government and private organizations requesting the Drugmobile. She provided educational material to the community; she conducted lectures and counseled individuals and groups on substance abuse prevention; and she developed lesson plans to enhance her presentations to the public.

As a Public Health Outreach Technician, Employee provided non-medical services to mothers and infants; conducted screenings to determine substance abuse, depression, domestic violence, infant development, postpartum, and immunizations; and collaborated with case managers to determine family needs and issues confronting families. *Agency’s Answer*, p. 1-3 (November 3, 2010).

violation of public policy, the whistleblower protection law, or District of Columbia.

Employee's termination notice clearly cites to the District Personnel Manual § 814.¹⁹ Agency adhered to District Personnel Manual §§ 814.2 and 814.3 by providing Employee with written notice of her termination which included an effective date and her appeal rights.²⁰

This Office has consistently held that a probationary employee may be removed without cause during their probationary period.²¹ OEA has reasoned that District government employees serving a probationary period do not have a statutory right to be removed for cause and cannot utilize the adverse action procedures under the Comprehensive Merit Personnel Act, which includes appealing those actions to this Office. Appeals filed by probationary employees are, therefore, dismissed for lack of jurisdiction.²² Because Agency properly removed Employee during her probationary period, her Petition for Review must be denied.

¹⁹ *Agency's Appendix of Documents*, Exhibit #8 (November 3, 2010).

²⁰ *Id.*

²¹ *Jason Codling v. Office of the Chief Technology Officer*, OEA Matter No. J-0151-09, *Opinion and Order on Petition for Review* (December 6, 2010); *Susan Wallace v. D.C. Public Schools*, OEA Matter No. J-0009-05 (January 31, 2006); and *Elliott Duvall v. D.C. Department of Youth Rehabilitative Services*, OEA Matter No. J-0008-06 (January 24, 2006).

²² *Jason Codling v. Office of the Chief Technology Officer*, OEA Matter No. J-0151-09, *Opinion and Order on Petition for Review* (December 6, 2010); *Susan Wallace v. D.C. Public Schools*, OEA Matter No. J-0009-05 (January 31, 2006); *Elliott Duvall v. D.C. Department of Youth Rehabilitative Services*, OEA Matter No. J-0008-06 (January 24, 2006); *Day v. Office of the People's Counsel*, OEA Matter No. J-0009-94, *Opinion and Order on Petition for Review*, (July 10, 1995); and *Jones v. District of Columbia Lottery Board*, OEA Matter No. J-0231-89, *Opinion and Order on Petition for Review* (August 19, 1991).

ORDER

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

FOR THE BOARD:

Clarence Labor, Chair

Barbara D. Morgan

Richard F. Johns

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.