

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:)	
)	
ALEXIS PARKER,)	
Employee)	OEA Matter No. J-0007-11R13
)	
v.)	
)	Date of Issuance: April 18, 2017
DEPARTMENT OF HEALTH,)	
Agency)	
_____)	

OPINION AND ORDER
ON REMAND

This matter was previously before this Board. 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 because her position was a reinstatement, Agency improperly placed her in a probationary status.³ Additionally, she contended that she did not receive

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 (“ARPP”), she was given priority consideration for the Public Health Outreach position. She was hired to fill the position on February 16, 2010. *Agency’s Answer*, Tabs #2, 3, 6, and 7 (November 3, 2010).

² Employee was terminated while in her probationary period.

³ Employee relied on D.C. Personnel Regulations (“DPR”), 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

information regarding her appeal rights to OEA; that her termination was without cause, prior notice, or due process; and that she should have been paid at a higher rate when she was reinstated in accordance with DPR § 1130.5.⁴ Therefore, Employee requested that she be reinstated with back pay and benefits, damages, and attorney's fees.⁵

On January 10, 2011, the OEA Administrative Judge ("AJ") issued an order directing Employee to brief whether her appeal should be dismissed for lack of jurisdiction because she was in a 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.⁶ Additionally, Employee disagreed with Agency's contention that DPR § 813.8 required her to serve another probationary period.⁷ She explained that the ARPP gave her priority consideration for reemployment, and thus, she was not hired through open competition. Finally, Employee reasoned that OEA had jurisdiction over her appeal because she was in a Career Permanent

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 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 DPR § 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.

DPR § 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)."

⁷ DPR § 813.8 provides that "except when the appointment is effected with a break in service of one (1)-workday or more, or as specified in subsection 812.2(a) of this chapter or subsection 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."

status at the time of her termination.⁸

Agency submitted its response on February 11, 2011. It argued that although the ARPP 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 was required to serve a second probationary period.⁹ Employee was still within her probationary period when she was terminated. Therefore, Agency believed that OEA lacked jurisdiction over the appeal and requested that the matter be dismissed.¹⁰

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. Moreover, the AJ found that Employee's formal offer letter stated that she was subject to satisfactorily completing a one-year probationary period. Accordingly, she ruled that pursuant to DPR § 813.3, Employee was in a probationary status at the time of her termination. Thus, she held that OEA lacked jurisdiction over Employee's appeal, in accordance with DPR § 814.3.¹¹

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; that the AJ did not

⁸ *Employee's Brief on Jurisdiction* (February 1, 2011).

⁹ Agency notes that Employee knew of this requirement because it was made clear in her offer letter and her Standard Form 50 ("SF-50"). Therefore, it believed that Employee's improper classification argument was a grievance, and as such, OEA lacked jurisdiction to consider it.

¹⁰ *Agency's Response to Employee's Brief on Jurisdiction* (February 11, 2011).

¹¹ *Initial Decision*, p. 2-3 (April 28, 2011).

accurately examine the evidence of record; and that the AJ did not consider her arguments.¹² Thus, Employee believed that the Initial Decision failed to meet the substantial evidence standard. Therefore, she requested that the decision be reversed.¹³

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 when she was terminated. Therefore, Agency believed that the Board should affirm the Initial Decision.¹⁴

The OEA Board issued its Opinion and Order on September, 18, 2012. It held that in accordance with DPR § 813.7, Employee was required to serve a second probationary period because there was a break in service. The Board found that the time between the RIF action and when Employee 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 did not apply to Employee under the DPR. Additionally, the Board held that 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. Accordingly, it ruled that Agency properly removed Employee during her probationary period and denied Employee's Petition for Review.¹⁵

The matter was appealed to the Superior Court for the District of Columbia. The Court

¹² Employee opined that the AJ pointed to no regulation or case law which supported the contention 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." Further, Employee believed that the AJ disregarded her argument that she was hired through the ARPP and not through open competition. As a result, Employee contended that she was in a Career Permanent status at the time of her termination.

¹³ *Petition for Review* (June 2, 2011).

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

¹⁵ *Alexis Parker v. Department of Health*, OEA Matter No. J-007-11, *Opinion and Order on Petition for Review*, p. 5-7 (September 18, 2012).

held that the AJ's decision was based on an incorrect reading of the record; a misunderstanding of the facts and arguments; and a failure to set out clearly the reasons for the decision reached. Therefore, the matter was remanded to the AJ for further findings.¹⁶

The AJ held a Status Conference and requested that both parties file briefs addressing the issues on remand. Employee provided that because she was reinstated through ARPP, she was not required to serve a second probationary period. She explained that in accordance with DPR § 816.5, "a person who is reinstated . . . shall be given a Career Appointment (Permanent)." Moreover, Employee argued that she was not hired through open competition. She contended that because she was reinstated through ARPP, she did not have to submit an application or complete an interview, as is required in the competitive hiring process. Finally, Employee opined that the Public Health Outreach Technician position required identical skill sets and duties as the Community Relations Specialist position that she previously held.¹⁷

In its brief, Agency argued that the posting of the vacancy announcement for the Public Health Outreach position was open to the general public. It did concede that Employee received priority consideration for the position because of her prior employment history with Agency. However, it contended that her ARPP status did not mean that the position was not subject to priority consideration. Additionally, Agency provided that the position was in a different series than the Community Relations Specialist position and had different duties and responsibilities. Further, it reiterated that Employee was notified in her offer letter and SF-50 that the Public Health Outreach position was subject to a new probationary period.¹⁸

On June 9, 2015, Employee filed a Reply to Agency's brief. She provided that Agency

¹⁶ *Alexis Parker v. District of Columbia Department of Health*, 2012 CA 008265 P(MPA)(D.C. Super. Ct. November 13, 2013).

¹⁷ *Employee's Brief in Support of Jurisdiction*, p. 6-9 (March 20, 2015).

¹⁸ *Agency's Response to Employee's Brief on Jurisdiction*, p. 3-6 (May 15, 2015).

could not admit to giving her priority consideration while also asserting that it considered candidates for the position regardless of former employment with the District government. Furthermore, she claimed that pursuant to the ARPP, Agency was required to appoint a former Career Service (Permanent) employee to the position unless no former Career Service (Permanent) employee was qualified for the position. Employee, again, asserted that the Community Relations Specialist and Public Health Outreach positions required identical skills.¹⁹

The AJ issued an Initial Decision on Remand on October 22, 2015. She explained that Agency posted a vacancy notice, which stated that it was open to the public, for two Public Health Outreach Technician positions. The notice provided that employees who were eligible through ARPP would be given priority consideration, if they qualified. The AJ held that the vacancy announcement further noted that the posting would be cancelled upon the non-competitive selection of an eligible ARPP candidate. However, she found that Employee was not hired through a non-competitive selection process but through open competition. Thus, she ruled that Employee was required to serve a second, one-year probationary period because she was appointed as a result of open competition in a different line of work.²⁰ As the result, the AJ reasoned that Employee was terminated as an at-will employee during her probationary period. Accordingly, she ruled that because OEA lacks jurisdiction over at-will employees, Employee's appeal must be dismissed for lack of jurisdiction.²¹

Employee filed a Petition for Review on November 25, 2015. She contends that the AJ erred in finding that she was given priority consideration and hired through open competition. It is Employee's position that an appointment through ARPP is not an appointment through open

¹⁹ *Employee's Reply in Support of her Brief on Jurisdiction*, p. 3-5 (June 9, 2015).

²⁰ The AJ found that Employee failed to provide evidence to support a finding that the two positions were substantially similar in their actual duties and responsibilities.

²¹ *Initial Decision on Remand*, p. 6-9 (October 22, 2015).

competition because ARPP does not permit Agency to consider applicants without regard to current or former District government employment. Additionally, she noted that she did not apply for the Public Health Outreach Technician position but was referred to the position based on her ARPP status. Employee also explained that all of the employees who were considered for the position were Displaced Employees in the ARPP. Thus, she believed that this proved that she was not hired through open competition. Moreover, Employee asserts that the AJ erred in finding that her new position and the previous position she held did not involve similar duties. She contends that in accordance with DPR § 813.8(c), the determination was to have been made by the appropriate personnel authority. Employee explains that Agency offered no evidence that the appropriate personnel classified the positions differently. Therefore, she requests that OEA reverse the Initial Decision on Remand.²²

On December 30, 2015, Agency filed its response to Employee's Petition for Review. It argues that Employee failed to provide evidence that she was hired through a non-competitive process. Agency contends that the AJ's reasoning that Employee was hired through open competition was supported by substantial evidence. It explains that just because Employee was hired through ARPP, does not automatically mean she was hired non-competitively. Additionally, Agency claims that Employee was on notice of her need to serve a second probationary period. Furthermore, Agency opines that the Public Health Outreach Technician and Community Relations Specialist positions were in a different line of work. As a result, it provides that the AJ properly dismissed Employee's appeal for lack of jurisdiction. Therefore, it requests that Employee's Petition for Review be denied.²³

²² *Petition for Review*, p. 1-12 (November 25, 2015).

²³ *Agency's Response to Employee's Petition for Review*, p. 1-11 (December 30, 2015).

Probationary Period

The DPR provides that a Career Service employee is required to serve a one-year probationary period. DPR § 813.8 provides that once an employee has satisfactorily completed a probationary period, they are only required to serve a second probationary period under one of three circumstances. It provides the following:

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.

Employee successfully completed her probationary period in the Community Relations Specialist position. However, Agency claims that in accordance with DPR § 813.8(c), she was required to serve a second probationary period as a Public Health Outreach Technician. The AJ ruled that Employee was hired as a Public Health Outreach Technician through open competition and that this position had different duties than Employee performed as a Community Relations Specialist. This Board is tasked with determining if there is substantial evidence to support the AJ's ruling.²⁴

²⁴ Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. 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

Open Competition

DPR § 813.8(c) provides that an employee must serve a second probationary period if their new position was obtained through open competition in a different line of work. 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.²⁵ The AJ reasoned that Employee was hired through open competition because the vacancy announcement was open to the general public, and Employee was required to compete with other candidates for the position. However, Employee contends that she was appointed through ARPP and not open competition.

This Board does not believe that the AJ's ruling that Employee was hired through open competition is based on substantial evidence. The AJ relied on the fact that the vacancy announcement was open to the public and that Employee was required to compete with other candidates. However, the Electronic District Personnel Manual ("E-DPM") instructions regarding the ARPP program seem to suggest that employees on the ARPP list were matched through open vacancy announcements. E-DPM(5) provides that ". . . Displaced employees are 'matched' with open job requisitions (vacancies) based on occupational series and grade . . . (including [the] lowest grade acceptable to each displaced employee)." Moreover, E-DPM(10)(c) provides that DCHR "generate *Lists of Eligibles* for priority consideration based on job requisitions 'Open to the General Public.'"²⁶ Thus, it appears that vacancy announcements that are open to the public trigger the use of the ARPP list. In accordance with E-DPM(5) and (10)(c), the ARPP matches rely on vacancy announcements that are open to the public. Thus, the AJ's conclusion that the position was the result of open competition because the announcement

there is substantial evidence in the record to support a contrary finding.

²⁵ See DPR §899.1.

²⁶ *Petition for Review*, Tab C (November 25, 2015).

was open to the public appears to be misguided.

The AJ also reasoned that Employee was hired through open competition because she had to compete with other candidates. However, the record provides that the candidates with whom Employee competed were all former government employees who were on the ARPP list. The Priority Consideration Selection Certificate provided that there were four employees considered for vacancy announcement 14958 for the two Public Health Outreach Technicians. Employee and another Displaced Employee were ultimately selected to fill the positions. Therefore, contrary to the AJ's findings, this does not prove that the positions were secured through open competition, but instead that they were filled through the ARPP/Displaced Employee program.²⁷

There are still genuine factual disputes in this case that the AJ did not adequately address. In *Dupree v. D.C. Office of Employee Appeals*, 36 A.3d 826, 832 (D.C. 2011), the D.C. Court of Appeals held that when a review of the administrative record obfuscates, rather than clarifies the material issues, it is difficult to decide these issue on the record and an evidentiary hearing is warranted. The record – in its current state – does not provide the clarity needed to render a decision in this matter.²⁸

Career Service Employment by Reinstatement

This Board also believes that the AJ failed to adequately address the issue of Career Service employment through reinstatement. DPR § 816.1 provides the following, as it relates to Career Service employment by reinstatement:

²⁷ Moreover, the AJ provided that there was no evidence in the record to support that the vacancy announcement was cancelled. However, she did not request any such proof from either party.

²⁸ This Board must note that if the AJ finds that Employee was not hired through open competition, then the requirement of a second probationary period is nullified despite Agency's requirement for one in Employee's offer letter and SF-50. Further, because it is not clear that Employee was hired through open competition, this Board will not address if the positions were considered a different line of work. However, we will note that DPM § 813.9(c) requires that the employee be hired through open competition *and* serve in a different line of work (emphasis added). The AJ must have the parties adequately address this issue.

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 regulations.

Employee was a Career Service (Permanent) employee who was removed from her position as the result of a RIF and not for cause. Therefore, she was eligible for reinstatement for three years after the effective date of the RIF action. Accordingly, Agency placed her on the ARPP list for reinstatement consideration.

DPR § 816.2 goes on to provide 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 . . . 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.”²⁹ DPR § 816.3 provides that “the three-year (3-year) restriction . . . on the reinstatement eligibility of an employee . . . shall start on the expiration of his or her entitlement to priority placement consideration under chapter 24 of these regulations.” DPR § 816.4 provides that “all other reappointments of former Career Service employees shall be processed competitively.” Read in combination, it seems that DPR § 816.3, which discusses employees on the ARPP list as outlined in Chapter 24, could mean that those employees are appointed through non-competition because DPR § 816.4 specifically states that all other reappointments are processed competitively. This appears to be supported by DPR § 816.5 which states that “a

²⁹ DPR § 816.4 states that if an employee is reinstated to a position with a higher promotion potential, then they are appointed to that position competitively. Agency asserted that Employee was appointed to a position at a grade no higher than the last grade held. According to Agency, Employee was a Grade 9, step 7 when she was terminated and was hired for the Public Health position as a Grade 7. However, it is not clear in the record whether Employee had a higher promotion potential in her new position. The job description provided by Agency states that there is “no known promotion potential.” This language is not definitive. *Agency’s Answer*, Tabs #3, #5, #6, and #7 (November 3, 2010).

person who is reinstated under the provisions of § 816.2 . . . shall be given a Career Appointment (Permanent).” Agency provides that Employee was reinstated under Chapter 8 of the DPR.³⁰ She was hired for a position at a lower grade than the one she previously held, so she did not fall under DPR § 816.4 which established that she was processed competitively. However, this Board will admit that a lack of clarity on this issue still remains. Thus, it is unable to definitively make any ruling on this issue. The AJ must address the complicated issues raised by the parties as it pertains to the above-mentioned sections of the DPR.

The AJ’s decision was not based on substantial evidence as it relates to her determination that Employee’s position was obtained through open competition. Additionally, there are still outstanding issues pertaining to the issue of Career Service employment through reinstatement. Accordingly, this matter is remanded to the AJ for further findings.

³⁰ *Agency’s Answer*, p. 3-4 (November 3, 2010).

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:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.