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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
)
MORRIS BEY)
Employee)
)
)
v.)
)
DEPT. OF RECREATION AND PARKS)
Agency)
_____)

OEA Matter No. 1602-0076-95

Date of Issuance: May 17, 2005

OPINION
ON
REMAND

On May 17, 1992 Employee began serving in the position of Carpenter Foreman with Agency subject to a one-year probationary period. Less than one year later, on May 10, 1993, Agency notified Employee that he would be returned to a non-supervisory position effective May 14, 1993. Employee made a timely appeal of Agency's actions to this Office. In his appeal Employee contended that Agency had not properly terminated

him during the supervisory probationary period. The Administrative Judge upheld Agency's action. Thereafter, Employee filed a Petition for Review.

We, however, denied Employee's petition. In the letter notifying Employee that he was being returned to a non-supervisory position, Agency informed him that, pursuant to section 815.12 of the District Personnel Manual ("DPM"), this action was not appealable or covered by the grievance procedures. Further because §§ 1600.2(h) and 1632.1(g) of the DPM at that time provided that an agency's "return or assignment of an employee who does not successfully complete a supervisory or managerial probationary period pursuant to § 815 of these regulations" was not appealable, we held that this Office lacked jurisdiction to consider Employee's appeal. Thus in an Opinion and Order on Petition for Review issued September 15, 1999, we upheld the Initial Decision.

Employee then appealed that decision to the Superior Court of the District of Columbia. The court stated that before it could review Employee's appeal, it needed to know our position with respect to the applicable DPM provisions that, according to Employee, Agency failed to follow. The court has remanded this appeal to us and has asked us to determine whether the return of Employee to a non-supervisory position was rendered ineffective due to Agency's failure to comply with DPM § 815.9, Part II, Subpart 19(I)(2)(b) of Chapter 8 and Part II, Subpart 19(E)(3) of Chapter 8.¹

¹ DPM § 815.9 provides:

If, after a full and fair evaluation of the employee's performance during the probationary period, supervisory or managerial deficiencies are revealed which make him or her unsuited for continued employment in the position, action shall be initiated prior to the end of the probationary period to return the employee to a position, in accordance with § 815.7 or 815.8. (These sections are not germane to this discussion)

Part II, Subpart 19(I)(2)(b) provides:

We believe that Agency's failure to follow these regulations did not render ineffective Employee's return to a non-supervisory position prior to the expiration of the probationary period. The regulations at issue in this appeal did not operate to create a substantive right by which Employee, who was serving a probationary period, could contest Agency's decision to return him to a non-supervisory position prior to the expiration of the probationary period. The regulations provide that the "probationary period is intended to bridge the gap between perceived potential and actual performance. It provides the agency with an opportunity to assess the new appointee's development on the job and to return an employee to a nonsupervisory or nonmanagerial position without undue formality should circumstances warrant." DPM, Chapter 8, Part II, Subpart 19(B). Based on this provision it is clear that probationary employees do not enjoy the same employment rights as do permanent employees. If an employee had a substantive right to contest an agency's action under these circumstances, we believe that the legislature would have expressly provided for such.

Even though we fully expect that an agency will adhere to its own regulations, we nonetheless believe that Agency's failure to apply the applicable procedures under these circumstances is harmless error. We cannot reverse an agency's action based on a procedural error if the error did not cause substantial harm or prejudice to an employee's

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- b. Except when an employee is concurrently serving both a probationary period under this subpart and a regular probationary period . . . the probationer must be rated on P.O. Form 12 (Report of Performance Rating) upon . . . assignment to another position or separation prior to completion of the probationary period.

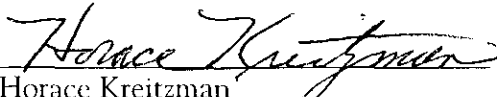
Part II, Subpart 19(E)(3) provides:

3. Notice to the employee. An action to return an employee to a nonsupervisory or nonmanagerial position should be based on sufficient factual information to make clear the basis for the agency's action. The notice must be made in writing and delivered to the employee at least 15 days prior to the effective date of the action.

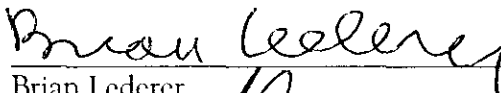
rights and did not significantly affect the agency's final decision to take the action. There is nothing in the record to indicate that Agency would not have returned Employee to a non-supervisory position had it followed the aforementioned regulations. Moreover, because the regulations did not create a substantive right whereby Employee could contest Agency's action, Employee was not harmed or prejudiced by Agency's failure to adhere to the regulations. For these reasons we find that Agency's failure to comply with the applicable regulations did not render its action ineffective.

FOR THE BOARD:

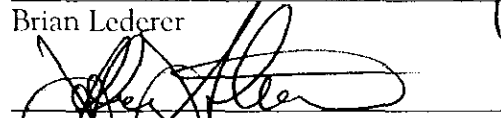
Erias A. Hyman, Chair



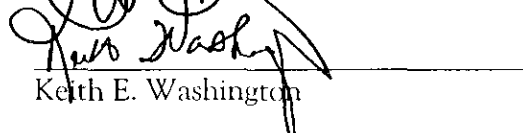
Horace Kreitzman



Brian Lederer



Jeffrey W. Stewart



Keith E. Washington