THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
SYLVIA JOHNSON,	)	
Employee	)	OEA Matter No. J-0145-15R17
	)	
v.	)	Date of Issuance: December 12, 2017
	)	
D.C. FIRE & EMERGENCY MEDICAL SERVICES,	)	
Agency	)	
	)	Arien Cannon, Esq.
	)	Administrative Judge

Johnny M. Howard, Esq., Employee Representative
Janea J. Raines, Esq., Agency Representative

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL BACKGROUND

Sylvia Johnson ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") on September 21, 2015, challenging the District of Columbia Fire & Emergency Medical Services' ("Agency") decision to remove her from her position as a Management Liaison Specialist. An Initial Decision was issued on February 11, 2016, dismissing this matter for lack of jurisdiction.

Employee filed a Petition for Review 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, which remanded this matter to the undersigned for further considerations.

On July 26, 2017, a Status Conference was convened to address the Board's Opinion and Order. Subsequently, an Order was issued which required the parties to address the issues raised by the OEA Board. Both parties have submitted their briefs accordingly. The record is now closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

1. Whether Employee was converted to a Career Service (Permanent) employee; and if so, whether the requirements of District Personnel Regulations ("DPR") § 823.2 have been met.

BURDEN OF PROOF

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.[1]

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee worked continuously with Agency from July 20, 2009, through March 30, 2014. The following summarizes the numerous term appointments that Employee served during the relevant time periods:

1. On July 20, 2009, Employee began working at Agency as a Management Liaison Specialist, pursuant to a term appointment not to exceed ("NTE") August 21, 2010.[2]

2. On August 22, 2010, Agency extended Employee's term for another year, not to exceed September 21, 2011.[3]

3. On September 22, 2011, Agency extended Employee's term for another year, not to exceed October 21, 2012.

4. On October 22, 2012, Agency again extended Employee's term, not to exceed July 19, 2013.

5. On or about July 30, 2013, then-Director of DCHR, Shawn Stokes, approved Agency's request to extend Employee's term beyond four (4) years via the Request for Superior Qualifications/Exceptions Form DCSF No. 11B-10.[4] Based on this approval, Employee's term was again extended until January 19, 2014.

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[1] OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).
[2] Employee's Brief, Exhibit A (August 15, 2017); See also Agency's Reply Brief, Attachment 2 (September 13, 2017).
[3] Employee's Brief, Exhibit B (August 15, 2017).
[4] Agency's Reply Brief, Attachment 6 (September 13, 2017). Extending Employee's numerous term appointments

6. Employee's term was once again extended on January 20, 2014, for an additional two months, not to exceed March 30, 2014.

7. Finally, on March 30, 2014, Employee's was terminated due to the expiration of her appointment.[5]

After a break in service for nearly six (6) months, Employee was again appointed to work with Agency as a Management Liaison Specialist, effective September 22, 2014. This was the same position Employee held from July 2009 through March 2014.[6]

Agency argues that Employee's new appointment in September of 2014, was a Career Service (Probational) appointment pursuant to D.C. Code § 1-608.01 (a)(5) and was subject to a probationary period of twelve (12) months. However, Employee maintains that she obtained Career Service with permanent status when she was employed with the District government from July 2009 through March 2014. Employee further contends that when she returned to service in September 2014 to the same position, grade, and salary, she was eligible for reinstatement under DPR § 816.1.

DPR § 816.1 states that:

> 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 argues that during her numerous term appointments made between June 2009 and March 2014 she was converted to a Career Appointment (Permanent). Employee's argument is based on the language in DPR § 823.2.[7] Relevant to Employee's argument are DPR §§ 823.1 and 823.2:

> **823.1** A personnel authority may make a term appointment for a

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consecutively, exceeding four (4) years, is of significance because of the language set forth in District Personnel Regulations ("DPR") §§ 823.1 and 823.2.

[5] Agency's Reply Brief, Attachment 9 (September 13, 2017).
[6] *Id*., Attachment 10.
[7] It is noted that Employee, through her attorney, asserted for the first time in her Petition for Review that her position was converted to Career Service (Permanent) status, pursuant to DPR § 823, during her numerous term appointments from July 2009 through March 2014.

> 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.

Here, it is undisputed that Employee held her "term appointment" continuously for more than four (4) years after it was extended numerous times. It is further undisputed that Employee's position was not supported by grant funds. However, the parties disagree whether Employee's term appointment was acquired through open competition.[8] Agency asserts that there is no indication in the record to support the idea that Employee competed for the term appointment she obtained in July 2009. I disagree. In the July 20, 2009, SF-50[9], "Box 34" indicates that the position occupied is through "Competitive Service," indicating that Employee's position was through open competition. Accordingly, I find that Employee's term appointment, which was served continuously for more than four (4) years, was acquired through open competition.

Furthermore, DPR § 823.2 provides an agency with two options when the following conditions are met: the employee is in a position *not* supported by grant funds, the position was acquired through open competition, and the employee has continuously served in a term appointment for at least four (4) years. The two options are to (1) separate the employee from District government; or (2) convert the employee's appointment to a regular Career Service appointment with permanent status. Agency did not separate Employee from service in July of 2013, after she had been serving continuously for four (4) years. Thus, her position was required to be converted to a regular Career Service appointment with permanent status. Because Employee's position was not supported by grant funds, her position was acquired through an open competition, and she served continuously for more than four (4) years under numerous term appointments, I must find that Employee's position was converted to a Career Service (Permanent) status in July of 2013.

Moreover, the Standard Form 50 in this matter, which officially documented Employee's return to service on September 22, 2014, indicates in "Box 24" that Employee's tenure upon her return to service was permanent.[10] The form further indicates in "Box 6-B" that Employee was

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[8] DPR § 899.1 defines open competition 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.
[9] See Agency's Reply Brief, Attachment 2 (September 13, 2017).
[10] A SF-50 is an employee's official personnel action form. See Agency's Reply Brief, Attachment 10, p. 2 (September 13, 2017).

reinstated to a Career Service position.

It is noted that attached with Agency's Reply Brief filed on September 13, 2017, is an affidavit submitted by a DCHR Specialist attempting to clarify the circumstances surrounding Employee's return to service on September 22, 2014. Despite the submission of this affidavit, the SF-50 must take precedence. The affidavit seems to acknowledge that an error was purportedly made in processing Employee's return to work in September 2014. However, it was not until the instant litigation that the purported error made in processing Employee's return to work in September of 2014, that Agency attempted to correct this supposed error. It is further noted that a new SF-50 attempting to correct the alleged error was never produced. Thus, I must rely on the SF-50 provided in the record, which indicates that Employee was reinstated effective September 22, 2014, in a Career Service (Permanent) position. Therefore, Employee could only be removed for cause.

Pursuant to DPR § 1603.2 (August 27, 2012), disciplinary action against an employee may only be taken for cause. As a permanent Career Service employee, Employee had the right to have an adverse action taken only for cause, along with the right to appeal to this Office any adverse action that leads to termination. Here, Agency issued Employee's termination letter on August 12, 2015, which noted that Employee was being terminated during her probationary period pursuant to DPR § 814. Because Agency did not properly impose the adverse action against Employee and failed to adhere to the guidelines that must be followed when dismissing a Career Service employee with permanent status as set forth in DPR §§§ 1608, 1612, 1613 (August 27, 2012), Employee's termination must be reversed.

ORDER

Accordingly, it is hereby **ORDERED** that:

1. Agency's termination of Employee is **REVERSED**; and
2. Agency shall reinstate Employee to the same or comparable position prior to his termination;
3. Agency shall immediately reimburse Employee all back-pay and benefits lost as a result of his removal; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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Arien P. Cannon, Esq.
Administrative Judge