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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
KAREN FALLS,)	OEA Matter No. 1601-0044-12
Employee)	
)	Date of Issuance: October 29, 2013
)	
DISTRICT OF COLUMBIA)	
DEPARTMENT OF GENERAL)	
SERVICES,)	
Agency)	

OPINION AND ORDER ON
MOTION FOR INTERLOCUTORY APPEAL

Karen Falls (“Employee”) worked as a Lead Protective Services Officer with the Department of General Services (“Agency”). On December 23, 2011, Agency issued its notice of final decision to remove Employee, charging her with neglect of duty, insubordination, incompetence, and malfeasance.¹ Employee challenged the termination by filing a Petition for Appeal with the Office of Employee Appeals (“OEA”) on December 27, 2011. She provided that Agency’s action was in retaliation to a previous sexual harassment and racial discrimination complaint, as well as a worker’s compensation claim. Therefore, she requested that Agency refrain from retaliation and that she be reinstated with back pay.²

On February 6, 2012, Agency filed an Answer to the Petition for Appeal and a Motion to

¹ *Petition for Appeal*, p.6 (December 27, 2011).

² *Id.* at 3.

Dismiss for Lack of Jurisdiction. In its answer, Agency denied Employee's allegations and explained that its action was taken for cause pursuant to the District Personnel Manual ("DPM") §§1603.3(f)(3), 1604(f)(4), and 1603.3(f)(5). Agency claimed that it documented many instances of neglect of duty, insubordination, and incompetence of Employee's work performance.³ Therefore, it believed its termination action was reasonable and requested that its decision be affirmed.⁴

With regard to the Motion to Dismiss, Agency argued that OEA lacked jurisdiction over Employee's claims of workplace discrimination and retaliation.⁵ It provided that pursuant to DPM § 1631.1, Employee could not submit to OEA matters involving allegations of unlawful discrimination because such matters are reserved for the D.C. Office of Human Rights ("OHR").⁶

The OEA Administrative Judge ("AJ") convened a Pre-hearing Conference. After the Pre-hearing Conference, the AJ denied Agency's Motion to Dismiss.⁷ Agency disagreed with the AJ's order and subsequently filed a Motion for Certification of Interlocutory Appeal with the OEA Board and Request for Stay Pending the decision on Interlocutory Appeal. It requests that the Board consider ". . . whether the October 1, 2013 Order denying [its] Motion to Dismiss was

³ It provided in its Advanced Written Notice of Proposed Removal that Employee slept while on duty; reported to work late; did not comply with Agency's proper uniform attire; left her weapon unsecured; abandoned her work post; demonstrated an inability to focus during her tour of duty; lacked improvement during training and failed to comprehend training materials; used profanity with co-workers and supervisors; refused to obey orders; made false statements; failed to make proper notification; and was absent without leave. *Agency's Answer*, p. 2 (February 6, 2012).

⁴ *Id.* at 3.

⁵ Agency submitted that Employee's appeal explicitly stated that she was terminated in retaliation for her allegations of sexual harassment and racial discrimination.

⁶ *Agency's Motion to Dismiss for Lack of Jurisdiction* (February 6, 2012).

⁷ *Order Denying Agency's Motion to Dismiss for Lack of Jurisdiction* (October 1, 2013). The AJ also issued a Post Pre-hearing Conference Order which required Agency to submit a legal brief addressing whether it had cause to take adverse action against Employee, and if so, was termination appropriate under the circumstances.

erroneous because it was contrary to District of Columbia case law and statute . . .”⁸ Agency provides that statutory law, case law, and regulation reserve claims of discrimination to OHR and reiterates that OEA lacks jurisdiction over appeals where discrimination or retaliation appear to be the motives behind an adverse action.⁹ Accordingly, it requests that the AJ’s order be reversed; that Employee’s appeal be dismissed; and that all deadlines be stayed pending certification to the Board and its decision.¹⁰ Thereafter on October 8, 2013, the AJ granted Agency’s Motion for Certification of Interlocutory Appeal. The matter was referred to the OEA Board and has been stayed pending the Board determination.

There appear to be two, different issues presented in the current case. The issue presented to this Board is if OEA has jurisdiction over discrimination and retaliation claims. Agency is correct that OEA does not have jurisdiction over discrimination claims. Those matters are decided by the Office of Human Rights.¹¹ However, this Board does not follow Agency’s reasoning that the AJ’s order denying Agency’s Motion to Dismiss equates somehow to the belief that he can adjudicate discrimination and sexual harassment matters. The AJ’s order offers no analysis on the discrimination claims. Therefore, there is no real basis for Agency’s belief that OEA is attempting to expand its jurisdiction to include discrimination and harassment matters.

The second issue presented is the neglect of duty, insubordination, incompetence, and

⁸ *Agency’s Motion for Certification of Interlocutory Appeal to Board of October 1, 2013 Order Denying Motion to Dismiss for Lack of Jurisdiction and Request for Stay Pending the Interlocutory Appeal*, p. 2 (October 8, 2013).

⁹ Agency provides that the courts in *Office of D.C. Controller v. Alvin C. Frost*, 638 A.2d 657, 666 (D.C. 1994) and *Samuel S. El-Amin v. D.C. Department of Public Works*, 730 A.2d 164 (D.C. 1999) removed claims covered by the D.C. Human Rights Act from OEA’s jurisdiction.

¹⁰ *Agency’s Motion for Certification of Interlocutory Appeal to Board of October 1, 2013 Order Denying Motion to Dismiss for Lack of Jurisdiction and Request for Stay Pending the Interlocutory Appeal*, p. 6 (October 8, 2013).

¹¹ OEA has held in *Edith Eastman-Ajaero v. D.C. Public Schools*, OEA Matter No. 2401-0221-10, Opinion and Order on Petition for Review (September 18, 2013) and *Mallie Wiggins v. Department of Corrections*, OEA Matter No. 2401-0010-00, Opinion and Order on Petition for Review (June 20, 2007), that it lacks jurisdiction over discrimination claims.

malfeasance charges against Employee. Employee provided a copy of Agency's final decision to terminate her on the basis of these charges. It is clear that Employee is appealing that action and not a sexual harassment, discrimination, or worker's compensation claim, as Agency seems to suggest. However, Agency is requesting that OEA dismiss Employee's case for lack of jurisdiction. To do so would be an abuse of discretion and a blatant denial of Employee's appeal rights under D.C. Official Code §1-606.03(a).

This statute provides that:

An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more (pursuant to subchapter XXIV of this chapter), or a reduction-in-force (pursuant to subchapter XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.

There has been an adverse action taken against Employee for which she was terminated. Agency concedes this point in its Answer to Employee's Petition for Appeal by arguing that the action was taken against Employee for cause under DPM §§1603.3(f)(3)-(5).¹² The AJ's Post Pre-hearing Order is attempting to move both parties to the merits of the case, as provided in Agency's Answer to Employee's Petition for Review. The order requests both parties to offer legal briefs on two issues – did Agency have cause for the adverse action taken against Employee and was termination the appropriate penalty. This Board finds no issue with the AJ's rulings. Although a more detailed rationale may have alleviated Agency's confusion regarding jurisdiction, it was not required. Thus, the AJ is free to proceed with his requests for legal briefs on the merits of the appeal.

¹² *Agency's Answer* (February 6, 2012).

ORDER

Accordingly, it is hereby **ORDERED** that Agency's interlocutory appeal is **DENIED** and this matter is **REMANDED** to the Administrative Judge for further proceedings.

FOR THE BOARD:

William Persina, Chair

Sheree L. Price, Vice Chair

Vera M. Abbott

A. Gilbert Douglass