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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
JACK SIMMONS,)	
Employee)	OEA Matter No. 1601-0138-08
)	
v.)	Date of Issuance: October 1, 2009
)	
D.C. OFFICE OF THE ATTORNEY)	
GENERAL,)	
Agency)	ERIC T. ROBINSON, Esq.
)	Administrative Judge
_____)	
Alan R. Kabat, Esq., Employee Representative		
Lionel C. Sims, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 7, 2008, Jack Simmons (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the Office of the Attorney General’s (“OAG” or “the Agency”) action of terminating his employment. I was assigned this matter on or around January 27, 2009. A prehearing conference was held in this matter in order to determine the salient facts and arguments of the instant matter. After review, I determined that an evidentiary hearing was unwarranted and ordered the parties to submit their final briefs regarding the ability of the OEA to properly exercise jurisdiction over this matter. The parties have since submitted their respective briefs, *inter alia*, in this matter. The record is now closed.

ISSUE

Whether this matter should be dismissed for lack of jurisdiction.

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. “Preponderance of the evidence” shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 629.2, *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing.

JURISDICTION

As will be explained below, the jurisdiction of this Office has not been established.

FINDING OF FACTS, ANALYSIS AND CONCLUSION

The proceeding finding of facts, analysis and conclusions are based on the documents of record as submitted by the parties. The Agency asserts that at the time of his removal, Employee was a member of the Legal Service and as such does not enjoy the protections afforded to aggrieved employee’s pursuant to D.C. Official Code § 1-606.03. D.C. Official Code § 1-608.01 (a) provides, in pertinent part, that the Career Service “shall include all persons appointed to positions in the District government, except persons appointed to positions in the ... Legal Service.” The pertinent question that must be resolved within the confines of the instant Initial Decision was which method did the Agency utilize in removing Employee from service. If Agency simply removed a legal service employee under the rubric of managerial prerogative, the OEA lacks jurisdiction to hear Employee’s appeal. *See*, D.C. Official Code § 1-608.01 (a). If however, Employee’s position was abolished pursuant to a Reduction in Force (“RIF”) then the OEA could exercise jurisdiction over Employee’s appeal. According to the documents of record, the following is a recitation of the salient events in this matter:

1. From November 1991 to July 2008, Employee was a Line Attorney in the OAG, and primarily litigated government contract, regulatory, and personnel matters.
2. Employee was a Grade 14, Step 9 attorney as of 2008. He was a Line Attorney, not a supervisory or managerial attorney.

3. Kimberly Johnson, an OAG attorney and Section Chief, was the supervisor of Employee during 2007 and 2008.
4. The last annual evaluation of Employee was for the period of September 1, 2006 to August 31, 2007, and he was rated as “meets expectations” overall, with one category rated as “exceeds expectations.”
5. On or around March 20, 2008, the Mayor of the District of Columbia submitted to the D.C. Council the proposed budget for Fiscal Year 2009, which would have reduced the budget for the OAG by \$3.5 million.
6. On April 4, 2008, Peter Nickles, the OAG Interim Attorney General, testified under oath to the D.C. Council about OAG’s budget for FY 2009. Mr. Nickles told the D.C. Council that OAG was going to identify 31 positions to “freeze” and replace with less-expensive younger attorneys.
7. On or around April 17, 2008, the OAG senior managers, including Eugene Adams (Chief Deputy Attorney General), Tarifah Coaxum (Chief Administrative Officer), and Nadine Wilburn (Chief Counsel of the Personnel, Labor and Employment Division) met with the OAG deputies to select the attorneys and staff whose positions would be terminated in response to the \$3.5 million budget reduction.
8. On May 22, 2008, Ms. Johnson gave Employee a Notice of Proposed Removal. The Notice of Proposed Removal stated that Employee was being terminated for three reasons: “as a result of (1) the permanent reduction of \$3.5 million from OAG’s FY09 budget (approximately 31 positions); (2) the need to maintain the efficiency of the OAG in light of this reduction; and (3) your achievements as an attorney during this rating period as compared to others in the division.”
9. At the time of Employee’s removal, he was assigned to the Civil Litigation Division and was in the position classification of Legal Services.

Agency’s argues that Employee was not subjected to a RIF but rather was removed from service due to his alleged sub-par performance. The following excerpt from Agency’s Brief dated August 18, 2009, is relevant, persuasive and informative:

The Agency’s personnel services budget is classified by program,

which roughly refers to the organizational division. Each division has a specified number of full-time equivalent (FTE) positions, which may be funded by various fund types. Each FTE is identified by a position number. The position number signifies for the agency fiscal officer whether the position is funded in a particular year's budget. If a position is not funded in a particular year's budget, it will not appear in the agency's budget and the agency fiscal officer will not approve its use to hire new employees. When a RIF occurs, the position number is abolished and may not be used in the future to hire another employee. Whenever an agency takes a personnel action with respect to an employee, for example, hire, termination or transfer, the Agency's Human Resources Section generates a Standard Form 50, "Notification of Personnel Action." The Form 50 identifies the employee, the effective date of the personnel action, the nature of the personnel action, the employee's position title, the employee's organizational assignment and the employee's position number. **(Exhibit 14).**

At the time of his termination, Employee was in position number 00013577. **(Exhibit 15).** Employee's former position number was not abolished through a RIF and is still active. Moreover, had Employee's position been affected by a budgetary reduction, the agency fiscal officer would have "frozen" the position number so that it could not be used in the future. **(Exhibit 14).** Neither circumstance occurred. On November 24, 2008, the Agency hired attorney Robert Dillard and assigned him position number 00013577. **(Exhibit 16).** Mr. Dillard was hired into the position vacated by Employee and is assigned to the same division, section and supervisor to which Employee was formerly assigned. **(Exhibit 14).** Had Employees' position been abolished due to a RIF or through position elimination to reduce personal services costs, OAG would not have been able to hire Mr. Dillard or assign him position number 00013577. *See*, Agency's Brief dated August 18, 2009 at 11 – 12.

Employee admits that his position classification was in Legal Services and that he was employed as an Attorney by the Agency. Employee counter argument is that the OAG utilized its option of an ill conceived RIF in order to effectuate his removal.

After reviewing the documents of record as well as the sum and substance of the parties' arguments in support of their various contentions it is evident to the undersigned that Employee position was not RIF'd. The May 22, 2008, 10 Day Advance Notice of Proposed Removal was very poorly worded. Citing the need of a budget reduction as one of the justifications for removing an Employee is language normally reserved for RIF notice not a removal for cause notice. Had this same language been otherwise affirmed

or neglected in Employee's Final Notice of Removal, this initial decision would have been in Employee's favor. However, Agency adequately corrected this poorly worded document in its Final Notice of Removal dated June 30, 2008. The following excerpt is relevant to this matter: "I reject all reference to the budget in your Proposed Notice and it forms no basis for my decision." See, Final Notice of Removal at 2. Agency is correct in that if a RIF had occurred; Employee's position number would have been erased, thereby depriving Robert Dillard, Esq., of said position description number. I further note that the Proposed Notice of Removal was authorized by Kimberly Johnson, Esq., Employee's supervisor while the Final Notice of Removal was authorized by Attorney General Peter Nickels, who through authority delegated to him by the Mayor of the District of Columbia, has final authority on how to manage the OAG workforce.

Because of the simple clarification Peter Nickels provided in the Final Notice, along with Robert Dillard, Esq., occupying Employee's former position number, I find that Employee position was not abolished pursuant to a RIF. I further find that Employee was removed from service due to Agency's allegation that his on-the-job performance was less than satisfactory.

I further find that at the time of his removal, Employee's position was within the Legal Service as defined by D.C. Official Code § 1-608.52. Employee admits as much in his Petition for Appeal and the same can be found in Employee's personnel action forms. According to the clear and unambiguous language of D.C. Official Code § 1-608.56(c), a Legal Service attorney does not have appeal rights to the OEA. Moreover, this issue has been addressed in previous matters before this Office. The undersigned held in *Lenore Verra v District of Columbia Public Schools*, OEA Matter No. J-0040-07, that an attorney classified within the Legal Service cannot appeal his removal to this Office pursuant to D.C. Code § 1-608.56(c). Accordingly, I find that Employee cannot appeal this matter to the OEA because it lacks jurisdiction to hear his petition for appeal

This Office has no authority to review issues beyond its jurisdiction. See *Banks v. District of Columbia Pub. Sch.*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (Sept. 30, 1992), __ D.C. Reg. __ (). Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding. See *Brown v. District of Columbia Pub. Sch.*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993), __ D.C. Reg. __ (); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (Jan. 22, 1993), __ D.C. Reg. __ (); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995), __ D.C. Reg. __ ().

Based on the foregoing, I find that Employee, when he was removed from service, was a member of the Legal Service. Reluctantly, I further find that pursuant to D.C. Official Code § 1-608.56 (c), Employee's appeal rights relative to this matter lie *possibly* with either the Mayor of the District of Columbia or the Agency head, but in any event his appeal rights *do not* lie with the OEA. Consequently, I conclude that Employee has failed to establish the jurisdiction of this Office in the instant matter and I must therefore

dismiss this matter for lack of jurisdiction.¹

ORDER

It is hereby ORDERED that this matter be DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

ERIC T. ROBINSON, Esq.
Administrative Judge

¹ Since the Employee failed to establish the jurisdiction of this Office in this matter, I am unable to address the factual merits (if any) of the Employee's petition for appeal. I am also unable to address any other arguments that Employee raised in the prosecution of same.