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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
ELLIOTT DUVALL)	OEA Matter No. J-0008-06
Employee)	
)	Date of Issuance: January 24, 2006
v.)	
)	Senior Administrative Judge
DEPARTMENT OF)	Joseph E. Lim, Esq.
YOUTH HABILITATION SERVICES)	
Agency)	

Frank McDougald, Esq., Agency Representative
John Carpenter, Esq., Employee Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

Employee was a probationary Correctional Officer with the Department of Youth Habilitation Services. After an alleged incident of physical abuse of a resident, Agency informed Employee that his termination date is June 17, 2005. Employee filed an appeal with the Office of Employee Appeals (OEA) on October 24, 2005 seeking a reversal of Agency's action.

On January 11, 2006, this matter was assigned to me. At the January 23, 2006 prehearing conference, Employee admitted that he was probationary at the time of the termination. I closed the record after ascertaining that there were no material issues of fact in dispute.

ISSUE

Should this matter be dismissed because Employee was probationary?

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Code Ann. § 1-606.3 (1992).

FINDINGS OF FACT

The following facts are undisputed:

1. Employee applied for employment and was accepted a Correctional Officer with the Department of Youth Habilitation Services on October 17, 2004, subject to a one-year probationary period.
2. After an alleged incident of physical abuse of a resident, Agency informed Employee that his termination date is June 17, 2005. At the time of his dismissal, Employee had been a probationary employee of Agency for ten months.
3. Employee also filed an appeal with the Office of Employee Appeals (OEA) on October 24, 2005 seeking a reversal of Agency's action.

ANALYSIS AND CONCLUSIONS

OEA Rule 629.2, 46 D.C. Reg. at 9317, reads as follows: "The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." According to OEA Rule 629.1, *id*, a party's burden of proof is by a "preponderance of the evidence", which is defined as "[t]hat 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."

Probationary Employees

Effective October 21, 1998, and except as otherwise provided in the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (the Act), pursuant to the D.C. Official Code, §1-606.03 and OEA Rule 604.2, a D.C. government employee may appeal a final agency decision affecting: (a) A performance rating which results in removal of the employee; (b) An adverse action for cause that results in removal, reduction in grade, or suspension for ten (10) days or more; or, (c) A reduction in force.

Effective June 9, 2000, the Council of the District of Columbia adopted amended regulations for the updated implementation of the Act and, at the outset of the new regulations, provided at Chapter 16, § 1600.1, that the newly adopted regulations apply to each employee of the District government in the Career Service, who has completed a probationary period.

- (b) Satisfactory completion of the probationary period is required to attain permanent status. See DPM § 813.11, D.C. Official Code § 5-105.04.

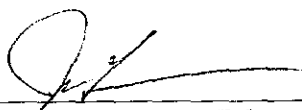
Thus, a District government employee serving a probationary period does not have a statutory right to be removed for cause and cannot utilize the adverse action procedures under subchapters VI or XVII of the Comprehensive Merit Personnel Act ("CMPA"), which include appealing an adverse action to this Office. An appeal of an adverse action filed in this Office by an employee serving a probationary period must therefore be dismissed for lack of jurisdiction. See *Davis v. Lambert*, MPA No. 17-89, 119 DWLR 305 (1991) (regardless of agency regulations and advice to the contrary, probationary employees may be discharged at-will and they do not have any statutory right to appeal their termination to the OEA); *Day v. Office of the People's Counsel*, OEA Matter No. J-0009-94, *Opinion and Order on Petition for Review* (July 10, 1995), __ D.C. Reg. __ (); *Employee v. Agency*, OEA Matter No. 1601-0057-83, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 6057 (1985); *Jones v. District of Columbia Lottery Bd.*, OEA Matter No. J-0231-89, *Opinion and Order on Petition for Review* (Aug. 19, 1991), __ 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. __ (); *Jordan v. Metropolitan Police Dep't*, OEA Matter No. 1601-0314-94, *Opinion and Order on Petition for Review* (Sept. 29, 1995), __ D.C. Reg. __ (); and *Ramos-McCall v. District of Columbia Pretrial Services*, OEA Matter No. J-0197-93, *Opinion and Order on Petition for Review* (March 18, 1994), __ D.C. Reg. __ ().

Here, Employee position was subject to a one-year probationary period. However, Employee was separated from service on June 17, 2005, ten months after his start date and still within the probationary period. Therefore, I conclude that this Office has no jurisdiction over this appeal, and that it must be dismissed.

ORDER

It is hereby ORDERED that this matter is DISMISSED.

FOR THE OFFICE:



JOSEPH E. LIM, Esq.
Senior Administrative Judge