

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
Adrienne Smith,)	OEA Matter No. J-0095-16
Employee)	
)	Date of Issuance: November 8, 2016
v.)	
)	Joseph E. Lim, Esq.
D.C. Dept. of Consumer & Regulatory Affairs,)	Senior Administrative Judge
<u>Agency</u>)	
Adrienne Smith, Employee <i>pro se</i>		
Adrienne Lord-Sorensen, Esq., Agency Representative		

INITIAL DECISION

BACKGROUND

On September 12, 2016, Adrienne Smith (“Employee”), filed a petition for appeal with the Office of Employee Appeals (“OEA”). The employee grieved her termination from her position as a Housing Code Specialist by the D.C. Department of Consumer & Regulatory Affairs (“Agency”).

The matter was assigned to the undersigned judge on October 6, 2016. On October 18, 2016, I ordered Employee to address the jurisdiction issue raised by the Agency. I closed the record after Employee submitted her final arguments. No hearing was held, as there were no material facts in dispute.

JURISDICTION

Jurisdiction in this Matter was not established.

ISSUE

Whether Employee’s appeal should be dismissed for lack of jurisdiction.

FINDINGS OF FACT

The following facts were submitted by the parties and are uncontroverted:

1. On February 29, 2016, Agency offered Employee employment as a Housing Code Specialist which Employee readily accepted. Agency Exhibit 1. The letter indicated that the appointment is probationary effective March 7, 2016.
2. Employee’s status as indicated in her offer was Probationary Career Service for a year.

3. On August 23, 2016, and September 15, 2016, Agency received emails detailing complaints about Employee's professional behavior. Agency Exhibit 4.
4. On September 2, 2016, Agency served Employee with a written notice of termination effective September 16, 2016. Agency Exhibit 2.

ANALYSIS, AND CONCLUSIONS OF LAW

Effective October 21, 1998, and except as otherwise provided in the District of Columbia Government Comprehensive Merit Personnel Act of 1978, DC Code 1 601.1 et seq. or Rule 604.2 below, any District of Columbia 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.

Chapter 8, Section 813.8 of the District Personnel Manual ("DPM") states, in pertinent part:

Except when the appointment is effected with a break in service of one (1)-workday or more, or as specified in subsection 812.2(a) of this chapter or subsection 813.9 of this section, an employee who once satisfactorily completed a probationary period in the Career Service shall not be required to serve another probationary period."¹

Moreover, Chapter 8, Section 814.3 of the District Personnel Manual provides that a termination during a probationary period cannot be appealed to this Office. An appeal to this Office by an employee serving in a probationary status must therefore be dismissed for lack of jurisdiction.² In light of the above, the outcome in this matter turns upon the determination of whether Employee was still within the probationary period of her employment as Agency contends, or whether she had become a permanent employee prior to Agency's notice of termination.

¹ D.C. Official Code § 5-105.04 (2001).

² See, e.g., *Day v. Office of the People's Counsel*, OEA Matter No. J-0009-94, *Opinion and Order on Petition for Review* (August 19, 1991).

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. Preponderance of the evidence is “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.” Under OEA Rule 628.2, 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.

It is Agency’s position that this Office does not have jurisdiction over Employee’s appeal. Agency submits that Employee’s status as a probationary employee at the time she was terminated prevents OEA from asserting subject matter jurisdiction over this appeal. In her brief, Employee sidesteps the issue of OEA’s jurisdiction over her appeal. Instead, Employee asserts Agency mismanagement and decried the complaints against her as frivolous.

District Personnel Manual (“DPM”) § 813.2 states that:

A person hired to serve under a Career Service Appointment (Probational), including initial appointment with the District government in a supervisory position in the Career Service, shall be required to serve a probationary period of one (1) year, except in the case of individuals appointed on or after the effective date of this provision to the positions listed in paragraphs (a) through (d) of this subsection below, who shall serve a probationary period of eighteen (18) months:

- (a) Individuals hired into entry-level police officer positions in the Metropolitan Police Department;
- (b) Individuals hired into entry-level Correctional Officer positions in the Department of Corrections, or entry-level Youth Development Representative positions in the Department of Youth Rehabilitation Services;
- (c) Individuals hired into entry-level Firefighter/Emergency Medical Technician (EMT) and entry-level Firefighter/ Paramedic positions in the Fire and Emergency Medical Services Department; and
- (d) Individuals hired into emergency or non-emergency operations positions in the Office of Unified Communications.

According to the record, Employee was hired as a Housing Code Specialist on a probationary status effective March 7, 2016. Employee was required to serve a one (1) year probationary period before she could obtain permanent employment status. Her status as a probationary employee did not end until March of 2017. Thus, at the time she was terminated, effective September 16, 2016, Employee remained “at-will” and did not have the protections afforded to Career Service employees. Moreover, Employee admits in her Petition for Appeal that she was terminated from service after working only seven (7) months. Based on the foregoing, I find that OEA lacks jurisdiction over this appeal. Accordingly, the Undersigned is precluded from adjudicating the merits, if any, of Employee’s substantive arguments.

ORDER

It is hereby ORDERED that Employee's appeal is dismissed for lack of jurisdiction.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge