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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
ANTHONY GILLESPIE)	OEA Matter No. 1601-0044-15
Employee)	
v.)	Date of Issuance: July 20, 2015
DISTRICT OF COLUMBIA PUBLIC SCHOOLS)	Lois Hochhauser, Esq.
Agency)	Administrative Judge
)	
)	
Anthony Gillespie, Employee, <i>Pro Se</i>		
Carl Turpin, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Anthony Gillespie, Employee herein, filed a petition with the Office of Employee Appeals on February 18, 2015, appealing the decision of the District of Columbia Public Schools, Agency herein, to terminate his employment, effective January 23, 2015. At the time of his removal, Employee was employed by Agency as a custodian.

This matter was assigned to me on March 23, 2015. After reviewing the file, I determined that jurisdiction was at issue. In his petition, Employee stated that he did not know the type of position he held, and identified his appointment as permanent. Agency contended that Employee was a term employee. However, it stated that by error, the offer letter that it issued to Employee on August 21, 2014, did not identify him as a term employee.

On March 27, 2015, I issued an Order directing Agency to submit legal, factual and/or documentary support for its position that Employee held a term appointment. In the Order, I also stated that it appeared that Employee was in a probationary status at the time of his removal, and advised Agency that if it agreed he was probationary when he was removed, it should present argument on this Office's jurisdiction to hear appeals of probationary employees. The Order further stated that employees have the burden of proof on issues of jurisdiction, and provided Employee with a deadline to submit argument on his position in this matter. On April 15, 2015, an Order was issued granting Agency's unopposed request to extend the filing deadlines. Employee's deadline was again

extended by consent by Order dated May 11, 2015. The Order also stated that the record would close on June 12, 2015, the Employee's filing deadline, unless the parties were notified to the contrary. The record closed on that date.

JURISDICTION

The jurisdiction of this Office was not established.

ISSUE

Did Employee meet his burden of proof on the issue of jurisdiction?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), places the burden of proof on employees on all issues of jurisdiction. This burden must be met by a "preponderance of the evidence" which is defined in OEA Rule 628.2 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." Employee has the burden of proof on the issue of his employment status, since employment status is one factor that determines this Office's jurisdiction.

Pursuant to the Omnibus Personnel Reform Amendment Act, (OPRAA), D.C. Law 12-124 (1998), this Office can hear appeals of permanent employees in the career and education services who have successfully completed their probationary periods. Permanent employees who serve in either the career or educational service are entitled to removal for cause. A term employee or an employee removed during the probationary period, is not so entitled, and therefore cannot appeal their removals to this Office. *See* D.C. Code §1-617.1(b).

The parties submitted a total of three letters of hire issued by Agency to Employee, all dated August 21, 2014. Two of those letter were actually issued on that date. In the first letter, "Letter 1" herein, Agency congratulated Employee on being hired as a "Term Teacher" at J.O. Wilson and provides a "not-to-exceed" (NTE) date of November 24, 2014. In the second letter, "Letter 2" herein, Agency congratulated Employee on being hired as a "Custodian" at J.O. Wilson Elementary School. There is no reference of a term appointment or an NTE date in Letter 2. The third letter, "Letter 3" herein, was attached to the January 23, 2015 notice of termination. In the notice, Agency explained:

Your offer letter stated that you were being hired as a Custodian when, in fact, you were being hired as a Term Custodian. You should have received an offer letter with an NTE date of November 24, [2014]...The offer letter you should have received is attached to this letter. As you will see in the attached letter, your original NTE date was set for November 24, 2014. In light of the above, we have extended your NTE date to January 23, 2015. Therefore, as of January 23, 2015, DCPS is separating you from service.

In support of its position that Employee held a term appointment, Agency submitted several documents. First, it offered a letter regarding S.M., a full-time custodian at J.O. Wilson who was placed on leave between July 30, 2014 and November 14, 2014. The leave was subsequently extended through January 30, 2015. It also submitted documentation regarding budgetary allocations. Agency explained that Employee was hired to serve during the term of S.M.'s leave and could not have held a permanent appointment because only a specific number of custodian positions were allocated. Agency also maintained that an e-mail sent by Assistant Principal (AP) Sheard Wilson at J.O. Wilson on September 15, 2014 supported its position. The e-mail was sent in response to a request from Agency Human Resources Manager Erica Smith to provide schedules for the custodians, noting that the Union was concerned with custodian scheduling at the school. In his email, AP Wilson listed the duty hours for each of the four custodians, and identified Employee and another custodian as temporary employees.

Chapter 8, Section §826.1 of the District Personnel Manual (DPM) provides that the "employment of an individual under a ...term appointment shall end on the expiration date of the appointment." Since there is no guarantee of continued employment at the expiration of the term, the individual has no basis to appeal termination. *See, e.g., Sinai v. Department of Human Services*, OEA Matter No. 1601-0126-91 (November 18, 1993). Agency did not submit any official document which identified Employee as a term employee. Although Letter 1 was for a term NTE November 14, 2014, it was for a teaching position. Since it was for a teacher position, and it is undisputed Employee was not hired as a teacher, it was not applicable. Letter 2 congratulated Employee for being hired as a custodian, but makes no reference to a term appointment or an NTE date. Letter 3 was not issued until Employee was terminated, and was only meant, according to Agency, to demonstrate the letter Agency should have issued. None of the letters support Agency's position that Employee held a term appointment. The e-mail from AP Wilson to Ms. Smith which did refer to Employee as a term employee, was not an official document from Agency and did not provide proof of Employee's status. Agency should possess an official document identifying the type of appointment Employee held. It did not submit any such document. In sum, Agency did not provide documentation to support its position that Employee held a term appointment.

However, the inquiry cannot stop here. The jurisdiction of this Office must be established in order for an appeal to be heard. Since it appeared that Employee was hired on August 21, 2014 and was terminated on January 23, 2015, the parties were directed to address whether Employee was in probationary status at the time of the removal. In its submission, Agency stated that even if its "administrative error means the OEA does not consider Employee to be a term employee, Employee was, at best, a probationary employee," and that OEA lacks jurisdiction to hear the appeal of a probationary employee. In his response, Employee argues that Agency did not establish that he held probationary status and further that Agency should not have been able to present alternative arguments.

It is mandatory that jurisdiction be established in order for an appeal to be heard by this Office. Jurisdiction cannot be established based on the error or omission of a party. Even if, for example, an employee filed a petition for appeal beyond the permitted deadline and the employing agency failed to object to the petition as untimely, the Administrative Judge would still be required to raise and resolve the issue, since timeliness is a jurisdictional issue. In this matter, even if Agency did not raise or even fully respond to the issue of whether Employee was in probationary status when he

was terminated, the Administrative Judge must address and rule on that issue, since this Office's jurisdiction can depend of its outcome.

The DPM at § 813.2 states that employees, with some exceptions not relevant here, remain in probationary status for one year:

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 below, who shall serve a probationary period of eighteen (18) months...

The DPM also provides the procedures that an agency must follow when it terminates an employee in probationary status:

814.1 Except for an employee serving a supervisory or managerial probationary period under section 815 of this chapter, an agency shall terminate an employee during the probationary period whenever his or her work performance or conduct fails to demonstrate his or her suitability and qualifications for continued employment.

814.2 An employee being terminated during the probationary period shall be notified in writing of the termination and its effective date.

814.3 A termination during a probationary period is not appealable or grievable. However, a probationer alleging that his or her termination resulted from a violation of public policy, the Whistleblower protection law, or District of Columbia or federal anti-discrimination laws, may file action under any such laws, as appropriate.

It is undisputed that Employee was hired on August 21, 2014, and was terminated on January 23, 2015. Therefore, he had not yet completed the required one year probationary period and was in probationary status at the time of his removal. Pursuant to DPM at §814.3, cited above, since he was still in his probationary period, Employee could not appeal his termination to this Office. His appeal, therefore, must therefore be dismissed for lack of jurisdiction. *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 629.2, 46 D.C. Reg. 9317 (1999), states that "the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." OEA Rule 629.1, 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" shall mean: "[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." Employee did not meet this burden of proof. Therefore, the Administrative Judge concludes that this petition for appeal should be dismissed.

ORDER

It is hereby:

ORDERED: The petition for appeal is dismissed.

FOR THE OFFICE:

Lois Hochhauser, Esq.
Administrative Judge