THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No. 1601-0100-08
PATRICE VAUGHAN	)	
Employee	)	Date of Issuance: November 26, 2008
	)	
v.	)	Sheryl Sears, Esq.
	)	Administrative Judge
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS	)	
Agency	)	
	)	

Patrice Vaughan, Employee, *Pro Se*
Harriet E. Segar, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

Patrice Vaughn ("Employee") was Head Start Educational Aide for the D.C. Public Schools ("DCPS" or "Agency"). By letter dated November 29, 2007, Thelma Monk, PhD., Interim Director of the Office of Human Resources, Employee was notified that the continuation of her employment with Agency for the school year 2008-2009 was contingent upon her ability to meet the following requirements:

> Possession of a high school diploma/GED, AND
> Possession of an associate's degree from an accredited college/university, OR;
> Completion of two years of full-time study (minimum of 48 credit hours) at an accredited college/university, OR;
> Passing score of 461 on the ETS (Educational Testing Systems) Para Pro Assessment

Dr. Monk noted that, according to the records of the Office of Human Resources (OHR), Employee had the following credentials on record:

> Proof of high school completion
> Y (Oxon Hill HS)

> Higher Education and/or ParaPro results:
> Completed 22 credit hours at UNIV OF DC
> OR
> Highest ParaPro Assessment score: 455

Employee was notified that, to meet requirements she must present evidence of 25 additional credit hours or a passing ParaPro Assessment score of 461 or higher. Employee was required to present either documentation showing that she had her credentials or an individual Highly Qualified Action Plan and submit to OHR no later than Friday, January 11, 2008. Employee was notified of two Paraprofessionals Highly Qualified Fairs that were scheduled in collaboration with the Office of Teaching and Learning. According to a note on the letter, attachments were also provided to Employee that included information on Agency's reimbursement program for expenditures for preparing for and taking the examination. Employee completed and submitted her Highly Qualified Action Plan.

On March 31, 2008, Erika L. Wesley, Licensure Administrator of the Office of Human Resources, presented Employee with a revised plan and offered her the opportunity to present suggested changes no later than April 7, 2008. There is no dispute that, once her plan was in place, Employee made efforts to gain her credentials. Employee took the test more than once. A score report submitted into the record shows that she got a 459. She avers that, on other occasion, she got a 460. There is no evidence in the record of that score. Agency neither concedes nor denies that it is true. In any case, it is still below the required 461.

On June 13, 2008, Agency notified Employee that she would be removed for lack of qualification requirements. The letter read, in pertinent part, as follows:

> You were previously informed that as an instructional paraprofessional with the District of Columbia Public Schools, your employment is contingent upon satisfactorily meeting qualification requirements outlined in the *No Child Left Behind Act* of 2001 (NCLB). Our records show that you have failed to meet these requirements to date. Accordingly, you will be separated from service with the District of Columbia Public Schools effective June 30, 2008.
>
> Upon successful completion of your certification requirements, we invite you to have your qualifications reassessed. For information on the minimum requirements of the paraprofessional position, please visit our website at www.k12.dc.us/offices/ohr/highlyqualifiedaction plan.htm[l]. If you meet minimum requirements, you may apply for a position by submitting a resume and cover letter to resume@k12,dc.us.

> If you currently meet the certification standards and you feel you have received this letter in error, immediately send documentation to our office via fax to (202) 442-5315 or email resume@k12.dc.us, Attn: Licensure Administrator. Please include a phone number where a message may be left.

Employee filed an appeal with the Office of Employee Appeals ("the Office") on June 26, 2008. Although the appeal was premature, there is no dispute that the removal was effected. The parties convened for a pre-hearing conference on November 19, 2008. No factual disputes were presented by this matter that required a hearing. Therefore, none was convened. This decision is based upon the documentary evidence and written and oral arguments presented by the parties.

JURISDICTION

For the reasons set forth in the "Analysis and Conclusion" section below, this Office does not have jurisdiction over Employee's appeal.

ISSUES

I. Whether this Office has jurisdiction over Employee's appeal.

II. If so, whether Employee was lawfully removed.

III. If not, whether this appeal should be dismissed.

BURDEN OF PROOF

OEA Rule 629.3, 46 D.C. Reg. 9317 (1999) provides that "[f]or appeals filed on or after October 21, 1998, the agency shall have the burden of proof, except for issues of jurisdiction." Pursuant to OEA Rule 629.1, *id.*, the applicable standard of proof is a "preponderance of the evidence." OEA Rule 629.1 defines a preponderance of the evidence 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." Accordingly, Agency has the burden of proving, by a preponderance of the evidence, that the separation of Employee was legal.

ANALYSIS AND CONCLUSION

Agency modified the requirements for Employee's position in accordance with a mandate of the *No Child Left Behind Act* of 2001. Employee was notified that she was subject to removal because she did not have proper credentials for her position. She has challenged the removal action on the grounds that Agency did not give her the opportunity, as was offered other employees, to take a preparatory course for the examination. She made vague references to other employees telling her that they had that opportunity but could not name the date, place or circumstances of their preparation. In

any case, there is no law, rule, regulation or guideline that Employee has brought forth, or of which this Judge is aware, that requires Agency to provide preparatory assistance to employees. Agency did, however, offer reimbursement for preparatory courses and made Employee aware of that.

Employee also challenges Agency's requirement that an employee achieve a score of 461. According to Employee, her internet research revealed that most other states require only a 455. This Office does not have the authority to revise Agency's standards for employment. While it must be highly frustrating that her diligent efforts did not result in a successful outcome, this Office can find no legal flaw in Agency's determination that Employee did not meet them. Because Employee did not achieve them, she became an "at will" employee. Section 1601.1 of the District Personnel Manual (DPM) distinguishes career service employees from others by stating that "[e]xcept as otherwise required by law, an employee not covered by §1600.1 is an *at will employee* and may be subjected to any or all of the foregoing measures at the sole discretion of the appointing personnel authority." (Emphasis added). Accordingly, an at will employee does not have the right to the same protections as their career service counterparts.

The law that establishes the jurisdiction of this Office is also clear in limiting the right of appeal to career service employees. The D.C. Official Code (2001), Section 1-606.03, establishes that an employee may appeal, to this Office, "a final agency decision" effecting "an adverse action for cause that results in removal." Chapter 16 of the District Personnel Manual (DPM) contains the rules and regulations that implement the law of employee discipline. Section 1600.1 of the DPM limits the application of those provisions to employees "of the District government *in the Career Service*." (Emphasis added.) In accordance with §1601.1, no career service employee may be "officially reprimanded, suspended, reduced in grade, removed, or placed on enforced leave, except as provided in this chapter or in Chapter 24 [the provisions for conducting a reduction in force] of these regulations."

It is well established that at will employees may be terminated "for any reason at all." *Cottman v. D.C. Public Schools*, OEA Matter No. JT-0021-92, *Opinion and Order on Petition for Review* (July 10, 1995), ___ D.C. Reg. ___ ( ). And according to the applicable laws, rules and regulations, this Office does not have jurisdiction over the appeal of a removal of an at-will employee.

Employee was required to have proper credentials for her position. But, despite Agency giving her an opportunity to gain them and her best efforts, she was unable to do so within the requisite time frame. She was subject to removal at the will of the agency with no recourse. According to the applicable laws, rules and regulations, this Office does not have jurisdiction over the appeal of a removal of an at-will employee. This Office does not have jurisdiction to review the instant appeal and it must be dismissed.

ORDER

It is hereby ORDERED that the petition for appeal in this matter is dismissed for lack of jurisdiction.

FOR THE OFFICE:

_____
SHERYL SEARS, ESQ.