THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0008-21
[redacted],	
Employee	
	Date of Issuance: August 3, 2021
v.	
D.C. DEPARTMENT OF YOUTH REHABILITATION SERVICES,	MICHELLE R. HARRIS, ESQ. Administrative Judge
Agency	

Employee, *Pro Se*
Daniel Thaler, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On March 3, 2021, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Youth Rehabilitation Services' ("Agency" or "DYRS") decision to suspend him from service for fifteen (15) days. The suspension was effective on December 4, 2020, and Employee returned to duty on January 6, 2021.[1] On March 22, 2021, Agency filed its Answer to Employee's Petition for Appeal. This matter was assigned to the undersigned Administrative Judge ("AJ") on May 7, 2021.

On May 12, 2021, I issued an Order requiring Employee to submit a brief regarding OEA's jurisdiction over this matter because Agency raised an issue of jurisdiction in its Answer. Agency asserted that OEA did not have jurisdiction over this matter because Employee's position status was Management Supervisory Service (MSS) and that status does not have appeal rights before this Office. Employee's brief was due on or before June 1, 2021. Employee failed to respond by June 1, 2021 as directed. Consequently, on June 7, 2021, I issued an Order for Statement of Good Cause to Employee. Due to the Covid-19 Operational Status, this Order was sent to the email address listed in the record for Employee. Employee was ordered to submit a statement of good cause for his failure to respond as directed by the May 12, 2021 Order. Employee had until June 16, 2021, to respond to the Order. On June 21, 2021, Agency filed a Motion to Dismiss, citing Employee's failure to

[1] The suspension dates included: December 14-18, 21- 24, 28- 31 (2020), and January 4 and 5, 2021.

respond and renewing its argument that OEA lacks the jurisdiction to adjudicate this matter. On June 22, 2021, Employee responded and indicated that he did not receive any of the previous orders issued by the undersigned. Accordingly, on June 22, 2021, I issued an Order requiring Employee to submit a brief on jurisdiction on or before July 6, 2021. Agency had the option to submit a reply on or before July 16, 2021. Employee submitted his brief as required by the prescribed deadline. The record is now closed.

JURISDICTION

The jurisdiction of this Office has not been established.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) 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 628.2 *id.* states:

> 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.

ANALYSIS AND CONCLUSIONS OF LAW

Employee's Position

Employee asserts that Agency's motion to dismiss is inaccurate. Employee argues that "DYRS' attempt to dismiss my appeal on the basis that I am an Management Supervisory Service (MSS) employee without appeal rights in this matter is inaccurate because of the protections provided to all employees, including MSS in the COVID-19 public health emergency Mayoral Orders, DC Law Codes, and DCHR Guidance."[2] Employee asserts he was entitled to the protections as prescribed in the Mayor's Declaration of Public Health Emergency for Covid-19. Specifically, Employee avers that on March 11, 2020, Mayor's Order 2020-045 went into effect and as a result provides him appeal rights to this Office. Employee argues that "[t]he subject of the order was "Declaration of Public Emergency: Coronavirus (COVID-19)". In Section II-F, the Order directs the

[2] Employee's Brief (July 6, 2021).

DC Department of Human Resources (DCHR) to issue a policy for all District employees relating to travel, designation of emergency and essential employees, employee responsibilities, and guidance on workplace flexibility, leave options, and workplace protections."[3] Consequently, Employee avers that "the Office of Employee Appeals (OEA) has jurisdiction to hear my appeal due to the unique circumstances and unprecedented nature of the COVID-19 public health emergency."[4]

Agency's Position

Agency avers that Employee's classification as MSS precludes OEA from hearing this matter, as it lacks the jurisdiction to hear matters of MSS employees. Specifically, Agency avers that Employee is classified as an MSS employee and is at-will and is not "afforded the substantive right of review."[5] Further, Agency argues that D.C. Official Code §1-609.54 provides that an appointment to the Management Supervisory Service (MSS) is an at-will appointment.[6] Agency asserts that "[t]he District of Columbia Court of Appeals has held that "while the CMPA and its implementing regulations provide procedural protections to Career Service employees who are subject to adverse employment actions (such as notice and hearing rights, an the right to be terminated only for cause), MSS employees are statutorily excluded from the Career Service and thus cannot claim those protections."[7] As a result, Agency asserts that Employee's suspension is not appealable to this Office and this matter should be dismissed for lack of jurisdiction.[8]

Analysis

This Office's jurisdiction is conferred upon it by law and was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Official Code §1-601-01, *et seq.* (2001). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which took effect on October 21, 1998. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions. According to 6-B of the District of Columbia Municipal Regulation ("DCMR") § 604.1[9], this Office has jurisdiction in matters involving Career Service District government employees appealing a final agency decision affecting:

(a) A performance rating resulting in removal;
(b) An adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more; or
(c) A reduction-in-force; or
(d) A placement on enforced leave for ten (10) days or more.

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[3] *Id.*
[4] *Id.*
[5] Agency's Answer to Employee's Petition for Appeal (March 23, 2021).
[6] *Id.*
[7] *Id.* at Page 2 *citing* to *Grant v District of Columbia*, 908 A.2d 1173, 1178 (D.C. 2006) and D.C. Code§§1-08.01(a), 1-609.51.
[8] It should be noted that Agency filed a Motion to Dismiss on June 21, 2021, renewing its jurisdiction argument and citing that the matter should also be dismissed due to Employee's failure to respond. The undersigned notes that Agency's motion to dismiss for failure to prosecute is moot given Employee's June 22, 2021 correspondence that he did not receive the previous orders and because Employee submitted his response by July 6, 2021 as required by the June 22, 2021 Order issued by the undersigned.
[9] *See also*, Chapter 6, §604.1 of the District Personnel Manual ("DPM") and OEA Rules.

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), states that "[t]he employee shall have the burden of proof as to issues of jurisdiction..." Pursuant to this rule, the 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." This Office has no authority to review issues beyond its jurisdiction.[10] Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.[11] Employees have the burden of proof for issues regarding jurisdiction and must prove jurisdiction by a preponderance of evidence.

The undersigned agrees with Agency's assertion that OEA does not have jurisdiction over this matter. Agency asserts in its Answer to Employee's Petition for Appeal, that Employee's position was an MSS appointment, and as such, he was classified as an 'at-will' employee. The D.C. Personnel Regulations, Chapter 38, § 3813.1, provides that "*an appointment to the Management Supervisory Service is an at-will appointment. A person appointed to a position in the Management Supervisory Service serves at the pleasure of the appointing authority, and may be terminated at any time.* (Emphasis Added)." Employee does not dispute his MSS classification, rather, Employee avers that Covid-19 State of Emergency Declarations issued in 2020 provides him rights to an appeal before this Office. In his response dated July 6, 2021, Employee argued that given the District Government's Covid-19 State of Emergency at the time of his suspension, that he should be afforded appeal rights to this Office, specifically as it relates to the charges levied against him.[12] The undersigned disagrees. This Office has held that while there are procedural protections afforded to Career service employees, MSS employees are excluded from those protections.[13] Additionally, D.C. Official Code § 1-609.54 provides that MSS position appointments "shall be an at-will appointment." Moreover, D.C. Official Code § 1-609.05 (2001), provides that "at-will employees do not have any job protection or tenure."[14] Further, I find that the Covid-19 State of Emergency Declaration did not change this Office's jurisdictional authority.

Accordingly, I find that Employee's status as an MSS, 'at-will' employee at the time of his suspension preemptively precludes this Office from any further review of the merits of this case, as this Office lacks the jurisdictional authority to do so. Employees have the burden of proof for issues regarding jurisdiction and must meet this burden by a "preponderance of evidence." I have determined that Employee did not meet this burden. For these reasons, I find that OEA lacks jurisdiction to adjudicate this matter.

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[10] *See Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).
[11] *See Brown v. District of Columbia Public Schools*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (January 22, 1993); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).
[12] Employee's Response (July 11, 2019).
[13] *Charlotte Richardson v. Department of Youth Rehabilitation Services*, OEA Matter No. J-0013-14 (January 9, 2014).
[14] *Bowie v. Gonzalez*, 433 F.Supp.2d 24 (D.D.C 2006); citing *Adams v. George W. Cochran & Co.* 597 A.2d 28, 30 (D.C. 1991).

ORDER

It is hereby **ORDERED** that the petition in this matter is **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

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MICHELLE R. HARRIS, Esq.
Administrative Judge