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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ROXANNE CROMWELL,)	
Employee)	OEA Matter No. J-0009-18
)	
v.)	Date of Issuance: January 29, 2018
)	
DEPARTMENT OF SMALL AND LOCAL)	MONICA DOHNJI, Esq.
BUSINESS DEVELOPMENT,)	Senior Administrative Judge
Agency)	
_____)	
Roxanne Cromwell, Employee, <i>Pro Se</i>)	
Andrea Comentale, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On October 17, 2017, Roxanne Cromwell (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the Department of Small and Local Business Development’s (“Agency”) decision to terminate her from her position as an Administrative Officer, effective October 9, 2017. I was assigned this matter on October 23, 2017. On November 16, 2017, Agency filed its Answer to Employee’s Petition for Appeal, stating that Employee was still in her probationary period at the time of her termination and as such, OEA lacked jurisdiction over this matter.

Thereafter, I issued an Order on November 20, 2017, requiring Employee to address the jurisdictional issue raised by Agency in its Answer. Employee’s brief on jurisdiction was due on or before December 7, 2017. Agency had the option to submit a response on or before December 18, 2017. Both parties have submitted briefs addressing the jurisdiction issue in this matter. Because this matter could be decided on the basis of the documents of record, no proceedings were conducted. The record is now closed.

JURISDICTION

The jurisdiction of this Office, pursuant to *D.C. Official Code, § 1-606.03 (2001)*, 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 notes in her Petition for Appeal that she is a “Career permanent converted to Career Term”. She further explains that she “served in a Career Service permanent and was promoted into a term position w/o [sic] break in service.”¹ Additionally, Employee states in her brief on jurisdiction, dated December 7, 2017, that she had completed her probationary period prior to accepting the term position on May 2017, and that there was no break in service. Employee argues that the one year probationary requirement in her offer letter was a formality.

Agency’s position

Agency states in its Answer that an employee removed during a probationary period cannot appeal their removal to OEA. Agency explained that Employee was terminated during her one-year probationary period. Agency maintains that, Employee began service on May 15, 2015, as a Human Resources Assistant. Thereafter, on May 10, 2017, Employee was offered a Term appointment as an Administrative officer. The offer specifically informed Employee that she was subject to the completion of a one-year probationary period beginning on May 28, 2017. On

¹ See Petition for Appeal at Pages 3&4 (October 17, 2017).

October 9, 2017, Employee was terminated from her position without completing the one-year probationary period.²

Agency further notes in its brief on jurisdiction that Employee's appointment to the Administrative Officer position resulted from open competition. It explains that her appointment was a result of a vacancy announcement and Employee was promoted from a DS-201-9 position to a DS-341-12 position. Agency also notes that the Administrative Officer position was in a different line of work. Agency submits that Employee was informed of the requirement to serve a second probationary period in her offer letter, and she accepted the position.³

Analysis

The threshold issue in this matter is one of jurisdiction. This Office has no authority to review issues beyond its jurisdiction.⁴ Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.⁵ 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 not relevant to this case, of permanent employees in Career and Education Service who are *not serving in a probationary period*, or who have successfully completed their probationary period (emphasis added).

Chapter 8, § 817.1 of the District Personnel Manual ("DPM") states that "[a]n agency may appoint by transfer an otherwise eligible employee serving under a Career Appointment (Probational) or Career Appointment (Permanent) under a different personnel authority." Additionally, § 823.8 provides that, an employee serving under a term appointment shall not acquire permanent status on the basis of the term appointment, and shall not be converted to a regular Career Service appointment, *unless the initial term appointment was through open competition within the Career Service and the employee has satisfied the probationary period* (emphasis added). Moreover, DPM § 813.9 (c) highlights in pertinent parts that, "[a]n employee who once satisfactorily completed a probationary period in the Career Service *shall be required to serve another probationary period when the employee... is appointed as a result of open competition to a position in a different line of work*, as determined by the appropriate personnel authority based on the employee's actual duties and responsibilities." (Emphasis added).

In the instant matter, Employee was offered and she accepted a Term appointment on May 10 2017, with a requirement for her to serve a one-year probationary period. Employee acknowledges that she was serving as a Term employee at the time of her termination. Employee

² Agency's Answer to Employee's Petition for Appeal (November 16, 2017).

³ Agency's Response to Employee's Brief on Jurisdiction (January 22, 2018).

⁴ See *Banks v. District of Columbia Public School*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

⁵ See *Brown v. District of Columbia Public School*, 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).

notes in her Petition for Appeal that she was a career permanent converted to career term. Employee's offer letter further states that, the position Employee accepted was a term appointment with a Not-to-Exceed (NTE) 396 days. The NTE date of the Term appointment is May 27, 2018. Therefore, I find that, Agency had the authority to transfer Employee who was serving under a career appointment (permanent) to a Term appointment. I further find that, Employee was aware of the transfer/term appointment and she was serving as a term employee at the time of her termination.

As noted in DPM § 823.8, an employee serving a term appointment can only be converted to a regular Career Service appointment if (1) the initial term appointment was through open competition within the Career Service and (2) the employee has satisfied the probationary period.

Open Competition

Open Competition is defined as the use of examination procedures which permit application and consideration of all persons without regard to current or former employment with the District government.⁶ The parties do not dispute that Employee was appointed through open competition. Because Employee was appointed by open competition, she was required to serve a second probationary period if the new position was in a different line of work.

Here, Employee was initially hired as a Human Resources Assistant with the D.C. Department of Human Resources, Office of the Director. She applied for, and accepted a new position as an Administrative Officer for the Department of Small and Local Business Development. Based on the job description provided by Agency, and Employee's assertion that she was performing dual duties (as a Human Resources Liaison and an Administrative Officer), I find that these two positions are in different lines of work. Consequently, Employee was required to serve a second probationary period.

Probationary Period

Because Employee's new position – Administrative Officer was in a different line of work from her previous position of Human Resources Assistant, Employee was required to serve a second probationary period, although there was no break in service.⁷ Employee was hired as a Human Resources Assistant in May of 2015. She completed her one-year probationary period for this position in May of 2016. In May of 2017, Employee was offered, and she accepted a new position as an Administrative Officer in a different line of work. As such, Employee was required to serve a second one-year probationary period. The effective date of the second probationary period was from May 28, 2017 to May 27, 2018. Employee was terminated from this position effective October 9, 2017. Accordingly, I find that Employee did not complete the second probationary period.

Section 814.3 of the DPM states that a termination during an employee's probationary period cannot be appealed to this Office. Additionally, this Office has consistently held that an

⁶ See DPM § 899.1.

⁷ DPM §813.9 (c).

appeal by an employee serving in a probationary status must be dismissed for lack of jurisdiction.⁸ While Employee argues that she was not required to serve a second probationary period because there was no break in service, DPM § 813.9(c) provides otherwise. Accordingly, in compliance with DPM §§ 813.9(c), 817.1, and 823.8, I find that Employee was required to serve a second probationary period and since she was terminated prior to completing the second probationary period, I conclude that this Office lacks jurisdiction in this matter. Furthermore, Career service employees who are serving in a probationary period are precluded from appealing a removal action to this Office until their probationary period is over. The record shows that Employee was hired effective May 28, 2017, and terminated effective October 9, 2017.⁹ Accordingly, I find that Employee was removed from service when she was still within her probationary period. For these reasons, I conclude that Employee is precluded from appealing her removal to this Office.

Employee has the burden of proof on issues of jurisdiction, pursuant to OEA Rule 628.2.¹⁰ Employee must meet this burden by a “preponderance of the evidence” which is defined in OEA Rule 628.1, *id.*, as 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.” Based on the foregoing, I find that Employee did not meet the required burden of proof, and that this matter must be dismissed for lack of jurisdiction. Consequently, I am unable to address the factual merits, if any, of this matter.

ORDER

It is hereby **ORDERED** that the Petition for Appeal is **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Senior Administrative Judge

⁸ 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); *Alexis Parker v. Department of Health*, OEA Matter No. J-0007-11 (April 28, 2011).

⁹ Agency’s Answer, *supra*.

¹⁰ 59 DCR 2129 (March 16, 2012).