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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

|                      |   |                                    |
|----------------------|---|------------------------------------|
| In the Matter of:    | ) |                                    |
|                      | ) |                                    |
| ERNEST HUNTER,       | ) |                                    |
| Employee             | ) | OEA Matter No. 2401-0036-05        |
|                      | ) | OEA Matter No. 1601-0046-05        |
|                      | ) |                                    |
| v.                   | ) | Date of Issuance: November 9, 2005 |
|                      | ) |                                    |
| DISTRICT OF COLUMBIA | ) |                                    |
| WATER AND SEWER      | ) |                                    |
| AUTHORITY,           | ) | ERIC T. ROBINSON, Esq.             |
| Agency               | ) | Administrative Judge               |
|                      | ) |                                    |

Ernest Hunter, Employee Pro-Se  
Stephen Cook, Agency Representative

**INITIAL DECISION**

INTRODUCTION PROCEDURAL HISTORY AND STATEMENT OF FACTS

On March 14, 2005, the Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals (hereinafter “OEA” or “the Office”) contesting the abolishment of his position as a Contract Compliance Specialist through a Reduction in Force (hereinafter “RIF”).<sup>1</sup> In his Petition for Appeal, the Employee alleges that the D.C. Water and Sewer Authority (hereinafter “the Agency” or “WASA”) did not follow applicable RIF procedures as outlined in the Comprehensive Merit Personnel Act (hereinafter “CMPA”). The Employee alleges, among other things, that he was entitled to one round of lateral competition within his competitive area. The Employee was notified of the abolishment

<sup>1</sup> Office of Employee Appeals Matter No. 2401-0036-05

of his position by a letter, sent by the Agency, dated March 3, 2005. According to this letter, the RIF's effective date was April 4, 2005.

The Agency then sent a series of letters resulting in a letter, dated March 16, 2005, to the Employee. The aforementioned letter references the final decision by Olu Adebo supporting the Employee's termination of employment from WASA. The basis for his removal was "discourteous conduct, including boisterous conduct, intimidation, unnecessary disruption of work area; abusive, threatening loud and profane language." According to this letter, Employee's termination became effective on March 16, 2005. The Employee then filed another Petition for Appeal with this Office on April 11, 2005.<sup>2</sup> In this appeal, the Employee alleges that the termination "...was done out of continuous retaliation and harassment of me and my wife for my opposition to WASA abuse of authority and discriminatory practices. My wife has also been terminated by the agency for the same actions which we believe are illegal activity of WASA." See *Employee's Prehearing Statement § C page 3*. Furthermore, the Employee alleged that WASA, both in attempting to RIF his position, as well as ultimately terminating him, violated the D.C. Whistleblower Protection for Employees of Contractors and Instrumentalities of the District Government Act (hereinafter "Whistleblower Act") found in D.C. Official Code § 1-615.51 *et seq.*

Both of these matters were assigned to me on June 14, 2005. I issued an Order Convening a Prehearing Conference, for both matters, scheduled to occur on October 13, 2005. A Prehearing Conference was held on October 13, 2005. During the Prehearing Conference, the Employee admitted that he was terminated from his employment with WASA as a result of WASA's disciplinary process rather than being separated as the result of a RIF. I consolidated both matters pursuant to OEA Rule 612.1, 46 D.C. Reg. 9303 (1999). I also ordered both parties to submit final legal briefs focusing on the jurisdiction of this Office. Since both matters could be decided based on the parties' positions as stated at the Prehearing Conference and on the documents of records, no additional proceedings were held. The record is closed.

#### JURISDICTION

As will be explained below, the jurisdiction of this Office has not been established.

#### BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. at 9317 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:

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<sup>2</sup> Office of Employee Appeals Matter No. 1601-0046-05

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 629.2, *id.*, states that “the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing.”

### ISSUES

Whether these matters should be dismissed for lack of jurisdiction.

### ANALYSIS AND CONCLUSIONS

#### **Reduction in Force (OEA Matter No. 2401-0036-05)**

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the CMPA, sets forth the law governing this Office. D.C. Official Code § 1-606.03 (“Appeal procedures”) reads in pertinent part as follows:

(a) An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . . , an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . . , or a reduction in force [RIF]. . . .

This Office has no authority to review issues beyond its jurisdiction. *See Banks v. District of Columbia Pub. Sch.*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (Sept. 30, 1992), \_\_\_ D.C. Reg. \_\_ ( ). Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding. *See Brown v. District of Columbia Pub. Sch.*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993), \_\_\_ D.C. Reg. \_\_ ( ); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (Jan. 22, 1993), \_\_\_ D.C. Reg. \_\_ ( ); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995), \_\_\_ D.C. Reg. \_\_ ( ). Furthermore, an agency's internal administrative remedies must be exhausted before an employee may appeal to this Office. *See Bufford v. District of Columbia Pub. Sch.*, 611 A.2d 519 (D.C. 1992).

According to D.C. Official Code § 1-606.03, this Office may only review a RIF if it has been finalized. In order for a RIF to be finalized, the Employee must be separated from his position as a result of the RIF. In the instant matter, the Employee was given notice of the RIF but before its effective date, the Employee was terminated from his position, not because of the RIF, but because of an alleged violation of WASA Personnel

Regulations. As a result, Employee's RIF never occurred and therefore was never finalized. This Office does not have jurisdiction over RIF's that have not been finalized. See D.C. Official Code § 1-606.03, *supra*. As it relates to the proposed RIF, I find that the Employee has failed to establish, by a preponderance of the evidence, that this Office has jurisdiction over this matter.

#### **Adverse Action (OEA Matter No. 1601-0046-05)**

As was stated above, Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the CMPA, sets forth the law governing this Office. Most agencies of the District government are subject to the CMPA, and thus employees of those agencies enjoy appeal rights to this Office. See also, D.C. Code § 1-601.01 *et seq.* However, as will be shown below, the District of Columbia Water and Sewer Authority is exempt from OEA review of final personnel decisions involving adverse actions.

Effective April 18, 1996, D.C. Law 11-111 (the "Water and Sewer Authority Establishment and Department of Public Works Reorganization Act of 1996") established, "as an independent authority of the District government, the District of Columbia Water and Sewer Authority. [WASA] shall be a corporate body, created to effectuate certain public purposes, that has a separate legal existence within the District government."<sup>3</sup> D.C. Official Code § 34-2202.02(a) (2001). (footnote added).

Furthermore, D.C. Official Code § 34-2202.15 states:

Merit personnel system inapplicable [Formerly § 43-1685]

(a) Except as provided in this section and in § 34-2202.17(b), no provision of § 1-601.01 *et seq.*, shall apply to employees of the Authority except as follows:

(1) Subchapters V and XVII of Chapter 6 of Title 1 shall apply to all employees of the Authority<sup>4</sup>; and

(2) Subchapters XII, XXI, XXII, and XXVI of Chapter 6 of Title 1 shall apply to employees transferred to the Authority who are covered under the Civil Service Retirement System and the District of Columbia Defined Contribution Pension Plan; provided, that all Authority employees continuously employed by the District

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<sup>3</sup> WASA's predecessor agency was the Water and Sewer Utilities Administration (WASUA).

<sup>4</sup> Subchapter V of Chapter 6 of Title 1 creates and empowers the Public Employee Relations Board. Subchapter XVII of Chapter 6 of Title 1 deals with Labor and Management Relations.

government since December 31, 1979, shall be guaranteed rights and benefits at least equal to those currently applicable to such persons under provisions of law and rules and regulations in force prior to April 18, 1996.<sup>5</sup>

(b) An employee of the Authority who is covered under the District of Columbia Defined Contribution Pension Plan, who meets the minimum requirements for participation in a retirement plan established by the Authority, may, upon written notice to the Authority, elect, instead, to be covered by the Authority's plan.

As is evident from the foregoing, none of the provisions of D.C. Code § 34-2202.15 confer jurisdiction on OEA over WASA's final personnel decisions involving adverse actions. Quite the contrary, according to 21 D.C.M.R. 5209.8:

Employees may appeal disciplinary actions through the grievance process established herein. The decision of the General Manager represents the Authority's final administrative review. The notice of final agency decision shall include a statement of the employee's right to bring an action in the D.C. Superior Court seeking judicial review of the final administrative decision by the General Manager.

It is evident from the preceding language that a WASA employee's appeal rights in an adverse action lie solely with the D.C. Superior Court, and not this Office. Thus, the Employee cannot appeal an adverse action to this Office. As it relates to the Employee's adverse action claim, I find that the Employee has failed to establish, by a preponderance of the evidence, that this Office has jurisdiction over this matter.

### **Whistleblower Act**

The Employee has argued that this Office should exercise jurisdiction over his causes of action through the Whistleblower Act. This Act encourages Employees of the D.C. government to "report waste, fraud, abuse of authority, violations of law, or threats to public health or safety without fear of retaliation or reprisal." D.C. Official Code § 1-615.51. To achieve this objective, the Whistleblower Act provides that "a supervisor shall not threaten to take or take a prohibited personnel action or otherwise retaliate against an employee because of the employee's protected disclosure or because of an

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<sup>5</sup> Subchapter XII of Chapter 6 of Title 1 specifies hours of work, legal holidays, and leave for D.C. Government Employees. Subchapter XXI of Chapter 6 of Title 1 handles health benefits for D.C. Government Employees. Subchapter XXII of Chapter 6 of Title 1 deals with life insurance benefits for D.C. Government Employees. And, Subchapter XXVI of Chapter 6 of Title 1 concerns itself with issues surrounding the retirement of D.C. Government Employees.

employee's refusal to comply with an illegal order." D.C. Official Code § 1-615.53. Furthermore, § 1-615.54(a) states that:

An employee aggrieved by a violation of § 1-615.53 may bring a civil action before a court or a jury in the Superior Court of the District of Columbia seeking relief and damages, including but not limited to injunction, reinstatement to the same position held before the prohibited personnel action or to an equivalent position, and reinstatement of the employee's seniority rights, restoration of lost benefits, back pay and interest on back pay, compensatory damages, and reasonable costs and attorney fees. A civil action shall be filed within one year after a violation occurs or within one year after the employee first becomes aware of the violation...

It is evident from the foregoing that the D.C. Superior Court has original jurisdiction over Whistleblower Act claims.<sup>6</sup> This Office was not granted original jurisdiction over such claims. Rather, the original jurisdiction of this Office was established in §1-606.03 of the D.C. Official Code:

(a) An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . ., an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . ., or a reduction in force [RIF]. . . .

Based on the preceding language, some causes of action under the Whistleblower provisions may be adjudicated by this Office. However, this does not mean that *all* causes of action pertaining to the Whistleblower Act may be appealed to this Office.<sup>7</sup> This Office has previously held that when it lacks jurisdiction to adjudicate the merits of

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<sup>6</sup> On May 20, 2005, the Employee, with the assistance of legal counsel, filed a complaint with the D.C. Superior Court (Civil Action No. 05-0003817) citing the same causes of action (among others) as this appeal. This complaint includes alleged violations (by WASA management) of the D.C. Whistleblower Act.

<sup>7</sup> It bears noting the relevant language contained in § 1-615.56 of the Whistleblower Act:

#### Election of Remedies

(a) The institution of a civil action pursuant to § 1-615.54 shall preclude an employee from pursuing any administrative remedy for the same cause of action from the Office of Employee Appeals...

(b) No civil action shall be brought pursuant to § 1-615.54 if the aggrieved employee has had a final determination on the same cause of action from the Office of Employee Appeals...

Thus, if an aggrieved employee has a matter with OEA that may otherwise be adjudicated by this Office, said employee may include, as part of his Petition for Appeal, any pertinent Whistleblower violations.

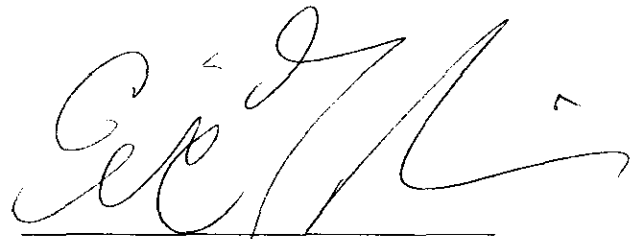
an employee's petition for appeal, this Office is unable to address the merit(s) of the Whistleblower claim(s) contained therein. *See, Rebecca Owens v. Department of Mental Health*, OEA Matter No. J-0097-03 (April 30, 2004), \_\_\_ D.C. Reg. \_\_\_.

I find that since this Office does not have jurisdiction over the Employee's RIF appeal (OEA Matter No. 2401-0036-05) or his adverse action appeal (OEA Matter No. 1601-0046-05), that consequently this Office does not have the jurisdiction to adjudicate the merits of his Whistleblower Act claims. As a result, these matters must be dismissed for lack of jurisdiction.

ORDER

It is hereby ORDERED that Agency's Motions to Dismiss for lack of jurisdiction are GRANTED, and that these matters be DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

A handwritten signature in black ink, appearing to read 'Eric T. Robinson', written over a horizontal line.

ERIC T. ROBINSON, Esq.  
Administrative Judge