

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
MICHAEL NELSON)	OEA Matter No. J-0041-07
Employee)	
)	Date of Issuance: March 19, 2007
v.)	
)	
DISTRICT OF COLUMBIA)	Joseph E. Lim, Esq.
WATER AND SEWER AUTHORITY)	Senior Administrative Judge
Agency)	
_____)	

Stephen Cook, Agency Representative
Michael Nelson, Employee pro se

INITIAL DECISION

INTRODUCTION

On January 9, 2007, Employee filed a petition for appeal from Agency's final decision removing him from his position of Industrial Equipment Mechanic, effective November 1, 2006, for inexcusable absence without leave and for violating a Last Chance Agreement. The matter was then assigned to this administrative judge on February 26, 2007.

By Order issued February 27, 2007, the undersigned required Employee to meet his burden of proof on the issue of jurisdiction by March 12, 2007. Agency was to submit its response, if any, by March 19, 2007. Although Agency submitted its response; Employee failed to do so. Because the matter can be decided based on the documents of record, no proceedings are necessary. The record is now closed.

JURISDICTION

As will be explained below, the Office lacks jurisdiction over this matter.

ISSUE

Whether this matter must be dismissed for lack of jurisdiction.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Subchapter VI of the Comprehensive Merit Personnel Act (CMPA), D.C. Law 2-139, D.C. Official Code § 1-601.01 *et seq.* (2001), establishes this Office and sets forth its appeal procedures. That subchapter 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]. . . .

D.C. Official Code §1-606.03(a). Thus, an employee of an agency covered by Subchapter VI of the CMPA has a right to appeal to this Office, among other things, an adverse action for cause that results in removal. However, Agency is exempt from the requirements of Subchapter VI.

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 Agency as an independent authority of the District government. D.C. Official Code §34-2202.02(a). Its enabling statute sets forth the laws to which Agency is subject:

Except as provided in §§ 34-2202.14 and 34-2202.15, [Agency] shall be subject to all laws applicable to offices, agencies, departments, and instrumentalities of the District government, and shall be subject to the provisions of the District of Columbia Home Rule Act, approved December 24, 1973.

D.C. Official Code §34-2202.02(b). Therefore, Agency is subject to all laws applicable to the District government, with two (2) exceptions. Of specific relevance here, Section 34-2202.15 (“Merit personnel system inapplicable”) reads as follows: “(a) Except as provided in this section and in § 34-2202.17(b), no provision of [the CMPA] shall apply to employees of [WASA]” That section provides that Subchapter V (Public Employee Relations Board), Subchapter XVII (Labor Management Relations Act), and the pension rights provisions of the Act are still applicable to Agency. Section 34-2202.17(b) (“Transition provisions”) reads as follows: “Until the Board [of WASA] establishes a personnel system . . . [the CMPA] and implementing rules and regulations shall continue to apply to [WASA].” Under this section, all subchapters of the CMPA, including Subchapter VI, were to continue to apply to Agency until it established a personnel system.

Effective November 21, 1997, Agency established its personnel system and published the rules and regulations governing that system. *See* 44 D.C. Reg. 7144 *et seq.* (1997). Section 5209 of those rules and regulations (44 D.C. Reg. at 7158 *et seq.*) sets forth Agency’s disciplinary system, including the causes for which an employee may be disciplined, and Section 5210 (“Grievance Process”) (44 D.C. Reg. at 7163 *et seq.*) establishes, *inter alia*, the procedures by which an employee of Agency can appeal a disciplinary action taken against him. In particular, Section 5209.8 (44 D.C. Reg. at 7162) reads as follows:

Employees may appeal disciplinary actions through the grievance process established herein. The decision of [Agency's] General Manager represents [Agency'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.

Thus, as of November 21, 1997, when Agency established its personnel system, it was no longer statutorily required to comply with most of the requirements of the CMPA, including the appeal procedures of Subchapter VI.¹ Further, the disciplinary system Agency established does not give an employee a right to appeal to this Office. Rather, an employee may bring an action in the Superior Court.

Here, Employee appealed his removal to this Office on January 9, 2007, long after his right to do so had ceased. Since an employee of WASA can no longer appeal a final decision effecting an adverse action to this Office, the undersigned concludes that this matter must be dismissed for lack of jurisdiction.

ORDER

It is hereby ORDERED that this matter is DISMISSED.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Administrative Judge

¹ Since that time, the undersigned notes that, pursuant to H.R. Conference Report No. 106-1005, which accompanied the District of Columbia Appropriations Act of 2001, P.L. 106-5222, WASA is covered by D.C. Official Code § 1-624.08, pertaining to RIFs for Fiscal Year 2000 and beyond. The Conference Report also states that "while the conferees agree that [§ 1-624.08] applies to [WASA], it does not change [WASA's] general exemption from coverage under the CMPA or [WASA's] independent legal status within the District Government." Conference Report at 64. Section 1-624.08 provides limited appeal rights to this Office for employees who have been separated as a result of a RIF. Thus, it appears that employees of WASA may now appeal RIFs to this Office. Nevertheless, the instant matter does not involve a RIF, and thus any putative appeal rights to this Office by an employee of WASA who has been rified are inapplicable here.