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

In the Matter of:)	
)	
STEVENSON WACHIRA,)	
Employee)	
)	OEA Matter No. J-0055-16
v.)	
)	Date of Issuance: January 5, 2017
UNIVERSITY OF THE DISTRICT)	
OF COLUMBIA,)	
Agency)	MICHELLE R. HARRIS, Esq.
)	Administrative Judge
<hr/>		
Stevenson Wachira, Employee, <i>Pro Se</i>		
Anessa Abrams, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On June 22, 2016, Stevenson Wachira (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the University of the District of Columbia’s (“Agency” or “UDC”) decision not to renew his appointment as a faculty member. The effective date of the action was May 23, 2016. On June 23, 2016, and August 4, 2016, Employee filed Addendums to his Petition for Appeal. Agency’s answer was due by July 25, 2016. On July 21, 2016, Agency filed a Motion for an Extension of Time to file its Answer. On August 2, 2016, Employee filed a response to Agency’s Motion. On August 4, 2016, I issued an Order for Answer and Statement of Good Cause to Agency. Agency had until August 15, 2016, to respond. On August 12, 2016, Agency filed its Statement of Good Cause, along with a Motion to Dismiss Employee’s Petition for Appeal, and a Motion to hold its Answer in Abeyance pending a decision on its Motion to Dismiss. On August 19, 2016, Employee filed a response to Agency’s Motion to Dismiss.

On August 29, 2016, I issued an Order denying Agency’s Motion for an Extension of time to file its Answer, and its Motion to Hold the Answer in Abeyance. Further, I required that Agency file its Answer on or before September 9, 2016. Agency filed its Answer on September 9, 2016. Agency noted in its Motion to Dismiss and Answer that OEA lacked jurisdiction over this matter because Employee was in probationary status at the time of termination. As a result, on September 13, 2016, I issued an order requiring Employee submit a brief addressing the jurisdiction matter raised by Agency. Employee had until September 27, 2016 to submit his brief. Agency had the option to respond on or before October 12, 2016. On September 19, 2016, Employee filed a Motion for an Extension of Time to file his response. On September 23, 2016, I issued an Order granting

Employee's request. Employee had until October 4, 2016 to submit his response. Additionally, Agency had the option to submit its response on or before October 19, 2016. On October 7, 2016, Employee filed his response to Agency's Answer along with his Legal Brief on Jurisdiction. Agency submitted its Response to Employee's Brief on Jurisdiction on October 19, 2016. On November 9, 2016, Employee filed a Motion for Summary Disposition. On November 18, 2016, Agency filed a response to Employee's Motion for Summary Disposition.

After considering the parties' arguments as presented in their submissions to this Office, I have decided that an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

The jurisdiction of this Office has not been established in this matter.

ISSUE

Whether Employee's Petition for 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.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee worked at Agency as an Assistant Professor of Computer Science in the University of the District of Columbia Community College.¹ In a letter dated May 23, 2016, Employee was given notice that "in accordance with Articles XI.A.2 and XVI.2 of the Seventh Master Agreement between the University of the District of Columbia and the University of the District of Columbia Faculty Association/NEA, your appointment as a probationary faculty member in the Computer

¹ Employee's Petition for Appeal (June 22, 2016).

Science Program at the University of the District of Columbia Community College will not be renewed.”²

Employee’s Position

Employee argues that he was improperly terminated and that his dismissal violated the Seventh Master Agreement and District of Columbia policies.³ Employee argues that over the course of his term with Agency that he was forced to work more than 40 hours a week and was not appropriately compensated.⁴ Further, Employee asserts that he was subject to humiliation and threats for disagreements with issues related to the Computer Science Technology Program that he was forced to coordinate against his wishes.⁵

Further, Employee indicates that his notice of non-renewal was improper because it was not on the correct University letterhead; rather, it was on the Community College letterhead. Employee argues that the Community College does not have the “authority to discharge, dismiss or non-renew faculty (the community college can only make recommendations).”⁶ Employee also proffers that the Sixth and Seventh Master Agreement, indicate that a faculty member may not be discharged, dismissed or non-renewed after the conclusion of the Academic Year.⁷ Employee argues that the Academic Year ended on May 15, 2016, thus his letter dated May 23, 2016, for non-renewal is improper.

Employee argues that the Seventh Master agreement provides that the probationary period is comprised of three academic years, not three calendar years, and as a result he was not on probation at the time of his discharge. Employee cites he should not have been considered probationary due to his record of “creditable prior service” in District government, namely his previous position as an adjunct professor at UDC, and his position as a teacher at District of Columbia Public Schools.⁸ Employee cites that he held an adjunct professor position with UDC between August 1988 and May 1998, and again in January 2000 through January 2003.⁹ Additionally, Employee cites that he worked at the District of Columbia schools as a Computer Technology Teacher.¹⁰ Further, Employee argues that he was a visiting professor with UDC from 2012 through 2014. As a result, Employee proffers that he was not a “new hire”, subject to a probationary term, but an employee who had “simply transferred/transitioned into the same faculty position that he had held for four (4) straight Academic Years.”¹¹ Further, Employee argues that it violates the CBA if Agency dismisses, discharges, terminates or non-renews a faculty member while they are in “off duty” status.¹² Additionally, Employee argues that he was given “reasonable assurance” of a continued position with Agency,

² Employee’s Petition for Appeal (June 22, 2016).

³ Employee’s Petition for Appeal Addendum to Question 14 (August 4, 2016).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at Page 3.

⁷ *Id.*

⁸ Employee’s Response to Agency’s Answer at Page 12. (October 7, 2016).

⁹ Employee’s Legal Brief on Jurisdiction (October 7, 2016).

¹⁰ *Id.*

¹¹ Employee’s Response to Agency’s Motion to Dismiss (August 23, 2016).

¹² *Id.* at Page 2.

following communications with Agency personnel.¹³ Employee maintains that he was not in probationary status and as a result is entitled to have Agency's decision reversed.¹⁴

Agency's Position

Agency asserts that this Office lacks jurisdiction over this matter because Employee was in probationary status at the time of his discharge. Further, Agency argues that the discharge was done in accordance with all applicable laws rules and regulations. Agency argues that the collective bargaining agreement between Agency and Employee's Union in effect at the time of Employee's hire "makes clear that faculty members who are not granted tenure are on probation for the first three years of employment."¹⁵ Further, Agency argues that the "current collective bargaining agreement, which was in effect at the time of Wachira's termination, includes the same provision."¹⁶ Agency contends that "Article XI.A.2 of the Seventh Master Agreement, the operative collective bargaining agreement between the University and Wachira's Union at the time of termination, provides that "[f]or the first three years of employment, non-tenured faculty who began teaching during or after the 2003-04 Academic Year may be discharged or their contracts not renewed without recourse to the grievance and arbitration procedures."¹⁷ Agency cites that Employee's employment commenced on August 18, 2014, thus his three year probationary term went up to and included August 18, 2017.¹⁸ Agency also avers that Employee's claim that he was not in probationary status due to previous summer appointments, previous jobs and teaching assignments is incorrect.¹⁹ Agency contends that Employee's argument that District of Columbia Municipal Regulations ("DCMR") indicate that that he should be credited for his prior service with DCPS and other temporary assignments with UDC is without merit.²⁰

Further, Agency argues that the code provisions cited by Employee only apply to Career appointments, and that Employee has failed to provide any evidence that the positions for which he wants prior service credit met that requirement.²¹ Agency argues that it provided notice of Employee's non-renewal on May 23, 2016, which was still within the probationary period. Agency maintains that Employee was still on probation when his appointment was not renewed on May 23, 2016, and as a result OEA lacks jurisdiction over his Petition for Appeal. Agency argues that the CBA also provides that "during the probation period, the University at its sole discretion, may decide for any reason not renew a faculty member's contract, or to terminate the employment of a faculty member, and such decisions shall not be subject to the grievance and arbitration procedure."²² As a result, Agency argues that it would be improper for OEA to exercise jurisdiction over this matter.

Agency contends that Employee's challenge of his probationary status is without merit. Further, Agency argues that the CBA provides that the probationary term is for three calendar years, not three academic years as proffered by Employee. Agency argues the terms of the CBA are clear and unambiguous regarding the three year probationary period, and as a result Employee's argument

¹³ Employee's Legal Brief on Jurisdiction (October 7, 2016).

¹⁴ Employee's Motion for Summary Disposition (November 2, 2016).

¹⁵ Agency's Answer to Employee's Petition for Appeal (September 9, 2016).

¹⁶ *Id.* at Page 2.

¹⁷ Agency's Answer to Employee's Petition for Appeal at Page 5 (September 9, 2016).

¹⁸ Agency's Response to Employee's Brief on Jurisdiction at Page 6 (October 19, 2016).

¹⁹ *Id.*

²⁰ *Id.* at Page 16.

²¹ *Id.*

²² *Id.* at Page 4.

that the period is broken up into “on duty” and “off duty” is not an interpretation supported by the guidelines set forth in the CBA.²³ Moreover, Agency argues that upon further analysis of the language used in other provisions of the agreement that the “parties clearly understood the difference between the academic year and calendar year in drafting the collective bargaining agreement as the terms are separately used throughout the agreement.”²⁴ Agency avers that Employee is unable to provide any information or cite to provisions in the CBA “to support his argument that his probation was “paused” during the summer and was only active during the academic year.”²⁵

Agency also argues that OEA lacks jurisdiction over generalized grievances. Agency proffers that Employee’s claims regarding work hours, assignments and compensation are all governed by the CBA, and fall outside of the scope of the jurisdiction of this Office.²⁶ Similarly, Agency argues that OEA is not the proper forum for Employee’s claims regarding discrimination, harassment and retaliation. Agency denies all allegations set forth by Employee in his Petition for Appeal. Agency argues it was within their discretion to decide not to renew Employee’s appointment as a probationary faculty member.²⁷ As a result, Agency argues that its actions were in accordance with all applicable laws, rules and regulations, and that OEA lacks jurisdiction over this matter.

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”) § 604.1,²⁸ this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting: (a) a performance rating resulting in removal; 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. In the instant matter, Employee’s employment was governed under the Seventh Master Agreement of the Collective Bargaining Agreement (“CBA”) between Agency and the University of the District of Columbia Faculty Association/NEA Union, of which Employee was a member at the time of the adverse action.

Accordingly, OEA usually does not review matters that are under the guidance of a Collective Bargaining Agreement. However, the Court of Appeals held in *Brown v. Watts*, 933 A.2d 529 (April 15, 2010), that this Office is not “jurisdictionally barred from considering claims that at termination violated the express terms of an applicable collective bargaining agreement.”²⁹ The Court went on to explain that the “Comprehensive Merit Personnel Act (“CMPA”) gives this Office broad authority to decide and hear cases involving adverse actions that result in removal, including matters covered under subchapter [D.C. Code § 1-616] that also fall within the coverage of a

²³ Agency’s Response to Employee’s Brief on Jurisdiction at Pages 6 and 7 (October 19, 2016).

²⁴ *Id.* at Page 8.

²⁵ *Id.*

²⁶ Agency’s Answer to Employee’s Petition for Appeal at Page 6 (September 9, 2016).

²⁷ *Id.*

²⁸ See also, Chapter 6, §604.1 of the District Personnel Manual (“DPM”) and OEA Rules.

²⁹ *Shands v. District of Columbia Public Schools*, OEA Matter No. 1601-0239-12 (May 7, 2014); See also *Robbins v District of Columbia Public Schools*, OEA Matter No. 1601-0213-11 (June 6, 2014).

negotiated grievance procedure.”³⁰ In the instant matter, Employee was a member of the University of the District of Columbia Faculty Association/NEA Union (“Union”) at the time of his discharge from service. Based on the holding in *Watts*, I find that this Office may interpret the relevant provisions of the CBA between Agency and the Union, related to the adverse action at issue in this matter.

In the instant matter, Article XIV.2 of the Seventh Master Agreement³¹ of the CBA between Agency and Employee’s Union in effect at the time of Employee’s discharge provides that:

“Faculty members who have not been granted tenure shall be on probation for the first three years of their employment at the University and shall be employed pursuant to a one-year individual employment agreement in each such year. During the probation period, the University at its sole discretion may decide for any reason not to renew a faculty member’s contract, or to terminate the employment of a faculty member, and such decisions shall not be subject to the grievance and arbitration procedure.”³²

Further, Article XIV, Section Two, of the Sixth Master Agreement of the CBA between Agency and Employee’s Union that was in effect at the time of Employee’s hire states in pertinent part that: “Faculty members hired after the effective date of this Agreement who have not been granted tenure shall be on probation for the first three years of their employment at the University and shall be employed pursuant to one year individual employment agreement in each such year.”³³

Employee was notified in a correspondence dated May 23, 2016, that his appointment would not be renewed.³⁴ The effective date of the discharge was May 23, 2016, and the notice indicated that Employee would remain on the payroll until August 15, 2016, for benefits purposes only.³⁵ Employee commenced employment with Agency on August 18, 2014. Thus, under the provisions of this CBA, his probationary status would not end until August 18, 2017.

Employee argues that the provisions of the CBA should be interpreted to mean that the probationary term is represented by “three academic years, not three calendar years, and as a result he was not a probationary faculty member at the time of his discharge.”³⁶ The undersigned disagrees. Based on the clear and unambiguous language of the CBA, I find that it is clear that the meaning for the term of a “year” is meant to represent a twelve-month (12) calendar year, and not an academic year as Employee argues.³⁷ The CBA makes clear distinctions throughout the body of the document regarding calendar years and academic years. Pursuant to the holding in *Brown v. Watts*, supra, I find that there is no evidence in the record to support a finding that Agency’s termination of Employee violated the express terms of the CBA between Agency and Union. Additionally,

³⁰ *Id.*

³¹ *Id.* at Exhibit C.

³² *Id.*

³³ Agency’s Response to Employee’s Brief on Jurisdiction at Page 2. See also Exhibit B (October 19, 2016).

³⁴ Agency’s Answer to Employee’s Petition for Appeal at Page 3 (September 9, 2016).

³⁵ Employee also argued that the incorrect letterhead was used to provide notice of his discharge, in that it reflected the Community College. However, Employee was hired as an Assistant Professor in Computer Science for the UDC Community College, thus the undersigned finds this claim to be without merit. See also Employee’s Petition for Appeal at Addendum to Question 14- Exhibit 01 (June 22, 2016).

³⁶ Employee’s Legal Brief on Jurisdiction (October 7, 2016).

³⁷ Employee also argued that Agency violated the CBA by terminating him after the academic year. The undersigned finds this argument to be unsubstantiated by the evidence presented in the record.

Employee indicated in his initial filing of his Petition for Appeal that he was in probationary status at the time of termination.³⁸ Employee later cited that this was an error, and also cited to previous temporary assignments with UDC and another District government agency to support his claim.³⁹ However, the undersigned finds that the overwhelming evidence in the record reveals that Employee was in probationary status at the time of his termination. This Office has consistently held that an appeal to OEA by an employee serving in probationary status must be dismissed for lack of jurisdiction.⁴⁰ As a result I find that this Office lacks the jurisdiction to adjudicate this matter.

Grievances

Employee's other claims that he was subject to discrimination and humiliation by his supervisors are best characterized as grievances. D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR"). Per this statute, the purpose of the OHR is to "secure an end to unlawful discrimination in employment...for any reason other than that of individual merit." Complaints classified as unlawful discrimination are described in the District of Columbia Human Rights Act.⁴¹ Further, it is an established matter of public law that as of October 21, 1998, pursuant to the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, OEA no longer has jurisdiction over grievance appeals. Employee's other ancillary arguments regarding workload, compensation and hours are best characterized as grievances, and are also outside of OEA's jurisdiction to adjudicate. That is not to say that Employee may not press his claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee's other claims.

Retaliation

Employee submits his discharge was improper because he was retaliated against following his refusal to accept additional duties as a program coordinator for the Computer Science Technology program.⁴² To establish a retaliation claim, the party alleging retaliation must demonstrate the following: (1) he engaged in a protected activity by opposing or complaining about employment practices that are unlawful under the District of Columbia Human Rights Act ("DCHRA"); (2) his employer took an adverse personnel action against him; and (3) there existed a causal connection between the protected activity and the adverse personnel action.⁴³ A prima facie showing of retaliation under DCHRA gives rise to a presumption that the employer's conduct was unlawful, which the employer may rebut by articulating a legitimate reason for the employment action at issue.⁴⁴ Here, Employee states that he was terminated in retaliation because he refused to take on additional duties.⁴⁵ However, I find that Employee failed to provide any substantive evidence to support this claim. Consequently, I find that Employee's retaliation claims are unsubstantiated, and as such, fall outside the scope of OEA's jurisdiction.

³⁸ Employee's Petition for Appeal at Page 4, Question 21 (June 22, 2016).

³⁹ The undersigned finds that Employee's claims in his brief regarding his prior service were a misapplication of the DCMR provisions cited therein. Further, Employee indicated at the time he filed his Petition for Appeal that he was in probationary status at the time of termination. Despite his later indicating this was an error, the undersigned finds he did not present any substantive evidence to support his claim that he was not in probationary status at the time of his discharge.

⁴⁰ *Day v. Office of the People's Counsel*, OEA Matter No. J-0009-94, Opinion and Order on Petition for Review (August 19, 1991).

⁴¹ D.C. Code §§ 1-2501 *et seq.*

⁴² Employee's Petition for Appeal at Addendum to Question 14 (August 4, 2016).

⁴³ *Vogel v. District of Columbia Office of Planning*, 944 A.2d 456 (D.C. 2008).

⁴⁴ *Id.*

⁴⁵ Employee's Petition for Appeal Addendum to Question 14 (August 4, 2016).

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. Consequently, I find that this matter must be dismissed for lack of jurisdiction.

ORDER

It is hereby **ORDERED** that Employee’s Motion for Summary Disposition is **DENIED**. It is **FURTHER ORDERED** that the petition for appeal in this matter is **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

MICHELLE R. HARRIS, Esq.
Administrative Judge