

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Mark James)	OEA Matter No. J-0003-08
Employee)	
)	Date of Issuance: January 11, 2007
v.)	
)	Joseph E. Lim, Esq.
Office of the Chief Technology Officer)	Senior Administrative Judge
Agency)	
_____)	

Robert Deso, Esq., Employee Representative
Christina Fleps, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On October 4, 2007, Employee appealed Agency's decision to reprimand him on August 8, 2007, for five instances of misconduct from January 2007 through August 2007. The matter was assigned to the undersigned judge on November 19, 2007. After Employee asked for and was granted an enlargement of time to respond to Agency's motion to dismiss, both parties submitted their legal briefs on the issue of jurisdiction. The record closed on December 20, 2007.

JURISDICTION

Jurisdiction over this appeal has not been established.

ISSUE

Whether Employee's appeal should be dismissed for lack of jurisdiction.

FINDINGS OF FACT

Based upon the documents submitted on the record, the following facts are undisputed:

1. Employee is an Information Technology Project Manager, DS 2210-16, in the competitive service.

2. Early in 2007, Employee was assigned to serve as Agency's liaison to the Metropolitan Police Department (MPD). In May 2007, then Interim Agency Director Robert LeGrande II ended the assignment because of Employee's alleged unsatisfactory performance.
3. On August 8, 2007, Agency gave Employee an advance written notice of an Official Reprimand due to insubordination, incompetence, inexcusable neglect of duty, and unreasonable failure to assist fellow employees in the performance of their official duties.
4. Agency immediately placed Employee on paid administrative leave because of his combative behavior.
5. On September 20, 2007, Agency notified Employee of its final decision to reprimand him and directed him to attend an anger management course. The notice informed him that he may contest the action in a disciplinary grievance to the human resource project coordinator within ten days.
6. On October 4, 2007, Employee appealed Agency's decision to this Office.
7. Employee alleges that this Office has jurisdiction over his appeal under the District of Columbia Whistleblower Amendment Act of 1998, contending that Agency retaliated against him because he was a whistleblower exposing inefficiencies, waste, incompetence, and abuse of authority.

ANALYSIS AND CONCLUSION

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:

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."

Whistleblower Act

The Employee has argued that this Office should exercise jurisdiction over his appeal 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 § 1-615.51.¹ 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 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,

¹ The full text of Title 1. Government Organization, Chapter 6. Merit Personnel System. Subchapter XV-A. Whistleblower Protection for Employees of Contractors and Instrumentalities of the District Government. §1-615.51 is as follows:

Findings and declaration of purpose.

The Council finds and declares that the public interest is served when employees of the District government are free to report waste, fraud, abuse of authority, violations of law, or threats to public health or safety without fear of retaliation or reprisal. Accordingly, the Council declares as its policy to:

- (1) Enhance the rights of District employees to challenge the actions or failures of their agencies and to express their views without fear of retaliation through appropriate channels within the agency, complete and frank responses to Council inquiries, free access to law enforcement officials, oversight agencies of both the executive and legislative branches of government, and appropriate communication with the public;
- (2) Ensure that acts of the Council enacted to protect individual citizens are properly enforced;
- (3) Provide new rights and remedies to guarantee and ensure that public offices are truly public trusts;
- (4) Hold public employees personally accountable for failure to enforce the laws and for negligence in the performance of their public duties;
- (5) Ensure that rights of employees to expose corruption, dishonesty, incompetence, or administrative failure are protected;
- (6) Guarantee the rights of employees to contact and communicate with the Council and be protected in that exercise;
- (7) Protect employees from reprisal or retaliation for the performance of their duties; and
- (8) Motivate employees to do their duties justly and efficiently.

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. 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.² Based on §1-606.03, reprimands and other grievances are not within the jurisdiction of this Office. This Office has previously held that when it lacks jurisdiction to adjudicate the merits of 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. ___.

However, 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.

I find that since this Office does not have jurisdiction over the Employee's appeal of his reprimand, consequently this Office does not have the jurisdiction to adjudicate the merits of his Whistleblower Act claims that were filed with the Office as a component of his complaint. As a result, these matters must likewise be dismissed for lack of jurisdiction.

2 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...

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:

JOSEPH E. LIM, Esq.
Senior Administrative Judge