THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
GEORGIA STEWART,	)	
Employee	)	OEA Matter No. J-0006-17
	)	
v.	)	
	)	Date of Issuance: March 22, 2018
D.C. OFFICE OF HUMAN RIGHTS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Georgia Stewart ("Employee") worked as a Supervisory Equal Opportunity Specialist with the D.C. Office of Human Rights ("Agency"). On September 30, 2016, Agency issued a final notice of separation to Employee. The effective date of Employee's termination was October 15, 2016.[1]

On October 28, 2016, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). She asserted that she was forced out of her Career Service status and placed in Management Supervisory Service ("MSS"). Employee believed that her failure to comply with the change in designation would have resulted in her termination. According to Employee, she was the only MSS employee targeted and terminated. Moreover, she argued that she was subjected to a hostile work environment. Therefore, Employee requested that she be reinstated

[1] *Petition for Appeal,* p. 7 (October 28, 2016).

and assigned to another Agency in a comparable position. Alternatively, she sought front pay for the three years she intended to work before she would have retired.[2]

Agency filed a Motion to Dismiss Employee's Petition for Appeal on November 21, 2016. It cited to *Jeffery E. McInnis v. D.C. Department of Parks and Recreation,* OEA Matter No. 1601-0138-15 (January 15, 2016), and stated that OEA has consistently held that it could not adjudicate the appeals of MSS employees, given their at-will status.[3] Agency explained that pursuant to D.C. Official Code § 1-609.51, individuals appointed to MSS are "not in the Career, Educational, Excepted, Executive, or Legal Service." In accordance with D.C. Official Code § 1-609.51 and 6B DCMR § 3813.3, MSS employees serve in an at-will appointment, and therefore, they are not subject to administrative appeals. Thus, it was Agency's position that MSS employees are statutorily excluded from the protections afforded to Career Service employees. Accordingly, it requested that Employee's petition be denied.[4]

On February 24, 2017, Employee filed her response to Agency's Motion to Dismiss. She, again, argued that she was Career status and not a MSS employee. According to Employee, Agency submitted an unsigned and undated position description as proof that she was a MSS employee. However, she explained that there were documents which proved that she was on the District Service pay scale. Therefore, it was her position that Agency's evidence was contradictory and failed to serve as uncontroverted evidence. Additionally, Employee argued that Agency was required to adhere to regulations to establish a MSS position. She also alleged

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[2] *Id.*, at 3-4.

[3] Agency explained that OEA also held that it did not have jurisdictional authority to review the appeals of MSS employees in *Charlotte Richardson v. Department of Youth Rehabilitation services,* OEA Matter No. J-0013-14 (January 9, 2014), *Kenneth Taylor v. Department of Housing and Community Development,* OEA Matter No. J-0042-12 (March 9, 2012), *Robert Ford v. D.C. Department of Parks and Recreation,* OEA Matter No. J-0402-10 (June 10, 2011), and *Penelope Minter v. D.C. Office of the Chief Medical Examiner,* OEA Matter No. J-0016-07, *Opinion and Order on Petition for Review* (July 22, 2009).

[4] *Agency's Motion to Dismiss Employee's Petition for Appeal and Request for Extension of Time to File Agency Answer,* p. 1-4 (November 21, 2016).

that she did not apply for the position of Supervisor of Mediation, MSS – MS-14. Thus, she argued that OEA did have jurisdiction to consider her matter.[5]

On March 13, 2017, Agency filed its reply to Employee's Response to Agency's Motion to Dismiss. Agency argued that pursuant to D.C. Official Code §1-609.58(a), "persons currently holding appointments to positions in the Career Service who meet the definition of 'management employee' as defined in § 1-614.11(5) shall be appointed to the Management Supervisory Service unless the employee declined the appointment." Agency contended that Employee did not exercise her right to decline her appointment in 2002, when she was converted to a MSS status. It asserted that Employee was also well aware of her training obligations and fulfilled this duty annually since her transition to the MSS status.[6] Accordingly, it requested that Employee's petition be denied and that Agency's Motion to Dismiss be granted.[7]

Employee replied to Agency's response on April 3, 2017. She argued that Agency failed to present evidence that her position was being converted to an MSS position or that she had the right to either decline or accept the position. Employee claimed that this was a violation of her due process rights. Therefore, it was her position that she was not an MSS employee.[8]

On April 12, 2017, the OEA Administrative Judge ("AJ") issued his Initial Decision. He held that District of Columbia Municipal Regulations ("DCMR") § 3813.1 provides that an appointment to a MSS position is an at-will appointment and an employee may be terminated at any time. The AJ found that from 2002 through 2015, Employee consistently completed mandatory and elective MSS courses. He opined that Employee's fulfillment of her annual

[5] *Employee's Response to Agency's Motion to Dismiss,* p.1-7 (February 24, 2017).
[6] It is Agency's position that by completing annual, mandatory trainings, Employee demonstrated that she was aware of her MSS status. Agency maintained that OEA does not have jurisdiction to hear the appeal of an MSS employee.
[7] *Agency's Reply to Employee's Response to Agency's Motion to Dismiss*, p.1-9 (March 13, 2017).
[8] *Employee's Reply to Agency's Response,* p. 1-5 (April 3, 2017).

mandatory MSS training and courses demonstrated that she was fully aware of her MSS status. Furthermore, the AJ disagreed with Employee's argument that the District Service ("DS") salary schedule was not the appropriate pay plan for MSS employees. He explained that in accordance with District Personnel Manual ("DPM") § 1125.1, all employees appointed under Career, Legal, or Management Supervisory Services were paid under the DS Salary System or the Wage Service Rate System.[9] Furthermore, he determined that because DPM § 3813.3 provides that severance is awarded at the discretion of the Agency head, Employee's argument that she was entitled to severance lacks merit. Accordingly, the AJ dismissed the appeal for lack of jurisdiction.[10]

On May 17, 2017, Employee filed a Petition for Review of the Initial Decision. The petition raises four questions: whether the AJ erred as a matter of law in ruling on Agency's motion to dismiss; whether the AJ's decision is unsupported by preponderance of the evidence in the record; whether the AJ erred as a matter of law by not conducting an evidentiary hearing; and whether the AJ erred in his interpretation of statute. There are no supporting arguments provided by Employee; she merely raised the above-mentioned questions.[11]

Agency filed its response to Employee's Petition for Review on June 13, 2017. It argues that Employee's petition was filed untimely. Furthermore, Agency explains that the appeal fails to present evidence for the OEA Board to grant Employee's request, as required by OEA Rule 633.3. Therefore, it requests that the petition be denied.[12]

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[9] Moreover, the AJ explained that the first open range salary schedule for MSS employees did not take effect until July 11, 2006. He noted that all of the documents submitted by Employee, dated after July 11, 2006, only listed a grade level reflected by the open range salary as established in D.C. Council Resolution 16-703. Thus, the AJ held that Employee was appropriately paid as an MSS employee under the DS pay plan.
[10] *Initial Decision*, p. 3-6 (April 12, 2017).
[11] *Employee Appeal of the Administrative Law Judge's Decision to the Board* (May 17, 2017).
[12] *Agency's Answer to Employee's Appeal of the Administrative Law Judge's Decision to the Board,* p. 1-3 (June 13, 2017).

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

> The petition for review *shall set forth objections to the initial decision supported by reference to the record* (emphasis added). The Board may grant a Petition for Review when the petition establishes that:
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> (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
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> (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
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> (c) The findings of the Administrative Judge are not based on substantial evidence; or
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> (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

Thus, Employee's petition not only needed to offer an objection to the Initial Decision, but those objections should have been supported by references to the record. As Agency provided, Employee raised questions, not objections in her Petition for Review. Furthermore, she did not provide any supporting evidence to substantiate the questions raised. Because of the lack of arguments presented, this Board has no basis upon which to grant Employee's petition. This Board has consistently held that merely disagreeing with the AJ's ruling is not a valid basis upon which a Petition for Review can be granted.[13] Accordingly, Employee's Petition for Review is denied.

[13] *Michael Dunn v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0047-10, *Opinion and Order on Petition for* Review (April 15, 2014); Gwendolyn *Gilmore v. D.C. Public Schools*, OEA Matter No. 1601-0377-10, *Opinion and Order on Petition for Review* (September 16, 2014); *Garnetta Hunt v. Department of Corrections*, OEA Matter No. 1601-0053-11, *Opinion and Order on Petition for Review* (July 21, 2015); and *Carmen Faulkner v. D.C. Public Schools*, OEA Matter No. 1601-0135-15R16, *Opinion and Order on Petition for Review* (July 11, 2017).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

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Sheree L. Price, Chair

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Vera M. Abbott

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Patricia Hobson Wilson

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P. Victoria Williams

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Jelani Freeman

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.