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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
ROBB CAPLAN,)	OEA Matter No. 1601-0144-03
Employee)	
)	Date of Issuance: July 31, 2007
)	
)	
METROPOLITIAN POLICE)	
DEPARTMENT,)	
Agency)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Mr. Caplan (“Employee”) worked as a police officer with the Metropolitan Police Department (“Agency”) for approximately twenty-one months. On February 12, 2002, Employee sustained a performance-related injury and was placed on limited duty status. Then on November 30, 2002, he was arrested and charged with driving while impaired as well as other traffic-related violations. On July 11, 2003, Employee received a letter stating that his probationary status as a police officer with Agency was extended indefinitely because of his non-contact status since November 30, 2002.¹

¹ *Petition for Appeal*, p. 6 (September 23, 2003).

On September 9, 2003, Employee received a termination letter. The letter stated that because of his probationary status, he could appeal in accordance with the D.C. Human Rights Act. His termination was effective on September 12, 2003.²

Employee appealed his termination to the Office of Employee Appeals (“OEA”). In his Petition for Appeal, he provided that he was not a probationary police officer. As a result of his permanent status, he was terminated without cause or due process. Therefore, he requested full back pay, benefits, and attorney’s fees.³

On October 1, 2004, Agency filed its response to Employee’s Petition for Appeal. It argued that because of Employee’s arrest, he was placed on administrative leave with pay which changed his status to non-contact. As a result, his probationary status was extended in accordance with Chapter 8, Section 813 of the District Personnel Manual (“DPM”).⁴

Because OEA’s jurisdiction was a major issue in this case, the Administrative Judge (“AJ”) had both parties to submit briefs on the issue. Employee concedes that he was placed on administrative leave and in non-contact status after his arrest. However,

² *Id.* at 7.

³ *Id.* at 3.

⁴ Section 813.1 provides the following:

An employee who is given a Career Appointment (Probational) shall be required to serve a probationary period of one (1) year, except in the case of an individual appointment on or after the effective date of this provision to an entry-level police officer position, who shall be required to serve a probationary period of eighteen (18) months.

Section 813.4 provides the following:

The probationary period required by §813.1 shall be extended for an equal amount of workdays in each of the following circumstances:

- (a) For each workday that the employee is placed in a non-pay status for any reason; and
- (b) In the case of an entry-level police officer serving an eighteen-month (18-month) probationary period, for each workday that the employee is unable to perform the full range of police duties of the position to which assigned, including, but not limited to, periods of sick leave or a non-contact status.

he argued that on May 13, 2003, his case was disposed of because his charges were placed on the Stet Docket. Employee contends that on June 29, 2003, his probationary period ended. He claimed that he received a Personnel Action Form 1 generated by Agency which stated that he successfully completed his 18-month probationary period and was entitled to a 4.2% pay increase.⁵ Therefore, he was a permanent employee entitled to a due process hearing.⁶

Agency responded by claiming that of Employee's 21-month tenure, he served in a full duty capacity for only seven (7) months. Consequently, he did not demonstrate his fitness as a police officer. Therefore, his probationary period was extended as required by the Metropolitan Police Department General Order 201.7, Part C.1.b and the DPM § 813.⁷ Agency further asserted that the Form 1 received by Employee was generated in error as a part of a routine, administrative function.⁸ Moreover, it argued that Employee was never certified by the Probationary Review Board pursuant to Agency regulations.⁹

After reviewing both briefs, the AJ issued his Initial Decision on February 7, 2005. He found that OEA lacked jurisdiction over this matter because Employee failed to meet his burden of proof. The AJ held that any employee serving in a probationary period does not have a statutory right to be removed for cause and could not utilize the

⁵ Employee argued that the 4.2% pay increase is given to permanent employees who successfully complete their probationary periods.

⁶ *Employee's Brief on Issue of Jurisdiction*, p. 2 (November 8, 2004).

⁷ Agency cites to the July 14, 2003, notice provided to Employee. This notice was provided prior to the Personnel Form 1 received by Employee.

⁸ The Director of Agency's Human Services Section issued an affidavit stating that the Form 1 was an error. She explained that her staff routinely issued a Form 1 for individuals in the class approximately 18 months after the recruit entered the Police Academy. The staff merely overlooked the fact that Employee's probationary status was extended.

⁹ *Metropolitan Police Department's Response to Employee's Brief on Issue of Jurisdiction* (January 13, 2005).

adverse action procedures which include appealing the action to OEA. Therefore, an appeal by an employee still under probationary status must be dismissed for lack of jurisdiction. Because Employee failed to prove that he was a permanent employee and not still in the extended probationary period, as evidenced by the notice signed by Employee, he did not meet his burden of proving OEA's jurisdiction.¹⁰ Employee disagreed with the AJ and filed a Petition for Review that reiterated the arguments raised in his Brief on Jurisdiction. Agency filed a response opposing Employee's Petition for Review.

This case hinges on Employee's status at the time of termination. Employee argued that he was a permanent employee because he received a Personnel Form 1 from Agency and a pay raise. Agency countered by stating that the form was issued in error, and Employee was not certified by the Probationary Review Board. This Board agrees with Agency's assessment.

The Metropolitan Police Department General Order 201.7 C.1.c provides the following:

The probationary officer shall be required to complete an essay to the Board of Review and Evaluation during his/her 14th month of employment.

- (1) The essay shall
 - (a) Be prepared in his/her own handwriting under supervision;
 - (b) Summarize his/her experiences up to that period of time in the department; and
 - (c) Set forth the reasons why he/she desires to remain on the force.
- (2) This essay shall serve a two-fold purpose:
 - (a) To measure his/her ability to write; and
 - (b) To provide insight into his/her reasons for desiring a law enforcement career.

¹⁰ *Initial Decision*, p. 3-5 (February 7, 2005).

General Order 201.7 C.4 goes on to provide the responsibilities of the Probationary Review Board as it relates to probationary police officers. The order provides the following:

4. Responsibilities of the Board
 - a. Concerning Evaluation
 - (1) The board shall interview all probationary officers during their fifteenth, or no later than their seventeenth month on the force. This interview will be part of a total review of their record which includes an assessment of the officer's basic skills, aptitude, and general fitness.
 - (2) At the time of the interview before the board, the entire record of the officer shall be made available.
 - (a) The unit personnel folder of each probationary officer shall be submitted to the board for evaluation at least three (3) days prior to the officer's scheduled interview;
 - (b) Two (2) different supervisors' written evaluations using PD Form 348 (Performance and Evaluation of Probationary Officer) prepared every 120 days after the probationer's assignment to the organizational element. Written documentation shall be required for each dimension rated;
 - (c) Medical record;
 - (d) Training school scores;
 - (e) Test results at the time of his/her initial application for appointment;
 - (f) The investigative background; and
 - (g) Any other information relating to his/her performance. . . .
 - (4) A letter shall be sent by the board to each probationary officer who has been interviewed advising him/her of the results of its evaluation.

The AJ correctly classified Employee's burden of proving OEA's jurisdiction as preponderance of the evidence. Preponderance of the evidence is 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.¹¹ This Board considers

¹¹ OEA Rule 629.1.

Employee's arguments to prove his permanency within Agency unreasonable when assessing the record as a whole. Although Employee was able to provide the Personnel Action Form 1 which notes that he successfully completed his 18-month probationary period, he did not address the other elements raised by Agency. It is clear, according to the Metropolitan Police Department General Order, that a pay increase and Form 1 are not the only requirements for a police officer to move from probationer to permanent employee.

When considering the record as a whole, this Board is convinced that the Form 1 was issued in error. It is reasonable to believe, as Agency presented, that the forms were automatically created. Moreover, Employee signed a notice which outlined that his probationary period would be extended indefinitely because of his non-contact status less than two weeks prior to receiving the Form 1. Therefore, he was aware that the Form 1 directly contradicted the notice that he was just given from Agency. Despite his knowledge that the Form 1 was probably issued in error, Employee failed to inform Agency of its error and continued to receive a 4.2% pay increase. It is without question that Agency should have done a better job updating its records while keeping the Human Services Department abreast of any changes in employee status. However, Employee was aware of the discrepancy between the notice extending his probationary period and the Form 1. Additionally, this Board must note that Employee does not dispute that he worked in a full-duty capacity for only 7 of the 21 months that he was employed by Agency. Considering this fact alone, Employee knew that he did not act in a full-duty status for the requisite 18-month probationary period.

Furthermore, Employee did not offer any evidence that he completed the required essay for the Board of Review and Evaluation as outlined in General Order 201.7 C. Likewise, he does not offer any evidence that he completed an interview with the Probationary Review Board which was also a requirement of probationary police officers. There is no evidence in the record of the letter that he would have received from the Review Board had he successfully completed his interview.

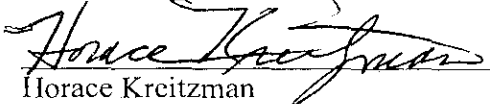
The Metropolitan Police Department General Order outlines all of the requirements of a probationary police officer seeking permanent status on the force. Employee did not prove that he met all of the requirements outlined to become a permanent Employee. Consequently, he failed to prove OEA's jurisdiction to hear this matter. Accordingly, we hereby **DISMISS** Employee's Petition for Review.

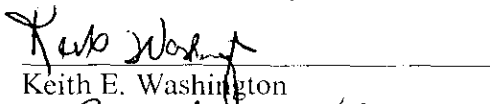
ORDER

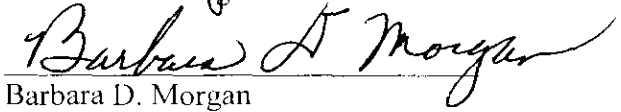
Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is DENIED.

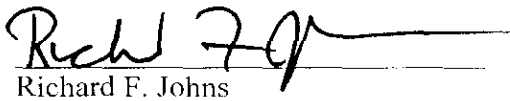
FOR THE BOARD:


Brian Lederer, Chair


Horace Kreitzman


Keith E. Washington


Barbara D. Morgan


Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.