**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| EMPLOYEE, | ) | |
| Employee | ) | OEA Matter No. J-0061-20 |
| | ) | |
| v. | ) | Date of Issuance: June 17, 2021 |
| | ) | |
| D.C. DEPARTMENT OF PUBLIC WORKS, | ) | |
| Agency | ) | ERIC T. ROBINSON, Esq. |
| | ) | Senior Administrative Judge |

Employee *Pro-Se*
Bradford Seamon, Jr., Esq., Agency Representative

## INITIAL DECISION[1]

### INTRODUCTION AND PROCEDURAL HISTORY

On September 30, 2020, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting the Department of Public Works ("DPW" or the "Agency") adverse action of removing him from service. Employee was hired by DPW on October 13, 2019 as a Parking Enforcement Officer (DS 1802, Grade 6) in the Parking Enforcement Management Administration ("PEMA"). In his Petition for Appeal, Employee alleges that his removal was done in retaliation due to his filing a workers' compensation claim. Employee remained in his position until August 27, 2020, when he was issued a written Notice of Termination (Notice) for failing to demonstrate suitability and qualification for the position. The Notice advised Employee that as a probationary employee, one of his only avenues for recourse would be to file a claim of discrimination. DPW asserts that Employee's probationary status would not have ended until about October 19, 2020. It further asserts that since he was removed from service before this date, that the OEA lacks jurisdiction to adjudicate this matter. The parties were Ordered to brief the jurisdictional issue raised by DPW. The parties timely submitted their required responses. After reviewing the documents of record, the Undersigned has determined that no further proceedings are warranted. The record is now closed.

[1] This decision was issued during the District of Columbia's COVID-19 State of Emergency.

## JURISDICTION

As will be explained in further detail below, the OEA lacks jurisdiction over this matter.

## ISSUE

Whether this matter should be dismissed.

## FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

*Probationary Employee*

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act (hereinafter "CMPA"), sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") states in pertinent part that:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.

The above referenced career/education service rights conferred by the CMPA may be exercised by aggrieved employees. The District Personnel Manual ("DPM") § 814.3, provides in relevant part that "a termination during a probationary period is not appealable or grievable...". Thus, according to the aforementioned section of the DPM, Career Service employees who are serving in a probationary period are precluded from appealing a removal action to this Office until their probationary period is finished.

The record is clear in establishing that Employee started working for DPW on October 13, 2019 and the effective date of his removal was August 27, 2020. Accordingly, I find that Employee was serving in a probationary status at the moment of his termination. I further find that since Employee was probationary at the moment of his termination that the OEA lacks authority to exercise jurisdiction over the instant matter.

Retaliation

Employee has ostensibly argued that this Office should exercise jurisdiction over his cause of action through the Whistleblower Act. This Act encourages employees of the District of Columbia 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. Employee's allegation that his removal was predicated on his filing a workers'

compensation claim calls into the question DPW's alleged abuse of authority. However, as will be explained in further detail below, I find that, given the instant facts, the OEA is not the proper forum for Employee to redress his retaliation claim.

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, 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. It bears noting the relevant language contained within § 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…

Thus, if an aggrieved employee has a matter with OEA that may otherwise be adjudicated by this Office, said employee may include, as part of her Petition for Appeal, any pertinent

Whistleblower violations. 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), if any, of the Retaliation/Whistleblower claim(s) contained therein. *See, Rebecca Owens v. Department of Mental Health*, OEA Matter No. J-0097-03 (April 30, 2004).

Based on the preceding statutes, case law, and regulations, it is plainly evident that the OEA lacks the jurisdictional authority to review adverse action appeals of probationary employees. Since the Employee's was terminated while he was serving during his probationary period, I find that I cannot adjudicate over his appeal and it therefore must be dismissed for lack of jurisdiction. I further find that since this Office does not have jurisdiction over the Employee's adverse action that consequently this Office does not have the jurisdiction to adjudicate the merits of his Retaliation claims. As a result, this matter must be dismissed for lack of jurisdiction.

***Conclusion***

Taking into account the discussion above, I find that Employee has failed to meet his burden of proof regarding the OEA's ability to exercise jurisdiction over the instant matter.[2] Accordingly, I conclude that I must dismiss this matter for lack of jurisdiction. [3]

ORDER

Based on the foregoing, it is hereby **ORDERED** that this matter be **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE: /s/ *Eric T. Robinson*
ERIC T. ROBINSON, Esq.
Senior Administrative Judge

[2] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin,* 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater,* 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

[3] Since I have found that the OEA lacks jurisdiction over this matter, I am unable to address the factual merits, if any, contained within Employee's petition for appeal.