

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Daniel Murray,)	OEA Matter No. J-0012-19
Employee)	
)	Date of Issuance: February 14, 2019
v.)	
)	Joseph E. Lim, Esq.
Department of General Services,)	Senior Administrative Judge
Agency)	
_____)	
Daniel Murray, Employee <i>pro se</i>)	
C. Vaughn Adams, Esq., Agency Representative)	

INITIAL DECISION

BACKGROUND

On October 26, 2018, Daniel Murray (“Employee”), filed a Petition for Appeal with the Office of Employee Appeals (“OEA”). The employee grieved his termination from his position as a Physical Security Specialist, CS-080-12/9, by the D.C. Department of General Services (“Agency” or “DGS”).

The matter was assigned to the undersigned Administrative Judge on December 5, 2018. On December 7, 2018, I ordered Employee to address the jurisdiction issue raised by the Agency. After Employee failed to respond, I ordered Employee to show cause. Employee responded and asked for an extension, which was partially granted with the deadline for his response brief extended to January 22, 2019. Employee failed to submit his brief. I determined that an Evidentiary Hearing was not warranted, as there were no material facts in dispute. The record is closed.

JURISDICTION

Jurisdiction in this matter was not established.

ISSUE

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

FINDINGS OF FACT

The following facts were submitted by the parties and are uncontroverted:

1. On August 21, 2017, Agency hired Employee as a Physical Security Specialist subject to a one year probationary period. See Agency Exhibit 1.

2. On August 7, 2018, Employee received a Notice of Termination during Probationary Period. The effective date of Employee's termination was August 20, 2018. See Agency Exhibit 2.
3. Employee filed his appeal on October 26, 2018.

ANALYSIS, AND CONCLUSIONS OF LAW

Effective October 21, 1998, and except as otherwise provided in the District of Columbia Government Comprehensive Merit Personnel Act of 1978, DC Code 1 601.1 et seq. or Rule 604.2 below, any District of Columbia government employee may appeal a final agency decision affecting:

- a. A performance rating which results in removal of the employee;
- b. An adverse action for cause that results in removal, reduction in grade, or suspension for ten (10) days or more;
or
- c. A reduction-in-force

Effective June 9, 2000, the Council of the District of Columbia adopted amended regulations for the updated implementation of the Act and, at the outset of the new regulations, provided at Chapter 16, § 1600.1, that the newly adopted regulations apply to each employee of the District government in the Career Service, who has completed a probationary period.

Chapter 8, Section 813.8 of the District Personnel Manual ("DPM") states, in pertinent part:

Except when the appointment is effected with a break in service of one (1)-workday or more, or as specified in subsection 812.2(a) of this chapter or subsection 813.9 of this section, an employee who once satisfactorily completed a probationary period in the Career Service shall not be required to serve another probationary period."¹

Moreover, Chapter 8, Section 814.3 of the District Personnel Manual provides that a termination during a probationary period cannot be appealed to this Office. An appeal to this Office by an employee serving in a probationary status must therefore be dismissed for lack of jurisdiction.² In light of the above, the outcome in this matter turns upon the determination of whether Employee was still within the probationary period of his employment as Agency contends, or whether he had become a permanent employee prior to the effective date of his termination.

¹ D.C. Official Code § 5-105.04 (2001).

² See, e.g., *Day v. Office of the People's Counsel*, OEA Matter No. J-0009-94, *Opinion and Order on Petition for Review* (August 19, 1991).

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states that the burden of proof with regard to material issues of fact shall be by a 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.” Under OEA Rule 628.2, 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.

It is Agency’s position that this Office does not have jurisdiction over Employee’s appeal. Agency submits that Employee’s status as a probationary employee at the time he was terminated prevents OEA from asserting subject matter jurisdiction over this appeal. I find that Employee has failed to address the issue of OEA’s jurisdiction over his appeal, and thus, has failed to meet his burden of proof on this issue.

District Personnel Manual (“DPM”) § 813.2 states that:

A person hired to serve under a Career Service Appointment (Probational), including initial appointment with the District government in a supervisory position in the Career Service, shall be required to serve a probationary period of one (1) year, except in the case of individuals appointed on or after the effective date of this provision to the positions listed in paragraphs (a) through (d) of this subsection below, who shall serve a probationary period of eighteen (18) months:

- (a) Individuals hired into entry-level police officer positions in the Metropolitan Police Department;
- (b) Individuals hired into entry-level Correctional Officer positions in the Department of Corrections, or entry-level Youth Development Representative positions in the Department of Youth Rehabilitation Services;
- (c) Individuals hired into entry-level Firefighter/Emergency Medical Technician (EMT) and entry-level Firefighter/ Paramedic positions in the Fire and Emergency Medical Services Department; and
- (d) Individuals hired into emergency or non-emergency operations positions in the Office of Unified Communications.

According to the record, Employee was hired as a Physical Security Specialist on a probationary status effective August 21, 2017. Employee was required to serve a one (1) year probationary period before he could obtain permanent employment status. His status as a probationary employee did not end until August 21, 2018. Thus, at the time he was terminated, effective August 20, 2018, Employee remained “at-will” and did not have the protections afforded to Career Service employees. Based on the foregoing, I find that OEA lacks jurisdiction over this appeal.

In addition, in violation of my order, Employee has twice failed to respond to my Order on jurisdiction. OEA Rule § 621.3, 59 D.C. Reg. 2129 (2012), states, “If a party fails to take

reasonable steps to prosecute or defend an appeal, the Administrative Judge in the exercise of sound discretion, may dismiss the action or rule for the appellant. Failure of a party to prosecute or defend an appeal includes, but is not limited to, a failure to . . . b) Submit required documents after being provided with a deadline for such submission.”

I find that under the rules of this Office, a failure to submit required documents after being directed to do so, and when provided with a deadline for such submission, could result in sanctions, including dismissal. Therefore, I further conclude that Employee failed to prosecute his appeal, which is a second cause for this matter to be dismissed.

Finally, Employee’s appeal is untimely. D.C. Official Code § 1-606.03 (2001) provides that: “Any appeal [to this Office] shall be filed within 30 days of the effective date of the appealed agency action.” Pursuant to OEA Rule 628.2, “[t]he employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing.” In addition to the above, OEA Rule 604.2 provides that “[a]n appeal filed pursuant to Rule 604.1 must be filed within thirty (30) days of the effective date of the appealed agency action. The date of filing shall be the date the Office time stamps on the document.”³ The D.C. Court of Appeals has held that the time limit for filing an appeal with an administrative adjudicatory agency such as OEA is mandatory and jurisdictional in nature.⁴

Here, Employee filed his appeal on October 26, 2018, which is 67 days after August 20, 2018, his effective date of termination. I therefore find that his appeal is untimely and is another basis for concluding that this Office has no jurisdiction over Employee’s appeal.

ORDER

It is hereby ORDERED that Employee’s appeal is dismissed for lack of jurisdiction.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge

³ OEA Rule 607.3.

⁴ See, e.g., *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991); *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162 (D.C. 1985).