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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	OEA Matter No.: 1601-0232-12
EARL HOLT,	)	
Employee	)	
	)	Date of Issuance: April 30, 2014
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	Sommer J. Murphy, Esq.
_____	)	Administrative Judge
Earl Holt, Employee	)	
Carl Turpin, Esq., Agency Representative	)	

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On August 31, 2012, Earl Holt (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) contesting the District of Columbia Public Schools’ action of terminating his employment. Specifically, Employee was terminated because he received a rating of “Ineffective” for his 2011-2012 IMPACT score. The effective date of Employee’s termination was August 10, 2012.

I was assigned this matter in December of 2013. On February 12, 2014, I issued an Order rescheduling a Prehearing Conference to be held at OEA on March 13, 2014. On March 7, 2014, Agency filed a Motion to Dismiss, asserting that Employee was in a probationary status at the time of his termination, thus OEA does not have jurisdiction to adjudicate this matter. Because the issue of jurisdiction can be raised at any point during a proceeding before this Office, I ordered Employee to submit a brief addressing whether his appeal should be dismissed. Employee was required to submit his filing on or before March 28, 2014. Employee failed to submit a brief on jurisdiction. On April 14, 2014, I issued an Order for Statement of Good Cause to Employee to explain his failure to submit a brief.<sup>1</sup> Employee was required to submit a statement of cause on or before April 23, 2014. The record is now closed.

<sup>1</sup> The Undersigned listed an incorrect date of March 10, 2014 on the Order for Statement of Good Cause. According to the attached Certificate of Service, the Order was issued on April 14, 2014.

## JURISDICTION

Jurisdiction has not been established in this matter.

## ISSUE

Whether Employee's appeal should be dismissed for lack of jurisdiction and failure to prosecute.

## BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) 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 628.2 *id.* states:

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.

## FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, amended certain sections of the CMPA. Amended D.C. Code §1-606.3(a) states:

"An employee may appeal 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...."

Chapter 8, Section 813.3 of the District Personnel Manual ("DPM") states, in pertinent part:

"Except when the appointment is effected with a break in service, an employee who once satisfactorily completed a probationary period in the Career Service shall not be required to serve another probationary period, unless the employee is appointed to a position (including entry-level police officer or firefighter) from a register resulting from open competition, for which appointment the employee

would not have been eligible as an internal placement in accordance with §§ 828 through 838.”<sup>2</sup>

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.<sup>3</sup> 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 Agency’s notice of termination.

According to Agency, Employee was hired as a teacher at Roosevelt Senior High School on July 31, 2011, and was required to serve a two (2) year probationary period before he could obtain permanent status as a teacher.<sup>4</sup> On July 27, 2011, Agency issued Employee written notice of termination based on his final 2011-2012 rating of Ineffective under the IMPACT program. The effective date of Employee’s termination was August 10, 2012. Based on the documents submitted by Agency, Employee’s status as a probationary employee did not end until July 31, 2013.<sup>5</sup> Thus, at the time he was terminated, Employee remained an “at-will” employee and did not have the protections afforded to Career Service or Educational Service employees. A review of the record indicates that Employee had not completed his probationary period at the time of his termination, and he has not proffered any evidence in support of establishing jurisdiction. Accordingly, I find that OEA lacks the jurisdiction to adjudicate the merits, if any, of Employee’s appeal.

In addition, OEA Rule 621.3 provides that “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 an appeal includes, but is not limited to.

- (a) Appear at a scheduled proceeding after receiving notice;
- (b) Submit required documents after being provided with a deadline for such submission; or
- (c) Inform this Office of a change of address which results in correspondence being returned.

In this case, Employee was warned that the failure to appear could result in sanctions as enumerated in Rule 621.3. Employee did not respond to the March 10, 2014 Order on Jurisdiction. Employee also failed to provide a Statement of Good Cause on or before April 23,

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<sup>2</sup> D.C. Official Code § 5-105.04 (2001).

<sup>3</sup> 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).

<sup>4</sup> Agency Motion to Dismiss (March 7, 2014).

<sup>5</sup> *Id.* at Attachment 1.

2014 to explain his failure to submit a brief.<sup>6</sup> It should further be noted that the Initial Decision in this matter was originally given to OEA's front office for processing on April 28, 2014 at approximately 2:30 p.m. and was set to be issued on the following business day. On April 28, 2014, at approximately 4:45 p.m., Employee visited OEA's front office to file a request for an extension of time. After being informed that a decision had been made in his case, Employee waited in the reception area, in an attempt to meet with the Undersigned. In addition, Employee requested to obtain a copy of the Initial Decision before it had been issued. On April 29, 2014, the front office informed me that the Initial Decision in this matter could not be located. After further investigation, Employee admitted to stealing the Initial Decision from OEA's front desk on April 28, 2014 at approximately 5:25 p.m. Employee was contacted by OEA's office manager and told to bring back the document that he had taken. Employee has not returned OEA's property as of the date of this decision. The act of taking the Initial Decision before it had been issued constituted theft of government property. In the least, Employee's actions were illegal, abhorrent, and wholly unacceptable. Accordingly, the Undersigned is forced to issue this revised Initial Decision.

Based on the foregoing, I find that OEA lacks jurisdiction over the instant appeal. In addition, Employee's lack of diligence in pursuing an appeal before OEA constitutes a failure to prosecute and serves as an alternate ground for the dismissal of this matter.

#### ORDER

It is hereby **ORDERED** that Employee's Petition for Appeal is **DISMISSED** for lack of jurisdiction and failure to prosecute.

FOR THE OFFICE:

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SOMMER J. MURPHY, ESQ.  
ADMINISTRATIVE JUDGE

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<sup>6</sup> Employee filed a motion for additional time to file a brief on April 28, 2014, several days after the deadline provided in the Undersigned's Order for Statement of Good Cause Order. Employee's request is denied, as his initial brief on jurisdiction was due on March 28, 2014. Employee has been given ample time to submit a request for an extension of time to file a brief; however, he did not until approximately a week after the deadline for filing a statement of good cause.