THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
WANDA WRIGHT,	)	
Employee	)	OEA Matter No. J-0085-18
	)	
v.	)	Date of Issuance: October 23, 2019
	)	
UNIVERSITY OF THE	)	
DISTRICT OF COLUMBIA,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Wanda Wright ("Employee") worked as a Campus Police Officer with the University of the District of Columbia ("Agency"). According to Agency, on August 13, 2018, it mailed a notice to Employee that she would be terminated from Agency. The notice provided that Employee was removed from her position during her one-year probationary period pursuant to Title 8-B of the District of Columbia's Municipal Regulations ("DCMR") Chapter 11, Section 111. The notice further noted that Employee was terminated effective August 15, 2018.[1]

On August 27, 2018, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). She asserted that Agency terminated her without cause. Employee explained that despite Agency's claims that it mailed her termination notice prior to the effective date, she

[1] *Petition for Appeal*, p. 1 and 7 (August 27, 2018).

did not receive the notice via U.S. mail. Employee contended that Agency emailed her termination notice on Friday, August 17, 2019, one day after her probationary period ended. As a result, she argued that Agency violated its Collective Bargaining Agreement ("CBA"), and DCMR Chapter 8 and 8B. Therefore, Employee requested that she be reinstated to her position with back pay and benefits.[2]

On September 28, 2018, Agency filed a Motion to Dismiss for Lack of Jurisdiction. Agency argued that Employee was a probationary employee at the time of her termination. It explained that it issued a notice of termination to Employee on August 13, 2018, with an effective termination date of August 15, 2018. Agency provided that the letter was mailed via "Overnight Express Mail," addressed to Employee's home address, and sent via USPS "Priority Mail Express 1-day." Moreover, it provided documentation of the confirmation of the delivery on August 14, 2018. It was Agency's position that the date Employee decided to retrieve her mail, does not govern her employment status. Further, Agency contended that pursuant to 8-B DCMR § 1110.1, "upon his or her initial appointment, each employee shall be subject to a one (1) year probationary period." It also noted that Article 10 of the CBA between Agency and Local 2087 states that "the probationary period for employees is one (1) year and shall commence with the employee's first day of regular full-time employment." Agency provided that in accordance with the DCMR and CBA, Employee's employment commenced on August 16, 2017; therefore, she remained a probationary employee through August 15, 2018. Because she was terminated during her probationary period, Agency requested that Employee's appeal be dismissed for lack of jurisdiction.[3]

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[2] *Id*. at 2.
[3] *Board of Trustees of the University of the District of Columbia's Memorandum of Points and Authorities in Support of its Motion to Dismiss for Lack of Jurisdiction*, p. 2-6 (September 28, 2019).

On October 2, 2018, the OEA Administrative Judge ("AJ") requested that the parties submit a written brief addressing whether Employee's appeal should be dismissed for lack of jurisdiction.[4] In her brief, Employee reiterated that she received Agency's final notice via email one day after her probation period ended. Moreover, she contended that pursuant to District Personnel Manuel ("DPM") §§ 1608.7 and 1614.6, Agency was required to send the notice of final decision by courier, or by certified or registered mail, return receipt requested. Employee cited to *Nursat Aygen v. D.C. Office of Employee Appeals*, 2009 CA 006528 P(MPA) (D.C. Super. Ct. April 5, 2012), providing that when an employee is not on duty, the final notice must be delivered to employee on or before the effective action date with a request for the employee to acknowledge it. Further, Employee argued that Agency erred in using DCMR Title 8-B § 1511.8 because a Notice of Proposed Adverse Action must be served upon a permanent Career Service employee before a notice of Final Administrative Decision is served upon an employee. She explained that the notice stated that she was being terminated during her probationary period; however, Employee asserted that she was a Career Service employee at the time of her termination and claimed that Agency failed to adhere to its guidelines for dismissing a Career Service employee.[5]

Agency asserted in its brief that OEA lacked jurisdiction over the matter because Employee was still in her probationary period when she was terminated. It argued that Employee incorrectly cited to DPM §§ 1608.7 and 1614.6, which do not apply to probationary employees. Additionally, Agency explained that Employee relied on sections 1608.7 and 1614.6 of the DPM, which appeared in the 2012 version of the regulation, but were removed before the 2017 version took effect. Consequently, Agency explained that the 2012 version was not in existence during

[4] *Order Requesting Briefs* (October 2, 2018).
[5] *Wanda J. Wright's Memorandum of Points and Authorities in Opposition to Board of Trustees of the University of the District of Columbia's Motion to Dismiss,* p. 1 and 6-10 (October 16, 2018).

Employee's 2018 removal. Moreover, Agency contended that Employee incorrectly cited to the *Aygen* matter. Agency posited that *Aygen* is inapplicable since the notice of Final Agency Action is part of the procedures that are applicable only to permanent employees of the District government, not probationary employees. Additionally, it provided that DPM § 1614.6, the regulation relied on in the *Aygen* matter, was no longer in effect when Employee was terminated. Therefore, the *Aygen* case had no bearing on the current matter. Finally, as it related to 8-B DCMR § 1511.8, Agency argued that the provision only applies to employees who have satisfied their probationary periods and who are, therefore, entitled to progressive discipline. It highlighted 8-B DCMR § 1500.2 which provided that "the provisions of this chapter shall apply to all University employees, except . . . employees serving in a probationary period . . . ." Therefore, Agency requested that Employee's appeal be dismissed.[6]

On November 13, 2018, the AJ issued her Initial Decision. She found that OEA did not have jurisdiction to consider the matter. The AJ held that Employee's one-year probationary period expired at 12:00 a.m. on August 16, 2018. However, Employee was terminated effective August 15, 2018, which was less than one year from her start date. She also held that Agency proved that Employee's notice was delivered to her address of record prior to the effective date of termination. Furthermore, the AJ explained that Employee's matter is distinguishable from *Aygen* in that, the employee in *Aygen* was a permanent employee at the time of their termination and was within their rights to receive a written final agency notice. Whereas in the instant matter, Employee was a probationary employee at the time of her termination, and she was not entitled to any of the privileges afforded to permanent employees under the law. The AJ also explained that the decision in *Aygen* was in compliance with 6-B DCMR §§ 1614.1, 1614.4, and 1614.6. However, when

[6] *Agency's Response to Employee's Opposition to Agency's Motion to Dismiss*, p. 2-8 (October 30, 2018).

Employee was terminated in August of 2018, these sections of the DCMR and their corresponding sections in the DPM had been removed. Finally, the AJ held that Agency adequately complied with DPM § 814.2 which provides that an employee terminated during their probationary period shall be notified in writing and the notice must include an effective date. Consequently, the AJ dismissed the matter for lack of jurisdiction.[7]

Employee filed a Petition for Review on December 18, 2018. She asserts that the AJ's findings were not based on substantial evidence and that the Initial Decision failed to address all material issues of law and fact raised on appeal. Employee maintains that she was not a probationary employee at the time of termination. She contends that the AJ erroneously interpreted 6-B DCMR §§ 1618.6, 1618.8, and 1623.7. Moreover, Employee objects to the AJ's conclusions that she had access to Agency's termination letter that was delivered to her based on the mail tracking information that was provided by Agency. Finally, she argues that because Agency approved her sick leave for August 15 and 16, 2018, she was not on administrative leave as Agency alleged. Therefore, she requests that the Board grant her Petition for Review.[8]

OEA's jurisdiction was established by the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA") and Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA") which provided that this Office could consider appeals of permanent employees in Career and Education Service who are not serving in a probationary period. Accordingly, OEA has consistently held that we do not have jurisdiction over matters involving probationary employees.[9]

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[7] *Initial Decision*, p. 3-5 (November 13, 2018).
[8] *Employee Wanda J. Wright's Petition for Review*, p. 6 and 14 (December 18, 2018).
[9] *Stephanie Huey v. D.C. Public Schools*, OEA Matter No. 1601-0113-15, *Opinion and Order on Petition for Review* (April 18, 2017); *Tiffany Shaw v. District of Columbia Public Schools*, OEA Matter No. J-0139-15 (January 12, 2016); *Alexis Parker v. Department of Health,* OEA Matter No. J-0007-11, *Opinion and Order on Petition for Review* (September 8, 2012); *Jason Codling v. Office of the Chief Technology Officer,* OEA Matter No. J-0151-09, *Opinion and Order on Petition for Review* (December 6, 2010); *Susan Wallace v. D.C. Public Schools*, OEA Matter No. J-

Section 8-B of the DCMR applies specifically to University of the District of Columbia employees. In accordance with 8-B DCMR § 1110.1, "upon his or her initial appointment, each employee shall be subject to a one (1) year probationary period." As the AJ determined, Employee's effective date of employment was August 16, 2017. Therefore, her probationary period ended on August 16, 2018. Agency offered proof that Employee's separation letter was delivered to the address on record on August 14, 2018, which was two days prior to the end of her probationary period. The effective date of separation was August 15, 2018.[10] Thus, Employee was separated before the end of her probationary period.

Furthermore, 8-B DCMR § 1110.7 provides that "the University shall terminate a probationary employee if, at any point during the probationary period, the employee's work performance or conduct fails to demonstrate suitability and qualifications for continued employment." In its separation notice, Agency provided that the "separation is the result of [Employee's] behavior that has failed to meet our expectations."[11] As a result, 8-B DCMR § 1110.7 was satisfied by Agency.

Moreover, as Agency argued, 8-B DCMR § 1500.2 clearly provides that "the provisions of this chapter shall apply to all University employees, except . . . employees serving in a probationary period . . . ." Accordingly, Employee's contention regarding the applicability of 8-B DCMR § 1511.8 is misplaced. Further, it is Employee's position that Agency failed to adhere to the notice requirements provided in Chapter 16 of the DPM. However, DPM Chapter 16 is not applicable to University of the District of Columbia employees, but *assuming arguendo*, this regulation is also

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0009-05 (January 31, 2006); *Elliott Duvall v. D.C. Department of Youth Rehabilitative Services*, OEA Matter No. J-0008-06 (January 24, 2006); *Day v. Office of the People's Counsel*, OEA Matter No. J-0009-94, *Opinion and Order on Petition for Review*, (July 10, 1995); and *Jones v. District of Columbia Lottery Board*, OEA Matter No. J-0231-89, *Opinion and Order on Petition for Review* (August 19, 1991).

[10] *Agency's Motion to Dismiss and Supporting Memorandum,* Exhibit A (September 28, 2018).

[11] *Id.*

not triggered until an employee has completed their probationary period and secured a permanent employment status.

Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. After a thorough review of the record, this Board concludes that the AJ's ruling was based on substantial evidence. Employee was in a probationary status at the time of removal. Accordingly, Employee's Petition for Review is denied.

ORDER

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

FOR THE BOARD:

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Clarence Labor, Chair

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Patricia Hobson Wilson

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Jelani Freeman

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Peter Rosenstein

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Dionna Maria Lewis

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.