

Notice: This decision may be formally revised before publication in the *District of Columbia Register*. Parties should promptly notify the Administrative Assistant of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
)
Sarah E. Simmons)
Employee)
)
v.)
)
D.C. Public Schools)
Agency)

OEA Matter No. 2401-0169-04
Date of Issuance: May 18, 2005
Rohulamin Quander, Esq.
Senior Administrative Judge

Charles R. Both, Esq., Employee Representative
Harriet Segar, Esq., Agency Representative

INITIAL DECISION

On July 23, 2004, Employee, a part-time Social Studies Teacher at Benjamin Banneker High School, filed with the D.C. Office of Employee Appeals (the "Office") a Petition for Appeal from the D.C. Public School's (the "Agency") final decision separating her from government service, effective June 30, 2005, pursuant to the abolishment of her job, due to financial challenges that the Agency was facing (the "RIF").

This matter was assigned to me on April 15, 2005. On April 20, 2005, I issued an *Order Convening A Prehearing Conference* and held said conference on May 20, 2005. On May 4, 2005, Agency filed *Agency's Pre-Hearing Statement*. Agency, citing two primary reasons, requested that the petition be dismissed. First, Employee was still in her probationary period as a teacher, having been hired by the Agency on or about August 25, 2003, and as such, had no appellate rights. Second, Employee was in a single person competitive level, being the sole person in a part-time position, and once her job was slated to be abolished, she would not be competitively rated with the full time teachers, who were not either in her competitive level or in her competitive area. Since this matter could be decided based on the parties' positions as stated at the Prehearing and on the *documents of record*, no additional proceedings were held. *The record is closed.*

ISSUE

Has the employee met her burden of proof that this Office has jurisdiction of this appeal?

JURISDICTION

The jurisdiction in this matter has not been established.

FINDINGS OF FACT

The following facts are undisputed:

1. On or about August 25, 2003, Employee signed a one-year contract employing her as a part-time Social Studies Teacher with Agency's public schools, subject to a one-year probationary period. The contract indicated that the employment was subject to all provisions of laws of the District of Columbia.
2. On or about May 27, 2004, Agency served Employee with a RIF notice, informing her that her employment would be terminated effective June 30, 2004. At the effective date of her dismissal, Employee had been a probationary employee of Agency for 10 months.
3. Employee filed a Petition for Appeal with the Office on July 23, 2004, seeking a reversal of Agency's action.
4. At the May 10, 2005, Prehearing Conference, Employee acknowledged that her status was probationary at the time of the RIF.

ANALYSIS AND CONCLUSIONS

OEA Rule 629.2, 46 D.C. Reg. at 9317, reads as follows: "The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." According to OEA Rule 629.1, *id*, a party's burden of proof is by a "preponderance of the evidence", which is defined as "[t]hat 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."

Probationary Employees

Effective October 21, 1998, and except as otherwise provided in the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (the Act), pursuant to the D.C. Official Code, §1-606.03 and OEA Rule 604.2, a D.C. 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.

- (b) Satisfactory completion of the probationary period is required to attain permanent status. See DPM § 813.11, D.C. Official Code § 5-105.04.

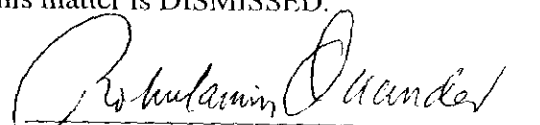
Thus, a District government employee serving a probationary period does not have a statutory right to be removed for cause and cannot utilize the adverse action procedures under subchapters VI or XVII of the Comprehensive Merit Personnel Act ("CMPA"), which include appealing an adverse action to this Office. An appeal of an adverse action filed in this Office by an employee serving a probationary period must therefore be dismissed for lack of jurisdiction. See *Davis v. Lambert*, MPA No. 17-89, 119 DWLR 305 (1991) (regardless of agency regulations and advice to the contrary, probationary employees may be discharged at-will and they do not have any statutory right to appeal their termination to the OEA); *Day v. Office of the People's Counsel*, OEA Matter No. J-0009-94, *Opinion and Order on Petition for Review* (July 10, 1995), __ D.C. Reg. __ (); *Employee v. Agency*, OEA Matter No. 1601-0057-83, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 6057 (1985); *Jones v. District of Columbia Lottery Bd.*, OEA Matter No. J-0231-89, *Opinion and Order on Petition for Review* (Aug. 19, 1991), __ D.C. Reg. __ (); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (Jan. 22, 1993), __ D.C. Reg. __ (); *Jordan v. Metropolitan Police Dep't*, OEA Matter No. 1601-0314-94, *Opinion and Order on Petition for Review* (Sept. 29, 1995), __ D.C. Reg. __ (); and *Ramos-McCall v. District of Columbia Pretrial Services*, OEA Matter No. J-0197-93, *Opinion and Order on Petition for Review* (March 18, 1994), __ D.C. Reg. __ ().

Here, Employee's position was subject to a one-year probationary period. However, Employee was separated from service on June 30, 2004, 10 months after her start date and still within the probationary period. Therefore, I conclude that this Office has no jurisdiction over this appeal, and that it must be dismissed.

ORDER

It is hereby ORDERED that this matter is DISMISSED.

FOR THE OFFICE:



Rohulamin Quander, Esq.
Senior Administrative Judge