This decision may be formally revised before it is published in the District of Columbia Register and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager 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:	
W. IRIS BARBER Employee	OEA Matter No. J-0083-15
	Date of Issuance: February 10, 2017
v.	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS Agency	Lois Hochhauser, Esq. Administrative Judge

W. Iris Barber, Esq., *Pro Se*
Milena Mikailova, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

W. Iris Barber, Esq., Employee, filed a petition with the Office of Employee Appeals (OEA) on May 29, 2015, appealing the decision by the District of Columbia Public Schools, Agency, to remove her "for cause" from her position as Supervisory Attorney Advisor with Agency's Office of General Counsel, effective May 1, 2015.

On July 9, 2015, Agency filed its Answer and a Motion to Dismiss. Employee submitted her opposition on July 20, 2015. The prehearing conference (PHC) took place on December 22, 2015.[1] Agency renewed its motion to dismiss at the PHC, arguing that Employee held an appointment in the Legal Service, and that OEA lacked jurisdiction to hear appeals of Legal Service employees. Although Employee identified herself as a Legal Service employee in her petition for appeal, at the PHC, she argued that she was not have a Legal Service appointment, and that no document had been submitted by Agency to support its claim. She added, however, that even if she was in the Legal Service, OEA still had jurisdiction to hear her appeal. The parties were directed to submit documents that established the service that Employee held by January 13, 2016; and to file objections, if any, to documents submitted by the opposing party by January 27, 2016.

Agency submitted[2] a Notification of Personnel Action-Standard Form-50 (SF-50)[3] dated December 21, 2010, which stated that Employee's position was in the Legal Service. Employee did

[1] The PHC, initially scheduled for November 16, 2015, was continued at Employee's request.

[2] Employee's social security number (SSN) was left on both SF-50s submitted by Agency. The AJ covered the

not file any document, and did not object to Agency's submission. Therefore, by Order dated February 9, 2016, the AJ notified the parties that the SF-50 was sufficient to establish that Employee was in the Legal Service.[4] The parties were directed to brief the issue of jurisdiction, and following the submissions, the record was closed.

JURISDICTION

This Office's jurisdiction was at issue in this matter.

ISSUE

Did Employee meet the burden of proof regarding this Office's jurisdiction?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS[5]

Employee had served as Supervisory Attorney for about three years at the time Agency proposed her removal. Her position was in the Legal Service.

On April 6, 2015, Agency issued an Advance Written Notice of Proposed Removal notifying Employee that it intended to remove her for cause.[6] The Notice provided Employee with information regarding her rights to respond and to request a hearing, pursuant to 6B DCMR § 3614.5(c). In its Final Decision, issued on April 30, 2015, Agency notified Employee that she would be removed, effective May 1, 2016. The Decision stated that Employee had the right to appeal her termination to the Mayor within five days of receipt of the Decision pursuant to 6B DCMR § 3614.9, and that the Mayor's decision would be final. Employee filed an appeal with the Mayor on May 5, 2015. She filed her appeal with this Office on May 29, 2015.

In support of her position that this Office has jurisdiction of her appeal, Employee, citing *District of Columbia v. Thompson*, 593 A.2d 521, 632 (D.C. 1991), argued that "clear and convincing evidence is required to rebut the presumption that OEA has jurisdiction over this appeal." She also maintained that she is an "employee" within the "plain language" of D.C. Official Code § 1-606.03(a) which states that an employee may appeal a final agency decision to this Office because

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numbers so they cannot be seen. Agency is reminded to delete SSNs and other confidential information from documents before submitting them to this Office.

[3] The SF-50 identifies the Employee as "Wannetta Iris Green." Employee did not argue that she is not "Wannetta Iris Green" or that the document was not her SF-50.

[4] Agency was also directed to include an explanation of the term "Exc Appt" contained in the SF-50 in its submission, and did so. The explanation and clarification was provided by Janice Cager, Supervisory Management Liaison Officer for the Human Resource Unit in the Office of the Attorney General, in her March 15, 2015 affidavit. (Attachment 1 of Agency Brief). Ms. Cager stated that "Exc Appt.," an abbreviation for "Excepted Appointment," is used in the Nature of Action section of the SF-50 "for all appointments into the Legal Service because PeopleSoft, the human resource application…does not have a Nature of Action code for "Legal Service." She stated that Employee "was a member of the Legal Service and not the Excepted Service."

[5] This Section is based on the parties' submissions and arguments.

[6] Agency identified five charges as cause for the removal in the Advance Written Notice. The specifics of the charges are not relevant in determining the outcome of this matter.

she meets the definition of "employee" contained in D.C. Official Code § 1-603.01 (7*), i.e.*, an individual who performs a function for the District of Columbia government and is paid for those services.

Employee asserted that the Comprehensive Merit Personnel Act (CMPA) identifies those classes of employees, *e.g*., employees in the Management Supervisory Service and the Executive Service, that are excluded from this Office's jurisdiction. She contended that since Legal Service employees are not listed, they are included as employees who can file appeals with this Office. Employee also argued that although D.C. Code §1-608.56(c) directs employees in the Legal Service to appeal to the Mayor, there is no language that excludes these employees from filing appeals with this Office. In support, she noted that Legal Service employees appeal reductions-in-force (RIFs) to this Office. Finally, Employee argued that the Legal Service Regulations cannot modify this Office's jurisdiction and, citing *McManus v. District of Columbia*, 530 F.Supp.2d 46, (D.D.C. 2007), argued that this Office's jurisdiction is "quintessentially a decision for OEA to make."

Agency argued that OEA lacks jurisdiction to hear this appeal based on Subchapter VIII-B of Chapter 6 of the CMPA, entitled "Government Attorneys," which established a separate appeal process for those with Legal Service appointments. It maintained that Legal Service employees are not governed by the disciplinary and appeal provisions which provides for appeals by District of Columbia employees to this Office, but rather, pursuant to D.C. Official Code §1-608.56 (c), Legal Service employees are subject to a "unique" set of disciplinary and appeal rules. Agency asserted that this Office has "repeatedly" determined that it lacks jurisdiction to hear appeals filed by Legal Service employees.

The threshold issue in this matter is one of jurisdiction. This Office has no authority to review issues beyond its jurisdiction. *See, e.g., Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, Opinion and Order on Petition for Review (September 30, 1992). Pursuant to the District of Columbia Comprehensive Merit Personnel Act of 1978, D.C. Official Code §1-601-01, *et seq*. (2001), as amended by the Omnibus Personnel Reform Amendment Act of 1998 D.C. Law 12-124, this Office is authorized to hear appeals of adverse actions of permanent employees in Career and Education Service. D.C. Official Code §1-608.01(a) specifically excludes Legal Service employees from the jurisdiction of this Office in disciplinary matters:

> The Mayor shall issue rules and regulations governing employment, advancement, and retention in the Career Service which shall include all persons appointed to positions in the District government, except persons appointed to positions in the Excepted, Executive, Educational, Management Supervisory or Legal Service. (emphasis added)

Employee has an appointment in the Legal Service. She does not dispute this, but contends it is not relevant. She argues that what is relevant is that she is an "employee" of the District of Columbia Government, and as such, she is entitled to appeal an adverse action to this Office. Employee is correct that she meets the definition of "employee" stated in D.C. Official Code § 1-603.01 (7), since she "perform[ed] a function for the District of Columbia government and [was] paid for those services." But this Office does not have jurisdiction of all employees of the District of Columbia Government. Rather, the D.C. Official Code provides different processes for appealing adverse actions based on the type of appointment or service held by the employee.

As noted above, D.C. Official Code §1-608.01(a) specifically excludes Legal Service employees from the jurisdiction of this Office in disciplinary matters. D.C. Official Code § 1-608.56 *et seq,* establishes a separate disciplinary and appeals process, for Legal Service employees. § 1-608.56 states:

> Any disciplinary action taken pursuant to this section against an attorney employed by a subordinate agency or the Mayor's Office of Legal Counsel **may** be appealed to the Mayor. Any such action taken against an attorney employed by the Office of the Attorney General may be appealed to the Attorney General. The Mayor's and the Attorney General's decisions regarding disciplinary actions shall be final. (emphasis added)

The fact that D.C. Official Code § 1-608.56(c) uses the precatory word "may" does not give Employee the option of appealing to this Office instead of to the Mayor or to avail herself of both options, as she seeks to do. The precatory word in this instance gives Employee the option of utilizing the processes identified in § 1-608.56.

Employee correctly points out that Legal Service employees can appeal reductions-in-force (RIFs) to this Office. However, this jurisdiction is explicitly stated in Chapter 24, Part I, § 2400.1(d) (2012) of the District Personnel Manual:

> All line attorney and **supervisory and non-supervisory attorneys** who did not occupy Senior Executive Attorney Service positions who **are appointed to the Legal Service…** (emphasis added).

There is no merit to the argument that the explicit grant of authority to hear RIF challenges can be expanded or interpreted to include appeals of challenges to adverse actions, particularly where, as noted above, the statute explicitly excludes Legal Service employees from appealing adverse actions to this Office and specifically establishes an appeal process for these employees *Jack Simmons v. D.C. Office of the Attorney General,* OEA Matter No. 1601-0138-08 (October 1, 2009)

In sum, Employee held an appointment in the Legal Service. D.C. Official Code §1-608.01(a) specifically excludes Legal Service employees from appealing adverse actions to this Office, although they are explicitly permitted to appeal RIF matters to this Office. D.C. Official Code §1-608.56 establishes a separate disciplinary and appeal processes for Legal Service employees. *See, e.g., Brenda Pennington v. D.C. Office of the People's Counsel*, OEA Matter Nol. J-0203-11 (January 18, 2012)

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) requires employees to carry the burden of proof on all issues of jurisdiction.[7] This burden must be met by "preponderance of the evidence," defined in OEA Rule 628.2 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

[7] In its motion, Agency provided legal and factual argument to support its position that this Office did not have jurisdiction to hear Employee's appeal. Employee's arguments regarding the "presumption" of jurisdiction and the quantum of the burden that Agency must carry to rebut that presumption, are inapplicable to this matter. It is well established that employees carry the burden of proof on all jurisdictional issues. OEA Rule 628.1, 59 DCR 2129 (March 16, 2012).r

true than untrue." For the reasons stated herein, the AJ concludes that Employee did not meet her burden of proof on the issue of jurisdiction. She further concludes that the appeal must therefore be dismissed.

ORDER

It is hereby:

ORDERED: The petition for appeal is dismissed.[8]

FOR THE OFFICE:

Lois Hochhauser, Esq.
Administrative Judge

[8] Since the appeal is dismissed, Agency's motion to dismiss is denied as moot.