THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
GEORGIA STEWART, Employee	OEA Matter No. J-0006-17
v.	Date of Issuance: April 12, 2017
DISTRICT OF COLUMBIA OFFICE OF HUMAN RIGHTS, Agency	
	Arien P. Cannon, Esq. Administrative Judge

Keith Grimes, Employee Representative
Ebony Robinson, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On October 28, 2016, Georgia Stewart ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA"), challenging the District of Columbia Office of Human Rights' ("Agency") decision to remove her from her position as a Supervisory Equal Opportunity Specialist.[1] This matter was assigned to the undersigned on November 8, 2016.

Agency filed a Motion to Dismiss for Lack of Jurisdiction on November 21, 2016. An Order on Jurisdiction was issued on November 23, 2016, which required Employee to submit a brief addressing why she believed this Office may exercise jurisdiction over her appeal. Employee's brief was due on or before December 9, 2016. On December 9, 2016, Employee filed a Motion to Extend Time to file her response to the Jurisdiction Order. Employee's motion was granted and a new deadline was set for December 30, 2016. On December 27, 2016, Employee filed a second motion requesting additional time, and stated that she had retained a representative, but that her representative at the time was experiencing a medical emergency and was unable to respond. Employee's Representative, Keith Grimes, officially entered his appearance in this matter on December 29, 2016.

[1] Employee's Petition for Appeal, Attachment, Notice of Separation (October 28, 2016).

On January 4, 2017, Agency filed an Opposition to Employee's Second Request for Additional time. Over Agency's objection, Employee's request for additional time was granted in part, and denied in part, in a January 11, 2017 Order. Employee sought a thirty (30) day extension to file her response to the Jurisdiction Order; however, the undersigned granted her a twenty (20) day extension.

Employee filed a third request on January 18, 2017, for additional time to file her response to the Order on Jurisdiction.[2] On January 23, 2017, Employee's representative filed a Memorandum of Points and Authorities in Support of Request for Additional Time. Employee filed another request for additional time to file her response on January 25, 2017, requesting thirty (30) days from the date of filing to submit her response addressing jurisdiction. On January 27, 2017, the undersigned issued an Order extending the time frame for Employee to submit her response addressing jurisdiction to February 24, 2017.

Employee ultimately submitted a response to Agency's Motion to Dismiss on February 27, 2017, addressing the jurisdiction issue in this matter. Agency submitted a response to Employee's opposition to its Motion to Dismiss on March 13, 2017. Employee then submitted a Reply to Agency's Response on April 3, 2017.

Based on the filings of both parties, I have determined that an evidentiary hearing is not warranted. The record is now closed.

JURISDICTION

As discussed below, the jurisdiction of this Office has not been established.

ISSUE

Whether this Office has jurisdiction over Employee's appeal

BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.[3] "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.

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.[4]

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[2] It is noted that Employee filed this request herself, not her representative.
[3] 59 DCR 2129 (March 16, 2012).
[4] OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

ANALYSIS AND CONCLUSIONS OF LAW

OEA Rule 628.2 provides that employees have the burden of proof for establishing jurisdiction.[5] OEA's jurisdiction is generally "limited to permanent employees who are serving in the career or educational services and who have successfully completed their probationary periods."[6] Further, 6-B DCMR § 3813.1 provides that an appointment to a Management Supervisory Service ("MSS") position is an at-will appointment and may be terminated at any time.

Employee's position

Employee argues that Agency's own documentation is "inconclusive as to whether the Employee is a MSS employee, since [D.C. Code § 1-609.51 *et seq*.,] clearly establishes certain criteria for MSS employees, and that criteria has not been established by the Agency."[7] Employee also avers that Agency did not satisfy the notice requirements that her position was being converted to MSS. Thus, Employee maintains that she was a career service employee.

Agency's position

Effective, April 21, 2002, Employee, along with hundreds of other District government employees, was converted to MSS status. Agency asserts that Employee was properly converted to MSS Status at this time.[8] Employee had the right to decline this appointment in 2002 pursuant to D.C. Code § 1-609.58(a); however, Employee elected not to do so, and instead consistently held herself out as a MSS employee. Because Employee was in a MSS position, she was an at-will employee; thus, OEA lacks jurisdiction to adjudicate this matter on the merits.

Discussion

The Omnibus Personnel Amendment Act of 1998 (D.C. Code § 1-609.51 *et seq*.), effective June 10, 1998, amended the Comprehensive Merit Act of 1978 (effective March 3, 1979). The purpose of the Act was to, *inter alia*, "establish the Management Supervisory Service to be composed of employees whose functions include responsibility for project management and supervision of staff and the achievement of the project's overall goals…."[9] Under provisions of the Act, certain management employees were transferred into the newly created Management Supervisory Service (MSS) and served "at-will."[10] Although the Act passed in 1998, fiscal year 2001 was the first full year of conversions to the newly established MSS. Pursuant to D.C. Code § 1-609.58(a) (2001)[11], "[p]ersons currently holding appointments to positions in the Career Service who meet the definition of 'management employee' as defined

[5] *Id*.
[6] *Roxanne Smith v. D.C. Department of Parks and Recreation*, Initial Decision, OEA Matter J-0103-08 (October 5, 2009).
[7] Employee's Response to Agency's Motion to Dismiss at 1 (February 27, 2017).
[8] *See* Agency's Reply to Employee's Response to Agency's Motion to Dismiss, Exhibit 1 (March 13, 2017).
[9] *See* D.C. Law 12-124, Notice.
[10] D.C. Code § 1-609.54.
[11] Formerly D.C. Code § 1-610.58 (1981).

in § 1-614.11(5) shall be appointed to the Management Supervisory Service unless the employee declines the appointment."

Here, Agency contends that Employee's position was properly converted to a MSS appointment in 2002, while Employee asserts that she was a Career Service employee and that Agency has not established that she is a MSS employee. It is noted, however, that in Employee's Petition for Appeal with this Office, she list her "Type of Appointment" as "MSS."[12] It was not until Employee's representative, Keith Grimes, entered his appearance in this matter, that Employee made the assertion that she was in a Career Service position, and not a MSS employee.

Agency argues that Employee was aware of her MSS status and fulfilled annual MSS training requirements. Pursuant to Section 1304.1 of the District Personnel Manual ("DPM"), "each employee appointed to the Management Supervisory Service shall be required to maintain and enhance his or her management and supervisory skills and to attend requisite training courses every year as prescribed by the personnel authority." Agency asserts that Employee was well aware of her training obligations, and fulfilled this duty annually since being converted to MSS status.

To support its position, Agency points to a District-wide e-mail notification from the District of Columbia Department of Human Resources ("DCHR") addressed to MSS employees who had not completed the required core courses for fiscal year 2017. Employee responded to this e-mail advising that she "will check to see what is offered online and sign up."[13] After completing the mandatory MSS courses, Employee e-mailed DCHR and advised that she had completed the online courses, and stated that the courses "were outstanding and really informative," and requested assurance that she had "complied with the requirements for FY 2013."[14]

Furthermore, from 2002 through 2015, Employee consistently completed mandatory and elective MSS courses, including Multigenerational Workplace, Progressive Discipline, Critical Thinking for Supervisors, and Project Management.[15] As a result, I find that Employee's fulfillment of her annual mandatory MSS training and courses demonstrates that she was fully aware of her MSS status.

Employee further argues that she was not a MSS employee because she was not paid as a MSS employee. In support of this position, Employee advances the argument that the documentary evidence she submitted indicate that she was paid as a "DS" employee on a "grade" and "step" level.[16] Essentially, Employee's argument is that the "DS" pay system is not the appropriate pay plan for MSS employees.

Pursuant to DPM § 1125.1, the following pay systems shall apply to all employees

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[12] *See* Petition for Appeal (October 28, 2016).
[13] Agency's Reply to Employee's Response to Agency's Motion to Dismiss, Exhibit 2 (March 13, 2017).
[14] *See Id.*
[15] Agency's Reply to Employee's Response to Agency's Motion to Dismiss, Exhibit 3 (March 13, 2017).
[16] *See* Employee's Response to Agency's Motion to Dismiss at 2; *See also* Exhibit A (February 27, 2017).

appointed under the Career, Legal, Excepted, or *Management Supervisory Services*: (a) District Service Salary System; and (b) Wage Service Rate System.

Here, "DS" is the abbreviation for the District Service salary schedule. The District Service salary schedules are the annual rate schedules applicable to employees who are paid under the District Service Salary System, which is the basic pay system for positions that are classified in accordance with section 1101 of this chapter and for which compensation is established on an annual basis.[17] This includes the Management Supervisory Service Pay schedule (MS Schedule). Thus, MSS employees, such as Employee, who were paid under the Management Supervisory Service Pay Schedule ("MS Schedule") were paid under the DS system established in Chapter 11 of the District Personnel Manual.[18] DPM § 3802.2 states:

> As applicable, individuals appointed to the Management Supervisory Service shall be paid from either: (a) The Management Supervisory Rate Schedule, the symbol for which is MW, which is the hourly rate schedule applicable to Management Supervisory Service employees who are paid under the Wage Service Rate System established in Chapter 11 of these regulations; or (b) The Management Supervisory Service Pay Schedule ("MS Schedule"), the symbol for which is MS, which is the annual rate schedule to Management Supervisory Service employees who are paid under the District Service Salary System established in Chapter 11 of these regulations.

As such, all documentation submitted by Employee which is dated after July 11, 2006 (Exhibits C, D, and F in her Response to Agency's Motion to Dismiss), that list "DS" under the "Pay Plan," does not change the fact that Employee was a MSS employee, as she suggests in her responses to Agency's Motion to Dismiss.

The first open range salary schedule for MSS employees, which does not include grade levels, did not take effect until July 11, 2006.[19] Thus, all of the documents submitted by Employee which are dated after July 11, 2006[20], which do not list a step—only a grade level—reflects the open range salary as established in D.C. Council Resolution 16-703, effective July 11, 2006. Thus, I find that Employee was appropriately paid as an MSS employee under the "DS" Pay plan.

Employee also asserts that Chapter 3813.1 of the DPM provides that an employee shall be entitled to severance pay upon termination for non-disciplinary reasons.[21] However, the language that Employee cites is inaccurate. The language of DPM § 3813.3 provides, in pertinent part,: "… at the discretion of the agency head, an employee in the Management

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[17] *See* DPM § 1125.2.
[18] *See* DPM § 3802.2(b)
[19] Agency's Reply to Employee's Response to Agency's Motion to Dismiss, Exhibit 4, *D.C. Council Resolution 16-703* (March 13, 2017).
[20] *See* Exhibits C, D, and F in her Response to Agency's Motion to Dismiss.
[21] *See* Employee's Response to Agency's Motion to Dismiss at 4 (February 27, 2017).

Supervisory Service *may* be paid severance upon termination for non-disciplinary reasons according to his or her length of employment in the District government…" This language makes clear that severance pay for MSS employees is at the discretion of the agency head. Thus, Employee's argument that she was a MSS employee entitled to severance pay must fail.

In Employee's Response to the Motion to Dismiss, submitted February 27, 2017, Employee asserts that "employees under [her] supervision…were hired, promoted and or terminated by management without any recommendation from [her]."[22] However, Agency submitted documentary evidence directly contradicting this assertion. In an e-mail sent by Employee on February 29, 2016, to Agency's Director, Employee stated her reasons for recommending that her current representative, Keith Grimes, who was once employed by Agency as a mediator, be terminated.[23] Thus, I find that Employee's argument that she did not perform significant duties and responsibilities as expected of a MSS employee, unpersuasive.

The District's Municipal Regulations make clear that terminations from the Management Supervisory Service are not subject to administrative appeals.[24] Based on the aforementioned, I find that Employee was well aware that she was serving in a MSS position, and thus an at-will employee. I further find that Employee has failed to satisfy her burden of proof and has failed to establish that OEA may exercise jurisdiction over this matter.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Motion to Dismiss for Lack of Jurisdiction is hereby **GRANTED,** and Employee's Petition for Appeal be **DISMISSED**.

FOR THE OFFICE:

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Arien P. Cannon, Esq.
Administrative Judge

[22] Employee's Response to Agency's Motion to Dismiss at 4 (February 27, 2017).
[23] Agency's Reply to Employee's Response to Agency's Motion to Dismiss, Exhibit 7 (March 13, 2017).
[24] *See* D.C. Code § 1-609.54 ; *See also* 6B DCMR §§ 3813.7, 3813.1.