

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
)
Brenda K. Pennington) OEA Matter No. J-0203-11
Employee)
) Date of Issuance: January 18, 2012
v.)
) Senior Administrative Judge
D.C. Office of the People’s Counsel) Joseph E. Lim, Esq.
Agency)

Thorn Pozen and Stephanie Scheck, Esq., Agency Representatives
Brenda K. Pennington, Employee *pro se*

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 29, 2011, Brenda K. Pennington (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the D.C. Office of the People’s Counsel’s (“Agency”) action of terminating her employment. I was assigned this matter on or around October 17, 2011. After review, I determined that an evidentiary hearing was unwarranted and ordered the parties to submit their final briefs regarding the ability of the OEA to properly exercise jurisdiction over this matter. After a series of postponements requested by the parties, the parties have since submitted their respective briefs, in this matter. The record is now closed.

ISSUE

Whether this matter should be dismissed for lack of jurisdiction.

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) 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 629.2, *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing.

JURISDICTION

As will be explained below, the jurisdiction of this Office has not been established.

FINDING OF FACTS, ANALYSIS AND CONCLUSION

The proceeding finding of facts, analysis and conclusions of law are based on the documents of record as submitted by the parties. The Agency asserts that at the time of her removal, Employee was a member of the Legal Service and as such does not enjoy the protections afforded to aggrieved employee's pursuant to D.C. Official Code § 1-606.03. D.C. Official Code § 1-608.01 (a) provides, in pertinent part, that the Career Service "shall include all persons appointed to positions in the District government, except persons appointed to positions in the ... Legal Service." The pertinent question that must be resolved within the confines of the instant Initial Decision is whether Employee was in the career service at the time she was removed. If Agency simply removed a legal service employee under the rubric of managerial prerogative, then OEA lacks jurisdiction to hear Employee's appeal. *See*, D.C. Official Code § 1-608.01 (a). If however, Employee's position was correctly classified as career service, then OEA could exercise jurisdiction over Employee's appeal. According to the documents of record, the following is a recitation of the salient events in this matter:

1. The Office of People's Counsel was established pursuant to D.C. Official Code § 34-804 as an independent agency of the District of Columbia government to be "a party, as of right, in any investigation, valuation, revaluation, or proceeding of any nature by the Public Service Commission of or concerning any public utility operating in the District of Columbia." D.C. Official Code § 34-804(a).
2. The People's Counsel is the head of the agency appointed by the Mayor of the District of Columbia. D.C. Official Code §34-804(b).
3. The People's Counsel receives compensation under the Senior Executive Attorney Service pursuant to D.C. Official Code §1-608.53 and §1-608.58 which is part of the Legal Service established by D.C. Official Code §1-608.52. The D.C. Department of Human Resources has designated the position of People's Counsel in the Excepted Service pursuant to D.C. Official Code § 1-609.02.
4. From July 2001 to March 2010, Employee occupied the position of Assistant

- People's Counsel for the Agency.
5. On March 10, 2011, then-Mayor Adrian Fenty of the District of Columbia appointed Employee to the temporary position of Interim People's Counsel.
 6. On January 2, 2011, Vincent Gray was elected Mayor of the District of Columbia.
 7. Employee asserts that on May 25, 2011, then Acting People's Counsel Sandra Mattavous-Frye reassigned her from Interim People's Counsel back to her former position as Assistant People's Counsel. To bolster her contention, Employee submitted an unsigned Form 50 (Notification of Personnel Action). See Employee's Exhibit A.
 8. On July 12, 2011, the D.C. Council approved Mayor Gray's nomination of Ms. Frye as People's Counsel.
 9. Ms. Frye terminated Employee from her position as Assistant People's Counsel effective July 29, 2011. The Notice of Termination stated that Employee had previously been appointed to the Legal Series, Grade 14 position back in July 30, 2001. The letter goes on to inform Employee that "this termination action is not appealable or grievable."

Agency's argues that not only is Employee's Form 50 unsigned and therefore invalid, it is replete with errors. Agency submitted the signed Affidavit of Human Resources Specialist Nicole Cook. The affidavit states that due to technical shortcomings in the personnel management software used by D.C. Department of Human Resources (DCHR), inaccurate information appears in boxes 5-B, 5-D, and 37 of Employee's Form 50. Ms. Cook states that box 5-B should read "Conv to Legal Service Appointment;" box 5-D should read "Sec 1-608.52 DC Code, Creation of the Legal Service;" and box 37 of Employee's Form 50 should be blank. Specifically, "Conv to Legal Service Appointment;" and "Sec 1-608.52" are not available options to select on the electronic form and DCHR cannot manually enter the correct information in those boxes. Had DCHR not been limited by the capabilities of its personnel management software, the Form 50 would have stated that Employee's position is in the Legal Service, which is an at-will position.

After reviewing the documents of record as well as the sum and substance of the parties' arguments in support of their various contentions it is evident to the undersigned that Employee's position was not in the career service, but in the legal service. The People's Counsel is the independent personnel authority for all its employees. D.C. Code § 1-604.06(b)(5). The People's Counsel is authorized to employ or to retain and fix the compensation of employees or independent contractors, including attorneys, necessary to perform the functions vested in the People's Counsel. D.C. Official Code § 34-804(c). Attorneys employed by an independent agency "shall be hired by the head of the agency or the Senior Executive Attorney designee." D.C. Official Code § 1-608-54(b).

Pursuant to D.C. Official Code § 1-608.56, “a Legal Service attorney, other than a Senior Executive Attorney, shall be subject to disciplinary action, including removal ... for unacceptable performance or for any reason that is not arbitrary or capricious.” The decision of the agency head or the Senior Executive Attorney designee shall be final with respect to disciplinary action taken against attorneys in independent agencies.” D.C. Official Code § 1-608.56 (c).

As a Legal Service employee, Employee cannot be a Career Service employee. D.C. Code § 1-608.01 (a) provides in pertinent part that the Career Service “shall include all persons appointed to positions on the District government, except persons appointed to positions in the ... Legal Service.”

Although it is evident to the undersigned that the entries in Employee’s Form 50 are erroneous, Employee argues that Agency is bound by its entries in her form.

The D.C. Court of Appeals has held that typographical errors on a Form 50 do not create changes in an employee’s job classification or status. See *Johnson v. District of Columbia Office of Employee Appeals*, 912 A.2d 1181 at 1184 (D.C. 2006), (citing *Hoage v. Board of Trustees of Univ. of District of Columbia*, 714 A.2d 776, 781 (D.C. 1998)).

I thus find that at the time of her removal, Employee’s position was within the Legal Service as defined by D.C. Official Code § 1-608.52. According to the clear and unambiguous language of D.C. Official Code § 1-608.56(c), a Legal Service attorney does not have appeal rights to the OEA. Accordingly, I find that Employee cannot appeal this matter to the OEA because it lacks jurisdiction to hear her petition for appeal

This Office has no authority to review issues beyond its jurisdiction. See *Banks v. District of Columbia Pub. Sch.*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (Sept. 30, 1992), __ D.C. Reg. __ (). Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding. See *Brown v. District of Columbia Pub. Sch.*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993), __ 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. __ (); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995), __ D.C. Reg. __ ().

Based on the foregoing, I find that Employee was a member of the Legal Service when she was terminated. Reluctantly, I further find that pursuant to D.C. Official Code § 1-608.56 (c), Employee’s appeal rights relative to this matter lie *possibly* with either the Mayor of the District of Columbia or the Agency head, but not with OEA. Consequently, I conclude that Employee has failed to establish the jurisdiction of this Office in the instant matter and I must therefore dismiss this matter for lack of jurisdiction.¹

¹ Since the Employee failed to establish the jurisdiction of this Office in this matter, I am unable to address the factual merits (if any) of the Employee’s petition for appeal. I am also unable to address any other arguments that Employee raised in the prosecution of same.

ORDER

It is hereby ORDERED that this matter be DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge