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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No. 1601-0021-21
██████████)	
Employee)	
)	Date of Issuance: April 19, 2022
v.)	
)	ARIEN P. CANNON, ESQ.
)	Administrative Judge
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
Agency)	
_____)	
Michael Ludwig, Esq., Employee Representative)	
Gehrie Bellamy, Esq., Agency Representative)	
Lynette A. Collins, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Employee filed a Petition for Appeal on April 6, 2021, challenging the District of Columbia Public Schools’ (“Agency” or “DCPS”) decision to terminate him from his position as an Investigator, effective at the close of business on March 26, 2021. Pursuant to a letter issued by OEA on May 27, 2021, Agency’s Answer was due on or before June 26, 2021. Agency filed its Answer on June 26, 2021. I was assigned this matter on October 1, 2021.

A Prehearing Conference was convened on December 16, 2021. Based upon representations made by Employee in his Prehearing Statement, the undersigned raised the issue of jurisdiction at the hearing. Employee was ordered to submit a brief addressing the jurisdiction of this Office and Agency was ordered to submit a response to Employee’s brief. Employee submitted a Brief in Support of Jurisdiction as ordered. Agency also submitted a Motion to Dismiss and an opposition to Employee’s Brief in Support of Jurisdiction. Both parties also submitted sur-reply responses to each other’s submissions. The record is now closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

1. Whether this Office may exercise jurisdiction over Employee's termination despite a Whistleblower complaint being filed in the District of Columbia Superior Court and Employee's position being under the Educational Service.
2. If so, whether Agency's action of terminating Employee was proper.

BURDEN OF PROOF

OEA Rule 628.2 ,59 DCR 2129 (March 16, 2012), provides an employee shall have the burden of proof as to issues establishing jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.¹

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

A Prehearing Conference was convened on December 16, 2021, where the undersigned raised the issue of jurisdiction *sua sponte* based on Employee's representation in his Prehearing Statement that he also filed a claim against Agency for violation of the Whistleblower Protection Act in the Superior Court for the District of Columbia. Under D.C. Code § 1-615.56, the Whistleblower Protection Act provides that the institution of a civil action pursuant to § 1-615.54 shall preclude an employee from pursuing any administrative remedy for the same cause of action from the Office of Employee Appeals. Accordingly, Employee was ordered to submit a brief addressing the jurisdiction of this Office and Agency was ordered to submit a response to Employee's brief.

In Employee's Brief in Support of Jurisdiction, submitted on January 24, 2022, he explains that his whistleblower complaint filed in Superior Court was made *prior* to his termination from Agency. In the Superior Court complaint, filed August 6, 2020, Employee alleged that his placement on a Performance Improvement Plan ("PIP") was done in retaliation for his protected disclosure under the D.C. Whistleblower Protection Act.² In the instant petition before OEA, Employee was issued a Notice on March 12, 2021, stating that his termination would become effective March 26, 2021. This Notice did not provide a cause for Employee's termination. However, throughout several filings by Agency, it asserts that Employee was "at-will" because he was transferred to the Educational Service under D.C. Code § 1-608.01a, the Public Education Personnel Reform Act of 2008, in April of 2014.

¹ *Order on Jurisdiction* (December 17, 2021).

² *See [Employee] v. District of Columbia Government, et al* (D.C. Super. Ct. 2020 CA 003462 B)

Given the timeline for when Employee filed his whistleblower complaint in D.C. Superior Court, and the effective date of Employee's termination, I find the Superior Court complaint is a separate and distinct matter from the instant appeal challenging Employee's termination. Furthermore, I find that Employee is not precluded from filing an appeal to this Office under D.C. Code § 1-615.56 for wrongful termination.

In addition to addressing the jurisdiction issue relating to the whistleblower complaint raised by the undersigned, in its Motion to Dismiss submitted on January 18, 2022, Agency asserts that Employee's latest position was an "at-will" appointment. Attached to Agency's Motion was an offer letter, which states, "this appointment is without tenure."³ Based on this language, Agency asserts that Employee was "at-will" and was subject to termination with or without cause. Additionally, in Agency's Opposition to Employee's Brief in Support of Jurisdiction, it points to D.C. Code § 1-608.01a, the Public Education Personnel Reform Act of 2008, to further support its position that Employee was "at-will." D.C. Code § 1-608.01a(b)(2)(C)(i) and (ii) states:

(C)(i) A person employed within the Educational Service in DCPS, or the Office of the State Superintendent of Education who is not an Excluded Employee, shall be a probationary employee for one year from his or her date of hire ("probationary period") and may be terminated without notice or evaluation.

(ii) Following the probationary period, *an employee may be terminated, at the discretion of the Mayor; provided, that the employee has been provided a 15-day separation notice and has had at least one evaluation within the preceding 6 months, a minimum of 30 days prior to the issuance of the separation notice.*

Stated differently, an employee serving under the Educational Service with DCPS, who is not an "Excluded Employee,"⁴ may be terminated after the completion of their probationary period, provided that certain conditions are met. Based upon a reading of the Public Education Personnel Reform Act of 2008, D.C. Code § 1-608.01a(b)(2)(C)(i), I find that Employee was transferred to an Educational Service position in April of 2014.⁵ Thus, Employee could have been separated from service with or without cause, *only* if certain conditions were met, namely: (1) a notice of separation at least 15 days prior to an effective termination date; and (2) the employee was subjected to at least one evaluation within the preceding 6 months, with a minimum of 30 days prior to the separation notice being issued.⁶

³ Noticeably, Agency does not address the language of this letter which states that Employee shall serve a probationary period for one year.

⁴ Excluded employees are those in a recognized collective bargaining unit, appointed before January 1, 1980, based at a local school or who provide direct services to individual students, and those required to be excluded pursuant to a court order. *See* D.C. Code § 1-608.01a(b)(2)(A)(i).

⁵ The SF-50 Form submitted by Agency in its Second Response to Employee's Opposition to Dismiss, indicates that the effective date of the "Promotion" to Educational Service was April 6, 2014. The offer letter extended to Employee for his "promotion" to Educational Service is dated April 9, 2014.

⁶ In Employee's Reply to Agency's Sur Reply to Employee's Opposition to Agency's Motion to Dismiss (January 25, 2022), Employee argues that the SF-50, dated April 6, 2014, was never presented to Employee at any time during his

Here, it is uncontroverted that Employee completed his probationary period after being transferred to the Educational Service under the Public Education Personnel Reform Act of 2008, D.C. Code § 1-608.01a. A letter dated April 9, 2014, which purports to transfer Employee's position from Career Service to Educational Service, states that Employee will also serve a one-year probationary period.⁷ After being transferred to Educational Service in April of 2014, Employee maintained the same position until March 2021, well beyond the one-year probationary period prescribed.

Employee was given notice on March 12, 2021, that his termination would become effective on March 26, 2021. While this notice falls one day short of the 15-day requirement under D.C. Code § 1-608.01a(b)(2)(C)(ii), the 15th day—March 27, 2021—falls on a Saturday. Accordingly, I find that the notice falling one day short of the 15-day notice requirement was harmless error given that the 15th day was not a business day. However, Agency has also failed to show where at least one evaluation within the preceding 6 months of Employee's termination was completed. The latest documentation in the record with any semblance of an evaluation is a PIP, dated June 15, 2020.⁸ This PIP is dated nearly 9 months prior to Employee's effective termination date. Because Agency has failed to adhere to the conditions for terminating an employee who has satisfied their probationary period under D.C. Code § 1-608.01a(b)(2)(C)(ii), Employee's termination cannot stand. As such, Employee's termination must be reversed.

ORDER

Accordingly, it is hereby **ORDERED** that:

1. Agency's termination of Employee is **REVERSED**;
2. Agency shall reinstate Employee to the same or comparable position prior to his termination;
3. Agency shall immediately reimburse Employee all back-pay and benefits lost as a result of his removal; and
4. Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

/s/ Arien P. Cannon
ARIEN P. CANNON, ESQ.
Administrative Judge

employment with DCPS. Employee further raises an issue regarding the SF-50's authentication. Because this matter is being decided on other grounds, the undersigned will not address this issue raised by Employee.

⁷ See Agency's Motion to Dismiss, Exhibit 1 (January 18, 2022).

⁸ See Agency Answer, Tab # 3 (June 26, 2021)