THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: J-0084-24
EMPLOYEE[1],	
Employee	
	Date of Issuance: February 13, 2025
v.	
DISTRICT OF COLUMBIA DEPARTMENT OF MOTOR VEHICLES,	MICHELLE R. HARRIS, ESQ. Senior Administrative Judge
Agency	

Joseph F. Davis, Employee Representative
Pamela B. Washington, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 30, 2024, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Motor Vehicles' ("Agency" or "DMV") decision to remove him from his position of a Hearing Examiner, effective August 9, 2024. Following a letter from OEA dated September 3, 2024, requesting an Answer in this matter, Agency filed its Answer and Motion for Summary Disposition on October 3, 2024. Agency cited therein that Employee was in probationary status at the time of separation, and that OEA lacked jurisdiction to adjudicate this matter. This matter was assigned to the undersigned Senior Administrative Judge ("AJ") on October 4, 2024. On October 9, 2024, I issued an Order scheduling a Status/Prehearing Conference for October 29, 2024.

Both parties appeared for the Status/Prehearing Conference as required. Following the conference, I issued an Order requiring the parties to address the jurisdiction issue raised by Agency. The parties were required to submit briefs regarding the jurisdiction issue raised by Agency. Employee's brief was due on or before November 25, 2024. Agency's response was due by or before December 16, 2024. Both parties filed their briefs as required. Upon review of the parties' submissions and the record, I have determined that an Evidentiary Hearing is not warranted in this matter. The record is now closed.

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.

JURISDICTION

The jurisdiction of this Office has not been established in this matter.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021) states:

> The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
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> > 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 631.2 *id.* states:

> For appeals filed under §604.1, 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.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Employee was hired to work at Agency as a Hearing Examiner CS-0930-13/1. By letter dated January 11, 2024, Employee's tenure began at Agency on January 29, 2024. In a letter dated July 26, 2024, Employee was provided notice that he was being removed from service during his probationary term. Employee's termination was effective, August 9, 2024.

Employee's Position

Employee asserts that he should not have been subject to a probationary period due to his prior civil service, and as a result, Agency's termination action should be rescinded. Employee contends that prior to his position with Agency, he worked for 15 years in "permanent civil service" with D.C. Water, and as a result, he should not have been subject to a probationary term for this position. Employee avers that he worked for DC Water and that it is a "quasi-governmental entity" created by District law in 1996.[2] Employee cites that "as a hybrid entity, DC Water possesses characteristics of both government agencies and private organizations. However, its foundational purpose, governance structure and legal obligations align it closely with the District Government, qualifying it as an extension of public service."[3] Further, Employee contends that because of his work with DC Water, that upon the start of the position with agency on January 29, 2024, he was reinstated as a career service employee and not subject to probationary status. Additionally, Employee asserts that he was assured

[2] Employee's Brief at Page 3 (November 26, 2024).
[3] *Id*.

by personnel in the District of Columbia Department of Human Resources ("DCHR") that "his prior tenure and status would be restored."[4]

Employee also avers that "[e]mployee with DC Water does not interrupt an individual's status as a civil service employee." Employee contends that "his employment with DC Water cannot be construed as a break in service because the entity services an integral part of the District's public services."[5] Employee further asserts that "similar to other quasi-governmental entities, such as federally chartered nonprofit organizations or government-sponsored enterprises, DC Water bridges the gap between governmental and private-sector operations."[6] This noted, Employee maintains that his "transition from DC Water to DMV reflects a seamless continuation of his public service with the District." Further, Employee cites that "as a reinstated civil service employee, his employment record demonstrates uninterrupted contributions to public-sector responsibilities."[7] For these reasons, Employee avers that the District Personnel Manual ("DPM") along with other principles "governing quasi-governmental entities" require that his tenure at DC Water "be recognized as part of his cumulative civil service."[8] To this end, Employee asserts that the probationary period was inapplicable to him. Employee avers that DCHR "explicitly communicated to [him] that his prior civil service status, accrued during 15 years of permanent employment with the District Government would be reinstated without any probationary period."[9]

Employee further iterates that "the DPM emphasizes that probationary periods are intended only for employees new to the career service or for those transition to positions with different terms or classifications." Employee avers that he was a "reinstated employee" and as a result, is exempt from a probationary period, absent a "fundamentally new appointment" which is not applicable in his case.[10] Employee also asserts that by subjecting him to a probationary period, Agency's actions are "incompatible with the Civil Service Reform Act ("CRSA")." Employee asserts that the CRSA "mandates that personnel actions be governed by merit and free from arbitrary decisions." As such, Employee avers that the imposition of a probationary period undermines the intent of the CRSA.[11] Employee also cites that there is legal precedent regarding his reinstatement. Specifically, Employee contends that the decision in *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532 (1985) and *Perry v Sinderman*, 408 U.S. 593 (1972), both protect the "property rights of public employees in their continued employment." Employee asserts that "the written assurances from DCHR and the absence of any prior notification of probationary terms created a legitimate expectation that he would retain his permanent status upon rehire."[12]

Employee also avers that OEA has already exercised jurisdiction over DC Water. Employee cites that OEA exercised jurisdiction in "*Nicholas v. District of Columbia Water and Sewer Authority*, OEA Matter No. 2401-0036-16 (2017). Employee argues that because he transferred from DC Water

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[4] *Id*. at Page 2.
[5] *Id*. at Page 4.
[6] *Id*. at Page 5.
[7] *Id*.
[8] *Id*. at Pages 5-6.
[9] *Id*. at Page 6. Employee asserts that DCHR Representative Robin Brown "confirmed that reinstated employees return to the same employment status held before leaving District service, as affirmed in direct communications." Employee cites to an email dated April 10, 2024, where DCHR confirmed that his retirement status had been adjusted to reflect his civil service status.
[10] *Id*. at Page 7.
[11] *Id*. at Pages 7-8.
[12] *Id*. at Page 8.

to another agency, it should not be considered a break in service to require a probationary period. Employee also contends that Agency failed to provide adequate notice regarding probationary terms. Specifically, Employee asserts that Agency failed to acknowledge and adhere to local and federal provisions regarding "quasi-governmental" agencies like DC Water; and failed to adhere to required procedural processes regarding reinstatement and notice of probationary periods.[13] Employee also asserts that he was not afforded due process in that he was not granted a "pre-deprivation hearing or a clear explanation of the basis for designating him as a probationary employee."[14] As a result, Employee maintains that OEA has jurisdiction over this matter because "the imposition of probationary status on [Employee] is inconsistent with his reinstated civil service protections and the governing legal framework."

Agency's Position

Agency asserts Employee was in probationary status at the time of his removal from Agency, and that OEA has no jurisdiction over this matter. Agency avers that "District personnel rules provide that someone who leaves a position as non-probationary Career Service employee for *more than three days* and who then returns to a Career Service position shall serve in a probationary period of at least one year."[15] Agency assets that Employee previously worked in District government as Career Service and left for a position at DC Water for a period of more than three days and then returned to a Career Service position. Agency avers that because of this passage of time, Employee was required to serve a probationary period.[16] Agency further asserts that "none of the authorities cited in Employee's Brief on Jurisdiction support his claim that he was not a probationary employee at the time of his separation from the Agency."[17] Agency also contends that "no representative of the District government told Employe that he was excused from the requirement to serve a probationary period (and even if a representative had done so, such a representation would have been incorrect and the District would not be estopped to require Employee to serve a probationary period)."[18]

Agency provides that Employee was originally hired with District government in September 1987 where he was employed in Career Service until October 2000, when he left the Department of Motor Vehicles. He then worked with DC Water from January 2002 until July 2022.[19] Agency cites that in a letter dated "January 11, 2024, [Employee] was notified that he had been selected for the Career Service position of Hearing Examiner CS-0930 Grade 13 Step 1." Agency notes that letter also cited that Employee would begin his tenure on January 29, 2024, and advised that "his position was a Probational Career Appointment."[20] Agency further cites that on April 10, 2024, Employee was advise by DCHR that "his employment history records had been amended to reflect this prior service and that he could continue to participate in CSRS."[21] Agency maintains that on July 26, 2024, Employee was notified that was being removed from his position.

Agency asserts that the Comprehensive Merit Personnel Act ("CMPA") provides the jurisdiction of OEA, which includes adverse actions for cause. Agency further avers that a

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[13] *Id*. at Pages 10-11.
[14] *Id*. at Page 12.
[15] Agency's Brief at Page 1 (December 17, 2024).
[16] *Id.*
[17] *Id*.
[18] *Id*. at Pages 1 -2.
[19] *Id*. at Page 2.
[20] *Id.*
[21] *Id*. The undersigned would note that "CSRS" is the acronym for the "Civil Service Retirement System."

"probationary employee does not have a statutory right to be removed for cause." Agency contends that the Career Service was established by the CMPA and states that permanent career service status are upon satisfactory completion of a probationary period of a least 1 year.[22] Agency further avers that 6B DCMR §223.2 provides the guidance around probationary period and terms. Specifically, Agency notes that with regard to new probationary periods that "except when the appointment is affected with a break in service of three (3) days or more, or as otherwise specified in this chapter, an employee who once satisfactorily completed a probationary period in the Career Service shall not be required to serve another probationary period."[23] Agency argues that Employee was not subject to this exception because he was not a member of Career Service when he worked at DC Water and as such, this was a break in service of more than three days, thus meaning he was required to serve a probationary period.

Agency avers that Employee's assertions regarding the "quasi-governmental" status of DC Water do not mean that work there was in Career Service as defined by the CMPA and are governed by other statutory provisions. Agency further cites that Employee's notion that OEA has jurisdiction over DC Water is incorrect. Agency avers that the [Nicholas] matter applies to a specific code provision 21 DCMR §5207.23(b) wherein an employee may challenge the abolition of their position at OEA. Agency maintains that there is "no statute or regulation providing for probationary employees to challenge their removal at OEA."[24] Agency also avers that through email communications on January 25, 2024, Employee was aware that his tenure at DC Water did not transfer in a way to except him from serving a probationary period. Agency asserts that the only assurances Employee received were with regard to his CSRS, which has no bearing on his requirement to serve a probationary period.[25] Agency also asserts that Employee citation to *Loudermill* and *Sniderrmann* are not applicable in his matter, as he did not have continued employment.

Agency maintains that Employee was required to serve in a probationary term, and that he was terminated during that term. Agency avers that Employee has not "established that the District government provided any assurances to the contrary or that, even if such an assurance has been given by an individual DCHR employee, that the District was bound by that assurance." As a result, Agency asserts that OEA lacks jurisdiction over this matter, and that it must be dismissed.

Jurisdiction

This Office's jurisdiction is conferred upon it by law, and was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Official Code §1-601-01, *et seq.* (2001). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which took effect on October 21, 1998. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions. According to 6-B of the District of Columbia Municipal Regulation ("DCMR") § 604.1[26], this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting:

(a) A performance rating resulting in removal;
(b) An adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more; or

[22] *Id*. at Page 3.
[23] *Id.* at Pages 3-4.
[24] *Id*. at Page 5 at footnote #13.
[25] *Id*. at Page 6.
[26] *See also*, Chapter 6, §604.1 of the District Personnel Manual ("DPM") and OEA Rules.

(c) A reduction-in-force; or
(d) A placement on enforced leave for ten (10) days or more.

OEA Rule 631.2, 6-B DCMR Ch. 600 (December 27, 2021), states that "[t]he employee shall have the burden of proof as to issues of jurisdiction..." Pursuant to this rule, the 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." This Office has no authority to review issues beyond its jurisdiction.[27] Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.[28]

The principal issue here rests in the question of this Office's jurisdiction. In the instant matter, the undersigned agrees with Agency's assertion that OEA does not have jurisdiction over this matter because Employee was in probationary status at the time of his removal from Agency. It is clear from the documents in the record that on January 29, 2024, Employee began his tenure with Agency as a Hearing Examiner. Further, the SF-50 dated January 29, 2024, also noted this position was subject to a probationary term. The District Personnel Manual (DPM) in Chapter 2 § 227.4, cites that removals during the probationary period, are "neither appealable or grievable." Consistent with the DPM, OEA has held that terminations during probationary terms are not appealable or grievable and must be dismissed for lack of jurisdiction.[29]

Employee avers that he should not have been subject to a probationary term because he was "reinstated" to career service from his transition from DC Water to Agency. Further Employee also asserts that he was provided with "assurances from DCHR" that he would not be subject to a probationary term. Employee further maintains that his service with DC Water – a "quasi-governmental" agency in the District, means that he did not have a break in service, such that he should not have been subject to a probationary term upon his tenure with Agency beginning in January 2024. Agency contends that no such assurances were made and that Employee's work at DC Water was not Career Service as defined by the CMPA. Agency asserts that Employee was only provided information related to his retirement information, but that in no way impacted his tenure and the required probationary terms. Further, Agency asserts that even if DC Water was a Career Service position, that pursuant DPM Chapter 2 §226, that Employee was subject to a new probationary term because his break in service was more than three (3) days.[30] Agency asserts that Employee was last employed by DC Water in July 2022, and began his tenure with Agency January 2024, thus result in more than three (3) days break in service.[31]

The undersigned agrees with Agency's assertions regarding Employee's requirement to serve a probationary term upon the commencement of his tenure with Agency on January 29, 2024. The SF-

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[27] *See. Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).
[28] *See Brown v. District of Columbia Public Schools*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (January 22, 1993); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).
[29] *Day v. Office of the People's Counsel*, OEA Matter No. J-0009-94, Opinion and Order on Petition for Review (August 19, 1991).
[30] DPM Chapter 2§ 226.1 – "Except when the appointment is affected with a break in service of three (3) days or more, or as otherwise specified in this chapter, an employee who once satisfactorily completed a probationary period in the Career Service shall not be required to serve another probationary period.}"
[31] Agency's Answer at Tab 2 (October 3, 2024).

50, dated January 29, 2024, clearly reflects that Employee's position was "Career Probation" and notes that it was "Subject to completion of a one (1) year probationary period beginning January 29, 2024." Employee's arguments regarding these communications with DCHR reflect only a change regarding his retirement benefits, which do not presuppose or alter the requirement of serving a one (1) year probationary term. The SF-50 dated June 16, 2024, clearly reflects that it is a "Corr. in Retirement Plan" which has no other bearing on Employee's status regarding his probationary term.[32] The undersigned would also note that Employee's arguments citing to OEA's jurisdiction over DC Water to suggest that would affect the career status to be misguided. OEA has limited jurisdiction for DC Water employee appeals related to an abolishment of a position and those provisions do not otherwise grant OEA any other jurisdiction regarding Employee's arguments of reinstatement or continued "civil service, as suggested by Employee.[33] Assuming *arguendo* that OEA did have such jurisdiction (which it does not), the undersigned finds that Employee's argument would still fail pursuant to DPM Chapter 2 § 226, as Employee had a break in service of longer than three (3) days. Employee last worked at DC Water in 2022 and started the position with Agency in January 2024.[34] Based on the aforementioned, the undersigned finds that Employee was in probationary status at the time of his removal from Agency. As was previously cited, removals in probationary terms are neither appealable nor grievable to this Office. Accordingly, I find that Employee's Petition for Appeal must be dismissed for lack of jurisdiction.

ORDER

It is hereby **ORDERED** that the Petition in this matter is **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

/s/ Michelle R. Harris
MICHELLE R. HARRIS, ESQ.
Senior Administrative Judge

[32] Agency's Answer at Tab 3 (October 24, 2024).
[33] *See.* 21 DCMR § 5207.23. : (b) "An employee affected by the abolishment of a position may file with the Office of Employee Appeals a complaint contesting the improper application of the separation procedures under these regulations related to implementation of an employee's entitlement to one round of lateral competition in positions in the employee's competitive level as provided in §§ 5207.1 to 5207.18. (c) An employee selected for separation may file with the Office of Employee Appeals a complaint contesting improper application of the procedures implementing an employee's right to be given notice of at least thirty (30) days before the effective date of his or her separation as provided in § 5207.19."
[34] Agency's Brief at Page 2. (December 17, 2024). *See also*. Agency Answer at Tab 1 – Employee's Resume. (October 3, 2024).