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**THE DISTRICT OF COLUMBIA  
BEFORE  
THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	
RICHARD KIRKPATRICK,	)	
Employee	)	
	)	OEA Matter No. J-0141-15
v.	)	
	)	Date of Issuance: November 30, 2015
D.C. FIRE AND EMERGENCY	)	
MEDICAL SERVICES DEPARTMENT,	)	
Agency	)	Michelle R. Harris, Esq.
	)	Administrative Judge
<hr/>		
Richard Kirkpatrick, Employee <i>Pro Se</i>		
Andrea Comentale, Esq., Agency Representative		

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

On September 10, 2015, Richard Kirkpatrick (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Fire and Emergency Medical Services Department’s (“Agency” or “DC FEMS”) decision to terminate him. On September 25, 2015, Agency filed its Motion to Dismiss Employee’s Petition for Appeal.

I was assigned this matter on October 7, 2015. Agency noted in its Motion to Dismiss Employee’s Petition for Appeal that OEA does not have jurisdiction over this appeal because Employee’s appeal was untimely. On October 13, 2015, I issued an Order directing Employee to submit a brief addressing the jurisdiction issue raised by Agency in its Motion to Dismiss. Employee’s brief was due on or before October 26, 2015. Additionally, Agency had the option to submit a response to Employee’s brief. Employee did not submit his brief by the deadline.

On November 3, 2015, I issued an Order for Statement of Good Cause to Employee. Employee was ordered to submit a statement of good cause based on his failure to provide a response to the October 13, 2015 Order. Employee had until November 13, 2015, to respond. Employee responded on November 13, 2015. After considering the parties’ arguments as presented in their submissions to this Office, I have decided that an Evidentiary Hearing is not required. The record is now closed.

**JURISDICTION**

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

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee worked for the Agency as a Firefighter/EMT-Probationer, FS-081, Grade 1, Step1, from November 16, 2014, until his termination on July 25, 2015. In a Final Agency Decision dated July 16, 2015, Employee was terminated from his position for “engaging in criminal misconduct which led your arrest on March 10, 2015 for reckless driving and assaulting a police officer. Reports indicate that in the process of being arrested for reckless driving, you resisted officers, head-butted and kicked a police officer in the chest and attempted to flee from police custody”<sup>1</sup> Agency’s decision was effective as of July 25, 2015, and Employee filed a Petition for Appeal with this Office on September 10, 2015. Agency filed a Motion to Dismiss Employee’s Petition for Appeal on September 25, 2015.

***Employee’s Position***

Employee asserts that he wants to appeal his termination “due to the court having not made a decision and that the charges brought against me are not true”.<sup>2</sup> Employee maintains he did not commit what he was reported to have done on March 10, 2015.

***Agency’s position***

Agency asserts in its Motion to Dismiss Employee’s Petition for Appeal that this Office lacks the jurisdiction to adjudicate this matter. Agency argues that Employee’s appeal must be dismissed as untimely as he did not properly file his appeal with this Office in accordance with 6 DCMR § 604.2.<sup>3</sup> Further, Agency asserts that Employee was in probationary status at the time of his termination and therefore OEA has no jurisdiction over this appeal. Agency indicates that Employee was hired as a Firefighter/EMT and this Career Service appointment was subject to the completion of an 18-month probationary period pursuant to Chapter 8, Section 813.2 of the District Personnel Manual (“DPM”) which states in pertinent part that:

“A person hired to serve under a Career Service Appointment (Probational), including initial appointment with the District government in a supervisory position in the Career Service, shall be required to serve a probationary period of one (1) year, except in the case of individuals appointed on or after the effective date of this provision to the positions listed in paragraphs (a) through (d) of this subsection below, who shall serve a probationary period of eighteen (18) months:

- (a) Individuals hired into entry-level police officer positions in the Metropolitan Police Department;
- (b) Individuals hired into entry-level Correctional Officer positions in the Department of Corrections, or entry-level Youth Development Representative positions in the Department of Youth Rehabilitation Services;

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<sup>1</sup> Employee’s Petition for Appeal at Final Agency Decision (July 20, 2015).

<sup>2</sup> *Id.* at Page 3.

<sup>3</sup> Agency’s Motion to Dismiss at Page 2(September 25, 2015).

- (c) *Individuals hired into entry-level Firefighter/Emergency Medical Technician (EMT) and entry-level Firefighter/ Paramedic positions in the Fire and Emergency Medical Services Department (emphasis added); and*
- (d) *Individuals hired into emergency or non-emergency operations positions in the Office of Unified Communications.”*

### ***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,<sup>4</sup> 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
- (c) A reduction-in-force; or
- (d) A placement on enforced leave for ten (10) days or more.

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), 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.<sup>5</sup> Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.<sup>6</sup>

Additionally, under OEA Rule 604.2, an appeal filed with this Office must be filed within thirty (30) calendar days of the effective date of the appealed action. The District of Columbia Court of Appeals has held that the time limit for filing an appeal with an administrative adjudicatory agency such as this Office is mandatory and jurisdictional in nature.<sup>7</sup> This Office has consistently held that an exception to this mandatory and jurisdictional timing requirement arises when the agency fails to provide the employee “adequate notice of its decision and the right to contest this decision through an appeal.”<sup>8</sup>

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<sup>4</sup> See also, Chapter 6, §604.1 of the District Personnel Manual (“DPM”) and OEA Rules.

<sup>5</sup> See *Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, Opinion and Order on Petition for Review (September 30, 1992).

<sup>6</sup> 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).

<sup>7</sup> *King v. Department of Human Services*, OEA Matter No. J-0187-99 (November 30, 1999).

<sup>8</sup> OEA Rule 605.1; See also *Rebello v. D.C. Public Schools*, OEA Matter No. 2401-0202-04, Opinion and Order on Petition for Review (June 27, 2008) citing *McLeod v. D.C. Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003); *Jones v. D.C. Public Schools, Department of Transportation*, OEA Matter No. 1601-0077-09, Opinion and Order on Petition for Review (May 23, 2011).

In the instant matter, the undersigned agrees with Agency's assertion that OEA does not have jurisdiction over this matter. The July 17, 2015, Final Agency Decision made Employee's termination effective on July 25, 2015. Agency provided notice in the Final Agency Decision that Employee did not have appeal rights because he was still in probationary status at the time of termination. Employee commenced working with Agency on November 16, 2014, and was subject to an eighteen (18) month probationary term. He was terminated effective July 25, 2015. Based on this timeline, Employee was still in probationary status at the time of termination. Additionally, Employee filed his appeal with this Office on September 10, 2015. Assuming *arguendo* that Employee had appeal rights to this Office, (which he does not given his probationary status at the time of termination), his filing of his appeal on September 10, 2015, was untimely. His effective date of termination was July 25, 2015. Accordingly, Employee would have needed to file his appeal by August 24, 2015 for it to be timely in accordance with OEA Rule 604.2. For these reasons, I find OEA has no jurisdiction to adjudicate this matter and this matter must be dismissed.

ORDER

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

FOR THE OFFICE:

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MICHELLE R. HARRIS, Esq.  
Administrative Judge