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

|   |   |                                |
|---|---|--------------------------------|
| In the Matter of:                       | ) |                                |
|   | ) |                                |
| JESSICA SMITH                           | ) | OEA Matter No. J-0133-10       |
| Employee                                | ) |                                |
|   | ) | Date of Issuance: June 7, 2010 |
| v.                                      | ) |                                |
|   | ) | Lois Hochhauser, Esq.          |
| D.C. DEPARTMENT OF CORRECTIONS          | ) | Administrative Judge           |
| Agency                                  | ) |                                |
|   | ) |                                |
| Earnest Durant, Employee Representative |   |                                |
| Mitchell Franks, Agency Representative  |   |                                |

**INITIAL DECISION**

INTRODUCTION AND STATEMENT OF FACTS

Employee filed this petition with the Office of Employee Appeals (OEA) on November 4, 2009, appealing Agency’s final decision to terminate her employment. In its notice of termination dated October 21, 2009, and in its response to the petition dated April 23, 2010, Agency represented that Employee was a term employee in probationary status at the time of the removal.

This matter was assigned to me on May 11, 2010. I issued an Order on May 14, 2010, 2006, directing Employee to present legal and factual arguments to support her position that this Office had jurisdiction of this appeal, in light of Agency’s representation of her status as a probationary and term employee, by 4:00 p.m. on June 1, 2010. Employee was advised that she had the burden of proof on this issue of jurisdiction. Employee was further notified that if she failed to respond to the Order, the petition would be dismissed without further notice. The parties were notified that unless they were advised to the contrary, the record in this matter would close by 4:15 p.m. on June 1, 2010. Employee filed a timely response. The record closed on June 1, 2010.

JURISDICTION

This Office’s jurisdiction was not established.

## ISSUE

Should this matter be dismissed?

## FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

In her petition for appeal, Employee identified herself as a term employee, who had worked for Agency for one year. However, in its termination letter and response to the appeal, Agency stated that Employee was in probationary status at the time of termination. In its response, it stated that Employee was appointed to a term appointment for period not to exceed 13 months as a correctional officer on October 14, 2008 and that her probationary period would last for 18 months. She was terminated, effective on October 21, 2009.

Chapter 8, Section 814.3 of the District Personnel Manual provides that a termination during a probationary period cannot be appealed to this Office. An appeal to this Office by an employee serving in a probationary status must therefore be dismissed for lack of jurisdiction. *See, e.g., Day v. Office of the People's Counsel*, OEA Matter No. J-0009-94, *Opinion and Order on Petition for Review* (August 19, 1991) \_\_\_ D.C. Reg. \_\_\_\_ ( ). Section 814.3 further provides a probationary employee allegation that the termination was a violation of public policy, the whistleblower protection law or any federal or D.C. anti-discrimination law “may file action under any such laws, as appropriate”. In her response to the May 14<sup>th</sup> Order, Employee did not address her status as a probationary or term employee. Her response stated, in pertinent part:

It is unlawful to retaliate against individuals for imposing employment practices that discriminate based on filing for a discrimination charge (*sic*) or for testifying or participating in any way [in] an investigation, proceeding or litigation. The agency actions were malic in nature (*sic*) further the agency representative did in fact fraudulent [ly] misrepresent these parties. The agency representative is fully aware that the stated policy by which actions were taken against Ms. Smith are a common everyday practice. The agency representative is also aware that Ms. Smith was listed in a complaint prior to [her] dismissal. Ms. Smith and her representative contend that her dismissal was due [in part] to a 3<sup>rd</sup> party complaint. Further, the agency has a longstanding history of deception in OEA matters. By virtue the agency did not forward ms. Smith[‘s] representative a copy of [its] findings on the termination. Further, the agency where seeking to gain advantage in this matter. This should be reason for a sanction against the agency.

Employees have the burden of proof on issues of jurisdiction, pursuant to OEA Rule 629.2, 46 D.C. Reg. 9317 (1999). Employee must meet this burden by a “preponderance of the evidence” which is defined in OEA Rule 629.1, as 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 Administrative Judge concludes that Employee did not meet the burden of proof regarding OEA’s jurisdiction to hear this matter in view of the fact that she did not argue that Agency’s assertion of her status as a probationary

term employee at the time of her removal was incorrect or irrelevant. To the extent that Employee may be alleging violations of anti-discrimination laws, her recourse may be in another forum.

ORDER

It is hereby ORDERED that the petition for appeal is DISMISSED.

FOR THE OFFICE:

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LOIS HOCHHAUSER, ESQ.  
Administrative Judge