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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

<b>In the Matter of:</b>	)	
	)	
<b>CLIVE SMITH</b>	)	<b>OEA Matter No. J-0143-03</b>
<b>Employee</b>	)	
	)	<b>Date of Issuance: June 1, 2005</b>
<b>v.</b>	)	
	)	<b>Rohulamin Quander, Esq.</b>
	)	<b>Senior Administrative Judge</b>
<b>DISTRICT OF COLUMBIA</b>	)	
<b>PUBLIC SCHOOLS</b>	)	
<b>Agency</b>	)	

Omar Vincent Melehy, Esq., Employee Representative  
Harriet Segar, Esq., Agency Representative

**INITIAL DECISION**

On September 13, 2003, Employee, an Accountability and Evaluation Specialist with the D.C. Public Schools (the “Agency”), filed a Petition for Appeal with the D.C. Office of Employee Appeals (the “Office”), challenging the Agency’s decision, issued on June 16, 2003, and effective that same date, separating him from government service at the Agency. Agency was notified by this Office of the petition on December 2, 2003, and responded on January 28, 2004, filing *Agency Response To Employee Petition For Appeal*. Agency requested that the petition be dismissed for two primary reasons. First, Employee was probationary in his position and had no appeal rights to this Office. Second, being a member of the Council of School Officers, he was bound by Article VI<sup>1</sup>, § C 9, of the Collective Bargaining Agreement (the “Agreement”), which dictates that Employee was bound to follow the grievance procedures provided in the Agreement, which limited him to pursuing a grievance through his union, and not before this Office.

<sup>1</sup> Although Agency referred to the governing section of the union contract as “Article VII, Grievances and Arbitration”, I take administrative notice that Grievances and Arbitration are addressed under Article VI (emphasis added) of the union contract.

This matter was assigned to me on August 25, 2004. I convened a Status Conference on September 14, 2004, followed by telephonic Status Conferences on December 22, 2004, and January 25, 2005. Because Employee's personnel folder could not be located, Employee was given the opportunity to file a comprehensive affidavit, setting forth his employment history with the Agency, beginning with March 1, 1979, the date of his first position with the Agency, as a Statistician. Because of Employee's meticulous record keeping, he was able to provide 20 exhibits, which included several personnel action forms tracking his long career with the Agency. Since this matter could be decided based on the parties' positions as stated at the Status Conference and on the documents of record, no additional proceedings were held. The record is closed.

### ISSUE

Has the employee met his burden of proof that this Office has jurisdiction over this appeal?

### JURISDICTION

The jurisdiction in this matter has not been established.

### FINDINGS OF FACT ANALYSIS AND CONCLUSIONS

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999), reads as follows: "The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." According to OEA Rule 629.1, *id.*, a party's 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."

### **Probationary Employees**

This Office was established by the D.C. Comprehensive Merit Personnel Act of 1978 (the "Act"), D.C. Official Code § 1-601.01, *et seq.* (2001), and has only that jurisdiction conferred upon it by law. Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, amended certain sections of the Act, and provided that, pursuant to the D.C. Official Code, §1-606.03 and OEA Rule 604.2, a D.C. government employee may only appeal to this Office a final agency decision affecting: (a) A performance rating which results in removal of the employee; (b) An adverse action for cause that results in removal, reduction in grade, or suspension for ten (10) days or more; or, (c) A reduction in force.

Further, D.C. Official Code § 1-608.01(a)(2)(E), confers permanent Educational Service status upon employees who have been appointed to a position, upon completion of a probationary period of at least one year. Effective June 9, 2000, the Council of the District of Columbia adopted amended regulations for the updated implementation of the Act and, at the outset of the new regulations, provided at D.C. Personnel Regulations § 1600.1, 47 DCR 7094 (9-1-00) that the newly adopted regulations apply to each employee of the District government in the Career [and

Educational] Service, *who has completed a probationary period of at least one year.* (emphasis added).

Thus, a District government employee serving a probationary period does not have a statutory right to be removed for cause and cannot access or utilize the adverse action procedures under subchapters VI or XVII of the Comprehensive Merit Personnel Act ("CMPA"), which include appealing an adverse action to this Office. An appeal of an adverse action filed in this Office by an employee serving a probationary period must therefore be dismissed for lack of jurisdiction. *See Davis v. Lambert*, MPA No. 17-89, 119 DWLR 305 (1991) (regardless of agency regulations and advice to the contrary, probationary employees may be discharged at-will and they do not have any statutory right to appeal their termination to the OEA); *Day v. Office of the People's Counsel*, OEA Matter No. J-0009-94, *Opinion and Order on Petition for Review* (July 10, 1995), \_\_\_ D.C. Reg. \_\_\_ ( ); *Employee v. Agency*, OEA Matter No. 1601-0057-83, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 6057 (1985); *Jones v. District of Columbia Lottery Bd.*, OEA Matter No. J-0231-89, *Opinion and Order on Petition for Review* (Aug. 19, 1991), \_\_\_ 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. \_\_\_ ( ); *Jordan v. Metropolitan Police Dep't*, OEA Matter No. 1601-0314-94, *Opinion and Order on Petition for Review* (Sept. 29, 1995), \_\_\_ D.C. Reg. \_\_\_ ( ); and *Ramos-McCall v. District of Columbia Pretrial Services*, OEA Matter No. J-0197-93, *Opinion and Order on Petition for Review* (March 18, 1994), \_\_\_ D.C. Reg. \_\_\_ ( ).

On December 5, 2002, Employee received a letter from Aleta Y. Alsop, Acting Director, Office of Human Resources, offering the position in question. While the letter did not specifically state that his appointment as an Accountability and Evaluation Specialist was probationary, the governing law and personnel regulations specifically provide that such new appointments shall be probationary for one year.

There is an additional component in this case. Pursuant to 5 DCMR § 1307.7, if an employee had permanent status in any prior position in the Agency's Educational Service, but is separated from his current position during the probationary period of that new position, the employee is entitled to return to a suitable and available position equivalent to his or her prior position. The operability of this provision presumes that a suitable and available equivalent position can be found to which the employee can return. However, the key term which overshadows this entire section of the municipal regulation is the word "Probationary Period", and any retreat rights that an employee might enjoy would have to be addressed within the context of this section.

Under the Act and governing regulations, I conclude that this Office clearly has no jurisdiction over probationary employees. Rather, Employee's remedy, if any, must be to address the terms and conditions of employment, which resulted first in Employee being separated from his most recent position during his probationary period, and second, in Agency taking no apparent steps to locate and then return him to a suitable and available position equivalent to his prior position. Employee's basic complaint is that the Agency failed to take appropriate steps to put him

into another position, since he was a long term employee, who should have had some right to retreat to another position, provided a suitable one could be located.

The record herein does not reflect what efforts, if any, Agency extended towards Employee in this respect, but regardless of that effort, or lack thereof, I conclude that this matter is a grievance issue, not within the jurisdiction of this Office, and which should have been filed with the union. It has long been held that addressing the terms and conditions of employment is a grievance matter with the Agency, and not a proper subject for a petition for appeal at this Office. Therefore, I conclude that this Office has no jurisdiction over this appeal, and that it must be dismissed.

ORDER

It is hereby ORDERED that this matter is DISMISSED.

FOR THE OFFICE:

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ROHULAMIN QUANDER, ESQ.  
SENIOR ADMINISTRATIVE JUDGE