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

_____	)	
In the Matter of:	)	
	)	
BARBARA BREWER,	)	OEA Matter No. 1601-0412-10
Employee	)	
	)	Date of Issuance: June 10, 2014
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
_____	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Barbara Brewer (“Employee”) worked as a Teacher with the D.C. Public Schools (“Agency”). On August 23, 2010, Agency issued a notice to Employee informing her that she would be terminated because she failed to secure a position within sixty days of being excessed; she was not a permanent status employee; and she did not receive a final rating of at least “Effective” under IMPACT, Agency’s performance assessment system. The effective date of the termination was August 23, 2010.<sup>1</sup>

Employee challenged the termination by filing a Petition for Appeal with the Office of Employee Appeals (“OEA”) on September 20, 2010. In it, she argued that she would not have been terminated if she had been rated “Effective” or “Highly Effective” under IMPACT; her evaluation under IMPACT did not comply with the District of Columbia Municipal Regulations

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<sup>1</sup> *District of Columbia Public Schools’ Answer to Employee’s Petition for Appeal*, Tab # 1 (October 21, 2010).

(“DCMR”); and the IMPACT evaluation was grossly unfair. Further, according to Employee, Agency stated that she would not suffer any consequences as a result of her IMPACT ratings. Therefore, she requested that OEA declare the IMPACT evaluations invalid and reinstate her to her position.<sup>2</sup>

Agency explained in its Answer to the Petition for Appeal that Employee’s allegations regarding the IMPACT process were irrelevant because her termination was not based on her IMPACT rating. It argued that Employee was removed because she was excessed and failed to secure a position within sixty days of being excessed.<sup>3</sup> Additionally, it claimed that Employee was not a permanent status employee. It was Agency’s position that because Employee was a probationary employee at the time of separation, OEA did not have jurisdiction over the matter. Accordingly, it requested that the appeal be dismissed for lack of jurisdiction.<sup>4</sup>

Employee subsequently filed an Amended Petition for Appeal. In response to Agency’s assertion that OEA did not have jurisdiction over her appeal, she provided that pursuant to OEA’s rules, OEA could adjudicate the matter because ultimately, her removal was based upon her IMPACT performance evaluations. Additionally, because Agency stated in its notice that Employee could file an appeal with OEA, she argued that under the estoppel doctrine, it was barred from asserting a contradictory position on the same issue.<sup>5</sup>

The OEA Administrative Judge (“AJ”) subsequently issued an order directing Employee to submit a brief on whether the appeal should be dismissed for lack of jurisdiction due to her

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<sup>2</sup> *Petition for Appeal* (September 20, 2010).

<sup>3</sup> According to Agency, excess is defined as “an elimination of a teacher’s position at a particular school due to a decline in student enrollment, a reduction in the local school budget, a closing or consolidation, a restructuring, or a change in the local school program, when such an elimination is not a ‘reduction in force’ (RIF) or ‘abolishment.’” *District of Columbia Public Schools’ Answer to Employee’s Petition for Appeal*, p. 1-2 (October 21, 2010).

<sup>4</sup> *Id.*, 3-4.

<sup>5</sup> *Amended Petition* (November 9, 2010).

probationary status at the time of her termination.<sup>6</sup> Employee's submission reiterated the same arguments as those in her Amended Petition for Appeal. Additionally, she asserted that Agency's position regarding OEA's jurisdiction was based on "... a secret, unpublished decision which [could] not be precedential."<sup>7</sup>

The Initial Decision was issued on January 29, 2013. The AJ found that Employee was in the Educational Service, and "... educational service employees who are serving in a probationary period are precluded from appealing a removal action to [OEA] until their probationary period is finished."<sup>8</sup> He found that Employee started working for Agency on January 3, 2010, and the effective date of her removal was August 23, 2010. As a result, the AJ held that Employee was in a probationary status at the time of her removal. Consequently, he ruled that pursuant to § 814.3 of the District Personnel Manual ("DPM"), OEA lacked jurisdiction over the matter. Accordingly, Employee's appeal was dismissed.<sup>9</sup>

On February 27, 2013, Employee filed a Petition for Review with the OEA Board. She argues that the AJ misinterpreted the DPM when he held that OEA lacked jurisdiction. Additionally, she contends that the AJ did not address all of the facts and law raised in her appeal. Employee opines that the relevant section of the DPM which discusses appeals by probationary employees does not apply to Educational Service positions.<sup>10</sup> It is Employee's position that any employee can appeal a final Agency decision to OEA which resulted in

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<sup>6</sup> *Order on Jurisdiction* (August 20, 2012).

<sup>7</sup> Employee provided that the case cited by Agency did not apply to her because it relied on a statute that was repealed. However, even if the case applied to her, Employee asserted that she could still appeal to OEA because her notice of termination constituted a unilateral contract in which the option to appeal the termination to OEA was offered to her. *Law Memorandum Supporting Jurisdiction* (September 4, 2012).

<sup>8</sup> The AJ explained that pursuant to 5 DCMR § 1307.3, Employee needed to serve a two-year probationary period, and in accordance with 5 DCMR § 1307.6, her failure to do so would result in termination. *Initial Decision*, p. 3 (January 29, 2013).

<sup>9</sup> *Id.* at 4.

<sup>10</sup> Employee also provides that OEA's rules do not mention the word probation, nor do they exclude probationary employees from OEA's jurisdiction. *Petition for Review of Initial Decision*, p. 8 (February 27, 2013).

removal. Therefore, Employee requests that the Board reverse the Initial Decision and hold that OEA has jurisdiction over her appeal.<sup>11</sup>

In response to the Petition for Review, Agency states that Employee was not terminated based on any of the provisions provided in D.C. Official Code § 1-606.03. It reiterates that she was excused in accordance with the procedures of the Collective Bargaining Agreement that existed between it and the Washington Teachers' Union. Lastly, Agency renews its argument that because Employee was in a probationary status, she had no statutory right to appeal to OEA.<sup>12</sup>

OEA Rule 633.3(c) provides that a “petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a petition for review when the petition establishes that the decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation, or policy.” Employee contends that the AJ erroneously applied DPM § 814.3 to remove her.<sup>13</sup> Employee is correct that DPM § 814.3 applies to Career Service Employees and not Educational employees. Thus, the AJ improperly cited to this section of the regulation in the Initial Decision. However, the reference was *de minimus* because the AJ did properly rely on 5 DCMR § 1307 in reaching his decision that Employee was properly removed.

Agency's removal notice provided that one of the reasons for Employee's termination was that she was not a permanent status employee.<sup>14</sup> As the AJ provided, Educational Service employees are governed by 5 DCMR § 1307. The relevant sections of 5 DCMR § 1307 provide

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<sup>11</sup> *Id.* at 9.

<sup>12</sup> *District of Columbia Public Schools' Response to Employee's Petition for Review* (March 21, 2013).

<sup>13</sup> DPM § 814.3 provides that “a termination during a probationary period is not appealable or grievable . . . .”

<sup>14</sup> On Petition for Review, Employee spent a great deal of time detailing her argument of her status as a government employee. This Board agrees that she was employed by the District government and was thus, an employee. However, this case hinges on her employment status – specifically, was she a permanent or probationary employee.

that:

- 1307.1 An employee initially entering or transferring into the Educational Service shall meet certification requirements of the Board of Education and serve a probationary period.
- 1307.3 An initial appointee to the ET salary class shall serve a two (2) year probationary period requirement.
- 1307.6 Failure to satisfactorily complete the requirements of the probationary period shall result in termination from the position . . . .
- 1307.8 If the employee does not have permanent status in a prior position, he or she shall be terminated from employment.

Agency asserted that Employee's position fell under the ET-15 category.<sup>15</sup> Moreover, Employee conceded in her Petition for Review that she was a teacher serving a probationary period within the Educational Service designation.<sup>16</sup> Thus, in accordance with 5 DCMR § 1307.3, Employee was required to serve a two-year probationary period.

Employee was hired by Agency on January 3, 2010. Therefore, her probationary period would not have ended until January 3, 2012. However, Employee was terminated from service on August 23, 2010. It should be noted that in a letter from Agency's Human Resources Director to Employee, Agency gave Employee until June 21, 2011, to secure a mutual consent placement at another school, due to a rating error.<sup>17</sup> Therefore, the effective date of Employee's termination was June 21, 2011. Nonetheless, Employee was still removed prior to January 3, 2012, and thus, did not achieve permanent status in her position prior to being terminated. The AJ properly relied on the regulation. In accordance with 5 DCMR § 1307.8, Employee was properly terminated.

OEA has consistently held that a probationary employee may be removed without cause

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<sup>15</sup> *District of Columbia Public Schools' Answer to Employee's Petition for Appeal*, p. 4 (October 21, 2010).

<sup>16</sup> *Petition for Appeal*, p. 1 (September 20, 2010).

<sup>17</sup> *Amended Petition – Documents*, p. 7 (January 12, 2011).

during their probationary period.<sup>18</sup> OEA has reasoned that District government employees serving a probationary period do not have a statutory right to be removed for cause and cannot utilize the procedures under the Comprehensive Merit Personnel Act, which includes appealing those actions to this Office. Appeals filed by probationary employees are, therefore, dismissed for lack of jurisdiction.<sup>19</sup> Because Agency removed Employee during her probationary period, her Petition for Review must be denied.

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<sup>18</sup> *Jason Codling v. Office of the Chief Technology Officer*, OEA Matter No. J-0151-09, *Opinion and Order on Petition for Review* (December 6, 2010); *Susan Wallace v. D.C. Public Schools*, OEA Matter No. J-0009-05 (January 31, 2006); and *Elliott Duvall v. D.C. Department of Youth Rehabilitative Services*, OEA Matter No. J-0008-06 (January 24, 2006).

<sup>19</sup> *Jason Codling v. Office of the Chief Technology Officer*, OEA Matter No. J-0151-09, *Opinion and Order on Petition for Review* (December 6, 2010); *Susan Wallace v. D.C. Public Schools*, OEA Matter No. J-0009-05 (January 31, 2006); *Elliott Duvall v. D.C. Department of Youth Rehabilitative Services*, OEA Matter No. J-0008-06 (January 24, 2006); *Day v. Office of the People's Counsel*, OEA Matter No. J-0009-94, *Opinion and Order on Petition for Review*, (July 10, 1995); and *Jones v. District of Columbia Lottery Board*, OEA Matter No. J-0231-89, *Opinion and Order on Petition for Review* (August 19, 1991).

**ORDER**

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.