

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
KIMBERLY SMITH,)	
Employee)	OEA Matter No. J-0052-14
)	
v.)	Date of Issuance: April 15, 2014
)	
DEPARTMENT OF SMALL AND LOCAL)	
BUSINESS DEVELOPMENT,)	
Agency)	
)	
_____)	Arien Cannon, Esq.
Kimberly Smith, Employee, <i>Pro se</i>)	Administrative Judge
Tabitha D. McQueen, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Kimberly Smith (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) on February 12, 2014, challenging the Department of Small and Local Business Development’s (“Agency” or “DSLBD”) decision to terminate her for insubordination, neglect of duty, and absence without official leave. I was assigned this matter on February 25, 2014. An Order on Jurisdiction was issued on February 26, 2014, which required Employee to provide a statement of reason(s) why she believes this Office may exercise jurisdiction over her appeal. Employee filed her response on March 11, 2014. Agency filed a Motion to Toll Time to File Answer and a Motion to Dismiss for Lack of Jurisdiction on March 20, 2014. The record is now closed.

ISSUE

Whether OEA may exercise jurisdiction over Employee’s appeal.

JURISDICTION

As will be explained below, the jurisdiction of this Office has not been established.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

There is a question as to whether this Office has jurisdiction over Employee's appeal. D.C. Official Code § 1-606.03 ("Appeal procedures") reads in pertinent part as follows:

An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . . , an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . . , or a reduction in force [RIF]. . . . *Any appeal shall be filed within 30 days of the effective date of the appealed agency action.*

OEA Rule 604.2 also provides that an appeal filed with this Office must be filed within thirty (30) calendar days of the effective date of the appealed agency decision.¹ Here, Employee's termination letter dated May 20, 2011, advised her that she must file her appeal with OEA within thirty (30) calendar days of Agency's final decision. Employee's termination became effective May 27, 2011. Employee filed her Petition for Appeal with this Office on February 12, 2014, nearly three (3) years after she was terminated.

OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), states that "[t]he *employee* shall have the burden of proof as to issues of jurisdiction..." The burden of proof is defined under a preponderance of the evidence standard. Preponderance of the evidence means "[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."²

On February 26, 2014, an order regarding jurisdiction was issued which required Employee to set forth her reasons as to why this Office may exercise jurisdiction over her appeal. In response to the Order on Jurisdiction, Employee states that "[she] was unaware of the DC Whistleblower statute at the time of [her] employment with [Agency]..." It appears that Employee is asserting that she was wrongfully terminated in violation of the Whistleblower Protection Statute, as set forth in D.C. Code § 1-615.51, *et. seq.* However, Employee does not provide any arguments as to why she failed to file her appeal within the thirty (30) day time frame set forth in D.C. Code § 1-606.03. While Employee may not have been aware of the Whistleblower Protection Statute, that does not negate the fact that she filed her appeal with this Office nearly three (3) years after her termination. The Notice of Final Decision on Proposed Removal, issued by Agency on May 20, 2011, clearly provides that Employee was entitled to appeal the removal action within thirty (30) days to OEA.

Employee further asserts that she has not pursued any civil action pursuant to D.C. Code § 1-615.54. Thus, Employee believes that OEA is the appropriate forum to seek an administrative remedy. However, this Office has no authority to review issues beyond its jurisdiction. The time limits for filing appeals with administrative adjudicative agencies are mandatory and jurisdictional matters. *See Zollicoffer v. District of Columbia Pub. Sch.*, 735

¹ 59 DCR 2129 (March 16, 2012).

² OEA Rule 628.1, 59 DCR 2129 (March 16, 2012).

A.2d 944 (D.C. 1999) (quoting *District of Columbia Pub. Emp. Relations Bd. v. District of Columbia Metro. Police Dep't*, 593 A.2d 641, 643 (D.C. 1991)). A failure to file a notice of appeal within the required time period divests this Office of jurisdiction to consider the appeal. *See Id.* at 946. Because Employee filed her appeal beyond the time limits set forth in OEA Rule 604.2, and has not satisfied her burden of proof as to jurisdiction, this matter must be dismissed. Although OEA's jurisdiction over this appeal was divested after thirty (30) days from the effective date of Employee's termination, that does not preclude Employee from seeking a remedy in another forum.

ORDER

Based on the aforementioned, it is **ORDERED** that Employee's Petition for Appeal is hereby **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge