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

In the Matter of:	)	
	)	
EMPLOYEE	)	OEA Matter No. 1601-0008-22
	)	
v.	)	Date of Issuance: March 15, 2022
	)	
OFFICE OF THE STATE SUPERINTENDANT	)	JOSEPH E. LIM, ESQ.
OF EDUCATION	)	Senior Administrative Judge
<u>Agency</u>	)	
Latisha Washington, Employee <i>pro se</i>	)	
Vincent Enriquez, Esq., Agency Representative	)	

**INITIAL DECISION**

PROCEDURAL HISTORY

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) on November 9, 2021, appealing the proposed decision of the Office of the State Superintendent of Education (“Agency”) to summarily remove her from her position as Bus Attendant. OEA requested Agency’s response on November 16, 2021, and Agency filed an Answer to Employee’s Appeal on December 16, 2021, as a Motion to Dismiss. This matter was assigned to me on February 4, 2022. I held a Prehearing Conference on February 22, 2022, and ordered the parties to submit briefs on the issue of jurisdiction. While Agency complied, Employee relied on her prior submissions. The record is now closed.

JURISDICTION

The Office lacks jurisdiction over this appeal.

ISSUE

Whether this matter should be dismissed for lack of jurisdiction.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

Based on the documents and agreed to by the parties, the undisputed facts are as follows:

1. Agency alleges that on October 25, 2021, Employee, a bus attendant in Agency's employ, engaged in conduct prejudicial to the District of Columbia government. Specifically, Agency alleges that Employee exhorted a fellow employee to join a "sick out," thereby jeopardizing Agency's mission of transporting students safely to and from school. Agency further alleges that Employee's motive was financial in that it was an attempt to get hazardous pay and five dollars from terminals.
2. On October 28, 2021, Agency issued a Notice of Summary Removal to Employee. The notice enumerated its factual allegations against Employee, identified the D.C. Code and D.C. regulations that Employee violated, provided Employee an opportunity to respond, and informed her of Agency's review process.
3. On November 8, 2021, Employee submitted a written response with supporting documentation.
4. On November 8, 2021, Hearing Officer Robinson issued her Memorandum of Administrative Review of Proposed Notice of Removal. Her memo recommended the removal of Employee.
5. To date, Agency has not issued a final decision regarding Employee.

Whether Employee's appeal should be dismissed for lack of jurisdiction.

The pertinent regulations governing summary removals is contained in 6 District of Columbia Municipal Regulations ("DCMR") B1616. 16B DCMR 1616.2 states that: "An employee may be suspended or removed summarily when his or her conduct: (a) Threatens the integrity of District government operations; (b) Constitutes an immediate hazard to the agency, to other District employees, or to the employee; or (c) Is detrimental to the public health, safety, or welfare. 6B DCMR §1616.4 states: When the agency head is satisfied that the conditions of § 1616.2 are present, the agency may order the employee to immediately leave his or her duty station. Additionally, the agency may order the employee to stay away from any District government owned or occupied properties, to the extent reasonably necessary to ensure the safety of District employees and property, the integrity of government operations, and the public health, safety, and welfare.

16B DCMR 1616.5 states that: When summary action is warranted, the agency shall: (a) Provide the employee with a notice of summary action, in accordance with § 1620; (b) Provide the employee an opportunity to respond, in accordance with §1621; (c) Provide the employee with a final determination, in accordance with §1623; and (d) Advise the employee of his or her applicable appeal rights.

6B DCMR §1621.1 states: Whenever an employee is served a *notice of proposed or summary action*, he or she may submit a written response to the appropriate official identified in the notice. [emphasis added]. In the case of removals, the appropriate official shall be a hearing officer appointed pursuant to § 1622. Otherwise, the appropriate official shall be the deciding official. 6B DCMR §1623.1 states: The final agency decision relating to a corrective or adverse action against an employee shall be made by the deciding official, who shall be the agency head,

or his or her designee. A proposing official may not serve as the deciding official for the same matter, except when the size of the agency mandates otherwise. 6B DCMR §1623.2 states: In making the final decision, the deciding official shall: (a) Consider the notice of proposed or summary action and supporting materials, the employee's response (if any), and any report and recommendation of a hearing officer; and (b) Either sustain or reduce the proposed or summary action, remand the action to the proposing official with instructions for further consideration, or dismiss the action. A copy of any remand decision shall be served on the employee.

6B DCMR §1623.3 states: The final determination shall be in writing, dated and signed by the deciding official. 1623.4 The final determination shall: (a) Provide a concise summary of the action(s) being taken and the effective date of the action(s); (b) Succinctly enumerate each independent cause for which corrective or adverse action is being taken; specifications shall not be used in any final written decision; (c) Provide for an independent corrective or adverse action for each enumerated cause, consistent with § 1623.4(b); (d) Demonstrate reasoned consideration of the relevant factors set forth in § 1606.2 for each independent action; and (e) Articulate the employee's appeal rights, as outlined in § 1625, if any.

6B DCMR §1623.5 states: In addition to the information specified in § 1623.4 each final agency decision shall be accompanied by: (a) Copies of the materials relied upon by the agency in rendering its decision; (b) For enforced leave of ten (10) or more days and adverse actions: (1) A copy of the Rules of Procedure for the Office of Employee Appeals (OEA); and (2) An OEA appeal form; (c) A notice of the employee's right to elect between the remedies specified in § 1625; and (d) A notice of the employee's right to be represented by an attorney or other representative authorized by law.

6B DCMR §1623.6<sup>1</sup> states: The final decision shall be completed within forty-five (45) days of the latter of: (a) The expiration of the employee's time to respond; (b) The agency's receipt of the employee's response (if any); (c) The completion of the hearing officer's report and recommendation, if applicable; or (d) A date agreed to by the employee.

In the documents and representations of the parties in this Matter, it is undisputed that Agency's final decision has not been rendered. Based on a review of the Petition for Appeal, a question arose as to whether this Office has jurisdiction over this matter. An employee has the burden of proof as to issues of jurisdiction. *See* OEA Rule 628.2, 59 D.C. Reg. 2129 (2012).

The D.C. Comprehensive Merit Personnel Act (CMPA), D.C. Official Code Ann. § 1-601.01 et seq. (2001), established this Office, which has only that jurisdiction conferred upon it by law. The types of actions that employees of the District of Columbia government may appeal to this Office are stated in D.C. Official Code Ann. § 1-606.03.

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<sup>1</sup> In *Kyle Quamina v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0055-17, *Opinion and Order on Petition for Review* (April 9, 2019), OEA held that this section was a statutory procedural requirement where the regulation is directory, not mandatory in nature. As such, any violation of this section is subject to a harmless error test.

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Protections Act (hereinafter “CMPA”), sets forth the law governing this Office. D.C. Official Code § 1-606.03 (“Appeal procedures”) states in pertinent part that:

- (a) An employee may appeal a *final* agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.

[Emphasis supplied.]

Further, OEA Rule 604.1 provides that Employee has the burden of proof for establishing jurisdiction.<sup>2</sup> Pursuant to OEA Rule 604.1 this Office has jurisdiction in matters involving District government employees appealing a *final* agency decision affecting:

- (a) A performance rating which results in removal of the employee;
- (b) An adverse action for cause which results in removal;
- (c) A reduction in grade;
- (d) A suspension for ten (10) days or more;
- (e) A reduction-in-force; or
- (f) A placement on enforced leave for ten (10) days or more.<sup>3</sup>

[Emphasis supplied.]

At the prehearing conference, Employee conceded that Agency has not issued a final decision on her adverse action. The plain language of CMPA and OEA Rules compels the dismissal of this appeal for lack of jurisdiction. The starting point in every case involving construction of a statute is the language itself. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 753, 756 (1975). A statute that is clear and unambiguous on its face is not open to construction or interpretation other than through its express language. *Banks v. D.C. Public Schools*; OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992); *Caminetti v. United States*, 242 U.S. 470 (1916); *McLord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980). Here, the CMPA clearly and unambiguously removed grievance appeals from the jurisdiction of this Office. Further, this Office has consistently held that appeals involving grievances are not within our jurisdiction. *See, e.g., Farrall v. Department of Health*, OEA Matter No. J-0077-99 (June 1, 1999); *Anthony v. Department of Corrections*, OEA Matter No. J-0093-99 (June 1, 1999); and *Forrest v. D.C. General Hospital*, OEA Matter No. J-0066-99 (April 9, 1999).

Agency does not come to this appeal with clean hands. It must comply with 6B DCMR §1623.6 and issue a final decision on Employee’s adverse action immediately. Nonetheless, based on the above-mentioned statutory provisions, I find that Employee has not established that this

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<sup>2</sup> OEA Rules 604.1, 68 DCR 012473 (December 27, 2021).

<sup>3</sup> *Id.*

Office has jurisdiction over her appeal by showing that there has been a final agency decision. I thereby conclude that Employee's appeal is not within the jurisdiction of this Office. Accordingly, I find that Employee's Petition for Appeal must be dismissed.

ORDER

It is hereby ORDERED that this appeal is DISMISSED for lack of jurisdiction. It is further ORDERED that Employee may refile her appeal once Agency's final decision has been rendered.

FOR THE OFFICE:

*s/ Joseph Lim*

JOSEPH E. LIM, ESQ.

Senior Administrative Judge