THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
SYLVIA JOHNSON,	)	
Employee	)	OEA Matter No. J-0145-15
	)	
v.	)	Date of Issuance: February 11, 2016
	)	
D.C. FIRE & EMERGENCY MEDICAL SERVICES,	)	
Agency	)	
	)	Arien Cannon, Esq.
	)	Administrative Judge

Johnny M. Howard, Esq., Employee Representative
Janea J. Raines, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Sylvia Johnson ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") on September 21, 2015, challenging the District of Columbia Fire & Emergency Medical Services' ("Agency") decision to remove her from her position as a Management Liaison Specialist. The effective date of Employee's termination was the close of business on August 21, 2015.

I was assigned this matter on October 21, 2015. An Order on Jurisdiction was issued on October 30, 2015, which required Employee to set forth her argument as to why this Office may exercise jurisdiction over her appeal. On October 30, 2015, Agency file a Motion to Dismiss for Lack of Jurisdiction and on November 23, 2015, Employee filed an Opposition to Agency's Motion to Dismiss. A Status Conference was convened on December 16, 2015, to address the jurisdiction issue. Subsequently, Employee submitted a supplemental brief addressing jurisdiction and Agency submitted its response. I have determined that an evidentiary hearing is not warranted. The record is now closed.

JURISDICTION

The jurisdiction of this Office has not been established in this matter as discussed below.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

BURDEN OF PROOF

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.[1]

Employee's Position

In her Opposition to Agency's Motion to Dismiss, Employee argues that Agency did not provide notice in her offer letter that she must satisfy a probationary period in order to be successful in her employment.[2] Employee further asserts that she was mischaracterized by Agency as a probationary employee at the time of her termination. Employee maintains that prior to being reinstated, and subsequently terminated from her most recent appointment, she held a Career Service appointment position and completed the probationary period as a Management Liaison Specialist. Based on these arguments, Employee contends that she was not in a probationary period at the time of her termination in the instant matter.

Agency's Position

Agency counters Employee's argument that she previously held a Career Service appointment and completed the probationary period, and asserts that Employee's previous appointment was classified as a term appointment under DPM § 823.[3] Agency maintains that Employee did not hold a permanent Career Service position prior to her separation at the conclusion of her term appointment on March 30, 2014; thus, Employee was not eligible for reappointment pursuant to DPM § 816. Rather, Agency contends that when Employee was rehired on September 22, 2014, she was hired to a probational Career Service appointment governed by D.C. Code § 1-608.01(a)(5).

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee was initially hired by Agency on July 20, 2009, as a Management Liaison Specialist under a term appointment.[4] On September 22, 2011, Employee's term appointment was extended, and subsequently extended again on July 20, 2013.[5] On March 30, 2014, Employee was terminated from her position as a result of the expiration of her term

[1] OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).
[2] Opposition to Agency's Motion to Dismiss Employee's Petition for Appeal (November 23, 2015).
[3] Agency's Reply Brief (January 29, 2016).
[4] Agency's Reply Brief, Attachments (January 29, 2016).
[5] *Id*.

appointment.[6] Employee was rehired on September 22, 2014, to a probational Career Service appointment pursuant to D.C. Code § 1-608.01(a)(5).[7] The instant appeal stems from Employee's termination effective at the close of business on August 21, 2015.

Employee argues that prior to being appointed to a Career Service position as a Management Liaison Specialist on September 22, 2014; she previously served in a Career Service position and completed the probationary period. This argument is not supported by the record. While it is true that Employee previously served with Agency as a Management Liaison Specialist beginning in July 2009, and ending in March 2014, this position was classified as a term appointment, which was extended on a number of occasions.[8] At the expiration of this term appointment, Employee was terminated on March 30, 2014. Nearly six (6) months later, Employee was rehired by Agency under a Career Service appointment pursuant to D.C. Code § 1-608.01(a)(5), which required Employee to serve a one year probationary period. In Employee's supplemental brief, she relies upon DPM § 816.1, to argue that she had reinstatement eligibility to a Career Service position and was not subject to a probationary period. DPM § 816.1 provides that:

> Except for a person who has a retreat right to a position in the Career Service as provided in chapter 9 or 10 of these regulations, a person shall have reinstatement eligibility for three (3) years following the date of his or her separation if he or she meets both of the following requirements:
>
> (a) The person previously held a Career Appointment (Permanent); and,
> (b) The person was not terminated for cause under chapter 16 of these regulations.

Despite Employee's contention that she was a Career Service (Permanent) employee from July 20, 2009, through March 30, 2014, and satisfactorily completed a probationary period, her Notification of Personnel Action forms ("Form SF-50") indicate otherwise in box 5-B and 5-D.[9] These respective boxes on the SF-50s clearly describe the nature of Employee's tenure during this time period as term appointments. In Employee's Supplemental brief, she highlights the remarks in box 45 of her SF-50, which states, "Reinstatement eligibility based on Career appointment with FEMS from 3/30/2014 to 9/22/2014."[10] It is apparent that this is an errant remark as Employee was not working with Agency during this time period. I find that this remark was not intended to deceive Employee regarding the status of her employment. I further find that Employee's Career Service appointment on September 22, 2014, was not preceded by a satisfactorily completed probationary period at any time from July 20, 2009, to March 30, 2014; and therefore, not eligible for reappointment under DPM § 816.

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[6] *Id*., Notification of Personnel Action Effective Date of March, 30, 2014.
[7] Petitioner's Supplemental Brief, Attachment (January 19, 2016).
[8] See Agency Reply Brief, Attachments (January 29, 2016).
[9] *Id*.
[10] Petitioner's Supplemental Brief, Attachment (January 19, 2016).

Employee also raises the argument in her Opposition to Agency's Motion to Dismiss that the offer letter she accepted did not provide any language stating that she would be required to complete a probationary period for her September 22, 2014, appointment. Although Agency submitted an offer letter that was purportedly accepted by Employee containing language regarding a one year probationary period, Employee also submitted an offer letter which does not contain any language pertaining to a probationary period.[11] Both offer letters are nearly identical, with the exception of the probationary language. It is unclear based on the record why Agency submitted the offer letter that was purportedly accepted by Employee that does not contain the one year probationary language. Despite this discrepancy, Employee does not cite to any law, rule, or regulation that requires that an employee be provided notice that they are subjected to serve a probationary period; nor is the undersigned aware of any such requirement. While the probationary language in the offer letter may have alleviated any discrepancies regarding Employee's status, it was not required.

Additionally, it is uncontroverted that Employee had a break in service from March 30, 2014, to September 22, 2014, when she was rehired. It is well settled in DPM §§ 813 and 813.8, that after a break in service of more than one (1) day, it is required that an employee be subjected to a one (1) year probationary period. Although the offer letter put forth by Employee in her Opposition to Agency's Motion to Dismiss does not contain language referencing a probationary period, the absence of this language cannot trump the requirements of a probationary period as set forth in the D.C. Personnel Regulations.

Furthermore, Employee cites to *Cocome v. Lottery & Ch. Games Control Bd*., 560 A.2d 547 (D.C. 1989), to support her arguments. In *Cocome*, the court held that the Lottery Board misled an employee by telling him that he was a probationary employee and had no retention or procedural rights, which resulted in him submitting an involuntary resignation. The court further held that a resignation may be regarded as involuntary where an agency makes a misrepresentation to an employee regarding his rights, and the employee who resigns detrimentally relies on that misrepresentation.[12] Agency asserts, and the undersigned agrees, that the instant case is starkly different. Unlike in *Cocome*, Employee did not voluntarily resign, but rather was terminated from her position prior to the end of her probationary period. Employee did not detrimentally rely on any representation made by Agency regarding her employment status. Accordingly, I must find that Employee has not satisfied her burden of proof that this Office has jurisdiction over her appeal.

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[11] Motion to Dismiss Employee's Petition for Appeal, Exhibit A (October 30, 2015); *See also* Opposition to Agency's Motion to Dismiss Employee's Petition for Appeal, Attachment (November 23, 2015).

[12] *Cocome v. Lottery & Ch. Games Control Bd*., 560 A.2d 547 (D.C. 1989)(citing *Christie v. United States*, 518 F.2d 584(1975)).

ORDER

It is hereby **ORDERED** that Agency's Motion to Dismiss is hereby **GRANTED** and Employee's Petition for Appeal is **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

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Arien P. Cannon, Esq.
Administrative Judge