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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: J-0127-11
LISA JONES,)	
Employee)	
)	Date of Issuance: November 30, 2011
v.)	
)	
DEPARTMENT OF INSURANCE,)	
SECURITIES AND BANKING,)	
Agency)	Sommer J. Murphy, Esq.
_____)	Administrative Judge
Lisa Jones, Employee, Pro Se		
Rhonda Blackshear, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On July 7, 2011, Lisa Jones (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the Department of Insurance, Securities and Banking’s (“Agency”) action of terminating her employment. Employee was hired as an Insurance Examiner on October 12, 2010. The position was subject to a one year probationary period. On June 13, 2011, Agency issued Employee an amended letter of termination with an effective date of June 24, 2011.

I was assigned this matter on or around October 1, 2011. After reviewing the record, it appeared there was a question of whether this Office has jurisdiction over Employee’s appeal. I subsequently issued an Order on October 12, 2011, requiring the parties to address the jurisdictional issue. Both parties responded to the Order.

JURISDICTION

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

ISSUE

Whether this Office has jurisdiction over Employee's appeal.

ANALYSIS, AND CONCLUSIONS OF LAW

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999), states that "the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." OEA Rule 629.1, states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean: "[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."

Effective October 21, 1998, and except as otherwise provided in the District of Columbia Government Comprehensive Merit Personnel Act of 1978, DC Code 1 601.1 et seq. or Rule 604.2 below, any District of Columbia government employee may appeal 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

Employee argues that OEA has the authority to adjudicate this matter, notwithstanding her status as a permanent or probationary employee.¹ According to Employee, Agency violated several District of Columbia personnel regulations as a result of her termination. To wit; Employee alleges that Agency: 1) failed to provide Employee with a performance plan or performance evaluation during her probationary period; and 2) refused to negotiate, in good faith, Employee's termination with the Equal Employment Office ("EEO"). Employee cites to several District Personnel Manual sections to support her arguments. In addition, Employee asserts that her termination was a result of retaliation from a former supervisor who allegedly threatened Employee beginning on the first day of her employment. In sum, Employee contends that Agency's actions during her employment were not in compliance with District personnel laws afforded to probationary employees.

It is Agency's position that this Office does not have jurisdiction over Employee's appeal. Agency submits that Employee's status as a probationary employee at the time she was terminated prevents OEA from asserting subject matter jurisdiction over this appeal. Furthermore, according to Agency, Employee was provided with, and subsequently signed, a "Performance Plan" in addition to other forms of instruction and training during her probationary

¹ In her petition for appeal, Employee identified herself as being in permanent status; however, she later identified herself as being a probationary employee in her submission on jurisdiction. See Petition for Appeal at p. 1 (July 7, 2011); Employee Brief on Jurisdiction at p. 6 (October 25, 2011).

period.² With respect to Employee's EEO complaints, Agency states that OEA is not the proper venue to address such grievances.

District Personnel Manual ("DPM") § 813.2 states that:

A person hired to serve under a Career Service Appointment (Probational), including initial appointment with the District government in a supervisory position in the Career Service, shall be required to serve a probationary period of one (1) year, except in the case of individuals appointed on or after the effective date of this provision to the positions listed below, who shall serve a probationary period of eighteen (18) months:

- (a) Individuals hired into entry-level police officer positions in the Metropolitan Police Department;
- (b) Individuals hired into entry-level correctional officer positions in the Department of Corrections or the Department of Youth Rehabilitation Services; and
- (c) Individuals hired into emergency or non-emergency operations positions in the Office of Unified Communications.

Employee was hired as a CS-1163-13/01 Insurance Examiner with an effective date of October 12, 2010. Employee's appointment as a Career Service employee was subject to the completion of a one year (1-year) probationary period.³ Agency issued Employee a notice of termination by letter dated June 9, 2011. Employee refused to sign the termination letter; however an Agency Management Liaison witnessed delivery of the letter to Employee and signed her name to the document.⁴ Agency subsequently amended the termination letter, dated June 13, 2011, and changed the effective date of Employee's termination to June 24, 2011. The amended letter was mailed to Employee's address of record via certified mail.

Employee did not complete the one year probationary period as required by DPM § 813.2 and therefore remained in a probationary status at the time she was terminated. Accordingly, we must look to § 814 of the District Personnel Manual to determine if Agency properly terminated Employee during her probationary period. District Personnel Manual §§ 814.1-814.3 states that:

814.1 Except for an employee serving a supervisory or managerial probationary period under section 815 of this chapter, an agency shall terminate an employee during the probationary period whenever his or her work performance

² See Agency Answer (August 10, 2011); Agency Brief on Jurisdiction, Exhibit 1 (November 16, 2011).

³ Agency Brief on Jurisdiction, Tab 2 (November 16, 2011).

⁴ Agency Answer at Tab 26 (August 10, 2011).

or conduct fails to demonstrate his or her suitability and qualifications for continued employment.

814.2 An employee being terminated during the probationary period shall be notified in writing of the termination and its effective date.

814.3 A termination during a probationary period is not appealable or grievable. However, a probationer alleging that his or her termination resulted from a violation of public policy, the Whistleblower protection law, or District of Columbia or federal anti-discrimination laws, may file action under any such laws, as appropriate.

Agency complied with District Personnel Manual §814.2 and §814.3 by providing Employee with written notice of her termination, providing an effective date of such termination, and by informing Employee of her appeal rights to this Office. DPM § 814.1 does not require Agency to provide the specific reasoning for an employee's termination. Instead, it offers a general reason why termination is allowable during the probationary period.⁵

In her Brief on Jurisdiction, Employee states that the basis of her termination was a result of a violation of Section 814.3 of the District Personnel Manual, *supra*. Although Employee alludes to alleged acts of retaliation and possible discrimination on the part of a former supervisor in her petition for appeal, these arguments were later blanketed as alleged violations of "public policy, the Whistleblower Act and/or District law(s)." The crux of Employee's arguments; however, pertain to her belief that Agency did not comply with the DPM because it failed to provide Employee with adequate training, performance planning and evaluation prior to terminating her.

I find that Employee was still in a probationary status at the time she was terminated. OEA has consistently held that an appeal to this Office by an employee serving in a probationary status must be dismissed for lack of jurisdiction.⁶ Because OEA lacks jurisdiction over Employee's appeal, this Office also does not have the authority to adjudicate Employee's arguments pertinent to claims of discrimination or violations of other District laws under DPM §814.3.⁷ These arguments must be brought before the correct forum. Consequently, Employee's petition for appeal must be dismissed.

⁵ See *Codling v. DC Office of the Chief Technology Officer*, OEA Matter No. J-0151-09 (December 4, 2009) *Opinion and Order on Petition for Review* (December 6, 2010).

⁶ See, e.g., *Day v. Office of the People's Counsel*, OEA Matter No. J-0009-94, *Opinion and Order on Petition for Review* (August 19, 1991) D.C. Reg. ().

⁷ See, *Rebecca Owens v. Department of Mental Health*, OEA Matter No. J-0097-03 (April 30, 2004), ___ D.C. Reg. ___. Holding that when OEA lacks jurisdiction to adjudicate the merits of an employee's petition for appeal, this Office was unable to address the merit(s) of Employee's Whistleblower claim(s) contained therein.

ORDER

It is hereby ORDERED that Employee's appeal is dismissed for lack of jurisdiction.

FOR THE OFFICE:

SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE