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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
EMPLOYEE <sup>1</sup> ,	)	OEA Matter No. J-0053-24
	)	
v.	)	Date of Issuance: August 13, 2024
	)	
DISTRICT OF COLUMBIA	)	MONICA DOHNJI, Esq.
METROPOLITAN POLICE DEPARTMENT,	)	Senior Administrative Judge
Agency	)	
_____	)	
Daniel J. McCartin, Esq., Employee Representative	)	
Lauren Schwartz, Esq., Agency Representative	)	

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On May 17, 2024, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Metropolitan Police Department’s (“Agency” or “MPD”) decision to terminate her from her position as a Senior Police Officer, effective April 30, 2024. OEA issued a Request for Agency Answer to Petition for Appeal on May 17, 2024. Agency filed its Motion to Dismiss Due to Lack of Jurisdiction on June 13, 2024, asserting that OEA lacked jurisdiction over this matter because Employee was a temporary Employee with no appeal rights. This matter was assigned to the undersigned on June 13, 2024.

The undersigned issued an Order on June 14, 2024, requiring Employee to address the jurisdiction issue raised by Agency in its June 13, 2024, submission. Employee’s brief on jurisdiction was due on or before July 1, 2024, and Agency had the option to file a reply brief on or before July 16, 2024. Both parties submitted their respective briefs as required. On July 26, 2024, Employee filed a Motion for Leave to File Brief, along with Employee’s Reply Brief in support of the Office of Employee Appeals’ Jurisdiction.<sup>2</sup> Subsequently, on August 5, 2024, Agency filed its Motion for

<sup>1</sup> Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

<sup>2</sup> See Motion for Leave to File Brief, at Exhibit A (July 26, 2024). This Motion is hereby GRANTED.

Leave to File Response Brief to Employee's Reply Brief.<sup>3</sup> Because this matter could be decided based on the documents of record, I determined that no Evidentiary Hearing was warranted. The record is now closed.

### JURISDICTION

The jurisdiction of this Office, pursuant to *D.C. Official Code, § 1-606.03 (2001)*, has not been established.

### ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

### BURDEN OF PROOF

OEA Rule § 631.1, 6-B District of Columbia Municipal Regulations ("DCMR") Ch. 600, et seq (December 27, 2021) states:

The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.<sup>4</sup>

OEA Rule § 631.2 *id.* states:

For appeals filed under § 604.1, 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.

### FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

The following findings of fact, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of Employee's appeal process with OEA. Employee was hired as a Senior Police Officer ("SPO") with Agency from September 25, 2023, to April 30, 2024, and subject to reappointment. Employee's appointment letter cited that "under the SPO program, retired Metropolitan Police Officers are eligible for rehire at the discretion of the Chief of Police "as fully sworn, temporary, full-time police officers without jeopardy to the retirement benefits of the officer."<sup>5</sup> This letter also stated that Employee was subject to a six (6) months probationary period based on her ability to perform the functions of the job.<sup>6</sup>

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<sup>3</sup> See Agency's Motion for Leave to File Response Brief to Employee's Reply Brief (August 5, 2024). This Motion is hereby GRANTED.

<sup>4</sup> OEA Rule § 699.1.

<sup>5</sup> Petition for Appeal at Exhibit 1 (May 17, 2024). See also. Agency's Motion to Dismiss Due to Lack of Jurisdiction, at Exhibit 2 (June 13, 2024).

<sup>6</sup> *Id.*

Employee completed her probationary period on March 25, 2024. Thereafter, she was informed in a letter dated April 23, 2024, that her contract would not be renewed pursuant to updates made to D.C. Official Code 5-107.01(f)(1) and that her appointment would end on April 30, 2024, the temporary appointment expiration date. Additionally, this letter informed Employee that “as a contract appointment employee, you may appeal your separation only in accordance with the D.C. Human Rights Act.”<sup>7</sup> Thereafter, Employee filed the instant Petition for Appeal with this Office.

### ***Employee’s Position***

Employee argues that her SPO appointment was a Term, ‘Not-To-Exceed One year’ appointment, and not a Temporary appointment. She explains that because she completed her probationary period, Chapter 6-B of the District of Columbia Municipal Regulations (“DCMR”), section 209.11<sup>8</sup> is applicable.<sup>9</sup> Employee avers that Agency violated her Due Process under the Fifth Amendment of the US Constitution and Chapter 16 of the DCMR when it summarily removed her from her position without notice or the opportunity to reply in writing as required by 6-B DCMR §§ 1620 and 1621.<sup>10</sup>

Employee further contends that Agency waived its purported basis of terminating Employee because D.C. Official Code 5-107.01(f)(1) does not apply to Employee since she was not applying to be a sworn member of MPD. Rather, she was hired by the MPD to a one-year term appointment as SPO. Additionally, Employee avers that she was hired several months after the effective date of the revision to D.C. Official Code 5-107.01(f)(1). Employee requests that she be reinstated to her position of SPO and paid lost wages, benefits, and interest on backpay from the effective date of her termination to September 25, 2024. Employee also requests attorney’s fees and costs incurred pursuant to OEA Rule 639.<sup>11</sup>

Employee argues that OEA has jurisdiction in this matter because she falls within the scope of Chapter 16, Title 6 of the DCMR. Citing to 6-A DCMR §105.1, Employee states that all SPOs “are subject to the rules of the Career Service of the District of Columbia except as otherwise specified in these rules or otherwise required by law or regulations.” Employee maintains that OEA’s jurisdiction over Career Service employees also extends to employees who serve under a term appointment and have completed their probationary period, such as Employee.<sup>12</sup>

### ***Agency’s Position***

Agency asserts in its Motion to Dismiss that OEA lacks jurisdiction over this matter because Employee was a temporary employee with no appeal rights to OEA. Agency avers that OEA’s jurisdiction is limited to appeals by career service employees with permanent status. Agency maintains that as a time-limited appointee, Employee was required to serve a six (6) months

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<sup>7</sup> *Id.* at Exhibit 2. *See also.* Agency’s Motion to Dismiss, *supra*, at Exhibit 3.

<sup>8</sup> 6-B DCMR § 209.11 provides as follows: After satisfactory completion of the probationary period, and prior to the expiration of the appointment, separation of a term employee shall be effectuated in accordance with Chapter 16.

<sup>9</sup> *See* Employee’s Petition for Appeal. *See also.* Brief in Support of the Office of Employee Appeals’ Jurisdiction (July 1, 2024) and Motion for Leave to File Reply at Exhibit A (July 26, 2024).

<sup>10</sup> *Id.*

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

<sup>12</sup> Brief in Support of the Office of Employee Appeals’ Jurisdiction and Motion for Leave to File Reply at Exhibit A.

probationary period, and her completion of the probationary period did not convert her temporary appointment to a regular or permanent career service appointment.<sup>13</sup>

Agency avers that its authority to hire SPOs comes from the Retired Police Officer Redeployment Amendment Act of 1992 (D.C. Law 9-163; D.C. Official Code § 5-761) as implemented through 6A DCMR 105.1 which states that:

“There is established within the Metropolitan Police Department the temporary full-time or part-time position of “Senior Police Officer” subject to the rule of the Career Service of the District of Columbia Government except as specified in the rules or otherwise required by law or regulation.”<sup>14</sup>

Agency explains that D.C. Official Code § 5-761 only authorizes appointment of SPOs as temporary employees.

Agency further asserts that General Order (“GO”) 101.12 (Senior Police Officer), Part IV, F, 2, which governs SPOs provides that “employment contracts are subject to renewal each year, at the discretion of the hiring authority.” Agency cites that pursuant to GO 101.12, IV, D, 2, a:

“As temporary employees of the District of Columbia Government, Senior Police Officers shall not be entitled to any rights and/or privileges that exceed or are in conflict with the provisions of:

- (1) The Comprehensive Merit Personnel Act; D.C. Code 1-601.01 *et seq.*;
- (2) The Redeployment Act;
- (3) MPD regulations covering Senior Police Officers;
- (4) Any applicable rules of the D.C. Department of Human Resources which govern the roles, responsibilities, rights and obligations of temporary employees.”<sup>15</sup>

According to Agency, it was within its discretion not to renew Employee’s SPO contract when it expired on April 30, 2024, and as an SPO, Employee is not entitled to any rights and/or privileges that exceed or conflict with the rights listed above. Agency avers that when Employee was rehired as a SPO effective September 25, 2023, she was notified that her appointment would run through April 30, 2024. Agency maintains that Employee’s appointment as a SPO was a temporary appointment for less than one (1) year and it is undisputed that Employee was terminated at the end of her SPO contract. Therefore, Employee’s appeal should be dismissed since none of the grounds for OEA’s jurisdiction applies.<sup>16</sup>

Additionally, Agency asserts that pursuant to 6-B DCMR 209.1, “the personnel authority may make a temporary appointment for a limited period of at least ninety (90) days up to twelve (12) months. A temporary appointment may be extended, provided the aggregate temporary appointment is less than twelve (12) months.” Agency argues that Employee’s seven (7) months appointment falls squarely within the definition of a temporary appointment pursuant to 6-B DCMR 209.1 since it is at

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<sup>13</sup> Agency’s Motion to Dismiss, *supra*. See also. Agency’s Opposition to Employee’s Brief in Support of the Office of Employee Appeals’ Jurisdiction (July 16, 2024).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

least ninety (90) days in duration, but less than twelve (12) months. It contends that Employee's appointment was not a Term appointment as defined in 6-B DCMR 209.2 because her appointment was for less than twelve (12) months. Agency also asserts that serving a probationary period did not make Employee's appointment a Term appointment. It explains that nothing in the DCMR prevents a temporary employee from serving a probationary period like Employee did. Agency further cites that 6-B DCMR 209.12 authorizes the separation of a temporary employee at the expiration date of the appointment, which it did in the current matter.<sup>17</sup>

### *Analysis*<sup>18</sup>

The threshold issue in this matter is one of jurisdiction. This Office has no authority to review issues beyond its jurisdiction.<sup>19</sup> Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.<sup>20</sup> The dismissal of this appeal is based solely upon the determination that this Office lacks subject matter jurisdiction, as both Term and temporary employees are specifically excluded from the jurisdictional authority of the OEA.

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the CMPA, sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") reads in pertinent part as follows:

- (a) 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]. . .

The Omnibus Personnel Reform Amendment Act (OPRAA), which amended the CMPA in 1998 authorizes OEA to hear appeals of *permanent employees* in the Career and Education services who have successfully completed their probationary period (emphasis added). There's no dispute that Employee's SPO appointment was not a permanent appointment. While the parties disagree as to whether SPOs hold "term" or "temporary" appointments, it remains that OEA does not have jurisdiction over either term or temporary employees.

Contrary to Employee's assertions that OEA's jurisdiction over Career Service employees also extends to term employees who have completed their probationary period, I find that this Office has consistently held that, OEA lacks jurisdiction over "Term" and "Temporary" employees.<sup>21</sup> It is

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<sup>17</sup> Agency's Opposition to Employee's Brief in Support of the Office of Employee Appeals' Jurisdiction, *supra*.

<sup>18</sup> Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. See *Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

<sup>19</sup> See *Banks v. District of Columbia Public School*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

<sup>20</sup> See *Brown v. District of Columbia Public. School*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (January 22, 1993); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).

<sup>21</sup> *Kyanna Feliciano v. Department of Behavioral Health*, OEA Matter No. J-0014-18, *Opinion and Order on Petition for Review* (September 4, 2018); *Roxanne Smith v. D.C. Department of Parks and Recreation*, OEA Matter No. J-0103-08, *Opinion and Order on Petition for Review* (May 23, 2011); *Carolynn Brooks v. D.C. Public Schools*,

clear from the record that Employee was a temporary employee who had completed her probationary period. Employee's employment letter identifies Employee's appointment as a temporary appointment, with an appointment expiration date of April 30, 2024.<sup>22</sup> Pursuant to 6-DCMR § 209.12, "the employment of an individual under a temporary or term appointment shall end on the expiration date of the appointment, on the expiration date of any extension granted by the personnel authority, or upon separation prior to the specified expiration date in accordance with this section." Here, Employee was employed effective September 25, 2023, and she was subsequently terminated from her appointment as a SPO on April 30, 2024, which was the expiration date of her temporary appointment.

Furthermore, 6-DCMR § 209.6 provides that "[a]n employee serving under a temporary or term appointment shall not acquire permanent status solely on the basis of their temporary or term appointment." Therefore, I find that the above-referenced regulation does not guarantee a Term or temporary employee, such as Employee, a permanent position, or any position at all. Because of Employee's status as a temporary employee, I find that she was not in permanent status upon her removal and as such, her appeal cannot be heard by this Office.

In addition, D.C. Official Code § 5-761(a) established the SPO position as a temporary position. Pursuant to D.C. Official Code § 5-761(a):

(a) Except for a disability annuitant, a police officer retired from the Metropolitan Police Department shall be eligible for rehire at the discretion of the Chief of the Metropolitan Police Department as a fully sworn *temporary* full-time or temporary part-time police officer without jeopardy to the retirement benefits of the police officer. (Emphasis added).

In addition, 6A DCMR 105.1 states as follows:

"There is established within the Metropolitan Police Department the *temporary* full-time or part-time position of "Senior Police Officer" subject to the rule of the Career Service of the District of Columbia Government except as specified in the rules or otherwise required by law or regulation." (Emphasis added).

Contrary to Employee's assertion that because she was a career service employee, albeit a term or temporary one, she is entitled to the same protection and rights afforded to permanent career service employees, I find that the applicable above cited statutes and regulations clearly state otherwise. Moreover, I conclude that Employee was on notice that her appointment was a temporary appointment with an appointment expiration date of April 30, 2024.

Employee further argues that her Due Process Rights were violated because she was summarily removed from her position without notice or an opportunity to provide a response. Pursuant to 6-DCMR § 209.13, "A temporary employee may be separated *without notice prior to the expiration date of the appointment...*" Here, Employee was informed in an April 23, 2024, letter that

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OEA Matter No. J-0136-08, *Opinion and Order on Petition for Review* (July 30, 2010); *Carla Norde v. Department of Human Resources*, OEA Matter No. J-0103-16, *Initial Decision* (January 6, 2017).

<sup>22</sup> See. Petition for Appeal, *supra*, at Exhibit 1 and Agency's Motion to Dismiss, *supra*, at Exhibit 2.

her appointment would not be renewed, and she would be terminated effective April 30, 2024, the expiration date of her appointment.

Employee has the burden of proof on issues of jurisdiction, pursuant to OEA Rule 631.2. Employee must meet this burden by a “preponderance of the evidence” which is defined in OEA Rule 631.1, *id*, as that “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.” Based on the foregoing, I conclude that Employee has not meet the required burden of proof, and that this matter must be dismissed for lack of jurisdiction. Consequently, I am unable to address the factual merits, if any, of this matter.

ORDER

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

FOR THE OFFICE:

/s/ *Monica N. Dohnji*

MONICA DOHNJI, Esq.  
Senior Administrative Judge