THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EASTERN STEWART, JR.,	)	
Employee	)	OEA Matter No. J-0010-12
	)	
v.	)	Date of Issuance: March 5, 2012
	)	
D.C. PUBLIC SCHOOLS,	)	MONICA DOHNJI, Esq.
Agency	)	Administrative Judge
	)	

Eastern Stewart, Jr., Employee *Pro se*
Sara White Esq., Agency's Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On October 18, 2011, Eastern Stewart Jr. ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Public Schools'("DCPS" or "Agency") decision to terminate him from his position as a Criminal Investigator, effective April 8, 2011. On November 21, 2011, Agency filed an Answer to Employee's appeal noting that Employee was an 'at-will' employee with no right to tenure at the time of his termination. Agency also noted that Employee was terminated during his probationary period and as such, the matter should be dismissed for lack of jurisdiction.

This matter was assigned to me on or about December 12, 2011. On December 19, 2011, I issued an Order wherein I required Employee to address whether OEA may exercise jurisdiction over this matter because Employee was an 'at-will' and probationary employee when he was terminated. Employee had until January 9, 2012, to respond. And Agency had until January 23, 2012, to submit a response to Employee's reply. However, on December 30, 2011, Employee filed a Motion for Enlargement of Time to File Brief. Subsequently on January 4, 2012, I granted Employee's motion for enlargement of time to file brief.[1] According to the January 4, 2012, Order, Employee's brief on jurisdiction was due on February 9, 2012, while

[1] On January 18, 2012, this Office received a Notice of non-representation of Mr. Eastern Stewart from the Law Offices of Pat Cresta-Savage. According to the record, Employee was represented by this Law Office in his claims with the District Office of Risk Management. The Notice explains that, the aforementioned Law Office has not been retained by Employee to represent him in his Administrative appeal before OEA, and that therefore, OEA should strike its name from any pleading or filing in the case.

Agency's reply brief was due February 23, 2012. Both parties have complied. The record is now closed.

JURISDICTION

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

ISSUE

Whether this Office may exercise jurisdiction over this matter.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

In a letter dated July 29, 2010, Agency extended an offer of employment to Employee for the position of Criminal Investigator with the Office of School Security within the Office of the Chancellor. The letter highlights in pertinent that, "[p]ursuant to the Public Education Personnel Reform Act of 2008, *this appointment is without tenure* to the DC Public Schools." (emphasis added).[2] This letter listed Employee's effective date of employment as August 23, 2010. Employee signed the letter on July 27, 2010. On March 25, 2011, Employee received a notice of termination of his probationary appointment as an Investigator with Agency effective April 8, 2011. On July 11, 2011, Employee filed a discrimination complaint with the District Office of Risk Management alleging Federal law and Public Policy violation. Thereafter, Employee filed a petition for appeal with this Office alleging wrongful termination and seeking back pay, and redress in monetary award for defamation and wrongful termination.[3] Employee maintains in his petition for appeal that his appointment with Agency was permanent. In Agency's answer to Employee's petition for appeal, Agency notes that Employee was an 'at-will' employee with no right to job tenure. Agency explained that, because Employee was a non excepted Educational Service employee, he served without job tenure and therefore, has no appeal right with OEA. Agency also maintains that, OEA only has jurisdiction over permanent employees in Educational Service who have successfully completed a probationary period.

The threshold issue in this matter is one of jurisdiction. This Office has no authority to review issues beyond its jurisdiction.[4] Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.[5] This Office's jurisdiction is conferred upon it by law, and was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Official Code §1-601-01, *et seq.* (2001). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which took effect on

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[2] *See* Tab 2 of District of Columbia Public Schools' Answer to Employee's Petition for Appeal, dated July 22, 2010.
[3] *See* Employee's petition for appeal.
[4] *See Banks v. District of Columbia Public School*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).
[5] *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).

October 21, 1998. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions not relevant to this case, of permanent employees in Career and Education Service who are not serving in a probationary period, or who have successfully completed their probationary period. D.C. Official Code § 1-608.01a(2)(A)(i) states that, "[e]xcluding those employees in a recognized collective bargain unit, those employees appointed before January 1, 1989, those employees who are based at a local school, or who provide direct services to individual students, and those employees required to be excluded pursuant to a court order (collectively, "Excluded Employees"), a person appointed to a position within the Educational Service shall serve without tenure." Section 1-608.01a(2)(A)(ii) goes on to note that, except for Excluded Employees, the provisions of this paragraph shall apply to all nonschool-based personnel, as defined in § 1-603.01(13C), including all Educational Service employees within DCPS. Additionally, District of Columbia Municipal Regulations, Title 5, § 1307.1 provides that, an employee initially entering or transferring into the Educational Service shall … serve a probationary period. D.C. Official Code § 1-608.01a(2)(C)(i) further provides that, "an employee within the Educational Service in the DCPS… who is not an Excluded employee, shall be a probationary employee for one year from his or her date of hire ("probationary period") and may be terminated without notice or evaluation."

In the instant case, Employee argues that, it was not disclosed to him that his position would be a probationary position, and for this reason, he was a regular employee when he was terminated. While Employee selected "DON'T KNOW" to the question regarding his type of service in his petition for appeal, Agency maintains that, Employee was an employee within the Educational Service when he was terminated. Pursuant to D.C. Official Code § 1-611.11, I find that as an employee of the DCPS, Employee's employment classification is Educational Service. I further find that, Employee is not an Excluded Educational Service employee because he does not meet any of the requirements as set forth for Excluded Educational Service employees in D.C. Official Code § 1-608.01a(2)(A)(i) *supra*.

Employee further contends that because he was employed by the District Metropolitan Police Department ("MPD") for eleven (11) years before being release as a result of a reduction-in-force ("RIF"), his service at MPD should count as service for the District of Columbia, thereby, making him a regular rather than probationary employee.[6] He goes on to explain that, the District of Columbia government, and not the Agency is his employer because individual agencies cannot be sued. I disagree. D.C. Official Code § 2-510 affords any person who has been adversely affected by any District of Columbia government agency the opportunity for judicial review of the contested matter. DCPS is a District of Columbia government agency, and as such is subject to suit by any person who is adversely affected by its decision, such as Employee. Although MPD and DCPS are both District of Columbia government agencies, there was a break in service between Employee's career at MPD and DCPS. According to the record,[7] Employee was RIFed at MPD around January 30, 2010, and he was employed by DCPS effective August 23, 2010. The RIF at MPD terminated Employee's employment with the District of Columbia government for a period of about six (6) months. Employee had to apply for

[6] *See* Employee's Brief on jurisdiction dated February 6, 2012.
[7] *Id*. at ATCH 4.

a vacant position at DCPS to gain re-employment. As such, when Employee was hired by DCPS, he was an initial employee entering into the Educational Service. Therefore, regardless of his protestation, Employee is an Educational Service employee who is not excluded, and has to serve a one year probationary period from his date of hire. Employee was hired effective August 23, 2010, and a year from this date is August 23, 2011. Employee was terminated April 8, 2011, which is less than a year. Clearly, he was still serving as a probationary employee and could therefore be lawfully terminated without notice or evaluation.

It is well established in the District of Columbia that, an employer may discharge an 'at-will' employee "at any time and for any reason, or for no reason at all."[8] 'At-will' employees do "not have any job tenure or protection."[9] Furthermore, D.C. Official Code § 1-608.01a (2)(A)(i) highlights that, "…a person appointed to a position within the Educational Service shall serve without job tenure." Specifically, pursuant to the Public Education Personnel Reform Amendment Act of 2008,[10] all non-excepted employees appointed to the Educational Services shall serve without tenure. And 'at-will' employees have no appeal rights with this Office.[11]

Here, Employee contends that because his standard form fifty (50), service computation date (1998), job description, qualification and benefit package does not identify his position as 'at-will' or probationary, he was a regular employee.[12] Employee further explains that, because he was allowed to carry over his sick leave from MPD to DCPS, he was a regular employee. Lastly, employee maintains that he never received any documents showing him as anything other than a regular District of Columbia government employee. He goes on to explain that; payroll also classified him as a regular employee.[13] Employee's offer letter dated July 22, 2010, and which he signed July 27, 2010, specifically informs Employee that his employment with DCPS was without tenure. It can be reasonably inferred that Employee read the offer letter before signing it, and thus, he was aware of the terms of his employment, including the part that highlighted the fact that his employment was without job tenure.

Based on the foregoing, I find that Employee was a probationary employee at the time of his termination, and Agency's March 25, 2011, notice of termination was in accordance with the District of Columbia rules and regulations. I also find that, as an 'at-will' employee, Employee could be discharged at any time and for no reason.

Employees have the burden of proof on issues of jurisdiction, pursuant to OEA Rule 629.2, 46 D.C. Reg. 9317 (1999). Employee must meet this burden by a "preponderance of the evidence" which is defined in OEA Rule 629.1, *id*, as that "degree of relevant evidence, which a reasonable mind, considering the record as a whole, would accept as sufficient to find a

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[8] *Bowie v. Gonzalez*, 433 F.Supp.2d 24 (D.D.C 2006); citing *Adams v. George W. Cochran & Co.* 597 A.2d 28, 30 (D.C. 1991).
[9] *See* D.C. Official Code § 1-609.05 (2001).
[10] 55 District of Columbia Register 004275, pub. April 18, 2008.
[11] *Brown et al. v. Department of Consumer and Regulatory Affairs*, OEA Matter Nos. 1601-0012-2009 *et al.* (June 26, 2009) citing *Davis v. Lambert*, MPA No. 17-89, 119 DWLR 204 (February 13, 1991).
[12] According to his submissions to this Office, Employee constantly refers to his employment classification as 'regular'. However, it is worth noting that, 'regular' is not listed as an employment classification in the District Personnel Manual §1100.
[13] Employee's brief on jurisdiction, dated February 6, 2012.

contested fact more probably true than untrue." I conclude that Employee did not meet the burden of proof, and that this matter must be dismissed for lack of jurisdiction.

ORDER

It is hereby ORDERED that the petition for appeal is DISMISSED.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.
Administrative Judge