

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
Ervin Anderson	)	OEA Matter No. 1601-0227-11
Employee	)	
	)	Date of Issuance: February 3, 2014
v.	)	
	)	Senior Administrative Judge
D.C. Public Schools	)	Joseph E. Lim, Esq.
Agency	)	
_____	)	

Sara White, Esq., Agency Representative  
Ervin Anderson, Employee *pro se*

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL HISTORY

On September 23, 2011, Ervin Anderson (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the D.C. Public Schools’ (“Agency”) action of terminating his employment.

I was assigned this matter on or around June 26, 2013. Agency had submitted a Motion to Dismiss for lack of jurisdiction over Employee’s appeal. I subsequently issued an Order to Employee to address the jurisdictional issue. Employee failed to respond. The record is closed.

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.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

The following facts are undisputed:

1. Employee was hired as a Teacher at Emery Education Campus on August 29, 2009. The position was subject to the satisfactory completion of two years probationary period, to be completed on August 29, 2011.

2. On July 15, 2011, Agency issued Employee a letter of termination with an effective date of August 12, 2011. The letter indicated that Employee had received an IMPACT rating of “minimally effective” for two consecutive years.

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

Effective June 9, 2000, the Council of the District of Columbia adopted amended regulations for the updated implementation of the Act and, at the outset of the new regulations, provided at Chapter 16, § 1600.1, that the newly adopted regulations apply to each employee of the District government in the Career Service, who has completed a probationary period.

On June 23, 2000, the Council of the District of Columbia further adopted regulations specifically geared for DCPS employees serving in the Educational Service. Thus, for such employees, the following rule on probationary employees appear in 47 DCR 5212, 5215 (June 23, 2000) or 5 District of Columbia Municipal Regulations (“DCMR”) § 1307.

The relevant provisions state:

- 1307.1 An employee initially entering or transferring into the Educational Service shall meet certification requirements of the Board of Education and serve a probationary period.
- 1307.3 An initial appointee to the ET salary class shall serve a two (2) year probationary period requirement.
- 1307.5 The probationary period shall be used to evaluate the performance of the employee.
- 1307.6 Failure to satisfactorily complete the requirements of the probationary period shall result in termination from the position. An employee who satisfactorily completes all

probationary requirements shall, upon the recommendation of the appropriate supervisor, receive tenure in the position, or salary class, in which the probation was completed.

SOURCE: Final Rulemaking published at 27 DCR 4297, 4323 (October 3, 1980); as amended by: Final Rulemaking published at 35 DCR 9054, 9056 (December 30, 1988); and Final Rulemaking published at 47 DCR 5212, 5215 (June 23, 2000).

As stated above, 5 DCMR § 1307.3 states that: “An initial appointee to the ET<sup>1</sup> salary class shall serve a two (2) year probationary period requirement.”

As noted above, Employee has not offered any argument or evidence on the issue of jurisdiction, nor has he ever denied his status as a probationary employee. 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 he was terminated prevents OEA from asserting subject matter jurisdiction over this appeal.

Employee did not complete the two year probationary period as required by 5 DCMR § 1307.3 and therefore remained in a probationary status at the time he was terminated. Accordingly, we must look to § 814 of the District Personnel Manual to determine if Agency properly terminated Employee during his 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 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 a written notice of his termination and the effective date of such termination. DPM § 814.1 does not require Agency to provide the specific reasoning for an employee’s

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<sup>1</sup> ET is a salary class in the D.C. Educational Service.

termination. Instead, it offers a general reason why termination is allowable during the probationary period.<sup>2</sup>

I find that Employee was still in a probationary status at the time he 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.<sup>3</sup>

ORDER

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

FOR THE OFFICE:

Joseph E. Lim, Esq.  
Senior Administrative Judge

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<sup>2</sup> 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).

<sup>3</sup> 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. ( ).