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**THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS**

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|---------------------------------------------------|---|------------------------------------|
| In the Matter of: |) | |
| |) | OEA Matter No.: J-0073-23 |
| EMPLOYEE, ¹ |) | |
| Employee |) | |
| v. |) | Date of Issuance: February 2, 2024 |
| |) | |
| D.C. DEPARTMENT OF MOTOR VEHICLES, |) | NATIYA CURTIS, Esq. |
| Agency |) | Administrative Judge |
| |) | |
| Joseph F. Davis, Employee Representative | | |
| Pamela B. Washington, Esq., Agency Representative | | |

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On September 26, 2023, Employee filed a Petition for Appeal (“Petition”) with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of Motor Vehicles’ (“Agency” or “DMV”) decision to terminate him from service, as a Hearing Examiner effective September 9, 2023. On September 27, 2023, OEA requested Agency’s Answer. On October 26, 2023, Agency filed a Motion for Summary Disposition and Answer to Employee’s Petition. Agency asserted in its Motion for Summary Disposition and Answer that this Office lacked jurisdiction over this matter because Employee was in probationary status at the time of his termination. This matter was assigned to the undersigned Administrative Judge (“AJ”) on October 26, 2023.

On October 27, 2023, the undersigned issued an Order for Briefs on Jurisdiction requiring Employee to address the jurisdiction issue raised by Agency in its Motion for Summary Disposition and Answer. The undersigned also required Agency to submit Employee’s Notification of Personnel Action Form, SF-50 (“SF-50”). Employee’s brief was due on or before November 16, 2023. Agency had the option to submit a brief on or before November 30, 2023. Employee did not comply with the prescribed deadline. Accordingly, on November 28, 2023, the undersigned issued an Order for Statement of Good Cause to Employee for his failure to submit a response pursuant to the October 27, 2023, Order. Employee was required to submit his brief and statement to the undersigned and Agency’s representative, by the close of business on December 8, 2023.

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

On December 8, 2023, the undersigned received Employee's Praeceptum for Late Filing and Employee's Brief on Jurisdiction. Accordingly, on December 12, 2023, the undersigned issued a Supplemental Order for Briefs on Jurisdiction, which amended Agency's deadline for submission of its response to on or before January 3, 2024. Agency submitted its response and provided the SF-50 as required. After considering the parties' arguments as presented in their submissions to this Office, the undersigned has determined that an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

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

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (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:

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.

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

Employee's Position

Employee asserts that he was not appropriately terminated. In his Petition, Employee argues that Agency wrongfully terminated him based on race, age, and temporary disability. Employee further asserts that the termination was retaliatory. Specifically, Employee avers that he was terminated because he asserted his right to proper training, questioned the legality of certain office policies, requested an accommodation, and exercised his duty to safeguard the independence of his judicial decisions.² In Employee's Brief on Jurisdiction, Employee asserts *inter alia* that this Office can retain jurisdiction over an employee still in a probationary period

² Employee's Petition for Appeal (October 26, 2023).

because the DC Code applies to any District of Columbia government employee appealing a final agency decision affecting an adverse action for cause which results in removal.³

Agency's Position

Agency asserts in its Motion for Summary Disposition and Answer that this Office lacks the jurisdiction to adjudicate this matter. Agency argues that Employee was in a probationary status at the time of his termination, and therefore, OEA has no jurisdiction over this appeal.⁴ Agency avers that Employee was hired as a Hearing Examiner on May 8, 2023, and was terminated effective September 9, 2023, and therefore was approximately four (4) months into his probationary period.⁵ Agency further avers that this termination is not appealable because separation from government service during a probationary period is neither appealable nor grievable.⁶ Additionally, Agency denies that Employee was wrongfully terminated based on his race, age, or temporary disability. Further, Agency asserts that Employee's probationary period was to determine whether the Hearing Examiner position was a good fit for his skill set. Agency alleges that Employee's skill set did not meet the needs of the Agency, thus prompting his termination.⁷

In its Response to Employee's Brief on Jurisdiction, Agency maintains that Employee's arguments concerning jurisdiction are not supported by statute, regulations, or case law. Agency specifically avers that Employee's termination is not the result of an adverse action. Agency asserts that while Career Service Employees can only be terminated for cause, such protection does not apply to an employee in a probationary period, who can be terminated at will.⁸

Analysis

The threshold issue in this matter is one of jurisdiction. This Office has no authority to review issues beyond its jurisdiction.⁹ 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 October 21, 1998. Both the CMPA and the OPRAA conferred jurisdiction on this Office to hear appeals, with some exceptions. According to the rules of this Office, established at 6-B of the District of Columbia Municipal Regulation ("DCMR") Chapter 600, Rule 604.1 states this Office has jurisdiction in matters involving District Government employees appealing a final agency decision affecting:

- (a) A performance rating resulting in removal;
- (b) An adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more; or
- (c) A reduction-in-force; or
- (d) A placement on enforced leave for ten (10) days or more.

³ Employee's Brief on Jurisdiction at Page 4 (December 8, 2023).

⁴ Agency's Motion for Summary Disposition (October 26, 2023).

⁵ Agency's Response to Employee Brief on Jurisdiction (October 26, 2023).

⁶ *Id.*

⁷ Agency's Motion for Summary Disposition and Answer (October 26, 2023).

⁸ Agency's Response to Employee's Brief on Jurisdiction (January 3, 2024).

⁹ See, *Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

In the instant matter, the undersigned agrees with Agency's assertion that OEA lacks jurisdiction over this matter. The record reflects and Employee does not dispute that he was still in a probationary period at the time of termination.¹⁰ Chapter 2, § 227.4 of the District Personnel Manual ("DPM") states that a termination during an employee's probationary period is neither appealable nor grievable. Consistent with the DPM, this Office has consistently held that an appeal by an employee serving in a probationary status must be dismissed for lack of jurisdiction.¹¹ Based on the record, the undersigned finds that Employee was hired on May 8, 2023 and terminated on September 8, 2023, according to his SF-50, and therefore was four (4) months into his one-year (1) probationary period.¹² Notably, 'Termination During Probationary Period' is listed as the nature of the action for termination.¹³ Further, in his Petition, Employee also acknowledges that he was in a probationary period, and had worked at Agency for only four (4) months.¹⁴ Accordingly, this Office lacks jurisdiction over Employee's appeal.

While Employee asserts several arguments in support of jurisdiction, the undersigned finds that those arguments do not overcome Employee's burden to establish jurisdiction by a preponderance of the evidence. Further, any argument that an employee in their probationary period can appeal a termination during a probationary period is not only in contradiction to § 227.4 of the DPM, but also the purpose of the probationary period, which is to evaluate an employee's conduct and performance on the job to determine job readiness to meet the requirements of permanent employment status in the Career Service.¹⁵

Discrimination Claims/Grievances

Lastly, assuming *arguendo* that this Office could retain jurisdiction, the merits of Employee's arguments do not fall within the purview of OEA's scope of review. Employee asserts that he was subject to discrimination based on age and race. D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights. Complaints classified as unlawful discrimination are described in the District of Columbia Human Rights Act.¹⁶ Employee's other ancillary arguments are best characterized as grievances and are also outside of OEA's jurisdiction to adjudicate. It is an established matter of public law that as of October 21, 1998, pursuant OPRAA, D.C. Law 12-124, that OEA no longer has jurisdiction over grievance appeals. That is not to say that Employee may not press his claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee's other claims. Accordingly, the undersigned finds that Employee's probationary status at the time of termination precludes him from appealing his removal to this Office, as OEA lacks jurisdiction in this matter.

ORDER

It is hereby **ORDERED** that the Petition in this matter is **DISMISSED** for lack of jurisdiction.

¹⁰ Employee's Petition for Appeal (October 26, 2023).

¹¹ 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, 991); *Alexis Parker v. Department of Health*, OEA Matter No. J-0007-11 (April 28, 2011).

¹² Employee's initial and final SF-50s submitted in Agency's Response to Employee's Brief on Jurisdiction (January 3, 2024).

¹³ *Id.*

¹⁴ Employee's Petition for Appeal (October 26, 2023).

¹⁵ DCHR Issuance on Probationary Periods 1-2021-33 (2021).

¹⁶ D.C. Code §§ 1-2501 *et seq.*

FOR THE OFFICE:

/s/ Natiya Curtis
NATIYA CURTIS, Esq.
Administrative Judge