THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
GEORGE FIANKO,	)	
Employee	)	OEA Matter No. 1601-0051-15
	)	
v.	)	Date of Issuance: July 31, 2015
	)	
D.C. PUBLIC SCHOOLS,	)	MONICA DOHNJI, Esq.
Agency	)	Administrative Judge
	)	

Carrie Crawford, Esq., Employee's Representative
Nicole Dillard, Esq., Agency's Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On March 11, 2015, George Fianko ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Public Schools' ("Agency" or "DCPS") decision to terminate him from his position as a Special Police Officer effective March 14, 2015. Subsequently, on April 15, 2015, Agency filed a Motion to Dismiss noting that OEA lacked jurisdiction in this matter.

I was assigned this matter on or around April 22, 2015. Thereafter, I issued an Order requiring Employee to submit a written brief addressing the jurisdiction issue in this matter by March 12, 2015. Subsequently, Employee submitted a request for extension of time to file his brief. In an Order dated June 8, 2015, the undersigned granted Employee's request for extension. According to this Order, Employee had until June 22, 2015, to submit his brief, and Agency had until June 30, 2015, to submit a reply brief if it chose to do so. Both parties have filed their respective briefs. After considering the arguments herein, I have determined that an Evidentiary Hearing is unwarranted. The record is now closed.

JURISDICTION

The jurisdiction of this Office has not been established.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> 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:
>
> > 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.

ANALYSIS AND CONCLUSIONS OF LAW

In its April 15, 2015, Motion to Dismiss, Agency notes that OEA lacks jurisdiction to hear Employee's appeal in this matter because all Special Police Officer serve as at-will employees. In his June 22, 2015, opposition to Agency's Motion to Dismiss, Employee highlights that he has been a career service employee of DCPS for almost ten (10) years. Citing to D.C. Official Code § 1-608.01a (2)(A)(i), Employee explains that while it is true that a person appointed to a position within the Education Service shall serve without job tenure, certain personnel such as those covered by a Collective Bargaining Agreement ("CBA"), employees appointed before January 1, 1980, employees based at a local school or who provide direct services to individual students are excluded. Employee further notes that pursuant to D.C. Code § 1-608.01a (B)(ii), any included employee must be notified in writing of his or her reappointment as an at-will employee. Employee maintains that he was based at a local school; therefore, he was not subject to the designation of employees serving with tenure. He further states that, there is no evidence in the record that he was provided with the required written notice changing his employment to at-will upon the adoption of D.C. Official Code § 1-608.01a.[1]

In its reply brief dated July 10, 2015, Agency notes that Employee was not a school base employee. Agency provided an affidavit from a Robert McCullagh, the current Executive Director of security for DCPS.[2] McCullagh stated in his affidavit that Employee was employed as a Special Police with the Office of School Security. In his role as a Special Police, Employee was not a member of a union, he worked in the DCPS' Office of School Security, and he was not assigned or managed by any one school or school administrator. Agency also provided a document signed by Employee in January 23, 2008, accepting without tenure, his current position with Agency.[3]

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[1] Employee's Opposition to Agency's Motion to Dismiss (June 22, 2015).
[2] Agency's Response to Employee's Response to Agency's Motion to Dismiss at Exhibit 1 (July 10, 2015).
[3] *Id*. at Exhibit 2.

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."[4] 'At-will' employees do "not have any job tenure or protection."[5] 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,[6] all non-excepted employees appointed to the Educational Services shall serve without tenure. And 'at-will' employees have no appeal rights with this Office.[7]

Here, I find that Employee's argument that he was based at a local school is without merit. McCullagh stated that Employee reported to Agency's Office of School Security, and he was not assigned or managed by any one school or administrator. Moreover, Employee did not provide any evidence such as the name of the school, to support his assertion that he was based at a local school. Additionally, I disagree with Employee's assertion that he was not provided with the required written notice changing his employment to at-will upon the adoption of D.C. Official Code § 1-608.01a. Agency's Exhibit 2, which is signed by Employee, clearly proves that Employee was given notice of his reappointment. In this notice signed by Employee, he states that "I hereby accept reappointment, *without tenure*, to my current position with the District of Columbia Public Schools." (Emphasis added).

Accordingly, I find that at the time of the discharge, Employee's status was 'at-will' and could be discharged at any time and for no reason. Employees have the burden of proof on issues of jurisdiction and must meet this burden by a "preponderance of the evidence". I conclude that Employee did not meet the burden of proof. Consequently, I find that OEA lacks the authority to exercise jurisdiction over Employee's Petition for Appeal.

ORDER

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

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

[4] *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).
[5] *See* D.C. Official Code § 1-609.05 (2001).
[6] 55 District of Columbia Register 004275, pub. April 18, 2008.
[7] *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).