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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

| | | |
|--|---|---------------------------------|
| _____ |) | |
| In the Matter of: |) | |
| |) | OEA Matter No.: 1601-0143-13 |
| ALBERT BARNES, |) | |
| Employee |) | |
| |) | Date of Issuance: July 10, 2014 |
| v. |) | |
| |) | |
| DISTRICT OF COLUMBIA |) | |
| PUBLIC SCHOOLS, |) | |
| Agency |) | Sommer J. Murphy, Esq. |
| _____ |) | Administrative Judge |
| Albert Barnes, Employee, <i>Pro Se</i> | | |
| Carl Turpin, Esq., Agency Representative | | |

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 28, 2013, Albert Barnes (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) contesting the District of Columbia Public Schools’ action of terminating his employment. Employee was charged with falsifying a Workers’ Compensation Form 1, in violation of Section 1401.2(h) of the D.C. Municipal Regulations. The effective date of Employee’s termination was August 31, 2013.

I was assigned this matter in June of 2014. On June 11, 2014, I issued an Order directing Employee to submit a brief addressing whether his appeal should be dismissed for lack of jurisdiction. Employee submitted a response to the Order on June 24, 2014. Agency filed its optional response brief on June 25, 2014. After reviewing the record, I determined that there were no material issues of fact that would require an evidentiary hearing. The record is now closed.

JURISDICTION

Jurisdiction has not been established in this matter.

ISSUE

Should Employee's appeal be dismissed for lack of jurisdiction?

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, amended certain sections of the CMPA. Amended D.C. Code §1-606.3(a) states:

“An employee may appeal 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....”

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) 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 is “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.” Under OEA Rule 628.2, 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.

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.

Chapter 8, Section 813.3 of the District Personnel Manual (“DPM”) states, in pertinent part:

“Except when the appointment is effected with a break in service, an employee who once satisfactorily completed a probationary period in the Career Service shall not be required to serve another probationary period, unless the employee is appointed to a position (including entry-level police officer or firefighter) from a register resulting from open competition, for which appointment the employee would not have been eligible as an internal placement in accordance with §§ 828 through 838.”¹

Moreover, Chapter 8, Section 814.3 of the District Personnel Manual provides that a termination during a probationary period cannot be appealed to this Office. An appeal to this Office by an employee serving in a probationary status must therefore be dismissed for lack of

¹ D.C. Official Code § 5-105.04 (2001).

jurisdiction.² In light of the above, the outcome in this matter turns upon the determination of whether Employee was still within the probationary period of his employment as Agency contends, or whether he had become a permanent employee prior to Agency's notice of termination.

According to the record, Employee was hired as a Custodian at Dunbar Senior High School on October 29, 2012.³ Employee was required to serve a one (1) year probationary period before he could obtain permanent employment status. His status as a probationary employee did not end until October of 2013. Thus, at the time he was terminated, effective August 31, 2013, Employee remained "at-will" and did not have the protections afforded to Career Service employees. Employee did not address the issue of jurisdiction in his June 24, 2014 submission to this Office. Moreover, Employee admits in his Petition for Appeal that he was terminated from service after working only eleven (11) months. Based on the foregoing, I find that OEA lacks jurisdiction over this appeal. Accordingly, the Undersigned is precluded from adjudicating the merits, if any, of Employee's substantive arguments.

ORDER

It is hereby **ORDERED** that Employee's Petition for Appeal is **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE

² 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).

³ Agency Brief, Attachment 2 (June 25, 2014).