THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
CAROL F. BARBOUR	)	
Employee	)	OEA Matter No. J-0137-08
	)	
v.	)	Date of Issuance: September 30, 2008
	)	
DISTRICT OF COLUMBIA	)	Rohulamin Quander, Esq.
PUBLIC SCHOOLS	)	Senior Administrative Judge
Agency	)	
	)	

E. Lindsey Maxwell, II, Esq., Employee Representative
Harriet Segar, Esq., Agency Representative

INTIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 6, 2008, Carol F. Barbour (the "Employee"), a former elementary school principal in the District of Columbia Public Schools (the "Agency"), filed a Petition for Appeal (the "petition") with the D.C. Office of Employee Appeals (the "Office" or "OEA"), seeking disciplinary action against the Agency, and particularly against Michelle Rhee, Chancellor of Agency's public school system, for allegedly creating a working atmosphere such, that Employee, " . . . resigned from DCPS under duress . . ." Employee further stated that she had, " . . . a list of horrid experiences during Rhee's reign over DCPS . . ." Although there is no Final Agency Action letter, indicative of when Employee and Agency ended their Employee-Employer relationship, the petition at Item #18 recited that Agency proposed to take action against the Employee on or about May 5, 2008. This case was assigned to me on September 15, 2008. In reviewing this petition, the question arises as to whether the Office has jurisdiction to consider this matter.

I issued an Order on September 16, 2008, directing Employee to supplement her petition, by addressing whether the Office had jurisdiction to consider the matter. On September 26, 2008, Employee, through counsel, submitted a *Jurisdictional Brief*, which

purported to explain why the Office has jurisdiction to consider this matter. Since a decision could be rendered based upon the documents contained in the case file, pursuant to discretionary authority granted to me by OEA Rule 625.2, no further proceedings, including an administrative hearing on the record, are necessary. The record is now closed.

ISSUE

The issue to be decided is whether this Office has jurisdiction in this matter

JURISDICTION

The jurisdiction of this Office is established by the *D.C. Official Code* (the "*Code"*) § 1-606.03 (2001 ed.) As will be explained in detail below, the Office lacks jurisdiction over this appeal.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The jurisdiction of this Office is both established and limited by statute. *D.C. Official Code* § 1-606.03 (a) (2001) recites the jurisdiction of this Office. It states in relevant part:

> An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . . [or] an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . . or a reduction in force.

Employee would have me adjudicate her case to fit within the parameters of the above-noted jurisdictional provision.

On September 26, 2008, Employee filed her *Jurisdictional Brief,* in an effort to establish that the Office has jurisdiction to consider her complaint. Without addressing all of the components of the brief in detail, the essence of it is the following:

1. Agency is engaged in a pattern of removing older and minority principals, replacing them with younger, white principals;
2. Agency sought to force Employee to cooperate in a Metropolitan Police Department (the "MPD") internal investigation of a police commander, who was a personal friend of the Employee, such being an invasion of Employee's personal life, privacy, and civil rights;
3. As a result of Employee's refusal to participate in the internal investigation, several harassment/retaliatory activities occurred, including:
    a) earmarking Employee's school for closure;
    b) contacting Employee continuously via e mails and telephone calls, seeking her cooperation in the internal investigation;
    c) refusing to provide MPD support services when criminal and/or

violent acts occurred inside the school building;

d) when Employee went on sick leave on May 1, 2008, to have surgery, Agency changed the locks to both the school front door and Employee's own office;
e) within a few days after Employee went on sick leave, one of Agency's Assistant Superintendents met with the building staff, at which time said person berated the staff in a nasty and threatening manner, including telling them that had Employee not resigned as principal within the past few days, she was going to be fired anyway because the school was one of the worst schools in the District of Columbia; and
f) Agency staff met with the press, at which time several potentially actionable statements were made about the 24 principals that were not retained for another term, including the use of inflammatory words like "fired," and "terminated," which implied professional incompetence on the part of those individuals, with Employee being one among the group cited.

4. The accumulation of actions, the egregious nature of Agency's conduct, adversely impacted upon Employee's health, resulting in increased personal stress, which both delayed her timely recovery from surgery, and also contributed to the necessity of having a second surgery in early July 2008.

Pursuant to OEA Rule § 632.2, Employee has the burden of proof as to the issue of jurisdiction. Employee's burden was to prove that she, a term employee, could still qualify to have her petition be considered by this Office. Pursuant to *D.C. Code Anno.*, § 1-617.1(b) (1992 Repl.), only permanent employees who serve in either the Permanent or Educational Service are entitled to removal for cause. Therefore, term employees have no right to appeal their termination to this Office. *See*, *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90 (Dec. 4, 1992), ___ D.C. Reg. ___ ( ), *petition for review denied* (Jan. 22, 1993), ___ D.C. Reg. ___ ( ); *Sinai v. Department of Human Services* , OEA Matter No. 1601-0126-91 (Nov. 18, 1993), ___ D.C. Reg. ___ ( ).

Pursuant to D.C. Municipal Regulations (the "DCMR") Title 5, § 520.1, persons appointed to the positions of Principal and Assistant Principal shall serve one year terms, and do not gain tenure in the position. Under § 520.2, retention and reappointment lie solely within the discretion of the Chancellor. Lastly, § 520.5 provides that the expiration of a term appointment is automatic upon the completion of the stated term, unless specifically renewed or extended. Therefore, I assume that, prior to this difficulty, Employee had been the beneficiary of either an expiring three-year term appointment, or the recipient of three consecutive one-year term appointments, of which the period at issue was the third one-year term appointment. The petition field with the Office also reflects that the Employee filed an EEOC complaint on or about May 18, 2008.

In the matter at bar, the working contract and the term of appointment both expired on June 30, 2008, officially ending the formal Employee-Agency relationship between the parties. From said contractual termination, there was nothing to appeal. Further, had

Employee not resigned, she still was not entitled to be provided any enumerated appellate rights in the standard letter of non-reappointment, that Agency issues when an employee is not rehired or retained for another term.

Relevant language from selected court cases is illuminating. "The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 753, 756 (1975). "A statute that is clear and unambiguous on its face is not open to construction or interpretation other than through its express language." *Caminetti v. United States*, 242 U.S. 470 (1916); *McLord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980); *Banks v. D.C. Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992), _ D.C. Reg. __ ( ).

Term Employees

My decision is underscored by both the *Code* and the D.C. Personnel Regulations (the Regulations). Pursuant to the *Code*, § 1-606.03(a), 2001:

> 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.

None of the above enumerated conditions apply in this case. Volume I, DPM, Chapter 8, Part I, provides in part: . . .

> 823.7 A term employee shall not acquire permanent status on the basis of his or her term appointment, and shall not be converted to a regular Career Service appointment without further competition . . .
>
> 823.8 The employment of a term employee shall end automatically on the expiration of his or her term appointment unless he or she has been separated earlier.

At Chapter 8, § 826.1 of the Regulations, it states:

> 826.1 The employment of an individual under a temporary or term appointment shall end on the expiration date of the appointment, on the expiration date of the extension granted by the personnel authority, or upon separation prior to the specified expiration date.

All three of the above noted sections are clearly applicable. Employee was on notice that her term of appointment expired on June 30. 2008.[1]

[1] Although Employee chose not to submit the document as a part of the formal record, the general practice is for term employees and an Agency representative to execute a

Considering the serious nature of the allegations that the Employee has raised against the Chancellor and several other key persons and the Agency in general, she may still have a remedy at law or equity, which might be considered in either a forum of general jurisdiction, or in another administrative forum located elsewhere in the D.C. Government. By having filed an EEOC complaint, she indicates that she is aware that she has other choices and avenues of possible relief, and apparently is in full pursuit of relief in that forum. Her legal theories of "constructive discharge" and "involuntary quit" may find traction elsewhere, but not here. This Office, an administrative agency, can only consider and grant relief that specifically fits within our jurisdictional mandate.

OEA Rule 629.2, 46 D.C. Reg. at 9317, provides that employees have the burden of proving that OEA has jurisdiction to hear and decide their appeals. In the matter at hand, Employee has not met this burden. The Office does not have subject matter jurisdiction in this case, and cannot now grant Employee any relief at this time. I conclude that the Office lacks jurisdiction to address any of the substantive issues raised in the Petition for Appeal, and to decide this matter. Therefore, I conclude that this matter should be dismissed for lack of jurisdiction.

ORDER

It is hereby ORDERED that this matter is DISMISSED.

FOR THE OFFICE: / s /
ROHULAMIN QUANDER, Esq.
Senior Administrative Judge

"Conditions of Employment Under Term Appointment," or similarly titled form, which form has often been reviewed by this Office in other term appointment-related cases.