

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
VERA BARKER-HAWKINS	)	OEA Matter No. 1601-0071-18
Employee	)	
	)	
v.	)	Date of Issuance: December 21, 2018
	)	
D.C. PUBLIC SCHOOLS	)	Joseph E. Lim, Esq.
Agency	)	Senior Administrative Judge
_____	)	
Vera Barker-Hawkins, Employee, <i>pro se</i>		
Lynette Collins, Esq., Agency Representative		

**INITIAL DECISION**

PROCEDURAL BACKGROUND AND FINDINGS OF FACT

On July 27, 2018, Vera Barker-Hawkins (“Employee”), a Middle School Teacher, filed a petition for appeal with this Office from Agency’s final decision separating her from Government service effective July 27, 2018, due to an unsatisfactory IMPACT score.<sup>1</sup> The matter was assigned to the undersigned on September 4, 2018. I issued an Order directing the parties to attend a September 19, 2018, Prehearing Conference and to submit a Prehearing Statement by September 14, 2018. Agency complied, but Employee did not submit a prehearing statement. Agency had submitted a Motion to Dismiss for lack of jurisdiction over Employee’s appeal. Nonetheless, I then ordered the parties to submit a legal brief on jurisdiction by October 22, 2018.

Again, Agency complied, but Employee did not. I issued a Show Cause Order to Employee on November 30, 2018. Employee asked for an extension of time, which was granted. I thereby ordered Employee to submit her brief by December 17, 2018. Again, Employee failed to comply nor did she reach out to the undersigned for another extension.

Despite prior warnings that failure to comply could result in sanctions, including dismissal, Employee again failed to respond. Nonetheless, based on the documents previously submitted by the parties, this matter can be decided on its merits. The record is closed.

JURISDICTION

As will be discussed below, the jurisdiction of this Office has not been established.

<sup>1</sup> IMPACT is the effectiveness assessment system which the D.C. Public Schools used for the 2016-2017 school year to rate the performance of school-based personnel.

## 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 Sousa Middle School on August 7, 2016. The position was subject to the satisfactory completion of two years probationary period.<sup>2</sup>
2. On or about February 21, 2017, Employee transferred to Brookland Middle School. At the end of the 2016-2017 school year, Employee voluntarily resigned by submitting a Declaration of Intent Not to Return. Moreover, she received an unsatisfactory IMPACT rating of "Minimally Effective."
3. Employee returned for the 2017-2018 school year and was hired again as a Brookland Middle School teacher on October 25, 2017. The offer letter expressly stated that Employee's employment status is probationary for a period of two school years.<sup>3</sup>
4. On June 25, 2018, Agency notified that she would be separated from employment effective July 27, 2018, due to Employee's receiving an IMPACT rating of "minimally effective" for two consecutive years.<sup>4</sup>

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

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<sup>2</sup> Agency's Brief on Jurisdiction, Tab 3.

<sup>3</sup> Agency's Brief on Jurisdiction, Tab 2.

<sup>4</sup> Agency's Brief on Jurisdiction, Tab 1.

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:<sup>5</sup>

- 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.<sup>6</sup>
- 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.

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

Employee has not offered any argument or evidence on the issue of jurisdiction, nor has she ever denied her 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 she 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 she 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:

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<sup>5</sup> 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).

<sup>6</sup> ET is a salary class in the D.C. Educational Service.

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 her termination and the effective date of such termination. DPM § 814.1 does not require Agency to provide the specific reasoning for an employee's termination. Instead, it offers a general reason why termination is allowable during the probationary period.<sup>7</sup>

I find that Employee was still in a probationary status at the time she 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>8</sup>

There is another basis by which this appeal may be dismissed. In accordance with OEA Rule 621.3, 59 DCR 2129 (March 16, 2012), this Office has long maintained that a petition for appeal may be dismissed when an employee fails to prosecute the appeal. In this matter, Employee failed to adequately respond to all Orders that I issued. Both had specific time frames and both contained warnings that failures to comply could result in penalties, including the dismissal of the petition. The Orders were sent to Employee at the address she listed as her home address in her petition and in her submissions. They were sent by first class mail, postage prepaid and were not returned. They are presumed to have been delivered in a timely manner. See, e.g., *Prater v. D.C. Metropolitan Police Dept.*, OEA Matter No.1602-0135-03, *Opinion and Order on Petition for Review* (November 28, 2006).

## ORDER

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<sup>7</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>8</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. ( ).

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

FOR THE OFFICE:

Joseph E. Lim, Esq.  
Senior Administrative Judge