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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
EMPLOYEE,)	OEA Matter No. J-0019-23
)	
)	Date of Issuance: July 10, 2023
v.)	
)	JOSEPH E. LIM, ESQ.
DEPARTMENT OF PUBLIC WORKS,)	Senior Administrative Judge
_____)	
Agency)	
Tameka Garner-Barry, Employee Representative		
Andrea Comentale, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On December 30, 2022, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the D.C. Department of Public Works’ (“DPW” or “Agency”) decision to terminate him from his position as a Motor Vehicle Operator effective December 23, 2022, due to testing positive for a controlled substance. On January 26, 2023, Agency submitted its Answer to Employee’s Petition for Appeal in response to OEA’s December 30, 2022, request.

This matter was assigned to the undersigned Senior Administrative Judge (“AJ”) on January 27, 2023. On March 9, 2023, I issued an Order to Employee to address Agency’s Motion to Dismiss for Lack of Jurisdiction. Employee submitted his written brief on April 21, 2023. After considering the parties’ arguments as presented in their submissions to this Office, I have determined that an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

The jurisdiction of this Office, pursuant to *D.C. Official Code, § 1-606.03 (2001)*, has not been established.

ISSUE

Whether this matter should be dismissed for lack of jurisdiction

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

According to the record, Employee was hired by DPW as a Parking Enforcement Officer (PEO), (WS-5703, Grade 8) on August 15, 2022, in a Career Service position subject to a one-year probationary period ending on August 15, 2023.¹ Employee's offer letter dated August 10, 2022, defined the terms of his employment including his effective start date, the expiration of his probationary period, the safety-sensitive status of his position, that he may be disqualified from employment based on the presence of marijuana or other controlled substance, and that he was subject to random drug and alcohol testing throughout his employment.

Employee accepted the offer of appointment with those conditions by signature on August 15, 2022.² On December 1, 2022, Employee was ordered to report for a random drug test. The drug test revealed a confirmed test result for marijuana, a controlled substance.³ On December 19, 2022, Agency issued a Notice of Termination During Probationary Period to Employee with an effective date of December 23, 2022.⁴

Whether this matter should be dismissed for lack of jurisdiction

The threshold issue in this matter is one of jurisdiction. This Office has no authority to review issues beyond its jurisdiction.⁵ Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.⁶ 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 OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions not relevant to this case, of permanent employees in Career and Education Service who are *not serving in a probationary period*, or who have successfully completed their probationary period (emphasis added).

Chapter 2, § 227.4 of the District Personnel Manual ("DPM") states that a termination during an employee's probationary period cannot be appealed to this Office. Additionally, this Office has consistently held that an appeal by an employee serving in a probationary status must be dismissed for lack of jurisdiction.⁷ In his Petition for Appeal to OEA and his brief, Employee

¹ Agency January 26, 2023, Response to Employee's Appeal, Tab 3 (August 10, 2022, Appointment Notice).

² *Id.*, Tab 3.

³ *Id.*, Tab 6.

⁴ *Id.*

⁵ See *Banks v. District of Columbia Public School*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

⁶ See *Brown v. District of Columbia Public School*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (January 22, 1993); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).

⁷ 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); *Alexis Parker v. Department of Health*, OEA Matter No. J-0007-11 (April 28, 2011).

did not dispute that he had a PROBATIONARY appointment at the time of his termination. He also did not dispute Agency's assertion that he was required to serve a twelve (12) months probationary period, nor did he dispute Agency's statement that he was hired effective August 15, 2022, and was terminated effective November 8, 2022. Agency also attached a copy of Employee's Offer letter with an effective start date of August 15, 2022. This letter informed Employee that his position was a "Probationary Career appointment" with a twelve (12) months probationary period.⁸ Furthermore, Career service employees who are serving in a probationary period are precluded from appealing a removal action to this Office until their probationary period is over. The record shows that Employee was hired effective August 15, 2022, and terminated effective December 23, 2022.⁹ This period is less than twelve (12) months. Consequently, I find that Employee was removed from service when he was still within his probationary period. This fact is true despite Employee's claims that he was protected by the mayor's order regarding marijuana, that he was not removed for poor performance, or that he had completed a drug program.¹⁰ For these reasons, I conclude that Employee is precluded from appealing his removal to this Office, as OEA lacks jurisdiction in this matter.

Employee has the burden of proof on issues of jurisdiction, pursuant to OEA Rule 631.2.¹¹ Employee must meet this burden by a "preponderance of the evidence" as stated in OEA Rule 631.1.¹² It is undisputed that Employee had a Probationary appointment and the record further reflect that Employee had not completed his one-year probationary period at the time of his termination. Based on the foregoing, I conclude that Employee did not meet the required burden of proof, and that this matter must be dismissed for lack of jurisdiction. Consequently, I am unable to address the factual merits, if any, of this matter.

ORDER

It is hereby **ORDERED** that the Petition for Appeal is **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

/s/ Joseph Lim

Joseph E. Lim, Esq.

Senior Administrative Judge

⁸ Agency's Answer, *supra*, at Tab 3.

⁹ Agency's Motion to Dismiss.

¹⁰ Employee's brief (April 21, 2023).

¹¹ 6-B DCMR Ch. 600, et. seq. (2021).

¹² *Id.*