THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: J-0078-15
TROY STEWART,	)	
Employee	)	
	)	Date of Issuance: July 9, 2015
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF CORRECTIONS,	)	
Agency	)	Sommer J. Murphy, Esq.
	)	Administrative Judge

Troy Stewart, Employee, *Pro Se*
Jacqueline Johnson, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On May 21, 2015, Troy Stewart ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") contesting the Department of Corrections' ("DOC" or "Agency") final decision to remove him from his position as a Correctional Officer. Employee's termination was effective on April 22, 2015.

I was assigned this matter in June of 2015. On June 22, 2015, I issued an order directing Employee to submit a brief addressing whether this appeal should be dismissed for lack of jurisdiction because he was in probationary status at the time he was terminated. Employee submitted a response to the Order on July 6, 2015. Agency filed its optional response brief on July 8, 2015. 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 jurisdiction.[2] 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

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

laws, may file action under any such laws, as appropriate.[3] 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 Corrections Officer on November 4, 2013.[4] Employee's Notification of Personnel Action Form ("Form 50") reflects that Employee was still serving in probationary status at the time Agency issued its Notice of Termination.[5] Thus, at the time he was terminated, effective April 22, 2015, Employee remained "at-will" and did not have the protections afforded to Career Service employees. Moreover, Employee admits in his Petition for Appeal that he was separated from service during his probationary period. Based on the foregoing, I find that OEA lacks jurisdiction over this appeal. Accordingly, the Undersigned, albeit reluctantly, is precluded from adjudicating the merits 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:

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SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE

[3] *Id.*
[4] Petition for Appeal (May 21, 2015).
[5] *Id.*