

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
DAVID SHELDON,)	
Employee)	
)	OEA Matter No.: 1601-0392-10
v.)	
)	Date of Issuance: August 23, 2012
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
Agency)	SOMMER J. MURPHY, Esq.
_____)	Administrative Judge
David Sheldon, Employee, <i>Pro Se</i>		
Sara White, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 30, 2010, David Sheldon (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“the OEA” or “the Office”) contesting the District of Columbia Public School’s (“Agency” or “DCPS”) action of terminating his employment based on an “Ineffective” rating under Agency’s Effectiveness Assessment System for School-Based Personnel program (“IMPACT”). The effective date of Employee’s termination was July 30, 2010.

I was assigned this matter in July of 2012. On July 19, 2012, I ordered the parties to submit briefs on the issue of whether this Office may exercise jurisdiction over Employee’s appeal because he was in probationary status at the time he was terminated. Employee was required to submit a brief on or before August 2, 2012. On August 8, 2012, I issued an Order for Statement of Good Cause to Employee because he had failed to submit a brief by the required deadline. Employee was required to submit a statement to establish good cause on or before August 15, 2012. Employee failed to submit a brief; therefore, this appeal will be decided based on the documents of record. The record is now closed.

JURISDICTION

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

ISSUE

Should this matter be dismissed?

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), states that “[t]he employee shall have the burden of proof as to issues of jurisdiction...” Pursuant to OEA Rule 628.1, the burden of proof is defined under a ‘preponderance of the evidence’ standard. Preponderance of the evidence means “[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.”

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the CMPA, sets forth the law governing this Office. D.C. Official Code § 1-606.03 (“Appeal procedures”) reads in pertinent part as follows:

- (a) An employee may appeal [to this Office] 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 [RIF]. . . .

This Office has consistently held that a District government employee serving a probationary period does not have a statutory right to be removed for cause and cannot utilize the adverse action procedures under subchapters VI or XVII of the Comprehensive Merit Personnel Act (“CMPA”), which include appealing an adverse action to this Office.¹ An appeal of an adverse action filed in this Office by an employee serving a probationary period must therefore be dismissed for lack of jurisdiction.

According to Agency, Employee was hired as the Dean of Students at Deal Middle School (“Deal”) on August 17, 2009 as an ET salary class employee. Under Chapter 5, Section 1307.3 of the D.C. Municipal Regulations, an initial appointee to the ET salary class is required to serve a two (2) year probationary period. Because Employee was terminated under the IMPACT program effective July 30, 2010, he remained a probationary employee at the time he was separated from service. Accordingly, I find that this Office may not exercise jurisdiction over Employee’s appeal.

OEA Rule 621.3 provides that “if a party fails to take reasonable steps to prosecute or defend an appeal, the Administrative Judge, in the exercise of sound discretion, may dismiss the action or rule for the appellant.” Failure of a party to prosecute an appeal includes, but is not limited to “a failure to submit required documents after being provided with a deadline for such submission.”²

In this case, Employee was warned that the failure to submit a brief could result in sanctions as enumerated in Rule 621.3. Employee failed to submit a written brief in response to the Order issued on July 19, 2012. Employee also failed to provide a Statement of Good Cause

¹ *Sherita Williams v. DCPS*, OEA Matter No. 1601-0123-08 (November 26, 2008); *Oliver v. DCPS*, OEA Matter No. 1601-0406-10 (February 14, 2011).

² *Id.*

on or before August 15, 2012 to explain his failure to submit a brief. Based on the foregoing, I find that Employee's lack of diligence in pursuing his appeal before OEA constitutes a failure to prosecute and serves an alternate ground for the dismissal of this matter.

ORDER

It is hereby ORDERED that Employee's petition for appeal is DISMISSED for lack of jurisdiction and failure to prosecute.

FOR THE OFFICE:

SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE