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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
)
ANTHONY GILLESPIE,)
Employee)
)
v.)
)
DISTRICT OF COLUMBIA)
PUBLIC SCHOOLS,)
Agency)
_____)

OEA Matter No.: 1601-0044-15

Date of Issuance: January 24, 2017

OPINION AND ORDER
ON
PETITION FOR REVIEW

Anthony Gillespie (“Employee”) worked as a Custodian with the District of Columbia Public Schools (“Agency”). On January 23, 2015, Agency issued a notice to Employee that he was being terminated effective January 23, 2015. The notice provided that when Employee was placed on administrative leave, pending an investigation into an allegation that he had inappropriate contact with a child, Agency discovered that it issued an incorrect offer letter. According to Agency, the original offer letter stated that Employee was being hired as a Custodian, when, in fact, he should have been hired as a Term Custodian.¹

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on February 18, 2015. He stated that he was originally offered and accepted a position as a full-time

¹ *Notice of Termination Letter* (January 23, 2015).

Custodian. However, Agency attempted to retroactively change the terms of his employment by stating in his termination letter that he should have been hired as a term employee and not a full-time employee. Employee, therefore, believed that Agency was in breach of contract and requested that he be reinstated with back pay and benefits.²

Agency filed its Answer to the Petition for Appeal on March 20, 2015. It requested that OEA dismiss the matter because Employee was a term and a probationary employee at the time he was terminated.³ Additionally, Agency denied that it retroactively changed the terms of his employment because his original offer letter should have stated that he was being hired as a “Term Custodian” with a “Not to Exceed” date of November 24, 2014. Consequently, it argued that Employee’s appeal should be dismissed for lack of jurisdiction.⁴

The matter was assigned to an OEA Administrative Judge (“AJ”) on March 23, 2015. On March 27, 2015, the AJ ordered Agency to submit a written brief clarifying its position that it intended to hire Employee as a term employee, or whether it wanted to amend its position and identify him as a probationary employee.⁵ In its brief, Agency stated that Employee was hired as a temporary (term) custodian at J.O. Wilson Elementary School on August 21, 2014 because of a staffing shortage.⁶ Agency explained that Employee was given the wrong offer letter by administrative error; however, he was clearly informed that the position was temporary because he was hired to temporarily replace another Custodian (“S.M.”) who was on extended medical leave at the time.⁷ According to Agency, even if OEA did not consider Employee to be a term

² *Petition for Appeal*, (February 18, 2015).

³ *Agency’s Answer to Petition for Review* (March 20, 2015).

⁴ *Id.* at 2.

⁵ *Order Requesting Statement of Clarification* (March 27, 2015).

⁶ Agency provided that another full-time custodian (“S.M.”) was on medical leave until January 30, 2015.

⁷ *Id.* at 2. Agency further stated that when Employee was placed on administrative leave pending an investigation into his alleged misconduct, the Office of Labor Management and Employee Relations discovered that his offer letter was incorrect.

employee, he was in a probationary status at the time of termination. It, therefore, opined that the matter should nonetheless be dismissed for lack of jurisdiction under either circumstance.⁸

Employee submitted a brief addressing the jurisdictional issue on May 21, 2015. He reiterated that he was hired as a full-time Custodian, as evidenced by the terms of employment provided in Agency's offer letter.⁹ He further claimed that Agency never informed him that he was a temporary employee until he was terminated. Moreover, Employee contended that the Collective Bargaining Agreement ("CBA") between Agency and his union stipulated that he could only be terminated for cause. As a result, he posited that OEA was the proper forum to adjudicate his claims and seek relief.¹⁰

An Initial Decision was issued on July 27, 2015.¹¹ The AJ held that Employee failed to meet his burden of proof in establishing jurisdiction before this Office. First, she determined that Agency produced a total of three offer letters to Employee. However, the AJ explained that none of these documents identified Employee as holding a term appointment.¹² Next, she provided that although Agency did not fully respond to the issue of whether Employee was probationary at the time of his removal, this Office was nonetheless required to address and determine the jurisdictional issue.¹³ In her analysis, the AJ highlighted District Personnel Manual ("DPM") §813.2, which provides that a person hired to serve under a Career Service Appointment is required to serve a probationary period of one year. She further noted that under DPM §813.4, a termination during a probationary period is not appealable or grievable. Since Employee was

⁸ *Id.*

⁹ *Employee's Brief on Jurisdiction* (May 21, 2015).

¹⁰ *Id.* at 2.

¹¹ *Initial Decision* (July 27, 2015).

¹² *Id.* at 3. The AJ noted that Agency's first offer letter erroneously stated that Employee was offered a teaching position. The second letter congratulated Employee for being hired as a Custodian, but it made no reference to a term appointment or an NTE date. The third letter was not issued until Employee was terminated. According to Agency, it was meant to illustrate the offer letter that should have been issued to Employee.

¹³ *Id.* at 3.

hired on August 21, 2014, and was terminated on January 23, 2015, the AJ held that he was still in a probationary status at the time Agency issued its termination notice.¹⁴ Consequently, Employee's Petition for Appeal was dismissed for lack of jurisdiction.

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on August 24, 2015. He presents many of the same arguments that were submitted in his previous filings.¹⁵ However, Employee has submitted new evidence of another electronic offer letter that he received from Agency, wherein there was no "Not to Exceed Date" listed on the document. It is his contention that Agency's conflicting offer letters prove that he was not hired as a term employee. In addition, Employee contends that he was a paying member of the Teamsters Local 639 Union. It is his belief that term custodians are ineligible to join the union; therefore, his membership supports the argument that he was hired as a permanent employee. As a result, he request that this Board find that OEA has jurisdiction over his appeal.¹⁶

Agency filed its Answer to Employee's Petition for Review on September 30, 2015.¹⁷ It maintains that the AJ was correct in concluding that Employee was in probationary status at the time he was terminated. In addition, it claims that Employee's newly presented evidence does not address the AJ's finding that he was terminated during his probationary period. Thus, it asks this Board to uphold the Initial Decision and dismiss Employee's Petition for Review.¹⁸

Term Employment

Employee argues that he was originally hired as a permanent Custodian, as evidenced by Agency's August 21, 2014 offer letter. Under DPM § 823.1, a personnel authority may make a term appointment for a period of more than one (1) year when the needs of the service so require

¹⁴ *Id.* at 4.

¹⁵ *Petition for Review* (August 24, 2015).

¹⁶ *Id.*

¹⁷ *Agency's Answer to Employee's Petition for Review* (September 30, 2015).

¹⁸ *Id.* at 4.

and the employment need is for a limited period of four (4) years or less. Section 824.3 states that “a person given a temporary appointment in the Career Service shall not acquire career status on the basis of that appointment.” In addition, DPM § 826 addresses an agency’s ability to terminate employees who are serving under temporary or term appointments. The regulation provides the following:

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 an extension granted by the personnel authority, or upon separation prior to the specified expiration date in accordance with this section.

826.2 A term appointee may be separated as provided in this chapter during a probationary period.

826.3 After satisfactory completion of the probationary period, and prior to the expiration date of the appointment, separation of a term appointee for cause shall be in accordance with chapter 16 of these regulations.

826.4 A term appointee may be separated for lack of funds or lack of work in accordance with the reduction-in-force requirements of chapter 24 of these regulations.

826.5 A temporary appointee may be separated without notice prior to the expiration date of the appointment.

In this case, Agency first issued Employee an offer letter on August 21, 2014, which outlined the terms of his employment. The letter incorrectly stated that he was being hired as a Term Teacher, and stated the following:

“Congratulations! On behalf of the District of Columbia Public Schools, I am pleased to inform you that you have been offered the position of Term Teacher, Full Time at J.O. Wilson ES. This position is a term position with a Not to Exceed (NTE) date of 11/24/2014. Your employment will terminate on this NTE date unless you and DCPS agree to an extension of your term employment. Your first date of employment is 8/11/2014....”¹⁹

¹⁹ *Agency’s Brief*, Exhibit 1 (April 29, 2015).

A second offer letter, dated August 21, 2014, provided the following in pertinent part:

“Congratulations! On behalf of the District of Columbia Public Schools (DCPS), I am pleased to extend to you an offer of employment for the position of Custodian, Full-time at J.O. Wilson E.S...Your first date of employment is 8/11/2014. In order to retain your employment offer with DCPS, you must report for duty at J.O. Wilson ES on 8/11/2014...This is a union position covered under the Agreement between DCPS and Teamsters Local 639....”²⁰

However, on January 23, 2015, Employee received notice that he was being terminated immediately. Agency’s notice stated that:

“This letter serves as official notice that you will be terminated from your position as a Term Custodian effective the date of this letter, January 23, 2015. When you were placed on administrative leave pending an investigation into an allegation made against you that you inappropriately touched a child, we discovered that the offer letter you received from DCPS was incorrect. Your offer letter stated that you were being hired as a Custodian, when, in fact, you were being hired as a Term Custodian. You should have received an offer letter with an NTE date of November 24, 2014.

The offer letter you should have received is attached to this letter. As you will see in the attached letter, your original NTE date was set for November 24, 2014. In light of the above, we have extended your NTE date to January 23, 2015. Therefore, as of January 23, 2015, DCPS is separating you from service....”²¹

Based on the foregoing, there is no evidence in the record to support a finding that Employee was hired as a term Custodian. Agency haphazardly provided Employee with a total of three offer letters. While the first offer letter incorrectly identified Employee’s position as a teacher, Agency’s August 21, 2014 letter clearly stated that he was being hired as a full-time Custodian, Grade 3, Step 6. The second offer letter did not include a NTE date, nor did it identify

²⁰ *Id* at Exhibit 7.

²¹ *Agency’s Answer to Petition for Appeal*, Tab 1 (March 20, 2015).

the position as a being for a term. Employee was entitled to rely upon Agency's representation that the position was full time. Accordingly, this Board finds that the AJ did not err in concluding that Employee did not hold a term appointment at the time he was terminated.

Probationary Period

This Board must look to the relevant provisions of District Personnel Manual §§ 813 and 814 to determine Employee was in probationary status at the time of his termination. The DPM provides the following in pertinent part:

§ 813.2 A person hired to serve under a Career Service Appointment (Probational), including initial appointment with the District government in a supervisory position in the Career Service, shall be required to serve a probationary period of one (1) year, except in the case of individuals appointed on or after the effective date of this provision to the positions listed below, who shall serve a probationary period of eighteen (18) months:

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.

Here, Employee was hired as a full-time Custodian on August 21, 2014, and was terminated effective January 23, 2015. Thus, at the time of termination, Employee had been working for approximately five months and did not complete the probationary period required

under DPM § 813.2. 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.²² Because OEA lacks jurisdiction over Employee's appeal, this Office does not have the authority to adjudicate his substantive arguments.²³

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.¹¹ The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. After a thorough review of the matter before us, this Board believes that the AJ's ruling that Employee was in probationary status at the time he was terminated was based on substantial evidence. Consequently, Employee's Petition for Review must be dismissed.

²² 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) and *Alexis Parker v. Department of Health*, OEA Matter No. J-0007-11 (April 28, 2011).

²³ Even if this Board were to determine that Employee was a term employee, DPM § 826 still requires that he complete a one year probationary period.

ORDER

Accordingly, it is hereby ordered that Employee's Petition for Review is **DISMISSED**.

FOR THE BOARD:

Sheree L. Price, Interim Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.