THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DAVID BOWLES,	)	
Employee	)	OEA Matter No. J-0057-16
	)	
v.	)	
	)	Date of Issuance: November 7, 2017
UNIVERSITY OF THE DISTRICT OF, COLUMBIA,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

David Bowles ("Employee") worked as an Assistant Professor with the University of the District of Columbia ("Agency"). On May 27, 2016, Employee received a notice that he would be terminated by Agency. According to Agency, Employee was removed from his position pursuant to Articles XI.A.2 and XIV.2 of the Collective Bargaining Agreement ("CBA") between Agency and the University of The District of Columbia Faculty Association/NEA ("Union"). Specifically, Agency explained that Employee was removed during his three-year probationary period. The effective date of Employee's removal was August 15, 2016.[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on June 24, 2016. He asserted that he was improperly terminated and that his termination violated

[1] *Petition for Appeal,* p. 1 and 6 (June 24, 2016).

Agency's policies and the CBA. He also provided that he was the subject of a continuing pattern of exploitation by his two direct supervisors. Employee claimed that he was forced to work more than fifty to sixty hours per week and was given tasks and assignments that were outside of the scope of his faculty appointment. Additionally, he provided that Agency retaliated against him for being part of a protected class of the Equal Employment Opportunity Commission ("EEOC"). He contended that the work environment had a negative impact on his disabilities. Therefore, Employee requested that he be reinstated to his tenure-track position and receive compensation for faculty overload for three academic years.[2]

Agency filed its Response to Employee's Petition for Appeal on September 9, 2016. It asserted that the CBA clearly provided that employees who were not granted tenure were on probation for the first three years of employment. Further, Agency argued that Employee acknowledged that he was a probationary employee when he was terminated. Additionally, it argued that pursuant to Article XIV.2 of the CBA, it may decide not to renew a faculty member's contract or to terminate the employment of a faculty member. As a result, Agency reasoned that OEA lacked jurisdiction over the matter and requested that the appeal be dismissed.[3]

On January 4, 2017, the OEA Administrative Judge ("AJ") found that there was no evidence in the record to support a finding that Agency's termination of Employee violated the express terms of the CBA. She provided that OEA consistently held that an appeal by an employee serving in a probationary status must be dismissed for lack of jurisdiction. The AJ held that Employee commenced employment with Agency on August 16, 2013. Thus, under the provisions of the CBA, his probationary status would not end until August 15, 2016. Because he was still within the three-year probationary period, the AJ dismissed the matter for lack of

[2] *Id.* at 2, 8-13.
[3] *Agency's Answer to Employee's Petition for Appeal,* p. 1-13 (September 9, 2016).

jurisdiction. Additionally, the AJ found that Employee's grievance and retaliation claims were unsubstantiated and fell outside the scope of OEA's jurisdiction.[4]

Employee filed a Petition for Review on February 7, 2017. He argues that Agency did not provide proper notice. Moreover, Employee contends that he fulfilled the obligations of his nine-month annual contract. Thus, it is his position that Agency should have terminated him before May 15, 2016. Additionally, Employee claims that the AJ failed to consider his arguments pertaining to his disabilities. Therefore, he requests that the Initial Decision be reversed.[5]

On March 13, 2017, Agency filed its Answer to Employee's Petition for Review. It argues that the AJ correctly determined that OEA lacks jurisdiction over probationary employees. Further, Agency provides that in accordance with the CBA, decisions to discharge a probationary employee are not subject to a grievance or arbitration process. Therefore, it explains that it would have been inappropriate for OEA to assert jurisdiction in this matter when the CBA makes clear that Agency can terminate a probationary faculty member without recourse for appeal. Accordingly, Agency requests that the Petition for Review be denied.[6]

First, this Board must note that both parties provided the same copies of the CBA although they both appear to have expired on September 30, 2015. It is assumed that the terms regarding probationary employees are the same in the current agreement, as alleged by Agency.[7] As a result, we will use the CBA terms provided by the parties.

Article XI.A.2 of the CBA provides the following:

> A "disciplinary or adverse action" shall be defined as a written reprimand, suspension or dismissal. The term does not include

[4] *Initial Decision*, p. 4-7 (January 4, 2017).
[5] *Employee's Request for Petition for Review,* p. 4-9 (February 7, 2017).
[6] *Agency's Answer to Employee's Petition for Review,* p. 6-12 (March 13, 2017).
[7] *Agency's Motion to Dismiss Employee's Petition for Appeal,* p. 2 (August 12, 2016).

> dismissal, discharge or UNIVERSITY TENURE, non-renewal or an annual contract of a probationary faculty member, or any decision regarding tenure. For the first three years of their employment, non-tenured faculty who began teaching during or after the 2003-04 Academic Year may be discharged or their contracts not renewed without recourse to the grievance and arbitration procedures; thereafter, non-renewal or discharge decisions are subject to the "cause" provisions of the contract and may be challenged in the grievance and arbitration procedure. Tenure decisions may not be challenged in the grievance and arbitration procedure.

Additionally, Article XIV.2 provides that:

> Faculty members who have not been granted tenure shall be on probation for the first three years of their employment at the University and shall be employed pursuant to a one-year individual employment agreement in each such year. During the probation period, the University, at its sole discretion, may decide for any reason not to renew a faculty member's contract, or to terminate the employment of a faculty member, and such decisions shall not be subject to the grievance and arbitration procedure.

Employee failed to provide, and this Board was unable to locate, any language within the CBA that grants OEA's authority to consider any matters that may arise from a dispute between an employee and Agency. Thus, on that basis, OEA lacks jurisdiction to consider the arguments presented by Employee. Furthermore, we agree with Agency's position that ". . . it would be inappropriate for OEA to assert jurisdiction in this matter when the agency and the Employee's union (in the collective bargaining agreement) have made clear that UDC can terminate or not renew the contract of a probationary faculty member at-will[,] and there is no recourse for a probationary faculty member to appeal his/her termination or contract non-renewal."[8]

Assuming arguendo that OEA did have authority to consider Employee's arguments, we would still lack jurisdiction over this case because the CBA language clearly provides that an employee must serve a three-year probationary term. Employee was in year two of the three-year term. Therefore, he was not a tenured employee. As the AJ noted, OEA has consistently

[8] *Id.* at 4.

held that it lacks jurisdiction over probationary employees.[9] Because OEA lacks jurisdiction over the appeal, we are unable to address Employee's arguments regarding notice, the nine-month contract, and retaliation.

Employee has failed to establish OEA's jurisdiction over his appeal. Absent an establishment of jurisdiction, OEA cannot consider the merits of Employee's claims. Moreover, the CBA does not explicitly state that OEA has authority over employee/agency disputes. Accordingly, this Board must uphold the AJ's decision and dismiss Employee's Petition for Review.

[9] *Stephanie Huey v. D.C. Public Schools*, OEA Matter No. 1601-0113-15, *Opinion and Order on Petition for Review* (April 18, 2017); *Tiffany Shaw v. District of Columbia Public Schools,* OEA Matter No. J-0139-15 (January 12, 2016); *Alexis Parker v. Department of Health,* OEA Matter No. J-0007-11, *Opinion and Order on Petition for Review* (September 8, 2012); *Jason Codling v. Office of the Chief Technology Officer,* OEA Matter No. J-0151-09, *Opinion and Order on Petition for Review* (December 6, 2010); *Susan Wallace v. D.C. Public Schools*, OEA Matter No. J-0009-05 (January 31, 2006); *Elliott Duvall v. D.C. Department of Youth Rehabilitative Services*, OEA Matter No. J-0008-06 (January 24, 2006); *Day v. Office of the People's Counsel*, OEA Matter No. J-0009-94, *Opinion and Order on Petition for Review*, (July 10, 1995); and *Jones v. District of Columbia Lottery Board*, OEA Matter No. J-0231-89, *Opinion and Order on Petition for Review* (August 19, 1991).

ORDER

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

FOR THE BOARD:

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Sheree L. Price, Chair

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Vera M. Abbott

_____
Patricia Hobson Wilson

_____
P. Victoria Williams

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Jelani Freeman

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.