THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
JASON CODLING, Employee	OEA Matter No. J-0151-09
	Date of Issuance: December 6, 2010
OFFICE OF THE CHIEF TECHNOLOGY OFFICER, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Jason Codling ("Employee") worked as an IT project manager at the Office of the Chief Technology Officer ("Agency"). Employee began working at Agency on May 12, 2008. On December 12, 2008, he received an amended letter of termination. The notice provided that because he was being terminated during his probationary period he did not have the same appeal rights afforded to permanent employees. Therefore, he could appeal his termination pursuant to District Personnel Manual, Chapter 8, § 814.2 in accordance with the D.C. Human Rights Act. Employee's termination was effective on January 2, 2009.[1]

On July 2, 2009, Employee filed a Petition for Appeal with the Office of Employee

[1] *Petition for Appeal,* p. 32-33 (July 2, 2009).

Appeals ("OEA"). He argued that Agency provided false reasons for his termination to the Department of Employment Services. He also provided that Agency misrepresented the truth and attempted to deny him unemployment benefits. Additionally, Employee stated that Agency retaliated against him because he filed a Whistleblower action against it regarding budget issues.[2]

On December 4, 2009, the Administrative Judge ("AJ") issued his Initial Decision in this matter. He held that a District government employee serving a probationary period does not have statutory rights to be removed for cause and cannot utilize the adverse action procedures to appeal to OEA. The AJ found that Employee's one-year probationary period began on May 12, 2008. Therefore, it would have ended on May 11, 2009. Because Employee was terminated within the probationary period and despite the validity of any of Employee's claims, the AJ reasoned that OEA lacked jurisdiction over his appeal. Consequently, Employee's case was dismissed.[3]

Employee filed a Petition for Review of the AJ's Initial Decision. He provided that while performing his duties, he found $350,000-$500,000 missing from the department's budget. Upon reporting it to Agency personnel, he was terminated. Employee also provided that as a probationary employee, he was entitled to a reason as to why he was terminated. Hence, Employee requested that he be reinstated with back pay and benefits.[4]

As the AJ provided in his Initial Decision, District Personnel Manual § 813.2 states that:

> 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

[2] *Id.*, 3 and 8.
[3] *Initial Decision*, p. 3 (December 4, 2009).
[4] *Petition for Review*, p. 2-8 (December 28, 2009).

effective date of this provision to the positions listed below, who shall serve a probationary period of eighteen (18) months:

(a) Individuals hired into entry-level police officer positions in the Metropolitan Police Department;
(b) Individuals hired into entry-level correctional officer positions in the Department of Corrections or the Department of Youth Rehabilitation Services; and
(c) Individuals hired into emergency or non-emergency operations positions in the Office of Unified Communications.

Thus, Employee was within his probationary period when he was terminated on January 2, 2009 because the one-year period did not end until May 11, 2009.

Accordingly, we must look to § 814 of the District Personnel Manual to determine if Agency properly terminated Employee during his probationary period. District Personnel Manual §§ 814.1-814.3 provide that:

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.

Employee's termination notice clearly cites to the District Personnel Manual § 814.[5] It does not indicate the reason for Employee's termination. However, the reference to District Personnel Manual § 814 assumes that he was terminated because his work performance or conduct failed to demonstrate his suitability and qualifications for continued employment. District Personnel

[5] *Petition for Appeal,* p. 32-33 (July 2, 2009).

Manual § 814.1 does not require Agency to provide the specific reasoning for an employee's termination. Instead, it offers a general reason why termination is allowable during the probationary period.

Furthermore, Agency adhered to District Personnel Manual §§ 814.2 and 814.3 by providing Employee with written notice of his termination with an effective date and by informing Employee of his appeal rights.[6] Employee, however, presented a Whistleblower argument that falls within the exception for termination during a probationary period. He asserts that while performing his duties, he found $350,000-$500,000 missing from the department's budget. After reporting it to Agency personnel, he was terminated.

Although the Whistleblower issue was not addressed by the Administrative Judge, this Board will address it on appeal. In accordance with D.C. Official Code § 1-615.51, the Whistleblower Act encourages employees of the District of Columbia government to "report waste, fraud, abuse of authority, violations of law, or threats to public health or safety without fear of retaliation or reprisal." To achieve this objective, D.C. Official Code § 1-615.53 provides that "a supervisor shall not threaten to take or take a prohibited personnel action or otherwise retaliate against an employee because of the employee's protected disclosure or because of an employee's refusal to comply with an illegal order." Furthermore, § 1-615.54(a)(1) states that:

> An employee aggrieved by a violation of § 1-615.53 may bring a civil action against the District, and, in his or her personal capacity, any District employee, supervisor, or official having personal involvement in the prohibited personnel action, before a court or a jury in the Superior Court of the District of Columbia seeking relief and damages, including:
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> (A) an injunction;
> (B) reinstatement to the same position held before the prohibited

[6] *Id.*

personnel action or to an equivalent position;
(C) reinstatement of the employee's seniority rights;
(D) restoration of lost benefits;
(E) back pay and interest on back pay;
(F) compensatory damages; and
(G) reasonable costs and attorney fees.

OEA has held that based on the above-mentioned statute, D.C. Superior Court has original jurisdiction over Whistleblower Act claims and that OEA was not granted original jurisdiction over such claims.[7] The original jurisdiction of this Office was established in D.C. Official Code §1-606.03 which provides that:

> "An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIIII-A of this chapter), an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more (pursuant to subchapter XXIV of this chapter), or a reduction-in-force (pursuant to subchapter XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action."

Thus, OEA has held that some causes of action under the Whistleblower provisions may be adjudicated by this Office. However, this does not mean that *all* causes of action pertaining to the Whistleblower Act may be appealed to this Office. OEA has previously held that when it lacks jurisdiction to adjudicate the merits of an employee's petition for appeal, the Office is unable to address the merits of the Whistleblower claims contained therein. Thus, if an aggrieved employee has a matter with OEA that may otherwise be adjudicated by this Office,

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[7] *Rebecca Owens v. Department of Mental Health*, OEA Matter No. J-0097-03 (April 30, 2004), ___ D.C. Reg. ___ ( ); *Marie Vines v. Office of Cable Television and Communications*, OEA Matter No. J-0028-08 (March 18, 2008), ___ D.C. Reg. ___ ( ); *Ernest Hunter v. D.C. Water and Sewer Authority*, OEA Matter No. 2401-0036-05 and 1601-0046-05 (November 9, 2005), ___ D.C. Reg. ___ ( ).

then they may include, as part of the petition for appeal, any pertinent Whistleblower violations. [8]

However, in the current case, OEA lacks the jurisdictional authority to review Employee's adverse action appeal because of his probationary status. Hence, we are unable to address the validity of any Whistleblower claims raised by Employee. Accordingly, this matter must be dismissed for lack of jurisdiction.

This case must also be dismissed because the Petition for Appeal was not timely filed. OEA Rule 604.2 and D.C. Official Code § 1-606.03 provide that "an appeal filed pursuant to Rule 604.1 must be filed within thirty (30) days of the effective date of the appealed agency action." The effective date of Employee's termination was January 2, 2009. His Petition for Appeal was filed six months after the effective date on July 2, 2009. In accordance with OEA Rule 629.2, Employee has the burden of proving issues of jurisdiction including the timeliness of his filing. Therefore, Employee's case is dismissed.

[8] *Id.*

ORDER

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

FOR THE BOARD:

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Clarence Labor, Chair

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Barbara D. Morgan

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Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.