

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

)
In the Matter of:)
) OEA Matter No. 1601-0028-09
CHANIETTA KELLY)
Employee) Date of Issuance: May 20, 2009
)
v.) Sheryl Sears, Esq.
) Administrative Judge
DEPARTMENT OF)
PUBLIC WORKS)
Agency)
)

Chanietta Kelly, Employee, *Pro Se*
Kevin J. Turner, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND FINDINGS OF FACT

Chanietta Kelly (“Employee”) was hired as a Parking Officer in a term position. On December 14, 2003, Employee was converted to a permanent, career service position. Employee was granted residency preference based upon her written representation that she had a domicile in the District of Columbia. Employee does not dispute that her position required that she maintain District of Columbia residence for five years from the date of her appointment. The end date for that period was December 14, 2008.

On March 19, 2008, Employee presented an “Address, Non-Resident and Tax Withholding Authorization” form to the Human Resources office of the Parking Enforcement Management Administration noting a Hyattsville, Maryland address. Agency processed the form and, as of April 1, 2008, Agency records were updated to show that Employee was no longer a D.C. resident.

On April 24, 2008, Michael Carter, Deputy Director of the Department of Public Works, issued Employee a notice to show cause why her position should not be forfeited for failing to maintain a *bona fide* residence in D.C.

On April 28, 2008, Employee filed another “Address, Non-Resident and Tax Withholding Authorization” form changing to a D.C. residence.

Stephanie Ferguson, Assistant Attorney General for the District of Columbia Department of Human Resources served as the Hearing Examiner and conducted an evidentiary conference on May 14, 2008. Employee presented documents to support her assertion that she was a D.C. resident as follows: a water bill for the D.C. address (covering the period from April 9 to May 11, 2008), rent receipts dated April and May 1, 2008 (without an address) and a leasing document for a D.C. address beginning on February 1, 2007, and ending on January 31, 2008. The agreement indicates that, upon its expiration, the lease will convert to a month-to-month tenancy. On August 26, 2008, Hearing Examiner Ferguson issued a Proposed Determination of Non-Compliance with the Residency requirement.

On October 20, 2008, Brender L. Gregory, Director of the Department of Human Resources, issued a final determination that Employee forfeited her position by failure to maintain a *bona fide* District residence. On October 22, 2008, William O. Howland, Jr., Director of the Department of Public Works, issued notice that Employee would be formally separated from employment with the Agency as of October 24, 2008.

On October 28, 2008, Employee filed an appeal with the Office of Employee Appeals (“the Office”). Employee maintains that she is a D.C. resident and has been for all of her life. She seeks reinstatement. The parties convened for a pre-hearing conference on May 13, 2009.

BURDEN OF PROOF

OEA Rule 629.2, 46 D.C. Reg. 9297 (1999) states that “[t]he employee shall have the burden of proof as to issues of jurisdiction . . .” Pursuant to OEA Rule 629.1, *id.*, the applicable standard of proof is by a “preponderance of the evidence.” OEA Rule 629.1 defines a preponderance of the evidence as “[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.” Employee must prove, by a preponderance of the evidence, that this Office has jurisdiction over his/her appeal.

JURISDICTION

For the reasons set forth in the “Analysis and Conclusion” section below, this Office does not have jurisdiction over Employee’s appeal.¹

¹ Agency challenged the jurisdiction of this Office to make any review of this appeal based upon the D.C. Municipal Regulations which provide, at Subpart 9 (d), Allegations of Residency Violations, that [t]erminations for Non-Compliance resulting from non-compliance with a residency requirement cannot be appealed to the Office of Employee Appeals or grieved through any grievance procedure.” While this

ISSUES

Whether this appeal should be dismissed for lack of jurisdiction.

ANALYSIS AND CONCLUSION

Employee maintains that she was a D.C. resident for the entire time she occupied her position. At the pre-hearing, she explained that, because she was having trouble with mail delivery at her residence in D.C., she chose to have her mail delivered to the residence of her children's father in Hyattsville, Maryland. According to her, it was not her intention, by filing the "Address, Non-Resident And Withholding Authorization," to indicate that she had moved. She only wanted to have her paycheck delivered to the Maryland address. However, as noted by Agency, Employee affixed her signature to a statement in the document that states as follows:

Under the penalties provided by law, I certify to the best of my knowledge and belief that my permanent residence is (Maryland address) and that I DO NOT HAVE A PLACE OF ABODE WITHIN THE DISTRICT; that I DO NOT RESIDE WITHIN THE DISTRICT; and that I AM NOT DOMICILED WITHIN THE DISTRICT.

In the section for indicating the state from which taxes should be withheld, Employee indicated D.C. However, her other statements raised a valid question for agency officials as to her state of actual residence.

regulation is clear in its language, it is contradicted by the statutory provision that establishes the jurisdiction of this Office.

The Office of Employee Appeals was established by the D.C. Comprehensive Merit Personnel Act of 1978 (CMPA), effective March 3, 1979, D.C. Law 2-139, D.C. Code § 1-601.01 *et seq.*. Those actions that employees of the District of Columbia government may appeal to the Office are listed at D.C. Code § 1-606.03. In accordance with the statute, OEA Rule 604.1, effective October 21, 1998, and except as otherwise provided in the District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Code § 1-601.1 *et seq.* or Rule 604.2 below, any District of Columbia government employee may appeal a final agency decision effecting *inter alia*, an adverse action for cause that results in removal. Accordingly, an Employee who is removed for cause has the right to appeal to this Office.

In the hierarchy of law, a statute precedes a regulation. Agency relies upon a regulation that purports to prohibit filing an appeal with this Office from a removal action based upon the violation of a residency requirement. However, there is nothing in the law that establishes the jurisdiction of this Office that excludes such an appeal. Employee was removed for cause and, therefore, has the right to file an appeal with this Office. And, for the purpose of determining whether this Office has jurisdiction to address the issues presented by the appeal, this Judge has the authority to review the record.

Once that question arose, Employee had the opportunity to submit evidence to address it. However, the documents that she presented did not convince Agency that she really lived in D.C. In the opinion of this Judge, that determination was sound. The rental agreements that Employee presented to Agency did not have an address on them. The water bill for the D.C. address had her name on it but only covered a period from April 9 until May 11, 2008. Employee submitted no concrete evidence to counter her prior sworn representation that she was now a Maryland resident. Therefore, Agency concluded, as does this Judge, that Employee was a resident of Maryland.

The D.C. Official Code (2001), Section 1-606.03, establishes that an employee may appeal, to this Office, “a final agency decision” effecting “an adverse action for cause that results in removal.” Chapter 16 of the District Personnel Manual (DPM) contains the rules and regulations that implement the law of employee discipline. Section 1600.1 of the DPM limits the application of those provisions to employees “of the District government in the Career Service.” In accordance with §1601.1, no *career service employee* may be “officially reprimanded, suspended, reduced in grade, removed, or placed on enforced leave, except as provided in this chapter or in Chapter 24 [the provisions for conducting a reduction in force] of these regulations.” (Emphasis added.)

Employee was required to maintain D.C. residence for her position and she failed to do so. By that failure, Employee violated the terms of her employment contract with Agency. In a similar factual scenario, this Office has held that when an employee fails to maintain the credentials required for a position he or she loses career status and becomes an at-will employee. See *Lydia Rosenboro v. D.C. Public Schools*, OEA Matter No. 1601-0175-08, ___ D.C. Reg. ___ (). Following that reasoning, this Judge concludes that, as of March 19, 2008, when Employee filed documents attesting to her status as a resident of Maryland, she lost her career status and became an at-will employee.

Section 1601.1 states that “[e]xcept as otherwise required by law, an employee not covered by §1600.1 is an *at will employee* and may be subjected to any or all of the foregoing measures at the sole discretion of the appointing personnel authority.” (Emphasis added). An at will employee may be terminated at any time and “for any reason at all.” *Cottman v. D.C. Public Schools*, OEA Matter No. JT-0021-92, *Opinion and Order on Petition for Review* (July 10, 1995), ___ D.C. Reg. ___ (). Once the appellant became an at-will Employee, she served at the pleasure of the agency and was subject to removal with no recourse.

This Judge determined that Employee had the lawful right to file an appeal here. However, there is no relief that this Office can afford her. According to the applicable laws, rules and regulations, this Office does not have jurisdiction over the appeal of a removal of an at-will employee. Therefore, this appeal must be dismissed.

ORDER

It is hereby ORDERED that the petition for appeal

in this matter is dismissed for lack of jurisdiction.

FOR THE OFFICE:

SHERYL SEARS, ESQ.
ADMINISTRATIVE JUDGE