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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
WATASHI MONTGOMERY	)	OEA Matter No. J-0010-18
Employee	)	
	)	Date of Issuance: January 24, 2018
v.	)	
	)	Lois Hochhauser, Esq.
D.C. METROPOLITAN POLICE DEPARTMENT	)	Administrative Judge
Agency	)	
_____	)	

Watashi Montgomery, Employee, *Pro Se*  
Andrea Comentale, Esq., Agency Representative

**INITIAL DECISION**

INTRODUCTION AND STATEMENT OF FACTS

Watashi Montgomery, Employee, filed a petition with the Office of Employee Appeals (OEA) on October 20, 2017, appealing the decision of the District of Columbia Metropolitan Police Department, Agency, to terminate her employment as a telecommunications equipment operator, effective October 12, 2017. Agency filed its response on November 16, 2017.

In her petition, Employee noted that she had been employed in this position for 11½ months, and identified her appointment as probationary. In its Answer, Agency stated that Employee was in probationary status when she was terminated.

Upon review of these documents, the Administrative Judge (AJ) determined that this Office's jurisdiction was at issue, since it appeared that Employee was in probationary status at the time of termination. By Order issued on December 4, 2017, the parties were directed to submit legal and/or factual argument on this jurisdictional issue by December 21, 2017. They were advised that unless they were notified to the contrary, the record in this matter would close on that date. Employee was also advised that employees have the burden of proof on all issues of jurisdiction. Both parties filed timely submissions, and the record closed on December 21, 2017.

JURISDICTION

The jurisdiction of this Office was at issue in this matter.

## ISSUES

Did Employee meet her burden of proof on the issue of jurisdiction? If not, should the matter be dismissed?

## FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), places the burden of proof on employees on all issues of jurisdiction. This burden must be met by a “preponderance of the evidence” which is defined in OEA Rule 628.2 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 has the burden of proof on the issue of her employment status, since employment status is one factor that determines this Office’s jurisdiction.

Employee did not dispute that she was in probationary status at the time of her removal. Rather, she argued that she should not have been removed, contending that she was an honest and hard-working employee, who had always received good performance ratings in previous positions. She noted that she was a single parent of three young children and asked that the AJ restore her to her position and award her back pay. Agency argued that this Office lacks jurisdiction to hear the appeal because of Employee’s probationary status. The documents submitted by the parties support the conclusion that Employee was in probationary status at the time of her removal. Agency’s September 29, 2016 letter to Employee, notifying her that she was selected for the position stated, in pertinent part:

As previously agreed, the effective date of your appointment is 10/17/2016. This will be a Career Appointment Probational....You will be subject to the satisfactory completion of a one-year...probationary period beginning on October 17, 2016.

In its October 12, 2017 letter to Employee notifying her of her removal, Agency stated that it was providing Employee with “official notification of the termination of [her] probationary appointment” which took effect on that date. The letter also stated, in pertinent part:

As a probationer, you may appeal termination under Chapter 8, Part 814 of the District Personnel Manual, only in accordance with the D.C. Human Rights Act.

Chapter 8 of the District Personnel Manual (DPM) governs the removal of probationary employees. Sections 814.1 and 814.2 provide that an agency may remove an employee holding probationary status provided it gives the employee written notice, and that the notice contains the effective date of removal and advises the employee of his or her appeal rights. The October 12, 2017 letter provided Employee with written notice of the removal, the effective date of the removal, and notified her of her appeal rights, thereby complying with the requirements of the applicable provisions of the DPM.

The threshold issue in every matter is one of jurisdiction. This Office’s jurisdiction is established

by law. It was initially created by the District of Columbia Comprehensive Merit Personnel Act of 1978 (CMPA) and then amended by the Omnibus Personnel Reform Amendment Act of 1998, D.C. Law 12-124 (OPRAA). Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions not relevant here, of *permanent* employees in the Career or Educational Service of 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. (emphasis added). Similarly, §814.3 of the DPM, provides that, also with few exceptions not relevant here, a “termination during a probationary period is not appealable or grievable.” Employee was still in her probationary period and had not yet achieved permanent status at the time of her removal.

This Office has consistently held that an employee who is removed while in probationary status, lacks the statutory right to be removed for cause and cannot utilize the adverse action procedures of the CMPA, which includes appealing removals to this Office. Therefore, this AJ has no authority to review the arguments raised by Employees, and must dismiss the petition for appeal for lack of jurisdiction. *See, e.g., 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); and *Elliott Duvall v. D.C. Department of Youth Rehabilitative Services*, OEA Matter No. J-0008-06 (January 24, 2006).

In sum, the AJ concludes that Employee failed to meet her burden of proof that this Office has jurisdiction of this appeal. Rather, she finds that there was sufficient evidence to conclude that Employee was removed while still in probationary status and that Agency complied with the applicable requirements related to the removal. The AJ concludes, therefore, that this appeal should be dismissed based on lack of jurisdiction since this Office has no authority to hear the appeal of an employee removed while in probationary status.

#### ORDER

It is hereby:

ORDERED: The petition for appeal is dismissed.

FOR THE OFFICE:

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Lois Hochhauser, Esq.  
Administrative Judge