THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
KENNON ROSS,	)	
Employee	)	
	)	OEA Matter No.: J-0130-11
v.	)	
	)	Date of Issuance: September 16, 2011
DC CHILD AND FAMILY SERVICES,	)	
Agency	)	SOMMER J. MURPHY, Esq.
	)	Administrative Judge

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On July 14, 2011, Kennon Ross ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting the D.C. Child and Family Services' ("Agency") action of terminating her employment. Employee worked as a Family Support Worker with Agency. The effective date of Employee's termination was effective July 5, 2011.

I was assigned this matter on or around August of 2011. On September 2, 2011, I issued an Order requiring Employee to submit a written statement that addressed whether this Office has jurisdiction over her appeal. Employee was directed to submit her brief by September 12, 2011. Employee submitted a timely brief through her American Federation of State, County and Municipal Employees ("AFL-CIO") union representative, Stephen G. White, on September 12, 2011.

JURISDICTION

As will be explained below, jurisdiction in this matter has not been established.

ISSUE

Whether OEA has jurisdiction over this matter.

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That 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.

OEA Rule 629.3 *id.* states:

> For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

Agency hired Employee as a CS-301 Grade 9, Step 5 Family Support Worker. The effective date of Employee's appointment was July 9, 2010.[1] In its appointment letter to Employee, Agency stated that the position was a "full-time career appointment subject to the completion of the one-year mandatory probation period."[2] Employee was terminated based poor performance as a Family Support Worker. In her petition for appeal, Employee requested to be reinstated to her previous position with Agency. Employee further argued that she had no previous disciplinary actions, and was never evaluated or written up prior to being terminated.

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999), states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean: "[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." Pursuant to OEA Rule 629.3, for appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction

Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, amended certain sections of the CMPA. Amended D.C. Code §1-606.3(a) states:

> "An employee may appeal 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…."

[1] *Agency Answer*, Tab 2, Notification of Personnel Action Form (August 17, 2011).
[2] *Agency Answer*, Tab 1 (August 17, 2011).

Thus, §101(d) restricted this Office's jurisdiction to employee appeals from the following personnel actions only: a performance rating that results in removal; a final agency decision affecting an adverse action for cause that results in removal, a reduction in grade, a suspension of 10 days or more, or a reduction-in-force.

Chapter 8, Section 814.3 of the District Personnel Manual provides that a termination during a probationary period cannot be appealed to this Office. An appeal to this Office by an employee serving in a probationary status must therefore be dismissed for lack of jurisdiction.[3] Section 814.3; however, provides that a probationary employee who alleges that their termination was a violation of public policy, the whistleblower protection law or any federal of D.C. anti-discrimination law "may file action under any such laws, as appropriate".

Agency submits that Employee was terminated as a result of poor work performance. It is also Agency's position that Employee was terminated during her one year probationary period and therefore was considered an "at-will" employee at the time of removal. I agree.

Agency hired Employee as a Family Support Worker with an effective date of July 9, 2010. Employee was informed that she was being terminated on July 1, 2011, with an effective date of July 5, 2011.[4] It should be noted that Employee's offer letter stated that the effective date of hire was July 4, 2010, which differs from the hire date indicated on the Notification of Personnel Action Form. Because the Personnel Action Form is signed and dated by an authorized official from the Human Resources department, July 9, 2010 will be the date utilized for the purposes for determining whether Employee was terminated within her one year probationary period.[5]

The effective date of Employee's termination was prior to the expiration of her one year probationary period. Under Section 814.3 of the District Personnel Manual, a termination occurring during a probationary period is not appealable or grievable. Furthermore, Employee does not assert that her termination was a result of a violation of public policy. Based on the foregoing, this Office does not have jurisdiction over Employee's appeal and must therefore be dismissed.

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[3] *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) D.C. Reg. ( ).
[4] *Agency Answer*, Tab 2, Notification of Personnel Action Form (August 17, 2011).
[5] It should also be noted that July 4th fell on a Sunday in the year 2010.

ORDER

It is hereby **ORDERED** that Employee's petition for appeal is **DISMISSED** for lack of jurisdiction.

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Sommer J. Murphy, Esq.
Administrative Judge