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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0096-11
ELLA CUFF,)	
Employee)	
)	Date of Issuance: December 22, 2011
v.)	
)	
DEPARTMENT OF)	
REAL ESTATE SERVICES,)	
Agency)	Sommer J. Murphy, Esq.
_____)	Administrative Judge
J. Michael Hannon, Esq., Employee Representative		
Andrea Comentale, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On April 12, 2011, Ella Cuff (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“the OEA” or “the Office”) contesting the Department of Real Estate Service’s (“Agency”) March 16, 2011 decision to deny Employee’s request for attorney’s fees.

I was assigned this matter on or around May of 2011. After reviewing the record, it appeared that there was a question of whether this Office has jurisdiction over Employee’s appeal. I subsequently issued an Order on July 25, 2011, requiring the parties to address the jurisdictional issue. Both parties responded to the Order. After reviewing the record, I determined that no material issues of fact are at dispute; therefore, a hearing is not warranted.

JURISDICTION

As will be discussed below, the jurisdiction of this Office has not been established.

ISSUE

Whether this Office has jurisdiction over Employee’s appeal.

FINDINGS OF FACT

The following findings of fact are based on the documentary evidence submitted by the parties during the course of Employee's appeal:

1. Employee worked as a CS-0083/06 Protective Services Officer in the Protective Service Police Department of Agency.
2. In February of 2003, Employee was served with an advanced written notice of proposed removal from her position based on the results of a background check initiated by the Metropolitan Police Department ("MPD") as part of the process for approving Employee's Armed Special Police Officer Commission.
3. The background check revealed that Employee was arrested in 1971 for carrying a Concealed Deadly Weapon ("CDW"). Employee was also arrested and charged with CDW-Knife, Unlawful Entry, and Destruction of Property offenses in 1972. According to Agency, both charges constituted felonies.
4. As a result of the investigation, Agency determined that Employee was unauthorized to carry a firearm and therefore could not be eligible for employment as a Protective Services Officer.
5. Employee's case was then assigned to a Hearing Officer who reversed Agency's proposed removal.
6. Employee was subsequently reassigned to another position within Agency, but sought reinstatement of her license to carry a firearm in May of 2009.
7. On November 20 2009, Employee received a second Advance Notice of Removal. The proposed removal was based, in part, on the charges stemming from Employee's 1971 and 1972 arrests.
8. The notice stated that Employee was being charged with "[a]ny on duty or employment related act or omission that interferes with the efficiency or integrity of government operations to include: incompetence, failure to perform the essential function of your position, and misfeasance."
9. On August 10, 2010, Agency dismissed the proposed removal with prejudice.
10. Agency's Deciding Official assigned to Employee's appeal stated the following in the final notice:

"After careful review of the advance written notice of the proposed removal; the adversary hearing findings of fact and information from the Hearing Officer's Written report and Recommendation; and

due consideration of Ms. Ann-Kathryn So's response on your behalf, I find that the cause for the proposed removal is not fully supported by the evidence, and it is my decision to dismiss the proposed removal action with prejudice."

11. On November 24, 2010, Employee's attorney submitted a Petition for Attorney's Fees to Agency. The petition requested attorney's fees for services performed by Employee's attorney during the administrative review of the proposed removal.
12. On March 16, 2011, Agency denied the request for attorney's fees and stated that: "[i]n the absence of a court order or other legal directive to pay the fees following a formal claim or legal action, the agency must deny your request for payment."
13. Employee, through counsel, filed a petition for appeal with this Office on April 12, 2011, requesting the award of attorneys fees incurred during Agency's administrative review of Employee's proposed termination.

ANALYSIS, AND CONCLUSIONS OF LAW

Employee's counsel argues that the OEA is the proper venue to request an award for attorney's fees in this matter. Employee's counsel relies, in part, on sections of the D.C. Official Code and the Comprehensive Merit Personnel Act ("CMPA") to support his argument that this Office may still retain jurisdiction to award attorney's fees in the case where "a District employee is forced to retain counsel to successfully defend herself from an unlawful attempt by an Agency to remove her from her position."¹

On May 11, 2011, Agency filed a motion to dismiss Employee's appeal, arguing that the OEA did not have jurisdiction to adjudicate this matter. Agency submits that this Office does not have the authority to review the request for attorney's fees because Agency did not take an adverse action against Employee. According to Agency, the OEA does not have subject matter jurisdiction over Employee's appeal and therefore lacks the authority to award attorney's fees.

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999), states that "the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." OEA Rule 629.1, 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."

¹ Petitioner's Brief at p. 3 (August 9, 2011).

Effective October 21, 1998, and except as otherwise provided in the District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Official Code 1 601.01 et seq., any District of Columbia government employee may appeal a final agency decision affecting:

- a. A performance rating which results in removal of the employee;
- b. An adverse action for cause that results in removal, reduction in grade, or suspension for ten (10) days or more; or
- c. A reduction-in-force
- d. A placement on enforced leave for ten (10) days or more

D.C. Official Code §1-606.08 allows a Hearing Examiner or Arbitrator to order payment by an agency of reasonable attorney fees if: 1) the appellant is the prevailing party; 2) and payment is warranted in the interest of justice. In this case; however, Employee has not filed an appeal to this Office based on any of the enumerated actions available in D.C. Official Code 1-601.01. In order to award attorney's fees to a 'prevailing party,' there must first be an appeal to this Office over which the OEA has exercised jurisdiction. Here, Employee's proposed termination was rescinded by Agency; therefore, no adverse action was taken. Because Employee has not appealed Agency's action to this Office, we cannot evaluate the merits of the claim for attorney's fees. Therefore, I find that Employee has failed to meet the jurisdictional burden of proof as required by OEA Rule 629.2, 46 D.C. Reg. 9317 (1999). This Office is not the proper venue to pursue a request for attorney's fees in this matter. This is not to say that Employee's counsel may not be awarded such fees in another forum. Based on the foregoing, Employee's petition for appeal is dismissed and the request for attorney's fees is denied.

ORDER

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

FOR THE OFFICE:

SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE