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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
BARBARA BREWER,	)	
Employee	)	OEA Matter No. 1601-0412-10
	)	
v.	)	Date of Issuance: January 29, 2013
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
_____	)	
Barbara Brewer, Employee <i>Pro-Se</i>	)	ERIC T. ROBINSON, Esq.
W. Iris Barber, Esq., Agency Representative	)	Senior Administrative Judge

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL HISTORY

On September 20, 2010, Barbara Brewer (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or the “Office”) contesting the District of Columbia Public Schools’ (“DCPS” or the “Agency”) action of removing her from service. At the time of her removal, Employee was an English Teacher at Spingarn Senior High School. Employee’s tenure with DCPS started on January 3, 2010.<sup>1</sup> According to a letter dated August 23, 2010, addressed to Employee and signed by then DCPS Chancellor Michelle Rhee, Employee was removed from service effective August 23, 2010.<sup>2</sup> In its Answer to Employee Petition for Appeal, DCPS argued that the OEA lacks jurisdiction over the instant matter because Employee was removed from service during her probationary period.<sup>3</sup> Accordingly, the undersigned issued an Order on August 20, 2012, wherein Employee was required to address whether the OEA may exercise jurisdiction over the instant matter. Employee has complied with this order and submitted her written response. After reviewing the documents of record, I have decided that no further proceedings are necessary. The record is closed.

<sup>1</sup> See Agency’s Answer at Tab 2 (October 21, 2010).

<sup>2</sup> *Id.* at Tab 1.

<sup>3</sup> *Id.* at 3 – 4.

## JURISDICTION

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

## ISSUE

Whether this matter should be dismissed for lack of jurisdiction.

## BURDEN OF PROOF

OEA Rule 628 *et al*, 59 DCR 2129 (March 16, 2012) states:

628.1 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 the 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.

628.2 The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

## FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS

### *Probationary Employee*

In its Answer to Employee Petition for Appeal, Agency contends in pertinent part as follows:

[Employee] was not a permanent employee at the time of her separation. [Employee] was hired as an ET-15 teacher and began her employment with DCPS on January 3, 2010. Pursuant to 5 DCMR §1307.3, an initial appointee to the ET salary class shall serve a two (2) year probationary period requirement. As an ET-15 teacher, [Employee's] probationary period would have ended on January 3, 2012. OEA therefore lacks jurisdiction over this matter.

On September 4, 2012, Employee submitted her response to my Order dated August 20, 2012. In her response, Employee contends that the OEA can exercise jurisdiction over her appeal based on the following:

- That since she was an employee (probationary or otherwise), the OEA can exercise jurisdiction over her appeal.

- Since DCPS instructed her that appealing to the EOA was a possible avenue to review her matter, equitable and judicial estoppel bars DCPS from challenging jurisdiction after she appealed to the OEA.
- Agency relied on secret non precedential decisions in support of its contention that the OEA lacks jurisdiction.

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Protections Act (hereinafter “CMPA”), sets forth the law governing this Office. D.C. Official Code § 1-606.03 (“Appeal procedures”) states in pertinent part that:

(a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to 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.

The above referenced career/education service rights conferred by the CMPA may be exercised by aggrieved employees. The District Personnel Manual (“DPM”) § 814.3, provides in relevant part that “a termination during a probationary period is not appealable or grievable...” According to 5 DCMR §1307.3 “an initial appointee to the ET salary class shall serve a two (2) year probationary period requirement.” And, 5 DCMR §1307.6 states in pertinent part that “failure to satisfactorily complete the requirements of the probationary period shall result in termination from the position.” Thus, according to aforementioned sections of the DCMR and DPM, educational service employees who are serving in a probationary period are precluded from appealing a removal action to this Office until their probationary period is finished. Employee started working for DCPS on January 3, 2010. The effective date of her removal was August 23, 2010. I find that when Employee was removed from service she was still within her two year probationary period. Because Employee was in a probationary status at the moment of her removal, I conclude that Employee is precluded from appealing said removal to this Office.

Employee has presented arguments regarding both the jurisdiction of this Office to hear her appeal as well as the legality of the process that the Agency utilized in effectuating her removal. Despite these arguments, I find that the OEA lacks jurisdiction over the instant matter and accordingly, I have no authority to address the merits of these arguments.

ORDER

Based on the foregoing, it is hereby ORDERED that this matter be DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

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ERIC T. ROBINSON, ESQ.  
Senior Administrative Judge