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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
AMBER MAIDEN,)	
Employee)	OEA Matter No. J-0030-16
)	
v.)	Date of Issuance: April 12, 2016
)	
UNIVERSITY OF THE DISTRICT)	
OF COLUMBIA,)	
Agency)	ERIC T. ROBINSON, Esq.
_____)	Senior Administrative Judge

Amber Maiden, Employee *Pro-Se*
Gary L. Leiber, Esq., & Anessa Abrams, Esq., Agency Representatives

INITIAL DECISION

PROCEDURAL BACKGROUND

On March 4, 2016, Amber Maiden (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or the “Office”) contesting the University of the District of Columbia (“UDC” or the “Agency”) action of removing her from service. According to the Petition for Appeal, Employee had only been employed by UDC for four months and was a probationary employee at the time of her removal from service. Employee’s last position of record was Human Resource Compliance Officer. This matter was assigned to the Undersigned on March 16, 2016. On March 21, 2016, the Undersigned issued an order to Employee requiring her to address whether the OEA may exercise jurisdiction over this matter. Employee timely complied with said Order. After reviewing the documents of record, I have determined that no further proceedings are warranted. The record is now closed.

ISSUE

Whether this matter should be dismissed for lack of jurisdiction.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) 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 628.2 *id.* states:

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.

JURISDICTION

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

ANALYSIS AND CONCLUSION

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 service rights conferred by the CMPA may be exercised by aggrieved career and educational service employees. However, the District Personnel Manual ("DPM") § 814.3, provides in relevant part that "a termination during a probationary period is not appealable or grievable..." Thus, according to DPM § 814.3, career service employees who are serving in a probationary period are precluded from grieving a removal to this Office until their probationary period is completed. According to the documents of record, particularly Employee's admission as referenced in her Petition for Appeal, I find that Employee was serving in a probationary period at the time of her removal. Considering as much, I find that pursuant to DPM § 814.3, the Employee is precluded from grieving her removal to this Office.

Whistleblowers Act

Employee has argued that this Office should exercise jurisdiction over her cause of action through the Whistleblower Act. This Act encourages employees of the District of Columbia government to “report waste, fraud, abuse of authority, violations of law, or threats to public health or safety without fear of retaliation or reprisal.” D.C. Official Code § 1-615.51. To achieve this objective, the Whistleblower Act provides that “a supervisor shall not threaten to take or take a prohibited personnel action or otherwise retaliate against an employee because of the employee's protected disclosure or because of an employee's refusal to comply with an illegal order.” D.C. Official Code § 1-615.53. Furthermore, § 1-615.54(a) states that:

An employee aggrieved by a violation of § 1-615.53 may bring a civil action before a court or a jury in the Superior Court of the District of Columbia seeking relief and damages, including but not limited to injunction, reinstatement to the same position held before the prohibited personnel action or to an equivalent position, and reinstatement of the employee's seniority rights, restoration of lost benefits, back pay and interest on back pay, compensatory damages, and reasonable costs and attorney fees. A civil action shall be filed within one year after a violation occurs or within one year after the employee first becomes aware of the violation...

It is evident from the foregoing that the D.C. Superior Court has original jurisdiction over Whistleblower Act claims. This Office was not granted original jurisdiction over such claims. Rather, the original jurisdiction of this Office was established in §1-606.03 of the D.C. Official Code:

(a) An employee may appeal [to this Office] 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 [RIF]. . . .

Based on the preceding language, some causes of action under the Whistleblower provisions may be adjudicated by this Office. However, this does not mean that *all* causes of action pertaining to the Whistleblower Act may be appealed to this Office. It bears noting the relevant language contained within D.C. Official Code § 1-615.56 of the Whistleblower Act:

Election of Remedies

(a) The institution of a civil action pursuant to § 1-615.54 shall preclude an employee from pursuing any administrative remedy for the same cause of action from the Office of Employee Appeals...

(b) No civil action shall be brought pursuant to § 1-615.54 if the aggrieved

employee has had a final determination on the same cause of action from the Office of Employee Appeals...

Thus, if an aggrieved employee has a matter with OEA that may otherwise be adjudicated by this Office, said employee may include, as part of her petition for appeal, any pertinent Whistleblower violations.

This Office has previously held that when it lacks jurisdiction to adjudicate the merits of an employee's petition for appeal, this Office is unable to address the merit(s) of the Whistleblower claim(s) contained therein. *See, Rebecca Owens v. Department of Mental Health*, OEA Matter No. J-0097-03 (April 30, 2004).

Conclusion

Based on the preceding statutes, case law, and regulations, it is plainly evident that the OEA lacks the jurisdictional authority to review adverse action appeals of probationary employees. Since Employee was terminated during her probationary period, I find that I cannot adjudicate over her appeal and it therefore must be dismissed for lack of jurisdiction. I further find that since this Office does not have jurisdiction over the Employee's adverse action that consequently this Office does not have the jurisdiction to adjudicate the merits of her Whistleblower Act claims. As a result, this matter must be dismissed for lack of jurisdiction.

ORDER

Based on the foregoing, it is hereby ORDERED that this matter be DISMISSED for lack of jurisdiction.¹

FOR THE OFFICE:

ERIC T. ROBINSON, Esq.
Senior Administrative Judge

¹ Since Employee failed to establish the jurisdiction of this Office in this matter, I am unable to address the factual merits (if any) of any arguments that Employee noted in her petition for appeal.