THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
DAVID BOWLES, Employee	
v.	OEA Matter No. J-0057-16
UNIVERSITY OF THE DISTRICT OF COLUMBIA, Agency	Date of Issuance: January 4, 2017 MICHELLE R. HARRIS, Esq. Administrative Judge

David Bowles, Employee, *Pro Se*
Anessa Abrams, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On June 24, 2016, David Bowles ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the University of the District of Columbia's ("Agency" or "UDC") decision not to renew his appointment as a faculty member. The effective date of the action was May 27, 2016. Agency's answer was due by July 28, 2016. On July 21, 2016, Agency filed a Motion for an Extension of Time to file its Answer. On August 2, 2016, Employee filed a response to Agency's Motion. On August 4, 2016, I issued an Order for Answer and Statement of Good Cause to Agency. Agency had until August 15, 2016 to respond. On August 15, 2016, Agency filed its Statement of Good Cause, along with a Motion to Dismiss Employee's Petition for Appeal, and a Motion to hold its Answer in Abeyance Pending a decision on its Motion to Dismiss. On August 19, 2016, Employee filed a response to Agency's Motion to Dismiss.

On August 29, 2016, I issued an Order denying Agency's Motion for an Extension of time to file its Answer, and its Motion to Hold the Answer in Abeyance. Further, I required that Agency file its Answer on or before September 9, 2016. Agency filed its Answer on September 9, 2016. Agency noted in its Motion to Dismiss and Answer that OEA lacked jurisdiction over this matter because Employee was in probationary status at the time of termination. As a result, on September 13, 2016, I issued an order requiring Employee to submit a brief addressing the jurisdiction matter raised by Agency. Employee had until September 27, 2016 to submit his brief. Agency had the option to respond on or before October 12, 2016. On September 28, 2016, Employee filed a response to Agency's Answer. On September 29, 2016, Employee filed a Legal Brief on Jurisdiction. Then, on October 5, 2016, Employee filed a "Clarification to Employee's Legal Brief on Jurisdiction."

Agency submitted its Response to Employee's Brief on Jurisdiction on October 12, 2016. On November 2, 2016, Employee filed a Motion for Summary Disposition. On November 8, 2016, Agency filed a response to Employee's Motion for Summary Disposition.

After considering the parties' arguments as presented in their submissions to this Office, I have decided that an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

The jurisdiction of this Office has not been established in this matter.

ISSUE

Whether Employee's Petition for Appeal 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.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee worked at Agency as an Assistant Professor of Architecture in the University of the District of Columbia Community College.[1] In a letter dated May 27, 2016, Employee was given notice that "in accordance with Articles XI.A.2 and XVI.2 of the Seventh Master Agreement between the University of the District of Columbia and the University of the District of Columbia Faculty Association/NEA, your appointment as a probationary faculty member in the Architectural Engineering Program at the University of the District of Columbia Community College will not be renewed." [2]

[1] Employee's Petition for Appeal (June 24, 2016).
[2] Employee Petition for Appeal (June 24, 2016).

Employee's Position

Employee argues that he was improperly terminated and that his discharge/non-renewal violated "DC Labor Laws, DC Municipal Regulations, DC Government Policies, Agency Policies, EEO Policies and Union Master Agreements."[3] Employee argues that over the course of his term with Agency that he was subject to a "continuing pattern of exploitation by two direct supervisors."[4] Specifically, Employee argues that he was subject to work 50 to 60 hours per week; and was given additional tasks and assignments outside of the scope of his faculty appointment, despite suffering from medical issues following an accident. Employee contends that the work environment had a negative impact on his disabilities, and as a result he faced complications.[5] Additionally, Employee argues that he was terminated in retaliation for reporting "improper activities" on the part of his supervisors.[6]

Further, Employee indicates that he received a notice regarding his discharge through telephone, prior to receiving a written notice. Additionally, Employee avers that the notice he received was improper because it did not come from the University, but from the Community College.[7] Employee also argues that Seventh Master Agreement does not apply to him because of his standing as a faculty member. Employee asserts that the Seventh Master agreement provides that the probationary period is for three (3) academic years, not three (3) calendar years, and as a result he was not in probationary at the time of his discharge. Employee cites that he "successfully completed 3 [sic] consecutive Academic Year Contracts, which is comprised of a Fall Semester and a Spring Semester and made up of 27 non-consecutive months (3 [sic] separate 9-month annual Academic Year Appointments) and 6 [sic] Semesters (3 [sic] Fall Semesters and 3 Spring Semesters.)"[8] Employee argues that there is a distinction between "on duty" and "off duty" time frames under the Seventh Master Agreement and as a result any "adverse action that Agency may have intended to enforce against the Employee per the CBA and DCMR would have had to occur during the *"On Duty"* Academic Year Contract."[9] Employee argues that it violates the Collective Bargaining Agreement if Agency dismisses, discharges, terminates or non-renews a faculty member in "off duty" status.[10] Employee also asserts that he was in "off duty" status at the time of the receipt May 27, 2016, notice regarding his discharge, and as such Agency's action was improper.[11]

Agency's Position

Agency asserts that this Office lacks jurisdiction over this matter because Employee was in probationary status at the time of his discharge. Further, Agency argues that the discharge was done in accordance with all applicable laws rules and regulations. Agency argues that the collective bargaining agreement between Agency and Employee's Union in effect at the time of Employee's hire "makes clear that faculty members who are not granted tenure are on probation for the first three years of employment."[12] Further, Agency argues that the "current collective bargaining agreement,

[3] *Id.* at Page 4.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] Employee's Legal Brief on Jurisdiction at Page 4 (September 29, 2016).
[9] *Id.*
[10] *Id.* at Page 2.
[11] Employee's Motion for Summary Disposition (November 2, 2016).
[12] Agency's Answer to Employee's Petition for Appeal at Page 2 (September 9, 2016).

which was in effect at the time of Bowles' termination, includes the same provision."[13] Agency contends that "Article XI.A.2 of the Seventh Master Agreement, the operative collective bargaining agreement between the University and Bowles' Union at the time of termination, provides that "[f]or the first three years of employment, non-tenured faculty who began teaching during or after the 2003-04 Academic Year may be discharged or their contracts not renewed without recourse to the grievance and arbitration procedures."[14] Agency argues that this provision also indicates that "during the probation period, the University at its sole discretion, may decide for any reason not to renew a faculty member's contract, or to terminate the employment of a faculty member, and such decisions shall not be subject to the grievance and arbitration procedure."[15] As a result, Agency argues that it would be improper for OEA to exercise jurisdiction over this matter.

Agency asserts that Employee's challenge of his probationary status is without merit. Further, Agency argues that the CBA provision makes very clear that the probationary term is for three years, not three academic years as proffered by Employee. Agency argues the terms of the CBA are clear and unambiguous regarding the three year probationary period, and as a result Employee's argument that the period is broken up into "on duty" and "off duty" is not an interpretation support by the guidelines set forth in the CBA.[16] Moreover, Agency argues that upon further analysis of the language used in other provisions of the agreement that the "parties clearly understood the difference between the academic year and calendar year in drafting the collective bargaining unit as the terms are separately used throughout the agreement."[17] Agency avers that Employee in unable to provide any information that "any provision of the collective bargaining agreement to support his argument that his probation was "paused" during the summer and was only active during the academic year."[18]

Further, Agency provides that Employee's employment commenced on August 16, 2013, thus the three year probationary term went up to and included August 15, 2016. Agency argues that it provided notice of Employee's non-renewal on May 27, 2016, which was still within the probationary period. Agency maintains that Employee was still on probation when his appointment was not renewed on May 27, 2016, and as a result OEA lacks jurisdiction over his Petition for Appeal. Agency denies all allegations set forth by Employee in his Petition for Appeal. As a result, Agency argues that its actions were in accordance with all applicable laws, rules and regulations, and that OEA lacks jurisdiction over this matter.

Analysis

This Office's jurisdiction is conferred upon it by law, and was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Official Code §1-601-01, *et seq.* (2001). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which took effect on October 21, 1998. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions. According to 6-B of the District of Columbia Municipal Regulation ("DCMR") § 604.1,[19] this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting: (a) a performance rating resulting in removal; an adverse action for cause that results in removal,

[13] *Id.*
[14] Agency's Answer to Employee's Petition for Appeal at Page 4 (September 9, 2016).
[15] *Id.*
[16] Agency's Response to Employee's Brief on Jurisdiction at Page 6 (October 12, 2016).
[17] *Id.* at Page 8.
[18] *Id.* at Page 12.
[19] *See also*, Chapter 6, §604.1 of the District Personnel Manual ("DPM") and OEA Rules.

reduction in grade, or suspension for 10 days or more; or (c) a reduction-in-force; or (d) a placement on enforced leave for ten (10) days or more.

Accordingly, OEA usually does not review matters that are under the guidance of a Collective Bargaining Agreement. However, the Court of Appeals held in *Brown v. Watts*, 933 A.2d 529 (April 15, 2010), that this Office is not "jurisdictionally barred from considering claims that at termination violated the express terms of an applicable collective bargaining agreement."[20] The Court went on to explain that the "Comprehensive Merit Personnel Act ("CMPA') gives this Office broad authority to decide and hear cases involving adverse actions that result in removal, including matters covered under subchapter [D.C. Code § 1-616] that also fall within the coverage of a negotiated grievance procedure."[21] In the instant matter, Employee was a member of the University of the District of Columbia Faculty Association/NEA Union ("Union") at the time of his discharge from service. Based on the holding in *Watts*, I find that this Office may interpret the relevant provisions of the CBA between Agency and the Union, related to the adverse action at issue in this matter.

In the instant matter, Article XIV.2 of the Seventh Master Agreement [22] of the CBA between Agency and Employee's Union in effect at the time of Employee's termination provides that:

> "Faculty members who have not been granted tenure shall be on probation for the first three years of their employment at the University and shall be employed pursuant to a one-year individual employment agreement in each such year. During the probation period, the University at its sole discretion may decide for any reason not to renew a faculty member's contract, or to terminate the employment of a faculty member, and such decisions shall not be subject to the grievance and arbitration procedure."[23]

Further, Article XIV, Section Two, of the Sixth Master Agreement of the CBA between Agency and Employee's Union that was in effect at the time of Employee's hire, similarly states in pertinent part that: "Faculty members hired after the effective date of this Agreement who have not been granted tenure shall be on probation for the first three years of their employment at the University and shall be employed pursuant to one year individual employment agreement in each such year."[24]

Employee was notified in a correspondence dated May 27, 2016, that his appointment would not be renewed. [25] The effective date of the discharge was May 27, 2016, and the notice indicated that Employee would remain on the payroll until August 15, 2016, for benefits purposes only.[26]

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[20] *Shands v. District of Columbia Public Schools*, OEA Matter No. 1601-0239-12 (May 7, 2014); See also *Robbins v District of Columbia Public Schools*, OEA Matter No. 1601-0213-11 (June 6, 2014).
[21] *Id.*
[22] *Id.* at Exhibit C.
[23] *Id.*
[24] Agency's Response to Employee's Brief on Jurisdiction at Exhibit B (October 12, 2016).
[25] Agency's Answer to Employee's Petition for Appeal at Exhibit D (September 9, 2016).
[26] Employee also argued that the incorrect letterhead was to provide notice of his discharge, in that it reflected the Community College. However, the undersigned finds that the letterhead used for the discharge notices is the same letterhead present in Employee's hire letter. Further, Employee was hired as an Assistant Professor in Architecture for the UDC Community College. (*See also* Employee's Petition for Appeal June 24, 2016).

Employee commenced employment with Agency on August 16, 2013. Thus, under the provisions of the CBA, his probationary status would end on August 15, 2016.

Employee argues that the provisions of the CBA provide that the probationary term is for "three academic years, not three years, and as a result he was not a probationary faculty member at the time of his discharge.[27] The undersigned disagrees. Based on the plain and unambiguous language of the Seventh Master Agreement of the CBA[28], I find that it is clear that the meaning for the term of a "year" is meant to represent a twelve-month (12) calendar year, and not an academic year as Employee argues.[29] The CBA makes clear distinctions throughout the body of the document regarding calendar years and academic years. Pursuant to the holding in *Brown v. Watts*, supra, I find that there is no evidence in the record to support a finding that Agency's termination of Employee violated the express terms of the CBA between Agency and Union. Consequently, I find that Employee was in probationary status at the time of his termination, and as a result, this Office lacks the jurisdiction to adjudicate this matter.

Grievances

Employee's other arguments that he was discriminated against because of his disabilities and that he was harassed by his supervisors are best characterized as grievances. D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR"). Per this statute, the purpose of the OHR is to "secure an end to unlawful discrimination in employment…for any reason other than that of individual merit." Complaints classified as unlawful discrimination are described in the District of Columbia Human Rights Act.[30] Further, it is an established matter of public law that as of October 21, 1998, pursuant to the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, OEA no longer has jurisdiction over grievance appeals. Employee's other ancillary arguments regarding workload, hours and compensation are best characterized as grievances and are also outside of OEA's jurisdiction to adjudicate. That is not to say that Employee may not press his claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee's other claims.

Retaliation

Employee submits his discharge was improper because he was retaliated against following his reporting of improper activities by supervisors.[31] To establish a retaliation claim, the party alleging retaliation must demonstrate the following: (1) he engaged in a protected activity by opposing or complaining about employment practices that are unlawful under the District of Columbia Human Rights Act ("DCHRA"); (2) his employer took an adverse personnel action against him; and (3) there existed a causal connection between the protected activity and the adverse personnel action.[32] A prima facie showing of retaliation under DCHRA gives rise to a presumption that the employer's conduct was unlawful, which the employer may rebut by articulating a legitimate reason for the employment action at issue.[33] Here, Employee states that his termination was the

[27] Employee's Legal Brief on Jurisdiction at Page 4 (September 29, 2016.)
[28] The same language is denoted in the Sixth Master Agreement as well, which was in effect at the time of Employee's hire.
[29] Employee also argued that Agency violated the CBA by terminating him after the academic year, namely while he was in "off-duty status". The undersigned finds this argument to be unsubstantiated by the evidence presented in the record.
[30] D.C. Code §§ 1-2501 *et seq.*
[31] Employee's Petition for Appeal (June 24, 2016).
[32] *Vogel v. District of Columbia Office of Planning*, 944 A.2d 456 (D.C. 2008).
[33] *Id.*

result of retaliation because he reported his supervisors' improper activities.[34] However, I find that Employee failed to provide any substantive evidence to support this claim. Consequently, I find that Employee's retaliation claims are unsubstantiated, and as such, fall outside the scope of OEA's jurisdiction.

Employees have the burden of proof for issues regarding jurisdiction and must meet this burden by a "preponderance of evidence." I have determined that Employee did not meet this burden. Consequently, I find that this matter must be dismissed for lack of jurisdiction.

ORDER

It is hereby **ORDERED** that Employee's Motion for Summary Disposition is **DENIED**. It is **FURTHER ORDERED** that the petition for appeal in this matter is **DISIMISSED** for lack of jurisdiction.

FOR THE OFFICE:

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MICHELLE R. HARRIS, Esq.
Administrative Judge

[34] Employee's Petition for Appeal (June 24, 2016).