

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Davonne Foster)	OEA Matter No. J-0119-14
Employee)	
)	Date of Issuance: April 30, 2015
v.)	
)	Joseph E. Lim, Esq.
Department of Behavioral Health)	Senior Administrative Judge
Agency)	
_____)	
Davonne Foster, Employee pro se		
Andrea Comentale, Esq., Agency Representative		

INITIAL DECISION

BACKGROUND

On August 29, 2014, Davonne Foster (“Employee”), filed a petition for appeal with the Office of Employee Appeals (“OEA”). The employee grieved her termination from her position as a Medical Support Assistant by the Department of Behavioral Health (“Agency”).

The matter was assigned to the undersigned judge on September 8, 2014. I ordered Employee to address the jurisdiction issue raised by the Agency. I closed the record after Employee submitted her final arguments. No hearing was held, as there were no material facts in dispute.

JURISDICTION

Jurisdiction in this Matter was not established.

ISSUE

Whether Employee’s appeal should be dismissed for lack of jurisdiction.

FINDINGS OF FACT

The following facts were submitted by the parties and are uncontroverted:

1. On April 24, 2014, Agency offered Employee employment as a Medical Support Assistant which Employee readily accepted. Agency Exhibit 2. The letter indicated that the appointment is probationary effective April 28, 2014.
2. On April 28, 2014, Agency hired Employee as a Medical Support Assistant for Agency’s Comprehensive Psychiatric Emergency Program. Agency Exhibit 3.

3. Employee's status as indicated in her D.C. Personnel Form 50¹ was Probationary Career Appointment.
4. On July 17, 2014, Employee was admitted to the Holy Cross Hospital for illness and was discharged on July 28, 2014. Employee notified her manager of her illness.
5. On August 12, 2014, Employee was cleared by her doctor to return to work on August 14, 2014. However, that evening, Employee fell and injured herself. She left messages with her manager about her accident.
6. On August 14, 2014, Agency served Employee with a written notice of termination effective August 22, 2014. Agency Exhibit 4.

ANALYSIS, AND CONCLUSIONS OF LAW

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."

Effective October 21, 1998, and except as otherwise provided in the District of Columbia Government Comprehensive Merit Personnel Act of 1978, DC Code 1 601.1 et seq. or Rule 604.2 below, 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

It is Agency's position that this Office does not have jurisdiction over Employee's appeal. Agency submits that Employee's status as a probationary employee at the time she was terminated prevents OEA from asserting subject matter jurisdiction over this appeal. In her brief, Employee sidesteps the issue of OEA's jurisdiction over her appeal. Instead, Employee asserts that Agency terminated her because of her health issues.

District Personnel Manual ("DPM") § 813.2 states that:

A person hired to serve under a Career Service Appointment (Probational), including initial appointment

¹ D.C. Standard Form 50, Notification of Personnel Action, is a personnel form used by D.C. Agencies to document personnel actions.

with the District government in a supervisory position in the Career Service, shall be required to serve a probationary period of one (1) year, except in the case of individuals appointed on or after the effective date of this provision to the positions listed below, who shall serve a probationary period of eighteen (18) months:

- (a) Individuals hired into entry-level police officer positions in the Metropolitan Police Department;
- (b) Individuals hired into entry-level correctional officer positions in the Department of Corrections or the Department of Youth Rehabilitation Services; and
- (c) Individuals hired into emergency or non-emergency operations positions in the Office of Unified Communications.

Employee was hired as a DS-0679-8/1 Medical Support Assistant with an effective date of April 28, 2014. Employee's appointment as a Career Service employee was subject to the completion of a one year (1-year) probationary period.² Agency issued Employee a notice of termination by letter dated August 14, 2014, with an effective date of August 22, 2014.

Employee did not complete the one year probationary period as required by DPM § 813.2 and therefore remained in a probationary status at the time she was terminated. Accordingly, we must look to § 814 of the District Personnel Manual to determine if Agency properly terminated Employee during her probationary period. District Personnel Manual §§ 814.1-814.3 states that:

814.1 Except for an employee serving a supervisory or managerial probationary period under section 815 of this chapter, an agency shall terminate an employee during the probationary period whenever his or her work performance or conduct fails to demonstrate his or her suitability and qualifications for continued employment.

814.2 An employee being terminated during the probationary period shall be notified in writing of the termination and its effective date.

814.3 A termination during a probationary period is not appealable or grievable. However, a probationer alleging that his or her termination resulted from a violation of public policy, the Whistleblower protection law, or District of Columbia or federal anti-discrimination laws, may file action under any such laws, as appropriate.

² Agency Response to Petition for Appeal (October 3, 2014).

District of Columbia Municipal Regulations (“DCMR”) states in Chapter 14 of 6 DCMR B814.1 that “an agency shall terminate an employee during the probationary period whenever his or her work performance or conduct fails to demonstrate his or her suitability or qualifications for continued employment.”

Agency complied with District Personnel Manual §814.2 and §814.3 by providing Employee with written notice of her termination, providing an effective date of such termination, and by informing Employee of her appeal rights to this Office. DPM § 814.1 does not require Agency to provide the specific reasoning for an employee’s termination. Instead, it offers a general reason why termination is allowable during the probationary period.³

It is unfortunate that Employee suffered health-related mishaps during her employment with Agency. However, I find that Employee was still in a probationary status at the time she was terminated. OEA has consistently held that an appeal to this Office by an employee serving in a probationary status must be dismissed for lack of jurisdiction.⁴ Because OEA lacks jurisdiction over Employee’s appeal, this Office also does not have the authority to adjudicate Employee’s arguments. Consequently, Employee’s petition for appeal must be dismissed.

ORDER

It is hereby ORDERED that Employee’s appeal is dismissed for lack of jurisdiction.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge

³ See *Codling v. DC Office of the Chief Technology Officer*, OEA Matter No. J-0151-09 (December 4, 2009) *Opinion and Order on Petition for Review* (December 6, 2010).

⁴ 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).