THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No. J-0087-17
TORREN FOX	
Employee	Date of Issuance: November 3, 2017
v.	
	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION	Administrative Judge
Agency	

INIITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Torren Fox, Employee, filed a petition with the Office of Employee Appeals (OEA) on August 23, 2017, appealing the decision of the District of Columbia Alcoholic Beverage Regulation Administration, Agency, to terminate her employment. At the time, Employee held the position of Investigator and had been employed with Agency for two years.

In the petition, Employee stated that she held a term appointment. Employee submitted Agency's Notice of Termination, in which Agency identified Employee as holding a term appointment, and advised her that because she held a term appointment, she had no right to appeal or grieve the termination. On September 25, 2017, Agency moved to dismiss the appeal, arguing that this Office lacks jurisdiction to hear an appeal of a term employee. The matter was assigned to this Administrative Judge (AJ) on September 11, 2017.

On October 11, 2017, the AJ issued an Order advising the parties that the jurisdiction of this Office had not been established. Employee was notified that she had the burden of proof on the issue of jurisdiction, and was directed to submit legal and/or factual argument to support her position regarding this Office's jurisdiction by October 30, 2017. The parties were advised that unless they were notified to the contrary, the record in this matter would close at 5:30 p.m. on October 30, 2017. Employee filed a timely response, and the record closed on October 30, 2017.

JURISDICTION

The jurisdiction of this Office was at issue.

ISSUE

Should this matter be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

In her response, entitled "Dismissal of Appeal," Employee stated on that she "hereby dismisses her appeal filed with the Office of Employee Appeals." She did not address the jurisdiction issue, but as a threshold issue that was raised by Agency and was the subject of the Order, it is addressed herein.

This Office's jurisdiction is conferred upon it by law. Pursuant to D.C. Code §1-617.1(b) (2006 Repl.), with some exceptions not relevant here, the right to appeal an adverse action to this Office is provided only to permanent employees serving in the career or education service who have successfully completed their probationary periods. Chapter 8 of the D.C. Personnel Regulations (DPM), E-District Personnel Manual Transmittal No. 221 (December 16, 2014) establishes that a term employee is hired for a limited period, not to exceed four years, and therefore does not hold permanent employment status.[1] The status of a term employee will, with rare exception, not change to permanent status during the employee's tenure as a term employee.[2] The employment of a term employee "ends automatically on the expiration of the appointment" unless the employee was separated earlier. *See*, DPM, Chapter 8, §823.9.

The August 24, 2016 Notification of Personnel Action, Standard Form-50 (SF 50), Employee's term appointment would terminate on a date "not to exceed" September 23, 2017. Agency's August 17, 2017 "Notice of Termination upon Expiration of Term Appointment" to Employee, begins:

> In accordance with section 826 of Chapter 8 of the D.C. personnel regulations…this letter serves as official notification of the Term appointment to the position of Investigator…which you were appointed on 7/27/2015, and which is set to expire on 9/23/2916, will not be extended after its expiration date. Accordingly you will be terminated effective close of business on …September 23, 2017.

Both documents support the conclusion that Employee held a term appointment, and that her separation was in accordance with the provisions of Chapter 8 of the DPM, cited above. Employee was terminated at the expiration of her term, consistent with DPM, Chapter 8, §823.9.

Pursuant to OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), employees carry the burden of proof on all issues of jurisdiction. This burden must be met by "preponderance of the evidence," which is defined in OEA Rule 628.2 as "[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

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[1] §823.1: A personnel authority may make a term appointment for a period of more than one (1) year when the needs of the service so require and the employment need is for a limited period of four (4) years or less.

[2] § 823.8: An employee serving under a term appointment shall not acquire permanent status on the basis of the term appointment, and shall not be converted to a regular Career Service appointment…

true than untrue." Employee identified herself a holding a term appointment in her petition, and did not present argument or evidence in support of this Office's jurisdiction to hear her appeal. The AJ concludes that Employee failed to meet her burden of proof on the issue of jurisdiction. She further concludes that the evidence supports the conclusion that Employee held a term appointment at the time she was separated, and that her separation took effect at the expiration of her term, which is in accordance with DPM, Chapter 8, §823.9, and is not an adverse action. For these reasons, the AJ concludes that this appeal must be dismissed. *See, e.g., Carolynn Brooks v. D.C. Public Schools*, OEA Matter No. J-0136-08, *Opinion and Order on Petition for Review* (July 30, 2010).

There is an alternative basis for dismissing the appeal. As noted earlier, Employee's only statement in her response was that she wanted her appeal dismissed. Employee signed the pleading, and there is no reason to suspect that she was not aware of the consequences of her request or that her decision was not made voluntarily and knowingly. OEA Rules do not prohibit an employee from withdrawing her appeal. The AJ therefore concludes that an alternative basis for dismissing the petition based on Employee's request to do so.

ORDER

It is hereby:

ORDERED: This petition for appeal is dismissed.[3]

FOR THE OFFICE: Lois Hochhauser, Esq.
Administrative Judge

[3] Since Employee's appeal is dismissed, Agency's motion to dismiss is denied as moot.