**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| ELIZABETH AVILES-WYNKOOP | ) | OEA Matter No. J-0034-17 |
| Employee | ) | |
| | ) | Date of Issuance: November 8, 2017 |
| v. | ) | |
| | ) | Lois Hochhauser, Esq. |
| DISTRICT OF COLUMBIA OFFICE OF CONTRACT AND PROCUREMENT | ) | Administrative Judge |
| Agency | ) | |

Elizabeth Aviles-Wynkoop, Employee, *Pro Se*
Janea Hawkins, Esq., Agency Representative

**INITIAL DECISION**

INTRODUCTION AND STATEMENT OF FACTS

Elizabeth Aviles-Wynkoop, Employee, filed a petition with the Office of Employee Appeals (OEA) on February 28, 2017, appealing the decision of the District of Columbia Office of Contract and Procurement, Agency, to terminate her employment as a Contract Specialist, effective November 21, 2016. The Administrative Judge (AJ) was appointed to hear this matter on March 6, 2017.

Upon review of the file, the AJ determined that this Office's jurisdiction was at issue for several reasons. First, in the petition, Employee stated that she had been employed by Agency for five weeks at the time of separation. Also, in its November 7, 2016 letter of termination, Agency stated that Employee was in probationary status and had no right of appeal. By Order dated April 13, 2017, the AJ notified the parties that this Office's jurisdiction was at issue, and that employees have the burden of proof on all issues of jurisdiction. The parties were directed to file arguments and documents in support of their positions on the issue of jurisdiction by 4:00 p.m. on May 4, 2017.[1] They were cautioned that compliance with OEA Rules was mandatory, as was compliance with procedures stated in the Order for requesting a continuance or extension.

At approximately 4:05 p.m. on May 4, 2017, Agency emailed the AJ a courtesy copy of its request to extend the filing deadline to May 11 based on Agency representative's **"**competing filing

[1] The AJ also directed Agency to explain why it failed to file an answer by the April 3, 2017 deadline, as directed by this Office's Executive Director.

deadlines and an evidentiary hearing in another tribunal." It had filed the request with OEA approximately 30 minutes earlier. Agency represented that it attempted to obtain Employee's consent, but that she had not responded. The AJ emailed the parties on May 5, expressing concern with the late request, and directing Agency to continue, by email and telephone, to contact Employee and seek her consent. The AJ also emailed and telephoned Employee several times, without success, directing her to respond to Agency's request by 3:00 p.m. on May 5. Employee did not respond. Therefore, on May 7, the AJ notified both parties by email that Agency's request was granted, and the filing deadline for both parties was extended to May 12. The Order memorializing this email was issued on May 8, 2017. In the Order, the AJ again noted concerns that neither party had complied with OEA Rules, since Agency filed its request for an extension less than 30 minutes before the deadline and did not offer a reason that would excuse it from filing the request in a timely manner; and Employee failed to respond to the AJ's directives or requests from Agency. The AJ noted that Employee telephoned the AJ on April 13, 2017,[2] and was aware of how to contact the AJ by telephone or email. The AJ also stated in the email, that there was no record that Employee had met the May 4 deadline or had sought an extension.

On May 10, 2017, Agency filed its "Brief in Support of Motion to Dismiss for Lack of Jurisdiction and Statement of Good Cause." Employee did not file her response. Instead, beginning on May 11, she sent *ex parte* emails to the AJ. In the first, she informed the AJ that she did not respond earlier because she had experienced an allergic reaction to poison ivy and sumac. She also asked that Agency's submission be dismissed. In a May 12 email, Employee asked for additional time, a request which Agency opposed. Subsequent emails from Employee included arguments on jurisdiction and had attachments.[3] The AJ responded to each email, stating that *ex parte* communications were prohibited, that submissions and arguments sent by email were not in compliance with OEA Rules and/or directives of this AJ, and that they would not be considered. On May 23, the AJ again directed Employee to advise her if she had filed a response to the April 13 Order, since none had been received by OEA. Employee responded by email that she had not filed a response because she had not received a copy of the Order and was unaware of its content:

> Unfortunately, I DON'T have any document, advising me that I was to file a response with OEA pursuant to the Order of April 13, 2017. So because I didn't receive this request, I DIDN'T respond.

The AJ did not find Employee's statement plausible for several reasons. First, deadlines and requests for extensions were discussed in a number of emails. In addition, copies of Orders sent to Employee by first class mail, postage prepaid, were not returned to this Office as undelivered and are

[2] Employee telephoned the AJ regarding Agency's failure to file a timely response. The AJ responded that she could not discuss the matter with Employee since *ex parte* communications were prohibited, and recommended that Employee familiarize herself with the OEA Rules.

[3] The Order issued on May 26 references these events. It also stated that the emails were printed out and placed them in the official file, noting that "it would take an inordinate amount of time to include the content, or even the subject of each email" in the Order.

presumed to have been received by Employee in a timely manner. Nevertheless, the AJ granted Employee additional time to file her submission.[4] Employee filed her response with OEA on June 13, 2017. On July 24, 2017, the AJ issued an Order directing Employee to respond to certain matters related to her submission by August 16, 2017; and directing Agency to file its final response by September 12, 2017. The parties were advised that unless they were notified to the contrary, the record would close on the issue of jurisdiction on September 12, 2017. Timely responses were filed. The record closed on September 12, 2017.

## JURISDICTION

The jurisdiction of this Office was at issue in this matter.

## ISSUES

Did Employee meet her burden of proof on the issue of jurisdiction? Should this petition for appeal be dismissed?

## FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The facts in this matter are not in dispute. Employee began her employment with Agency on October 17, 2016. The Standard Form 50 (SF 50) associated with that hire, states in the "Remarks" section: "Subject to completion of a one (1) year probationary period beginning 10/17/2016." By letter dated November 7, 2016, George Schutter, Agency's Chief Procurement Officer, notified Employee that she was being terminated during her probationary period, and that November 21, 2016 was the effective date of her removal. Employee accurately stated in her petition, that she worked for Agency a total of "1 month and 1 week."

The threshold issue in this matter is one of jurisdiction. This Office can hear appeals of permanent employees in the career and education services who have successfully completed their probationary periods. However, pursuant to D.C. Code §1-617.1(b), an employee removed during the probationary period cannot appeal a removal to this Office.

Employees bear the burden of proof on all issues of jurisdiction. *See,* OEA Rule 628.1, 59 DCR 2129 (March 16, 2012). The burden must be met by a "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 true than untrue." Employee has the burden of establishing by a preponderance of evidence that she

[4] The AJ permitted the late filing although she did not find the excuse credible, and did not impose any sanctions despite instances of noncompliance of OEA Rules and Orders by both parties, but most notably by Employee. The AJ did not want to limit the parties, particularly Employee who had the burden of proof on this issue, from fully presenting their arguments and supporting documents on the issue of jurisdiction which cannot be established or denied based on the conduct of the parties. *Laffey v. Northwest Airlines*, 567 F2d 429, 474 (D.C. Cir. 1976),

not in probationary status when she was terminated.

Employee argued in support of her position that this Office has jurisdiction of her appeal because she was not in probationary status when terminated by Agency. She contended that she completed the requirements of serving a probationary period while employed in the federal sector, and was therefore not required to serve a probationary period when she began her employment with Agency. She stated in her June 13, 2017 submission:

> Employee [satisfactorily] completed probation period under the Federal Government under the United States Civil Service Commission had served her probationary period during the timeframe of 9/13/1982 till 9/13/1985. Since, this requirement was met [Employee] is considered a Career Tenured employee and NOT a probationary employee.

Employee submitted copies of SF-50s associated with her employment with various federal agencies, including her 2014 resignation from the U.S. Department of Housing and Urban Development, her 2008 separation from the U.S. Small Business Administration, her 2003 departure from the National Park Service, and her 1989 separation from the U.S. General Services Administration. These SF-50s identify Employee as having permanent status, and several note that she completed a probationary period. With regard to her employment with the U.S. Department of Defense, which appears to be Employee's most recent federal sector employment and identified her tenure as "conditional," Employee maintained, in her August 14, 2017 submission, that the SF-50 was incorrect because she was not in probationary status when separated, and that she was awaiting the decision of the Merit Systems Protection Board (MSPB) to reinstate her since she "WASN'T a probationary employee, due to initial probation done on 9/13/82 through 9/13/1985."

Agency argued that that this Office lacked jurisdiction to hear this appeal since Employee was in probationary status when terminated. It characterized her argument that she was not required to serve a probationary period with Agency because she had completed that requirement during her federal government employment as "inherently flawed." Agency did not dispute that Employee completed probationary periods while employed by various federal government agencies, but maintained that she was still required, as a new hire to the District of Columbia government, to serve a probationary period.

Chapter 8 of the District Personnel Manual (DPM) addresses issues related to employees serving probationary periods. Section 813.2 states that an employee will remain in probationary status during the first year of employment. Sections 814.1 and 814.2 state that an employee can be terminated during the probationary period with no right of appeal, provided that the employing agency give the employee written notification of the termination and an effective date of the removal. Section 814.3 states that a "termination during a probationary period is not appealable or grievable."

Employee was employed by a number of federal agencies prior to her employment with Agency, and during her employment with at least some of these federal agencies, she completed probationary periods and then held permanent status. However, Employee did not submit any law, statute, policy, or precedent to support her position that her completion of one or more probationary

periods in the federal sector exempted her from serving a probationary period when she began her employment with Agency in October 2016. The AJ is not aware of any law, statute, policy or precedent that support Employee's position. Employee did not provide any credible reason to conclude that this matter is not governed by Chapter 8 of the DPM. She failed to meet her burden of proof on the issue of jurisdiction. The documents submitted by the parties, rather, support the conclusion that Employee was required to serve a probationary term with Agency, that she was terminated during her probationary period, and that Agency complied with the notice requirement provided by Chapter 8. Since Employee was serving her probationary period at the time of the removal, this Office lacks jurisdiction to hear her appeal. For these reasons, the AJ concludes that this petition for appeal must be dismissed.[5] *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).

ORDER

It is hereby:

ORDERED: The petition for appeal is dismissed.[6]

FOR THE OFFICE: Lois Hochhauser, Esq.
Administrative Judge

[5] The result would not change even if Employee prevails in the matter pending before MSPB.
[6] Given this outcome, Agency's motion to dismiss is denied as moot.