THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
AUGUSTINE EKWEM Employee	OEA Matter No. 1601-0180-08
v.	Date of Issuance: May 8, 2009
DISTRICT OF COLUMBIA DEPARTMENT OF CHILD AND FAMILY SERVICES Agency	Lois Hochhauser, Esq. Administrative Judge

Bryan Chapman, Esq., Employee Representative
Michael Bruckheim, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Employee filed a petition for appeal with the Office of Employee Appeals (OEA) on September 26, 2008, appealing Agency's final decision to suspend him for ten days, effective September 9, 2008. At the time of the adverse action, was a supervisory social worker and part of the Management Supervisory Service (MSS).

This matter was assigned to me on January 7, 2009. A prehearing conference was held on February 5, 2008, during which the parties presented oral argument on the issue of whether this Office had jurisdiction of this appeal. The parties were given until March 23, 2009 to submit written arguments on this issue. The parties filed their submissions in a timely manner. The record is now closed

JURISDICTION

This Office's jurisdiction was not established.

ISSUE

Should this matter be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The threshold issue in this matter is one of jurisdiction. This Office's jurisdiction is conferred upon it by law. It 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); and amended by the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.

D.C. Official Code §1-606.03 (a)(1) describes the jurisdiction of this Office, in relevant part, as follows:

> An employee may appeal [to OEA]… an adverse action for cause that results in removal, reduction in grade, or suspension of ten days more …

However, as an MSS employee, Employee was an "at-will" employee with no expectation of continued employment. The District Personnel Manual (DPM) states at Chapter 38, §3819.1:

> An appointment to the Management Supervisory Service [MSS] shall be an *at-will appointment*. A person appointed to a position in the Management Supervisory Service shall not acquire Career Service status, shall serve at the pleasure of the appointing personnel authority, and may be *terminated at anytime*. (emphasis added).

Section 1-609.54 of the D.C. Official Code provides that appointment to a position in the Management Supervisory Service "shall be an at-will appointment". In *Grant v. District of Columbia,* 908 A2d 1173, 1178 (D.C. 2006), the District of Columbia Court of Appeals concluded that "MSS employees are statutorily excluded from the Career Service and thus cannot claim [the] protections" afforded to Career Service employees who are subject to adverse employment actions, such as notice, hearing rights, and the right to be terminated only for cause.

It is well established that in the District of Columbia that an "at-will" employee may be removed "at any time and for any reason, or for no reason at all". *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 30 (D.C. 1991). *See also, Bowie v. Gonzalez*, 433 F.Supp.2d 24 (DCDC 2006). In "at will" status, Employee did not have job tenure or protection from removal. *See* Code § 1-609.05 (2001). However, there is no explicit language that addresses the rights, if any, of MSS employees who are suspended for ten days or more. *Grant v. District of Columbia* , cited above, cited above, does not specifically address this issue since the MSS employee in that case, had been placed on paid administrative leave.

The Administrative Judge found guidance in Chapter 16 of the DPM which contains the rules and regulations implementing the disciplinary system in the District government.

Section 1600.1 of the DPM states that its provisions "apply to each employee of the District government in the *Career Service*". (emphasis added). Section 1601.1 of the DPM further provides:

> An employee covered by §1600.1 may not be officially reprimanded, suspended, reduced in grade, removed, or placed on enforced leave, except as provided in this chapter or in Chapter 24 of these regulations. Except as otherwise required by law, an employee not covered by §1600.1 is an at-will employee and may be subject to any or all of the foregoing measures at the sole discretion of the appointing personnel authority.

These provisions, read together, reasonably lead to the conclusion that this Office lacks jurisdiction to hear petitions of MSS or other at-will employees who are appealing suspensions of ten days or more.

Employees have the burden of proof on all issues of jurisdiction, pursuant to OEA Rule 629.2, 46, D.C. Reg. 9317 (1999). This burden must be met by a "preponderance of the evidence" which is defined in OEA Rule 629.1, as 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". Employee argues that he "may not be entitled to appeal his case to [this Office] but there is no absolute bar to appeal his case either" He contends his "right to appeal his suspension is discretionary". For the reasons stated above, and upon careful consideration of the arguments presented and the applicable laws, rules and regulations, the Administrative Judge concludes that Employee did not meet the burden of proving that this Office has jurisdiction of this appeal.

ORDER

It is hereby ORDERED that the petition for appeal is DISMISSED.

FOR THE OFFICE: Lois Hochhauser, Esq.
Administrative Judge