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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
MERRITT WUCHINA,)	
Employee)	OEA Matter No. 1601-0077-17
)	
v.)	Date of Issuance: February 6, 2018
)	
D.C. PUBLIC SCHOOLS,)	
Agency)	Eric T. Robinson, Esq.
)	Senior Administrative Judge
_____)	
Merritt Wuchina, Employee <i>Pro-Se</i>		
Nicole C. Dillard, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On July 26, 2017, Merritt Wuchina (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or the “Office”) contesting the District of Columbia Public Schools’ (“DCPS” or the “Agency”) adverse action of removing her from service. Employee’s last position of record was Teacher. On September 13, 2017, DCPS filed a Motion to Dismiss and Answer to Employee’s Petition for Appeal (“Motion to Dismiss”). In it, DCPS notes that Employee was first hired on August 9, 2015. Agency notes that Employee herein was evaluated pursuant to IMPACT which “is the effectiveness assessment system which DCPS used for the 2016-2017 school year to rate the performance of school-based personnel.”¹ For this rating period, Employee was rated as “minimally effective.” Regrettably, Employee was notified that she was being removed from service. The effective date of Employee’s removal was July 29, 2017. Agency noted that Employee was being terminated during her probationary period.

This matter was assigned to the Undersigned on or around October 3, 2017. However, the Undersigned was involved in a serious motorcycle accident and was out of the Office, recuperating, for an extended period of time. On December 28, 2017, after the Undersigned returned to the Office, an Order was issued whereby Employee was required to respond to

¹ See Motion to Dismiss at 2 (September 13, 2017).

Agency's Motion to Dismiss. This Order required Employee to submit her response on or before February 1, 2018. To date, Employee has not filed a response with the OEA. After reviewing the documents of record, the Undersigned has determined that no further proceedings are warranted. The record is now closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

Whether this matter should be dismissed.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

Probationary Employee

In its Motion to Dismiss, Agency contends in pertinent part as follows:

... The [OEA] can hear appeals of permanent employees in the career and education services who have successfully completed their probationary periods. Permanent employees who serve in either the career or educational service are entitled to removal for cause. A term employee or an employee removed during the probationary period, is not so entitled, and therefore cannot appeal their removals to OEA...

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Protections Act (hereinafter "CMPA"), sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") states in pertinent part that:

(a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.

The above referenced career/education service rights conferred by the CMPA may be exercised by aggrieved employees. The District Personnel Manual ("DPM") § 814.3, provides in relevant part that "a termination during a probationary period is not appealable or grievable..." According to 5 DCMR §1307.3 "an initial appointee to the ET salary class shall

serve a two (2) year probationary period requirement.” 5 DCMR §1307.6 states in pertinent part that “failure to satisfactorily complete the requirements of the probationary period shall result in termination from the position.” Thus, according to aforementioned sections of the DCMR and DPM, educational service employees who are serving in a probationary period are precluded from appealing a removal action to this Office until their probationary period is finished. Employee started working for DCPS on August 9, 2015. The effective date of her removal was July 29, 2017. I find that when Employee was removed from service, she was still within her two year probationary period. Because Employee was in a probationary status at the moment of her removal, I conclude that Employee is precluded from appealing said removal to this Office.

Failure to Prosecute

OEA Rule 621.3, *id.*, states as follows:

If a party fails to take reasonable steps to prosecute or defend an appeal, the Administrative Judge, in the exercise of sound discretion, may dismiss the action or rule for the appellant. Failure of a party to prosecute or defend an appeal includes, but is not limited to, a failure to:

- (a) Appear at a scheduled proceeding after receiving notice;
- (b) Submit required documents after being provided with a deadline for such submission; or
- (c) Inform this Office of a change of address which results in correspondence being returned.

This Office has held that a matter may be dismissed for failure to prosecute when a party fails to submit required documents. *See David Bailey Jr. v. Metropolitan Police Department*, OEA Matter No. 1601-0007-16 (April 14, 2016). Here, Employee did not file her response to Agency’s Motion to Dismiss and Answer. I find that Employee has not exercised the diligence expected of an appellant pursuing an appeal before this Office. I further find that Employee’s inaction presents another valid basis for dismissing the instant matter.

Conclusion

Taking into account the discussion above, I find that Employee has failed to meet her burden of proof regarding the OEA’s ability to exercise jurisdiction over the instant matter.²³

² Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) (“The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence”).

³ Since I have found that the OEA lacks jurisdiction over this matter, I am unable to address the factual merits, if any, contained within Employee’s petition for appeal.

Accordingly, I conclude that I must dismiss this matter for lack of jurisdiction.

ORDER

Based on the foregoing, it is hereby **ORDERED** that this matter be **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

ERIC T. ROBINSON, Esq.
Senior Administrative Judge