Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of: JEFFREY MCINNIS, Employee v. DEPARTMENT OF PARKS AND RECREATION, Agency	OEA Matter No.: 1601-0138-15 Date of Issuance: June 6, 2017

OPINION AND ORDER
ON
PETITION FOR REVIEW

Jeffrey McInnis ("Employee") worked as a Government Operations Manager for the Department of Parks and Recreations ("Agency"). On July 24, 2015, Agency served Employee with a fifteen-day notice stating that he was being terminated from his position. The effective date of his termination was August 7, 2015.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on September 8, 2015. In his appeal, Employee argued that he was improperly terminated by Agency for reporting the illegal and unethical misuse of public resources. He further stated that his termination was an act of retaliation that violated the Whistleblower Protection Amendment Act. Therefore, Employee requested that he be reinstated with back pay, benefits, and

reimbursement for attorneys' fees. He also requested that Agency promote him to a higher position.[1]

On October 9, 2015, Agency filed a Motion to Dismiss for Lack of Jurisdiction. It argued that Employee's position was classified as Management Supervisory Service ("MSS"); therefore, he was at-will at the time of termination. Additionally, Agency asserted that OEA lacked the authority to adjudicate Employee's claims pertinent to the Whistleblower Protection Act because he failed to meet the threshold of OEA's jurisdiction. Thus, it requested that Employee's Petition for Appeal be dismissed.[2]

An OEA Administrative Judge ("AJ") was assigned to the matter on October 21, 2015. On October 22, 2015, the AJ issued an order directing Employee to submit a brief addressing whether OEA retained jurisdiction over this appeal because he was working in a Management Supervisory Service position at the time he was terminated. In his brief, Employee argued that his status as an MSS employee did not prevent him from seeking relief pursuant to the Whistle Blower Protection Amendment Act ("WBPAA") of 2009. According to Employee, Agency improperly terminated him in retaliation for reporting certain violations of the WBPAA to the Office of the Inspector General. As a result, he reiterated his request to be reinstated with back pay and benefits. Employee also requested reimbursement for attorneys' fees and to be compensated for pain and suffering.[3]

The AJ issued an Initial Decision on January 15, 2016. He first determined that Employee's position of record at the time he was terminated was a Government Operations Director in Management Supervisory Service. Next, the AJ highlighted D.C. Official Code § 1-

[1] *Petition for Appeal* (September 8, 2015).
[2] *Agency's Motion to Dismiss for Lack of Jurisdiction* (October 9, 2015).
[3] *Employee's Memorandum in opposition to Agency's Motion to Dismiss for Lack of Jurisdiction* (November 6, 2015).

609.54, which provides that appointment to MSS positions shall be at-will. According to the AJ, MSS employees lack the same procedural protections as Career Service employees who are subject to adverse employment actions. Therefore, the AJ concluded that OEA lacked jurisdiction to review Employee's substantive claims because he was at-will at the time of Agency's termination action.

With respect to Employee's whistleblower argument, the AJ stated that the D.C. Superior Court has original jurisdiction over such claims. However, he noted that some causes of actions involving whistleblower violations may be adjudicated if the aggrieved employee has a matter pending before OEA that may otherwise be heard by this Office. Since Employee's at-will status precluded OEA from exercising jurisdiction over his appeal, the AJ held that his substantive argument pertinent to the Whistle Blower Protection Act could not be addressed. Therefore, his Petition for Appeal was dismissed for lack of jurisdiction.[4]

Employee disagreed and filed a Petition for Review with OEA's Board on March 1, 2016. He argues that the Initial Decision should be overruled because the AJ failed to utilize the correct version of the D.C. Official Code in making his decision to dismiss the Petition for Appeal. According to Employee, the AJ cited to the Whistleblower Protection Act, when he should have cited to the Whistleblower Protection Amendment Act of 2009, D.C. Official Code § 1-615.54. He further argues that the WBPAA does not distinguish between MSS and non-MSS employees in relation to its provisions regarding retaliation. As a result, Employee requests that the Initial Decision be overruled and that he be reinstated with back pay and benefits.[5]

Agency filed its Reply to Employee's Petition for Review on March 31, 2016. It argues that the AJ's decision that OEA lacks jurisdiction over this appeal is supported by District of

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[4] *Initial Decision* (January 15, 2016).
[5] *Petition for Review* (March 1, 2016).

Columbia law and legal precedent. Agency reiterates that Employee was appointed to an MSS position and was not entitled to the same protections as employees in the Career, Educational, Excepted, Executive, or Legal Service, as provided under D.C. Official Code § 1-609.51. Consequently, it contends that he was not entitled to appeal his termination to OEA. Regarding his Whistleblower claims, Agency provides that the WBPAA does not authorize this Office to assume jurisdiction over an appeal from an MSS employee. Therefore, it requests that Employee's Petition for Review be denied and that the Initial Decision be upheld.[6]

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

> The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:
>
> (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
>
> (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
>
> (c) The findings of the Administrative Judge are not based on substantial evidence; or
>
> (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

<u>Management Supervisory Service</u>

OEA's jurisdiction is conferred upon it by law and 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). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which took effect on October 21, 1998. According

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[6] *Agency's Reply to Employee's Petition for Review* (March 31, 2016).

to Section 6-B of the District of Columbia Municipal Regulation ("DCMR") § 604.17, this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting:

> (a) A performance rating resulting in removal;
> (b)An adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more; or
> (c) A reduction-in-force; or
> (d) A placement on enforced leave for ten (10) days or more.

Moreover, OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), states that "[t]he employee shall have the burden of proof as to issues of jurisdiction...." The burden of proof is defined under a preponderance of the evidence standard. Preponderance of the evidence means "[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."[7] In this case, the AJ correctly held that in accordance with D.C. Official Code § 1-609.54(a):

> "[a]n appointment to a position in the Management Supervisory Service shall be an at-will appointment. Management Supervisory Service employees shall be given a 15-day notice prior to termination…."

OEA has consistently held that it lacks jurisdiction over at-will employees.[8] As the AJ provided, the D.C. Court of Appeals in *Grant v. District of Columbia*, 908 A.2d 1173 (D.C. 2006), held that there are certain procedural protections afforded to Career Service employees. However, MSS employees are statutorily excluded from Career Service protections. In addition, the United States District Court for the District of Columbia in *Evans v. District of Columbia*, 391 F.Supp. 2d 160 (2005), articulated that because MSS employees serve at-will, they have no property

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[7] OEA Rule 628.1

[8] *Hodge v. Department of Human Services*, OEA Matter No. J-0114-03 (January 30, 2004); *Guimaraes v. D.C. Public Schools*, OEA Matter No. 1601-0101-14 (December 22, 2014*); Luchner v. D.C. Public Schools*, OEA Matter No. 1601-0216-12 (January 10, 2013); *Stewart v. Department of Corrections*, OEA Matter No. J-0078-15 (July 9, 2015); and *Clark v. Department of Corrections*, OEA Matter No. J-0033-02, *Opinion and Order on Petition for Review* (February 10, 2004).

interest in their employment because there is no objective basis for believing that they will continue to be employed indefinitely.

Applying the provisions of D.C. Official Code § 1-609.54(a) and the reasoning provided in *Grant* and *Evans*, it is clear from the record that Employee was an MSS employee at the time of termination.[9] Agency fulfilled its requirement to provide him with fifteen days' notice prior to his termination. Employee was not entitled to the same protections afforded to Career Service employees. Thus, his at-will status authorized Agency to terminate him without cause.[10] Consequently, the AJ properly held that OEA lacks jurisdiction to adjudicate appeals from MSS employees.

Whistleblower Protection

Employee's primary argument is that the AJ utilized the incorrect version of the Whistleblower Protection Act. According to Employee, the AJ should have cited to the Whistleblower Protection Amendment Act of 2009, which amended certain parts of its statutory predecessor.[11] Of note, Employee cites to the following provisions of the WBPAA in support of his position:

> § 1-615.53(a): A supervisor shall not take, or threaten to take, a prohibited personnel action or otherwise retaliate against an employee because of the employee's protected disclosure or because of an employee's refusal to comply with an illegal order.
>
> § 1-615.54(a)(1): An employee aggrieved by a violation of § 1-615.53 may bring a civil action against the District, and, in his or her personal capacity, any District employee, supervisor, or official having personal involvement in the prohibited personnel action, before a court or a jury in the Superior Court of the District of Columbia seeking relief and damages….

[9] *Agency Answer to Petition for Appeal*, Attachment C (October 9, 2015).
[10] *Leonard et al v. Office of the Chief Financial Officer*, OEA Matter Nos. et al. 1601-0241-96 (February 5, 1997).
[11] The WBPAA was amended through D.C. Law 18–117, 57 D.C. Reg. 896 (March 11, 2010).

> § 1-615.54(c): Notwithstanding any other provision of law, a violation of § 1-615.53 constitutes a complete affirmative defense for a whistleblower to a prohibited personnel action in an administrative review, challenge, or adjudication of that action.
>
> § 1-615.56(b): An employee may bring a civil action pursuant to § 1-615.54 if the aggrieved employee has had a final determination on the same cause of action from the Office of Employee Appeals or from an arbitrator pursuant to a negotiated grievance and arbitration procedure or an employment contract.

This Board recognizes that AJ in this case should have utilized the WBPAA in his analysis, as the amended provisions of the Act became effective prior to the date of Employee's termination. However, D.C. Official Code § 1-615.54(a)(1) explicitly provides that the Superior Court of the District of Columbia, and not OEA, retains original jurisdiction over Whistleblower claims.[12] The only exception to this rule occurs when an aggrieved employee has a matter before OEA that may otherwise be adjudicated by this Office. In these cases, the employee may include, as part of their petition, any pertinent whistleblower violations.[13] Thus, contrary to Employee's argument, the WBPAA of 2009 did not confer original jurisdiction to OEA; thereby, enabling this Office to adjudicate his substantive claims. Moreover, he provides no credible legal basis to support a finding that OEA may exercise original jurisdiction over his claims as an MSS employee. Accordingly, Employee's at-will status renders this Office unable to exercise jurisdiction over his appeal. Therefore, this Board cannot consider any ancillary claims, including his arguments pertinent to Agency's alleged violations of the WBPAA.

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[12] *See also Rebecca Owens v. Department of Mental Health*, OEA Matter No. J-0097-03 (April 30, 2004); *Marie Vines v. Office of Cable Television and Communications*, OEA Matter No. J-0028-08 (March 18, 2008); *Ernest Hunter v. D.C. Water and Sewer Authority*, OEA Matter No. 2401-0036-05 and 1601-0046-05 (November 9, 2005) and *Jason Codling v. Office of the Chief Technology Officer*, OEA Matter No. J-0151-09, *Opinion and Order on Petition for Review* (December 6, 2010).

[13] *Cloney v. Department of Insurance Securities and Banking*, OEA Matter No. 2401-0085-09, Opinion and Order on Petition for Review (August 22, 2011).

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[14] In *Baumgartner v. Police and Firemen's Retirement and Relief Board*, the D.C. Court of Appeals held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding.[15] In this case, the AJ did not err in determining that OEA lacks jurisdiction over appeals from MSS employees. The AJ also was correct in concluding that this Office is precluded from addressing Employee's whistleblower claims. Based on the foregoing, his Petition for Review must be denied.[16]

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[14] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

[15] 527 A.2d 313 (D.C. 1987).

[16] It should further be noted that Employee's Petition for Review was filed approximately forty-six days after the issuance of the Initial Decision. Under OEA Rule 633.1, a party wishing to file a Petition for Review with OEA must do so within thirty-five calendar days, including holidays and weekends, of the issuance date of the Initial Decision. In *Department of Mental Health v. District of Columbia Office of Employee Appeals, et al.,* Case No. 2015 CA 7829 P(MPA)(D.C. Super. Ct. February 14, 2017), the Superior Court of the District of Columbia recently held that even if the Court were to conclude that a filing deadline is jurisdictional, ". . . OEA [ ] retains the equitable authority to hear the matter even outside the filing period." Although Employee's petition was untimely filed, the Board considered the matter on its merits because Agency provided a response to Employee's claims and failed to object to the untimeliness of the appeal.

ORDER

Accordingly, it is hereby ordered that Employee's Petition for Review is **DENIED**.

FOR THE BOARD**:**

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Sheree L. Price, Chair

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Vera M. Abbott

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Patricia Hobson Wilson

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P. Victoria Williams

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.