

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:)	
)	
IRENE JORDAN,)	
Employee)	OEA Matter No. J-0056-20
)	
v.)	Date of Issuance: February 17, 2021
)	
D.C. DEPARTMENT OF PUBLIC)	
WORKS,)	
Agency)	ERIC T. ROBINSON, ESQ.
)	SENIOR ADMINISTRATIVE JUDGE
_____)	
Irene Jordan. Employee <i>Pro-Se</i>		
Andrea Comentale, Esq. Agency Representative		

INITIAL DECISION¹

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 28, 2020, Irene Jordan (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or the “Office”) contesting the negative evaluation that she received as part of a Performance Review Plan. Employee’s position of record with the Department of Public Works (“DPW” or the “Agency”) is Direct Maintenance/Repair Manager, Management Supervisory Service (“MSS”) 13. The Undersigned was assigned this matter on December 17, 2020. On December 22, 2020, I issued an Order Regarding Jurisdiction wherein Employee was required to address whether OEA may exercise jurisdiction over her claim. Employee’s deadline for responding was January 8, 2021. To date, OEA has not received a response. Agency responded by noting that OEA lacks jurisdiction over this matter for multiple reasons and further noted that Employee failed to respond which provides another basis for dismissal. After reviewing the documents of record, I have determined that no further proceedings are warranted. The record is now closed.

¹ This decision was issued during the District of Columbia's COVID-19 State of Emergency.

ISSUE

Whether this matter should be dismissed for lack of jurisdiction.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. “Preponderance of the evidence” shall mean:

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.

OEA Rule 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

JURISDICTION

As will be explained below, the jurisdiction of this Office has not been established.

STATEMENT OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

The following statement of facts, analysis, and conclusions are based on the documents of record as submitted by the parties. Based on a review of the Petition for Appeal, a question arose as to whether this Office has jurisdiction over this matter.

Agency noted as follows in its Renewed Motion to Dismiss pp. 2 -3 (January 19, 2021):

“...neither the placement of an employee on a Performance Improvement Plan (“PIP”) nor a negative evaluation as part of a PIP is within OEA’s jurisdiction. Additionally, Employee’s position of record is in the Management Supervisory Service (“MSS”). Therefore, pursuant to D.C. Official Code §1-609.54, her position is at-will and, even if Agency had taken an adverse action against her, Employee has no right of appeal to OEA. *See* § 3813.7 of the District Personnel Manual.”

It is uncontroverted that Employee is contesting the determinations made by DPW management as part of a PIP. Of note, this negative evaluation did not result in an adverse action being meted out. Further, it is noted that Employee’s position of record is MSS. For the reasons explained below, I find that OEA cannot exercise jurisdiction over Employee’s claim.

An employee has the burden of proof as to issues of jurisdiction.² The D.C. Comprehensive Merit Personnel Act (CMPA), D.C. Official Code § 1-601.01 et seq. (2001), established this Office, which has only that jurisdiction conferred upon it by law. The types of actions that employees of the District of Columbia government may appeal to this Office are stated in D.C. Official Code § 1-606.03. Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act 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.

Thus, § 1-606.03(a) restricted this Office’s jurisdiction to employee appeals from the following personnel actions only:

- a performance rating that results in removal;
- a final agency decision effecting an adverse action for cause that results in removal, reduction in grade, or suspension of 10 days or more;
- placement on enforced leave for ten days or more; or
- a reduction in force

Further, OEA Rule 628.2 provides that Employee has the burden of proof for establishing jurisdiction.³ Pursuant to OEA Rule 604.1, this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting:

- (a) A performance rating which results in removal of the employee;
- (b) An adverse action for cause which results in removal;
- (c) A reduction in grade;
- (d) A suspension for ten (10) days or more;
- (e) A reduction-in-force; or
- (f) A placement on enforced leave for ten (10) days or more.⁴

Therefore, this Office no longer has jurisdiction over appeals from grievances. I find that Employee’s complaint is a grievance as she has not lost her job with the Agency. I further find that

² See OEA Rule 628.2, 59 D.C. Reg. 2129 (2012).

³ 59 DCR 2129 (March 16, 2012).

⁴ OEA Rule 604, 59 DCR 2129 (March 16, 2012); D.C. Official Code § 1-606.03.

the PIP evaluation provided to an aggrieved employee is discretionary on the part of management. I also find that this situation is not covered under the above cited § 1-606.03(a). The plain language of CMPA and OEA Rules compels the dismissal of this appeal for lack of jurisdiction. The starting point in every case involving construction of a statute is the language itself.⁵ A statute that is clear and unambiguous on its face is not open to construction or interpretation other than through its express language.⁶ Here, the CMPA clearly and unambiguously removed grievance appeals from the jurisdiction of this Office. Further, this Office has consistently held that appeals involving grievances are not within our jurisdiction.⁷

ORDER

Based on the foregoing, it is hereby ORDERED that the above-captioned Petition for Appeal be DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

/s/ Eric T. Robinson

ERIC T. ROBINSON, Esq.
Senior Administrative Judge

⁵ *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 753, 756 (1975).

⁶ *Banks v. D.C. Public Schools*; OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992); *Caminetti v. United States*, 242 U.S. 470 (1916); *McLord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980).

⁷ *See, e.g., Farrall v. Department of Health*, OEA Matter No. J-0077-99 (June 1, 1999); *Anthony v. Department of Corrections*, OEA Matter No. J-0093-99 (June 1, 1999); and *Forrest v. D.C. General Hospital*, OEA Matter No. J-0066-99 (April 9, 1999).