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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)

Employee)

v.)

DISTRICT OF COLUMBIA DEPARTMENT)
OF MOTOR VEHICLES,)
Agency)

Joseph Davis, Employee Representative
David M. Glasser, Esq., Agency Representative

OEA Matter No. J-0044-21

Date of Issuance: March 23, 2022

ARIEN P. CANNON, ESQ.
Administrative Judge

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on September 1, 2021. Pursuant to a letter issued by OEA on October 19, 2021, Agency’s Answer was due on or before November 18, 2021. Agency filed its Answer and a Motion for Summary Disposition, or in the Alternative, Dismissal Based on Lack of Jurisdiction, on November 5, 2021. Agency asserted that OEA lacked jurisdiction over Employee’s appeal because of her probationary status at the time of her termination. I was assigned this matter on January 6, 2022.

An Order on Jurisdiction was issued on January 12, 2022, which ordered Employee to respond to the jurisdiction issue raised by Agency in its Motion for Summary Disposition, or in the Alternative, Dismissal Based on Lack of Jurisdiction. Employee was ordered to submit her response on or before January 28, 2022. Employee submitted her response accordingly on January 28, 2022. The record is now closed.

JURISDICTION

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

ISSUE

Whether this Office may exercise jurisdiction over Employee's appeal.

BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.¹ "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.

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.²

ANALYSIS AND CONCLUSIONS OF LAW

Pursuant to OEA Rule 604, 59 DCR 2129 (March 16, 2012) 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.

District Personnel Manual ("DPM") § 223.1³ states that an agency shall utilize the probationary period as fully as possible to determine the employee's suitability and qualifications as demonstrated by the employee's knowledge, skills, and abilities as well as his or her conduct. Satisfactory completion of the probationary period is a prerequisite to continued employment in the Career Service.⁴ Whenever a Career Service employee fails to perform his or her duties at a satisfactory level during the probationary period, probation shall be terminated, and the employee shall be separated from government service.⁵ Agency does not provide cause for its termination of Employee other than citing to the applicable regulations pertaining to probationary employees which essentially provide that this time be used to assess an employee's suitability for the position. In Employee's brief, she points to issues pertaining to her time and attendance as raised by Agency's management. Because of the jurisdictional issues raised in this matter, the undersigned

¹ 59 DCR 2129 (March 16, 2012).

² OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

³ Chapter 2 of the DPM was renamed to "Talent Acquisition" (formerly named "Retention of Personnel Rights and Benefits") and provisions were amended in their entirety, effective February 1, 2021. The changes included, but are not limited to, incorporating and amending relevant provisions from former Chapters 7 and 8.

⁴ DPM § 225.1.

⁵ DPM § 225.1.

will not address the underlying merits of Employee's claims.

DPM § 227.4⁶, provides that a termination during a probationary period is not appealable or grievable. However, a probationary employee alleging that his or her termination resulted from a violation of public policy, the whistleblower protection law, or District of Columbia or federal anti-discrimination law, may file an action under any such laws, as appropriate. This Office has no authority to review issues beyond its jurisdiction.⁷ OEA's jurisdiction is generally "limited to permanent employees who are serving in the career or educational services and who have successfully completed their probationary periods."⁸

Here, Employee acknowledges her status as a probationary employee. However, she avers that her termination was in retaliation for engaging in protected activity by reaching out to a union representative about a time and attendance matter. Employee further contends that she was not informed of her right to union representation during her meetings with Agency's management. Employee's arguments appear to assert a violation of public policy and the District's retaliation laws. While District of Columbia law may provide an avenue for Employee to pursue her legal claims, OEA is not the appropriate forum for a probationary employee to assert these arguments. That is to say that Employee is not foreclosed from pursuing her claims in a different forum as provided by District or federal law. Accordingly, I find that Employee has not satisfied her burden of proof; thus, this matter must be dismissed for lack of jurisdiction.

ORDER

It is hereby **ORDERED** that Employee's Petition for Appeal is **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

/s/ Arien P. Cannon
ARIEN P. CANNON, ESQ.
Administrative Judge

⁶ This section was formerly § 814.3. Chapter 8 of the DPM was amended and reorganized under Chapter 2, effective February 1, 2021.

⁷ See *Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

⁸ *Roxanne Smith v. D.C. Department of Parks and Recreation*, Initial Decision, OEA Matter J-0103-08 (October 5, 2009).