THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JANICE WRIGHT	)	OEA Matter No. J-0336-10
Employee	)	
	)	Date of Issuance: June 8, 2011
v.	)	
	)	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA DEPARTMENT OF PARKS AND RECREATION	)	Administrative Judge
Agency	)	
	)	

Janice Wright, Employee, *Pro Se*
Andrea Comentale, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Janice Wright, Employee herein, filed a petition for appeal with the Office of Employee Appeals (OEA) on July 20, 2010, appealing the final amended decision issued by the D.C. Department of Parks and Recreation, Agency herein, to terminate her employment, effective April 2, 2010. At the time she was removed, Employee was a Supervisory Recreation Specialist, MS-188-11.

This matter was assigned to me on September 2, 2010. After reviewing the file, I determined that this Office's jurisdiction was at issue, and on September 10, 2010, I issued an Order directing Employee to submit legal and/or factual argument to support her position regarding this Office's jurisdiction. She was directed to address two issues: first that at the time of her removal, she was in the Management Supervisory Service (MSS), and second, that her appeal was filed beyond the permitted time period.

Employee filed a timely response asserting that she was terminated in retaliation for her actions as a "whistleblower" and, as such, her case should not be treated as an appeal of an at-will employee. She contended that Agency did not advise her of any appeal rights. I then issued an Order allowing Agency to respond. Agency filed a timely response, contending that given

her status as an MSS employee, Employee was not entitled to be notified of her appeal rights. The record is hereby closed

JURISDICTION

This Office's jurisdiction was not established.

ISSUE

Should this appeal 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, 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); and amended by the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions not relevant to this case, of permanent employees in the Career or Education Service who are not serving in a probationary period.

Section 1-609.54 of the D.C. Official Code provides that an appointment to a position in the Management Supervisory Service "shall be an at-will appointment." The District Personnel Manual (DPM) mirrors this language 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.

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. An at-will employee can be discharged "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). As an at-will employee, Employee lacked job tenure and protection from removal. *See* Code § 1-609.05 (2001). In sum, as an MSS employee, in at-will status, she had no right to appeal her removal to this Office. *Davis v. Lambert*, MPA No. 17-89, 119 DWLR 204 (February 13, 1991). *See also, Leonard et al v. Office of Chief Financial Officer*, OEA Matter Nos. 1601-0241-96 *et al.* (February 5, 1997), _____D.C. Reg._____ . ( ). Since Employee does not have the right to appeal her termination to this Office, Agency is not required to notify her of her appeal rights to this Office.

Employee argues, however, that although she was in MSS status at the time of removal, OEA has jurisdiction of the matter pursuant to the Whistleblower Protection Act, D.C. Official Code § 1-615.51 *et seq*. (2001). The Whistleblower Protection Act (WPA) seeks to protect employees who report "waste, fraud, abuse of authority, violations of law, or threats of public health and safety" from retaliation or reprisal. This Office's jurisdiction is referred to in §1-615.56 (Election of Remedies) of the WPA which states in pertinent part:

> (a) The institution of a civil action pursuant to § 1-615.54 shall preclude an employee from pursuing any administrative remedy for the same cause of action from the Office of Employee Appeals…
>
> (b) No civil action shall be brought 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…

The Supreme Court stated in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 753,756 (1975), "[t]he starting point in every case involving construction of a statute is the language itself." If the language is clear and unambiguous on its face it is not open to interpretation. The language of the WPA is not ambiguous or unclear. The language in the WPA does not authorize this Office to assume jurisdiction of an appeal of an MSS employee, even if the MSS employee is seeking the protection of the WPA. Employee has submitted no law, rule or regulation to the contrary. The language cited above provides only that an employee cannot seek judicial relief while at the same time pursuing an appeal with OEA. However, this language does not extend the jurisdiction of this Office where it otherwise does not exist, i.e., to MSS or other "at-will" employees. Therefore, based on her status as an MSS employee, OEA lacks jurisdiction to adjudicate Employee's appeal notwithstanding her claim to protection under the WPA. *Codling v. D.C. Office of the Chief Technology Officer*, OEA Matter No. J-0151-09, *Opinion and Order on Petition for Review* (December 6, 2010) _____ D.C. Reg . _____ . ( ). *See also, Bank v. D.C. Public Schools,* OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992) _____ D.C. Reg._____ . ( ).

Employee has the burden of proof on issues of jurisdiction, pursuant to OEA Rule 629.2, 46, D.C. Reg. 9317 (1999). The 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". After carefully reviewing the arguments and the applicable laws, rules and regulations in this matter, the Administrative Judge concludes that Employee did not meet her burden and that this matter must be dismissed for lack of jurisdiction.[1]

[1] Based on the findings and conclusions as discussed herein, the timeliness issue is rendered moot.

ORDER

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

FOR THE OFFICE:

Lois Hochhauser, Esq.
Administrative Judge