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**THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:)	
)	
KAREN WATERS,)	
Petitioner)	
)	OEA Matter No. 1601-0056-15
v.)	
)	Date of Issuance: July 1, 2015
DISTRICT OF COLUMBIA OFFICE)	
OF UNIFIED COMMUNICATIONS,)	
Agency)	MONICA DOHNJI, Esq.
)	Administrative Judge
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Harry T. Spikes, Sr., Esq., Employee Representative		
Adrianne Day, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On March 25, 2015, Karen Waters filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Office of Unified Communications’ (“Agency” or “OUC”) decision not to hire her as a Dispatcher. On April 28, 2015, Agency filed a Motion to Dismiss and to Stay Proceedings in the matter until OEA makes a determination on jurisdiction.

I was assigned this matter on April 29, 2015. On May 8, 2015, Ms. Waters filed her Opposition to Agency’s Motion to Dismiss and to Stay Proceedings in the matter until OEA makes a determination on jurisdiction. Thereafter, on May 11, 2015, Ms. Waters filed a Revised Opposition to Agency’s Motion. On May 26, 2015, and again on June 1, 2015, Agency filed a Motion to Strike the arguments contained within Ms. Waters’ revised Opposition to Agency’s Motion to Dismiss. After considering the parties’ arguments as presented in their submissions to this Office, I have decided that an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

The jurisdiction of this Office has not been established.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

In a letter dated December 10, 2014, Agency informed Ms. Waters that she was “selected under Job Requisition No. 25698, for Career Service position of Dispatcher, CS-2151, Grade 10 Step 1, at an annual salary of \$55,927.00... As previously agreed, the tentative effective date of your appointment is Sunday, January 25, 2015. Yours will be a Career Service Appointment.” This letter goes on to note that “[t]his offer of employment is *contingent* upon satisfactory completion of pre-employment checks. Therefore, you are required to complete the enclosedbefore your entrance-on-duty-date....You will be subject to the satisfactory completion of an eighteen-month (18-month) probationary period beginning on January 26, 2015 (emphasis added).”¹ This letter also informed Ms. Waters that if she accepted the terms of the employment offer, her orientation would take place on Monday, June 26, 2015 at 9:00am at 441 4th Street, NW, Washington, DC, wherein, she would submit her signed acceptance statement, and later report to the Human Resources Officer at 2720 Martin Luther King Jr., Ave, SE, 3rd Floor, Washington, DC. Ms. Waters was further informed that she had the option of initiating the credentialing/identification process on the Wednesday or Thursday of the week prior to her scheduled orientation between the hours of 8:00 a.m. and 5:00 p.m., otherwise, she could do so during the orientation session.

Ms. Waters showed up at 441 4th Street, NW, Washington, DC on January 26, 2015, for orientation as noted in the December 10, 2014, employment letter, however, she was sent back home. On February 19, 2015, Agency issued another letter to Ms. Waters stating that “[r]ecently, you applied and interviewed for a position with the Office of Unified Communications (OUC). As you can imagine, we received a considerable number of applications, and take very seriously the process of recruitment and selection. Even though your application and experience were good, we have selected another candidate...”²

Ms. Waters’ Position

In this case, Ms. Waters states that she was misclassified as a probationary employee. She explains that she has more than five (5) consecutive years of District Government service in the competitive system as a career employee and this should exempt her from probationary status. She states that she is a permanent career service employee by virtue of her previous D.C. government service. Ms. Waters notes that she was employed by Agency on December 10, 2014, pursuant to a letter of acceptance of employment for a career service position. She maintains that she was scheduled to start January 26, 2015. However, she received a letter from Agency termination her employment on February 19, 2015. The letter stated that Agency has selected another candidate for the position. According to Ms. Waters, the letter did not provide her with her appeal rights in violation of her procedural and substantive due process protection. Ms. Waters avers that Agency terminated her employment without cause, and its subsequent selection of another candidate after Ms. Waters had been selected is unlawful. Further, Ms. Waters states that, Agency’s reason for terminating her was pretextual, based on nepotism, race and gender discrimination. She is a black African American female who by Agency’s decision to employ her is qualified for the position. Ms. Waters maintains that, Agency employed a male who is a relative and friend of the government personnel who elected to terminate her employment. Ms. Waters explains that she is more qualified than the selected employee for the same position. Ms. Water also argues that by virtue of her

¹ Agency’s Motion to Dismiss at Exhibit 1 (April 28, 2015).

² *Id.* at Exhibit 3.

previous employment with the District government, she retains all rights and privileges afforded by the Collective Bargaining Agreement (“CBA”). Agency’s failure to inform her of her appeal rights was based on Agency’s malicious intent to deprive her of her appeal rights.

Ms. Waters states that she filed complaint with the EEOC and D.C. Office of Human Rights because she was not aware of her OEA appeal rights as the termination letter did not contain notice of appeal rights. She explains that she filed her appeal with OEA within thirty (30) days of receiving the termination letter. Additionally, Ms. Waters notes that she is a District employee under District laws by virtue of the documents issued to her, including the OUC identification card with an expiration date of January 26, 2018. Part of her employment was the orientation she received on January 26, 2015. Her termination letter is dated nearly one (1) month after orientation. Ms. Waters explains that she complied with the pre-employment check on December 30, 2014; she was scheduled for orientation on January 26, 2015; and issued an OUC identification on January 26, 2015. Ms. Waters denies that she was informed that she had not been selected for the position and was told to go home when she came for orientation on January 26, 2015. Ms. Waters also alleges that Agency breached the employment contract. She explains that she justifiably relied on the contract to her detriment by discarding other beneficial employment and she was injured financially by this reliance. Ms. Waters states that the February 19, 2015 letter did not use the term ‘terminated’ but instead used selection of a more qualified candidate, and this does not fall within the category for terminating a probationary employee.³

Agency’s position

Agency states that Ms. Waters is not an employee and as such, OEA lacks jurisdiction in this matter. It explains that OEA’s jurisdiction is limited to reviewing employee grievances and Ms. Waters is not an employee and has not been an employee of the District government for nearly a decade. Agency explains that pursuant to D.C. Official Code 1603.01, an employee is defined as “an individual who performs a function of the District government and who receives compensation for the performance of such services.” Ms. Waters has not performed a function for the District and had not received any compensation from the District for the position at issue. When Ms. Waters arrived at Agency on January 26, 2015, she was immediately asked to leave before she performed any functions. She never matriculated to an employee because she did not serve a function and was never compensated.

Additionally, Agency explains that the December 10, 2014 letter plainly stated that “this offer of employment is contingent upon satisfactory completion of pre-employment checks.” Thus, the letter did not make Ms. Waters an employee. It merely explained her advancement in the recruitment process with the clear caveat that she must meet a “pre-employment check requirement.” Moreover, the interviewing officer stressed the term “conditional” to Ms. Waters and that she should not quit her current job because the offer was contingent upon completion and verification of her background check. Agency maintains that this was done with every interviewed candidate, Ms. Waters failed to meet the condition and as a result she was not selected for employment. Ms. Waters did not become an employee in the instant hiring process and as such, OEA lacks jurisdiction in the instant matter.

³ Petition for Appeal; *See also* Employee’s Opposition to Respondent’s Motion to Dismiss and to stay proceedings in the matter until OEA makes a determination on jurisdiction (May 8, 2015); Revised and resubmitted filing to substitute the filing on May 08, 2015 (May 11, 2015).

Agency also argues that assuming Ms. Waters is considered an employee; she is a probationary employee because she was terminated during her 18 months probationary period. The December 10, 2014 letter clearly stated that Ms. Waters was subject to the satisfactory completion of eighteen (18) months probationary period. Therefore, if she was an employee, she had probationary status at the time of the alleged termination on February 19, 2015, and as a result, OEA lacks jurisdiction over this matter. Agency further states that Ms. Waters' former employment with the District government has no effect on the current matter. It explains that, Ms. Waters left the District government more than ten (10) years ago, beyond the three (3) years reinstatement period required by District law. Agency also highlights that Ms. Waters has had more than a one (1) day break in service.

In addition, Agency maintains that the Petition for Appeal is untimely as it was filed more than thirty (30) days from when the February 19, 2015 letter was issued. Agency also requests that Ms. Waters' breach of contract claim found in her May 11, 2015, submission be struck from the record. Agency explains that the breach of contract is an affirmative defense and Ms. Waters did not raise the claim in her original complaints. Furthermore, the breach of contract claim does not address the jurisdiction issue.⁴

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). 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. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions. According to 6-B of the District of Columbia Municipal Regulation ("DCMR") § 604.1⁵, 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.

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), states that "[t]he employee shall have the burden of proof as to issues of jurisdiction..." Pursuant to this rule, the burden of proof is by a preponderance of the evidence which is defined as "[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." This Office has no authority to review issues beyond its jurisdiction.⁶ Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.⁷

⁴ Agency's Motion to Dismiss (April 28, 2015); *See also* Agency's Motion to Strike (June 1, 2015).

⁵ *See also*, Chapter 6, §604.1 of the District Personnel Manual ("DPM") and OEA Rules.

⁶ *See Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

⁷ *See Brown v. District of Columbia Public Schools*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and*

In the instant matter, I agree with Agency's assertion that OEA does not have jurisdiction over this matter. Based on the record, I find that Ms. Waters was not an employee of the District of Columbia government. While Agency notified her in the December 10, 2014 letter that she had been offered a position, she was also advised that the offer was contingent on the successful completion of the pre-employment check. Agency highlighted in its submissions to this Office that Employee failed to meet the condition of this employment offer and as such she was not selected for the position. While I find that Agency's February 19, 2015 letter notifying Ms. Waters that she was not selected for the position is poorly drafted, I find that the letter is not a termination letter. It is simply notifying Ms. Waters of Agency's decision to go with another candidate for the position. Consequently, I conclude that the December 14, 2014 offer of employment did not confer District Government employee status on Ms. Waters and she does not have appeal rights to this Office.

Furthermore, the February 19, 2015 letter notified Ms. Waters of Agency's decision to go with another candidate. The letter does not relate to a performance rating that resulted in removal; it is not an adverse action for cause that has resulted in removal, reduction in grade, suspension for ten (10) or more days; it is not a reduction-in-force; and it is not considered enforced leave for ten (10) days or more. Ms. Waters is simply appealing Agency's decision not to ultimately hire her for the position she was offered in the December 10, 2014 letter, and this falls outside of OEA's purview.

Additionally, although Ms. Waters may have a valid breach of contract and/or a discrimination claim, OEA is not the right forum for these issues. Based on the foregoing, I conclude that this Office does not have jurisdiction over Ms. Waters' current appeal. That is not to say that Ms. Waters may not press her claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear her claims. And for this reason, I am unable to address the factual merits, if any, of this matter.

ORDER

It is hereby **ORDERED** that the petition in this matter is **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge