**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | |
| EMPLOYEE | OEA Matter No. J-0034-21 |
| | Date of Issuance: March 17, 2022 |
| v. | |
| DISTRICT OF COLUMBIA DEPARTMENT OF YOUTH REHABILITATION SERVICES Agency | LOIS HOCHHAUSER, Esq. Administrative Judge |

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

**INITIAL DECISION**

PROCEDURAL HISTORY AND BACKGROUND

Employee filed a Petition for Appeal ("PFA")with the Office of Employee Appeals ("OEA") on June 28, 2021, challenging the decision of the District of Columbia Department of Youth Rehabilitation Services ("Agency") to terminate her employment, effective May 13, 2021. On July 20, 2021, this Office's Executive Director notified Agency of the PFA and that its response was due by April 19, 2021. Agency filed its response on August18, 2021. The matter was assigned to this Administrative Judge ("AJ") on August 19, 2021.

On September 13, 2021, the AJ issued an Order notifying Employee that the jurisdiction of this Office was at issue, since it appeared that she was terminated during her probationary period. She was told that employees carry the burden of proof on all jurisdictional issues; and directed to submit legal and/or factual arguments supporting this Office's jurisdiction by October 1, 2021. The Order stated that the record would close at 5:30 p.m. on October 1, 2021, unless the parties were advised otherwise. Although Employee neither responded in a timely manner nor sought an extension, she filed a response on October 4, 2021.

On December 3, 2021, the AJ issued an Order stating that it appeared that the PFA was not filed in a timely manner, and also that Agency had not provided information regarding appeal rights in its final notice. The parties were directed to submit legal and/or factual argument on these issues by December 23, 2021, and Employee was also directed to submit certificates confirming that she had served Agency with copies of her filings with this Office. Neither party sought an extension nor filed

a timely response. Although Agency had not sought an extension, it filed a response on February 3, 2022. The record is now closed [1]

## JURISDICTION

The jurisdiction of this Office was at issue in this matter.

## ISSUE

Did Employee meet the burden of proof on the jurisdiction of this Office to hear this appeal?

## FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

In its November 26, 2019, letter, Agency notified Employee that it selected her for the position of Youth Development Representative ("YDR"), and that she would be required to serve an 18month probationary period, beginning on December 8, 2019. On May 13, 2021, Agency issued a "Notice of Termination during Probationary Period," notifying Employee that effective that day and while in probationary status, her employment was terminated.

The threshold issue in this matter is one of jurisdiction. This Office has no authority to hear matters beyond its jurisdiction. See, e.g., *Banks v. District of Columbia Public Schools*, OEA Matter 1602-0030-90, Opinion and Order on Petition for Review (September 30, 1992). This Office's jurisdiction was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA") and amended in 1998 by the Omnibus Personnel Reform Amendment Act of 1998, D.C. Law 12-124 ("OPRAA"). Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals of adverse actions, with exceptions not relevant here, filed by "permanent" employees who are not in probationary status.

According to Sections 814.1 and 814.2 of Chapter 8 of the District Personnel Manual ("DPM"), an employee terminated while in probationary status has no right of appeal. The employing agency is only required to provide the probationary employee with written notification of the termination and its effective date. Section 814.3 states that "termination during a probationary period is not appealable or grievable." This Office has consistently maintained that it lacks jurisdiction to hear appeals of employees challenging removals that occurred while they were still in probationary status. See, *e.g., 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).

Employee stated in the PFA that she was "unsure" if she was in probationary status at the time of her removal because she had a "lateral transfer from another agency." In her October 4, 2021 submission, she argued that "the DC Personnel Regulations Chapter 8…[established that her] status as a permanent employee was never converted to the status of a probationary employee as, to the best of [her] recollection, knowledge, and belief, [her] rights and privileges as a Permanent employee." She stated that Agency did not inform her that her "rights as an employee would change in any

[1] Both parties filed untimely pleadings, without seeking or obtaining leave to do so. However, rather than delay resolution of this matter further by permitting arguments on whether the submissions should be accepted, the AJ allowed the submissions to be entered into the record, having determined that neither impacted on the outcome.

manner nor was [she] informed that [she] had waived any rights by accepting a new position" when she was hired. She asserted that she was in permanent status at OSSE and maintained that status when she took the position with Agency.

Employee was working as a bus attendant with the D.C. Office of State Superintendent of Education ("OSSE") at the time she was hired by Agency. When she was hired by OSSE, on or about December 11, 2018; she was informed that she was required to serve a probationary period. On November 26, 2019, less than a year later, Agency notified her that she had been selected for the position of YDR. Employee did provide any factual support for her assertion that she was in permanent status when she left OSSE, was not required to serve a probationary period in her new position, or was not notified of the requirement of serving a probationary period in the YDR position. Agency's letter of November 26, 2019, informing Employee that she was selected for the YDR position, specifically states that the position was: "Career Appointment-Probational." (emphasis in original). It further informed Employee:

> **Probationary Period Requirement** (emphasis in original)
> You will be subject to the satisfactory completion of an eighteen month (18 months) probationary period beginning on 12/08/2019.

The letter of November 26, 2019, clearly put Employee on notice that she was required to serve an 18 month probationary period. In addition, Employee's contention that the new position was a "lateral transfer" is not supported by the submissions by the parties. A lateral transfer requires similarities in job title, responsibilities, grade level and/or salary in the current and new positions. In this matter, the YDR position was not substantially similar to the bus attendant position. The Position Descriptions ("PD") of the two positions have few, if any, similarities. For example, the YDR must have at least 30 postsecondary school credit hours in social or behavioral science and two years of experience working with youth in treatment programs or four years of experience working with youth in treatment programs, while the OSSE bus attendant is required to have a high school diploma or its equivalent and does not experience working with youth in treatment programs. According to the Standard Form 50, Employee was hired by Agency at a Grade 7, Step 1, however, she was a Grade 3, Step 7 when she left OSSE. According to the *General Services Pay Scales in the District of Columbia Government for 2019*, Employee had an annual salary of about $36,264 when she left OSSE to begin her employment at Agency, where her annual salary was approximately $47, 016, a difference of close to ten thousand dollars.

OEA Rule 628.1, (March 16, 2012), places the burden of proof on employees on issues of jurisdiction. The burden must be met by a "preponderance of the evidence," which is defined in OEA Rule 628.2 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. The documents referenced in this section were attachments to Agency's August 18, 2021 *Answer* which, according to Agency's certificate of service, were sent to Employee at her current address, on that date. Employee therefore had the opportunity to review Agency's arguments and the supporting documentation, and did not refute them or challenge their accuracy.

Based on the findings of fact, and the applicable DPM provisions, the AJ concludes that Employee failed to meet the burden of proof regarding this Office's jurisdiction. She further

concludes that the documentation supports the conclusion that this Office lacks jurisdiction to hear this appeal since Employee was in probationary status when terminated. For these reasons, she concludes that this appeal should be dismissed. *See, e.g., Day v. Office of the People's Counsel,* OEA Matter No. J-0009-94, *Opinion and Order on Petition for Review* (August 19, 1991).[2]

ORDER

It is hereby:

ORDERED: The petition for appeal is dismissed.

FOR THE OFFICE:

Lois Hochhauser, Esq.
Administrative Judge

[2] Since the AJ determined that the appeal should be dismissed based on Employee's failure to meet the burden of proof on the issue of jurisdiction, the issues of timeliness and notification of appeal rights are moot, and are not addressed in this decision.