

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Anthony Holliday)	Matter No. 1601-0046-09
Employee)	
)	Date of Issuance:
v.)	November 6, 2009
)	
Metropolitan Police Department)	Senior Administrative Judge
Agency)	Joseph E. Lim, Esq.
_____)	

Brenda Wilmore, Esq., Agency Representative
Anthony Holliday, Employee *pro se*

INITIAL DECISION

PROCEDURAL BACKGROUND

On September 17, 2007, Employee was appointed as a civilian Fleet Servicer. After observations of unsatisfactory work performance during his probationary period, Agency informed Employee that his termination date is September 17, 2008. Employee filed an appeal with the Office of Employee Appeals (OEA) on November 18, 2008, seeking a reversal of Agency's action.

Judge Muriel Aikens-Arnold ordered submissions on the issue of jurisdiction by the September 28, 2009, deadline. On October 28, 2009, this matter was reassigned to me. I closed the record after ascertaining that there were no material issues of fact in dispute.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

Whether Employee was no longer probationary at the time of his termination, and if so, whether Agency's action should be reversed.

FINDINGS OF FACT

The following facts are undisputed:

1. Employee applied for employment and was accepted as a civilian Fleet Servicer with the Agency on September 17, 2007, subject to a one-year probationary period.
2. After observations of unsatisfactory work performance, Agency informed Employee that his termination date is September 17, 2008. Agency does not allege that its termination of Employee was for cause, and in fact, failed to inform Employee of his right to appeal his termination to the Office of Employee Appeals. Agency asserts that at the time of his dismissal, Employee had been a probationary employee of Agency for 366 days.
3. Employee filed an appeal with the Office of Employee Appeals (OEA) on November 18, 2008, to seek a reversal of Agency's action.
4. Employee alleges that at the time of his dismissal, he was no longer on probation as he had completed his probationary period. Thus, his removal was illegal because it was without cause.
5. Agency counters that because 2008 was a leap year, Employee was still in his probationary period when he was terminated.

ANALYSIS AND CONCLUSIONS

OEA Rule 629.2, 46 D.C. Reg. at 9317, reads as follows: "The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." According to OEA Rule 629.1, *id*, a party's 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."

Probationary Employees

Effective October 21, 1998, and except as otherwise provided in the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (the Act), pursuant to the D.C. Official Code, §1-606.03 and OEA Rule 604.2, a D.C. government employee may appeal a final agency decision affecting: (a) A performance rating which results in removal of the employee; (b) An adverse action for cause that results in removal, reduction in grade, or suspension for ten (10) days or more; or, (c) A reduction in force.

Effective June 9, 2000, the Council of the District of Columbia adopted amended regulations for the updated implementation of the Act and, at the outset of the new regulations, provided at Chapter 16, § 1600.1, that the newly adopted regulations apply to each employee of the District government in the Career Service, who has completed a probationary period.

- (b) Satisfactory completion of the probationary period is required

to attain permanent status. See DPM § 813.11, D.C. Official Code § 5-105.04.

For employees serving at the Metropolitan Police Department, the section 813.2 of the District Personnel Manual provide as follows:

813.2 An employee who is appointed to a Career Appointment (Probational), including initial appointment with the District government in a supervisory position, shall be required to serve a probationary period of one (1) year, except in the case of an individual appointed on or after the effective date of this provision to an entry-level police officer position in the Metropolitan Police Department or an entry-level correctional officer position in the Department of Corrections or Department of Youth Rehabilitation Services, who shall be required to serve a probationary period of eighteen (18) months.

Thus, a District government employee serving a probationary period does not have a statutory right to be removed for cause and cannot utilize the adverse action procedures under subchapters VI or XVII of the Comprehensive Merit Personnel Act (“CMPA”), which include appealing an adverse action to this Office. An appeal of an adverse action filed in this Office by an employee serving a probationary period must therefore be dismissed for lack of jurisdiction. See *Davis v. Lambert*, MPA No. 17-89, 119 DWLR 305 (1991) (regardless of agency regulations and advice to the contrary, probationary employees may be discharged at-will and they do not have any statutory right to appeal their termination to the OEA); *Day v. Office of the People's Counsel*, OEA Matter No. J-0009-94, *Opinion and Order on Petition for Review* (July 10, 1995), __ D.C. Reg. __ (); *Employee v. Agency*, OEA Matter No. 1601-0057-83, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 6057 (1985); *Jones v. District of Columbia Lottery Bd.*, OEA Matter No. J-0231-89, *Opinion and Order on Petition for Review* (Aug. 19, 1991), __ D.C. Reg. __ (); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (Jan. 22, 1993), __ D.C. Reg. __ (); *Jordan v. Metropolitan Police Dep't*, OEA Matter No. 1601-0314-94, *Opinion and Order on Petition for Review* (Sept. 29, 1995), __ D.C. Reg. __ (); and *Ramos-McCall v. District of Columbia Pretrial Services*, OEA Matter No. J-0197-93, *Opinion and Order on Petition for Review* (March 18, 1994), __ D.C. Reg. __ ().

The regulations, however, do not specifically define what is a one-year probationary period. Is it exactly 365 days or is it a calendar year, thereby including a leap year? If it was the former, then Employee was terminated after his probation. If the latter, then Agency alleges that Employee was correctly terminated during his probation.

In common usage, a “year” is defined as “a cycle in the Gregorian calendar having 365 or 366 days divided into 12 months beginning with January and ending in December.” Webster’s Third New Int’l Dictionary 2648 (unabridged edition 1993). Courts that have tackled this question

have also defined a “year” as a calendar year, regardless of whether the year was a leap year, and not a 365-day period. *See Kowalski v. Hereford L’Oasis*, 190 Or. App. 236, 236, 239, 79 P.3d 319 (2003), and *Lewis v. Olafson & City of Monmouth*, No. 08-1163-KI, 2009 U.S. Dist. LEXIS 38968.

Here, Employee’s position was subject to a one-year probationary period. A District of Columbia government employee who successfully serves a one-year probationary period obtains permanent status at midnight on the day before the anniversary date of appointment.

It is undisputed that Agency hired Employee on September 17, 2007. If the agency has not taken action, *inter alia*, to extend an employee’s probationary period, prior to the anniversary date (here, on September 17, 2008), the employee becomes permanent at midnight the day before. *See Miller v. Department of Finance and Revenue*, OEA Matter No. 1601-0157-89 (July 24, 1990), ___D.C. Reg.__; and Vol. I, District Personnel Manual (DPM) Chapter 8, Part II, Subpart 6, § 6.1 (H)(1), pp. 8-24, 25 (11/90).

The DPM states, in part:

- a. Termination actions, normally, are effective at midnight; however, a probationary period is completed when the employee completes his or her tour of duty on his or her last day of probation. Therefore, if an agency wishes to terminate a probationer during the probationary period, the agency should terminate the probationer no later than the day before he or she completes the probationary period. For example:

A probationary period begins on December 1; the tour of duty is from 8:15 a.m. to 4:45 p.m. Probation normally will be completed at 4:45 p.m. on November 30 of the succeeding year. A termination made effective on November 30 would become effective at midnight – after probation has been completed – and would therefore be of no effect. Accordingly, to ensure that the termination is made during the probationary period, the agency should terminate the probationer on or before November 29; otherwise the action must be made effective as of a specific time on November 30 prior to 4:45 p.m.

Here, Employee was separated from service on September 17, 2008. Agency does not assert that it ever extended Employee’s probationary period. Because Employee’s appointment was on September 17, 2007, his probationary period ended on September 16, 2008. Even if we were to accept Agency’s argument that the one-year probationary period can be 366 days during a leap year, it is clear that Agency terminated Employee after his probation ended. Agency does not allege that its termination of Employee was for cause, and in fact, failed to inform Employee of his right to appeal his termination to this Office.¹ I find that Employee became permanent as of

¹ Although Agency failed to assert that Employee’s appeal was untimely because the appeal was filed

September 17, 2008. Thus, I also find that Agency terminated a permanent employee without cause. Therefore, I conclude that Agency's action removing Employee must be reversed.

ORDER

It is hereby ORDERED that:

- 1) Agency's action removing Employee is REVERSED;
- 2) Agency reinstate Employee and reimburse him all pay and benefits lost as a result of the removal; and
- 3) Agency file with this Office documents showing compliance with the terms of this Order within thirty (30) days of the date on which this decision becomes final.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge

past the statutory deadline of 30 days after the effective date of Agency's action, it cannot assert that defense when Agency violated OEA Rule 605.1 by failing to give Employee actual copies of OEA rules, appeal form, notice of rights. *See Margaret Rebello v. D.C. Public Schools*, OEA Matter No. 2401-0202-04, *Opinion & Order on Petition for Review* (June 27, 2008).