

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

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|-------------------------------------|---|-----------------------------|
| In the Matter of: |) | |
| |) | |
| Bruno K. Mpoy |) | Matter No. J-0109-09 |
| Employee |) | |
| |) | Date of Issuance: |
| v. |) | October 8, 2009 |
| |) | |
| DISTRICT OF COLUMBIA PUBLIC SCHOOLS |) | Senior Administrative Judge |
| Agency |) | Joseph E. Lim, Esq. |
| |) | |

Harriet Segar, Esq., Agency Representative
E. Ned Sloan, Esq., Employee Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

Employee was a probationary ET-15 Special Education Teacher with Agency's Ludlow Taylor Elementary School. On August 19, 2008, Agency informed Employee that he had been terminated. Employee filed an appeal with the Office of Employee Appeals (OEA) on February 18, 2009, seeking a reversal of Agency's action.

On July 10, 2009, this matter was assigned to me. After submissions by the July 31, 2009, deadline, I closed the record after ascertaining that there were no material issues of fact in dispute.

ISSUE

Should this matter be dismissed because Employee was probationary?

JURISDICTION

The jurisdiction of this Office was not established.

FINDINGS OF FACT

The following facts are undisputed:

1. Employee applied for employment and was accepted as a ET-15 Special Education Teacher with Agency's Ludlow Taylor Elementary School on August 20, 2007, subject to a one-year probationary period.
2. After an annual performance evaluation, Agency informed Employee on August 19, 2008, that he had been terminated. According to Employee's petition, his termination date is July 15, 2008. At the time of his dismissal, Employee had been a probationary employee of Agency for less than eight months.
3. Employee filed an appeal with the Office of Employee Appeals (OEA) on February 18, 2009, to seek a reversal of Agency's action.
4. In his petition and his legal brief on jurisdiction, Employee alleged malfeasance on the part of the principal, retaliation from management, and aired other grievances.

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.

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. __ ().

Here, Employee’s position was subject to a one-year probationary period. However, Employee was separated from service on July 15, 2008, less than eight months after his start date and still within the probationary period. Even if we were to assume that his actual termination date was August 19, 2008, the date Employee acknowledges being informed of his termination, it would still be within his probationary period. Therefore, I conclude that this Office has no jurisdiction over this appeal, and that it must be dismissed.¹

ORDER

It is hereby ORDERED that this matter is DISMISSED.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge

¹ Untimeliness is a second ground for dismissing his appeal. D.C. Official Code § 1-606.03(a) (2001) mandates that “Any appeal shall be filed within 30 days of the effective date of the appealed agency action.” Employee filed his appeal on February 18, 2009, which is at least five months beyond his statutory deadline.