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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
THOMAS CUNNINGHAM,	)	
Employee	)	
	)	OEA Matter No.: J-0217-12
v.	)	
	)	Date of Issuance: December 17, 2012
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF TRANSPORTATION,	)	
Agency	)	SOMMER J. MURPHY, Esq.
_____	)	Administrative Judge
Thomas Cunningham, Employee, <i>Pro Se</i>		
Nana Bailey-Thomas, Esq., Agency Representative		

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On August 22, 2012, Thomas Cunningham (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”). Employee’s appeal stemmed from being notified by the District of Columbia Department of Transportations’ (“Agency”) Advanced Written Notice of Proposed Removal. Employee was charged with “Any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law.” Specifically, Agency alleged that Employee knowingly and willfully failed to report the receipt of unemployment insurance benefits for eight (8) weeks.<sup>1</sup>

I was assigned this matter in September of 2012. On September 7, 2012, I ordered the parties to submit briefs on the issue of whether this Office may exercise jurisdiction over this appeal. Both parties submitted briefs in response to the Undersigned’s Order. After reviewing the record, I determined that an Evidentiary Hearing was not warranted. The record is now closed.

**JURISDICTION**

As will be explained below, the jurisdiction of this Office has not been established.

<sup>1</sup> Advance Written Notice of Proposed Termination, Agency Brief, Exhibit C (September 27, 2012).

ISSUE

Whether OEA may exercise jurisdiction over Employee's appeal.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

There is a question as to whether OEA has jurisdiction over Employee's appeal. Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the CMPA, sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") reads in pertinent part as follows:

- (a) An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . . , an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . . , or a reduction in force [RIF]. . . .

OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), states that "[t]he employee shall have the burden of proof as to issues of jurisdiction..." Pursuant to OEA Rule 628.1, the burden of proof is defined under a 'preponderance of the evidence' standard. Preponderance of the evidence means "[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. Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.<sup>2</sup> According to DCMR § 604.2, [a]n appeal filed pursuant to § 604.1 must be filed within thirty (30) calendar days of the effective date of the appealed agency action.

Employee raises several arguments in his September 14, 2012 submission to this Office pertaining to the repayment of unemployment compensation back to Agency. Employee also believes that his proposed termination may or may not be retaliatory; however, he does not provide any reliable evidence to support this allegation.<sup>3</sup> Furthermore, Employee does not address the issue of whether a final agency action was ever taken against him.

According to Agency, Employee's appeal was not ripe for consideration at the time he filed with this Office. Agency asserts that Employee appealed to OEA based on a proposed action, and not a final agency action; therefore, his appeal should be dismissed for lack of jurisdiction.<sup>4</sup>

The record reflects that Agency issued a fifteen (15) day Advance Written Notice of Proposed Termination to Employee on August 7, 2012. The notice states that Employee had the

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<sup>2</sup> See *Banks v. District of Columbia Public School*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

<sup>3</sup> Employee Brief (September 14, 2012).

<sup>4</sup> Agency Brief (September 27, 2012).

right to review the material upon which Agency's proposed action was based. Employee was also afforded an opportunity to respond to the charges in writing within six (6) days of receiving said notice. Instead of responding to Agency's proposed action, Employee filed a Petition for Appeal with OEA on August 22, 2012. Employee attached a copy of the Advance Written Notice of Proposed Termination; however, there is nothing in the record to reflect that Employee submitted the final notice of termination.

Because no final agency action had been taken against Employee at the time he filed a Petition for Appeal with this Office, pursuant to D.C. Official Code § 1-606.03 (a), I find that OEA may not exercise jurisdiction over Employee's appeal. Moreover, I am unable to address the substantive merits, if any, of Employee's claims. Based on the foregoing, Employee has failed to meet the burden of proof on the issue of jurisdiction and his appeal must therefore be dismissed.

ORDER

It is hereby ORDERED that Employee's appeal is DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

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SOMMER J. MURPHY, ESQ.  
ADMINISTRATIVE JUDGE