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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
SUSAN WALLACE)	OEA Matter No. J-0009-05
Employee)	Date of Issuance: January 31, 2006
v.)	Sheryl Sears, Esq.
D.C. PUBLIC SCHOOLS)	Administrative Judge
Agency)	

E. Lindsey Maxwell II, Esq., Employee Representative
Harriet Segar, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

On October 21, 2002, Employee was appointed to the position of Supervisory Public Affairs Specialist. On January 13, 2003, Aleta Y. Alsop, Acting Director of Human Resources, notified Employee that she was terminated. In relevant portion, the letter stated:

Pursuant to the District of Columbia Municipal Regulations, Title 5 (Board Rules), Chapter 13, Conditions of Employment and Chapter 14, Adverse Actions, your service as a probationary Supervisory Public Affairs Specialist is no longer required. You are hereby terminated from your employment with the District of Columbia Public Schools (DCPS), effective immediately.

On November 26, 2004, Employee filed an appeal with the Office of Employee Appeals ("OEA" or "the Office") seeking back pay and benefits.

Employee contends that she was not probationary at the time of her removal but, instead, “a party to an employment agreement that provided for her employment for a term of one year.” She maintains that Agency acted unlawfully when it failed to give her advance notice or a statement of cause and “breached this agreement by terminating her employment before its term had expired.”

JURISDICTION

The jurisdiction of this Office over the instant appeal has not been established.

ISSUES

Whether Employee’s appeal should be dismissed for lack of jurisdiction.

Whether Employee’s appeal should be dismissed for untimely filing.

BURDEN OF PROOF

OEA Rule 629.3, 46 D.C. Reg. 9317 (1999), provides that “[f]or appeals filed on or after October 21, 1998, the agency shall have the burden of proof, except for issues of jurisdiction.” Accordingly, Employee has the burden of proving that this Office has jurisdiction over her appeal.

FINDINGS OF FACT AND ANALYSIS AND CONCLUSIONS

The Office of Employee Appeals was established by the D.C. Comprehensive Merit Personnel Act of 1978 (CMPA), effective March 3, 1979, D.C. Law 2-139, D.C. Code § 1-601.01 *et seq.* Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, amended some sections of the CMPA. OPRAA added a statutory time limit for filing an appeal in this Office as follows: “Any appeal shall be filed within 30 days of the effective date of the appealed agency action.” D.C. Official Code § 1-606.3 (a); *see also* OEA Rule 604.2, 46 D.C. Reg. at 9297. Employee’s appeal was due on February 12, 2004. It was filed a year and nine months late.

Employee argues that Agency “should be equitably estopped from asserting that this claim is not timely because they incorrectly and improperly told [her] that she was a probationary employee and thus did not have any rights to appeal her termination.” Employee maintains that, under the terms of her employment “contract” with Agency, she was a term employee who was not required to serve a probationary period. The District Personnel Manual (DPM) Volume I, Chapter 8, Career Service, Part I, § 823.9, provides that “[a] term employee shall serve a probationary period.” Accordingly, Employee was required to serve one.

Section 101(d) of OPRAA amended § 1-606.03 of the Code to provide as follows:

(a) An employee may appeal a final agency decision effecting 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* (Emphasis added).

Effective June 9, 2000, the Council of the District of Columbia amended the regulations that implemented the Act. According to Chapter 16, § 1600.1, those regulations apply only "to each employee of the District government in the Career Service who has completed a probationary period." Employee was not covered by the protections afforded to career service employees who have completed their probationary periods.

Section 826.2 of the DPM provides that "[a] term appointee may be separated as provided in this chapter during a probationary period." Agency, therefore, had the right to remove her. Section 814.2 provides for notice as follows: "An employee being terminated during the probationary period shall be notified in writing of the termination and its effective date." Agency issued written notice to Employee and advised her of the effective date. Under § 814.3 "[a] probationer may appeal a termination under this section only in accordance with the D.C. Human Rights Act of 1977, § 1-2501 et seq., D.C. Code (1981). Employee does not have the right to appeal to this Office.

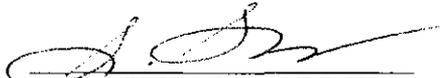
Employee's equitable argument also fails. Federal courts have found that a government employee's status is statutory and not contractual. See *Anderson v. Merit System Protection Agency*, 12 F.3d 1069 (9th Cir. 1993), and *Weidel v. Department of Justice*, 230 F.3d (9th Cir. 2000). Moreover, this Office does not have the authority to fashion equitable relief. *Banks v. D.C. Public Schools*, Opinion and Order on Petition for Review (Sept. 30, 1992) ___ D.C. Reg. ___ ().

This Office has held that a probationary employee may be removed without cause during a probationary period. See *Michelle Byers v. Department of Health*, OEA Matter No. 1601-0071-00R03, ___ D.C. Reg. ___ (). Agency properly removed Employee during her probationary period. She was not entitled to notice of cause or the right to appeal to this Office. Additionally, she filed her appeal after the statutory guideline. This untimely appeal from a probationary employee does not invoke the jurisdiction of this Office and, therefore, must be dismissed.

ORDER

It is hereby ORDERED that Employee's appeal is dismissed.

FOR THE OFFICE:


SHERYL SEARS, ESQ.
ADMINISTRATIVE JUDGE