THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DELORES ENNIS	)	OEA Matter No. 1601-0034-07
Employee	)	
	)	Date of Issuance: April 2, 2008
v.	)	
	)	Sheryl Sears, Esq.
	)	Administrative Judge
D.C. PUBLIC SCHOOLS	)	
Agency	)	

Delores Ennis, Employee, *Pro Se*
Harriet E. Segar, Agency Representative

INITIAL DECISION

INTRODUCTION AND FINDINGS OF FACT

Employee was hired as a Vocal Music Teacher by Agency. On January 15, 2000, the Certification Branch of the District of Columbia State Education Agency issued Employee a provisional license in vocal music education for grades K-12. Provisional licenses are temporary and cannot be renewed. In accordance with the District of Columbia Municipal Regulations (DCMR) governing licensure, Employee was required to complete certain course work by January 14, 2003, in order to gain full certification. The course work was three components of Praxis I Pre-Professional Skills Test: the Reading Test Code (10710), Math Test Code (10730) and Writing Test Code (20720).

On January 14, 2003, Employee's provisional license expired without her having completed the Praxis requirements. According to a report from Ms. Angie Skinner, the State Licensing Coordinator, Employee submitted a score report on or around June 16, 2003, attesting to the successful completion of the writing exam only.

By letter dated June 21, 2006, Agency notified Employee that, although she was still not fully licensed, it was expected that she could complete the certification requirements for her position by the end of the school year 2006 – 2007. Employee was

required to reapply for her position and notified that, if she was not hired by July 14, 2006, the Department of Human Resources would try to place her. She was further informed that, if no placement was found by August 30, 2006, she would be separated. Employee was urged to complete the certification process or risk separation.

On November 3, 2006, while Employee's certification was still pending, Tony J. Demasi, Executive Director, issued a letter advising Employee of a coming staff reduction. Demasi explained that, it was "necessary for the District of Columbia Public Schools (DCPS) to realign staff assignments to meet student enrollment and/or budgetary constraints criteria." Mr. Demasi advised that, in accordance with provisions of the collective bargaining agreement between the Board of Education and the Washington Teachers' Union, surplus teachers were entitled to bumping rights based on system-wide seniority in the area of their certification. He explained that, after the completion of the system-wide seniority placements, the surplus teachers were subject to separation. Employee was notified that, pursuant to these provisions, she would be separated effective Friday, November 17, 2006. On November 17, 2006, Agency did terminate Employee. Employee filed a petition for appeal with this Office on December 14, 2006. The parties spent several months in settlement negotiations but were unable to reach an agreement.

On March 9, 2007, well after the filing of this appeal, Ms. Angie Skinner, the State Licensing Coordinator, reported that Employee still had not completed the math and reading portions of the Praxis exam. Employee was notified of her obligation to present her scores to the office. Employee has, at no time, challenged Agency's contention that she did not hold a license when she was removed.

This appeal presented no factual disputes that required resolution by a hearing. Therefore, none was convened. This decision is based upon the record of documentary evidence and written legal arguments by the parties

POSITIONS OF THE PARTIES

Employee maintains that, by letter dated June 21, 2006, she had completed 99% of the requirements for licensing for her position. She also asserts that Superintendent Clifford B. Janey authorized her to remain employed as a Music Teacher at Noyes Elementary School until at least the end of the 2006 – 2007 school year pending her satisfactory performance of her duties. Employee contends, therefore, that Agency's decision to remove her during the school year was unlawful.

Agency counters that, without complete certification, Employee had no right to continued employment. Agency further contends that, because she was an unlicensed employee, this Office does not have jurisdiction over her appeal.

JURISDICTION

For the reasons set forth in the "Analysis and Conclusion" section below, this Office does not have jurisdiction over Employee's appeal.

ISSUES

I. Whether this Office has jurisdiction over Employee's appeal.

II. If so, whether Employee was lawfully removed.

III. If not, whether this appeal should be dismissed.

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." Pursuant to OEA Rule 629.1, *id.*, the applicable standard of proof is a "preponderance of the evidence." OEA Rule 629.1 defines a preponderance of the evidence 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." Accordingly, Agency has the burden of proving, by a preponderance of the evidence, that the separation of Employee was legal.

ANALYSIS AND CONCLUSION

Employee was notified that she was subject to removal because she did not have proper licensure for her position. However, Agency effected her removal as part of a budgetary adjustment. This Office has found that a removal for budgetary reasons is tantamount to a reduction-in-force and, therefore, subject to the requirements thereof. In the matter of *R. Jamal Johnson v. D.C. Public Schools*, OEA Matter No. 1601-0011-07 (February 8, 2007), Judge Joseph Lim held that a removal for budgetary reasons that was not conducted in accordance with lawful procedures for a reduction in force (RIF) or for cause was improper. He reversed the Agency's action and ordered Employee's reinstatement. The Board of this Office upheld that determination in its *Opinion and Order on Petition for Review* issued on June 20, 2007. However, the rights referred to belong only to career service employees who have completed their probationary periods. Due to Employee's status, as the time of the separation, this appeal presents a threshold question of jurisdiction.

As a teacher with only provisional licensing, Employee did not meet all of the requirements of her contractual agreement with Agency. Therefore, she never achieved career status. Instead, she was an "at will" employee. Section 1601.1 of the District Personnel Manual (DPM) distinguishes career service employees from others by stating that "[e]xcept as otherwise required by law, an employee not covered by §1600.1 is an *at will employee* and may be subjected to any or all of the foregoing measures at the sole

discretion of the appointing personnel authority." (Emphasis added). Accordingly, an at will employee does not have the right to the same protections as their career service counterparts.

The law that establishes the jurisdiction of this Office is also clear in limiting the right of appeal to career service employees. The D.C. Official Code (2001), Section 1-606.03, establishes that an employee may appeal, to this Office, "a final agency decision" effecting "an adverse action for cause that results in removal." Chapter 16 of the District Personnel Manual (DPM) contains the rules and regulations that implement the law of employee discipline. Section 1600.1 of the DPM limits the application of those provisions to employees "of the District government *in the Career Service*." (Emphasis added.) In accordance with §1601.1, no career service employee may be "officially reprimanded, suspended, reduced in grade, removed, or placed on enforced leave, except as provided in this chapter or in Chapter 24 [the provisions for conducting a reduction in force] of these regulations."

It is well established that at will employees may be terminated "for any reason at all." *Cottman v. D.C. Public Schools*, OEA Matter No. JT-0021-92, *Opinion and Order on Petition for Review* (July 10, 1995), ___ D.C. Reg. ___ ( ). And according to the applicable laws, rules and regulations, this Office does not have jurisdiction over the appeal of a removal of an at-will employee.

While this matter, at first review, appears to present some layers of complexity, it really does not. Unfortunately, Employee was vulnerable to removal on more than one ground. Agency could have opted to remove Employee for her lack of competence due to her failure to achieve licensing. Instead, she was removed for budgetary reasons. But no matter the manner of her separation, Employee was an at-will employee at the time of the removal. Any promise that may have been made to Employee by Superintendent Clifford B. Janey did not have the force of law. Employee was required to have proper licensing for her position. But she did not. She was subject to removal at the will of the agency with no recourse. According to the applicable laws, rules and regulations, this Office does not have jurisdiction over the appeal of a removal of an at-will employee. This Office does not have jurisdiction to review the instant appeal and it must be dismissed.

ORDER

It is hereby ordered that the petition for appeal in this matter is dismissed for lack of jurisdiction.

FOR THE OFFICE:

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SHERYL SEARS, ESQ.
ADMINISTRATIVE JUDGE