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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	
ROBERT FORD	)	OEA Matter No. J-0402-10
Employee	)	
	)	Date of Issuance: June 10, 2011
v.	)	
	)	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA DEPARTMENT	)	Administrative Judge
OF PARKS AND RECREATION	)	
Agency	)	
	)	
Robert Ford, Employee, <i>Pro Se</i>		
Will Potterveld, Esq., Agency Representative		

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

Robert Ford, Employee herein, filed a petition for appeal with the Office of Employee Appeals (OEA) on September 13, 2011, appealing the final decision issued by the D.C. Department of Parks and Recreation, Agency herein, to terminate his employment, effective August 30, 2010. At the time he was removed, Employee was a Supervisory Recreation Specialist, MS-0188-11.

This matter was assigned to me on January 10, 2011. After reviewing the file, I determined that this Office's jurisdiction was at issue, and on January 19, 2011, I issued an Order directing Employee to submit legal and/or factual arguments to support his position regarding this Office's jurisdiction. The Administrative Judge, unaware that this Order was not issued, dismissed the matter on March 7, 2011 based on Employee's failure to respond to the Order. On or about March 9, 2011, the Administrative Judge spoke with Employee and he informed her that he had not received the January 10 Order. At that time, the Administrative Judge became aware that the Order had never been issued. Since the Initial Decision had already been issued, she advised Employee to petition this Board for review. He did so, and on March 15, 2011, the Board issued its Opinion and Order remanding the matter to the undersigned. On April 5, 2011, the Administrative Judge issued an Order directing Employee to respond to the jurisdictional issue, i.e., whether this Office has jurisdiction of this matter given Employee's status as a Management Supervisory Service (MSS) employee. Agency had

also raised this matter in its motion to dismiss on October 15, 2010. Employee responded in a timely manner. The record is now closed.

### JURISDICTION

This Office's jurisdiction was not established.

### ISSUE

Should this appeal be dismissed?

### FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The threshold issue in this matter is one of jurisdiction. This Office's jurisdiction is conferred upon it by law, and was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 (CMPA), D.C. Official Code §1-601-01, *et seq.* (2001); and amended by the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions not relevant to this case, of permanent employees in the Career or Education Service who are not serving in a probationary period.

Section 1-609.54 of the D.C. Official Code provides that an appointment to a position in the Management Supervisory Service "shall be an at-will appointment." The District Personnel Manual (DPM) mirrors this language at Chapter 38, § 3819.1:

An appointment to the Management Supervisory Service [MSS] shall be an at-will appointment. A person appointed to a position in the Management Supervisory Service shall not acquire Career Service status, shall serve at the pleasure of the appointing personnel authority, and may be terminated at anytime.

In *Grant v. District of Columbia*, 908 A2d 1173, 1178 (D.C. 2006), the District of Columbia Court of Appeals concluded that "MSS employees are statutorily excluded from the Career Service and thus cannot claim [the] protections" afforded to Career Service employees who are subject to adverse employment actions, such as notice, hearing rights, and the right to be terminated only for cause. An at-will employee can be discharged "at any time and for any reason, or for no reason at all". *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 30 (D.C. 1991). *See also, Bowie v. Gonzalez*, 433 F.Supp.2d 24 (DCDC 2006). As an at-will employee, Employee lacked job tenure and protection from removal. *See Code § 1-609.05* (2001). In sum, as an MSS employee, in at-will status, Employee had no right to appeal his removal to this Office. *Davis v. Lambert*, MPA No. 17-89, 119 DWLR 204 (February 13, 1991). *See also, Leonard et al v. Office of Chief Financial Officer*, OEA Matter Nos. 1601-0241-96 *et al.* (February 5, 1997), \_\_\_\_\_D.C. Reg.\_\_\_\_\_. ( ).

Employee contends that he comes under the protection of the Whistleblower Protection Act, D.C. Official Code § 1-615.51 *et seq.* (2001). The Whistleblower Protection Act (WPA) seeks to protect employees who report “waste, fraud, abuse of authority, violations of law, or threats of public health and safety” from retaliation or reprisal. This Office’s jurisdiction is referred to in §1-615.56 (Election of Remedies) of the WPA which states in pertinent part:

(a) The institution of a civil action pursuant to § 1-615.54 shall preclude an employee from pursuing any administrative remedy for the same cause of action from the Office of Employee Appeals...

(b) No civil action shall be brought pursuant to §1-615.54 if the aggrieved employee has had a final determination on the same cause of action from the Office of Employee Appeals...

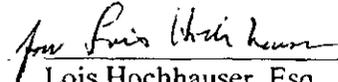
The Supreme Court stated in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 753,756 (1975), “[t]he starting point in every case involving construction of a statute is the language itself.” If the language is clear and unambiguous on its face, it is not open to interpretation. The language of the WPA is neither ambiguous nor unclear. The WPA does not contain any language which authorizes OEA to assume jurisdiction of an appeal of an MSS employee, even if the MSS employee is seeking the protection of the WPA. Employee has submitted no law, rule or regulation to the contrary. The language cited above provides only that an employee cannot seek judicial relief while at the same time pursuing an appeal with OEA. However, this language does not extend the jurisdiction of this Office where it otherwise does not exist. Therefore, based on his status as an MSS employee, OEA lacks jurisdiction to adjudicate Employee’s appeal notwithstanding his claim to protection under the WPA. *Codling v. D.C. Office of the Chief Technology Officer*, OEA Matter No. J-0151-09, *Opinion and Order on Petition for Review* (December 6, 2010) \_\_\_\_\_ D.C. Reg. \_\_\_\_\_ . ( \_\_\_\_\_ ). *See also, Bank v. D.C. Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992) \_\_\_\_\_ D.C. Reg. \_\_\_\_\_ . ( \_\_\_\_\_ ).

Employee has the burden of proof on issues of jurisdiction, pursuant to OEA Rule 629.2, 46, D.C. Reg. 9317 (1999). The burden must be met by a “preponderance of the evidence” which is defined in OEA Rule 629.1, as that “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”. After carefully reviewing the arguments and the applicable laws, rules and regulations in this matter, the Administrative Judge concludes that Employee did not meet his burden of proof, and that this matter must be dismissed for lack of jurisdiction.

ORDER

It is hereby ORDERED that the petition for appeal is DISMISSED<sup>1</sup>

FOR THE OFFICE:

  
\_\_\_\_\_  
Lois Hochhauser, Esq.  
Administrative Judge

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<sup>1</sup> Given the resolution of this matter, Agency's motion to dismiss is denied as moot.