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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
JOHN HAMMOND)	OEA Matter No. 2401-0141-03
Employee)	
)	Date of Issuance: October 3, 2005
v.)	
)	Senior Administrative Judge
D.C. PUBLIC SCHOOLS)	Joseph E. Lim, Esq.
Agency)	
)	

Harriet Segar, Esq., Agency Representative
Omar V. Melehy, Esq., Employee Representative

INITIAL DECISION

INTRODUCTION

On August 29, 2003, Employee filed a petition for appeal. Employee had demanded reinstatement to his Elementary Math Content Specialist position, which had been abolished pursuant to a reduction-in-force (RIF). This matter was assigned to me on August 2, 2004. After postponements requested by Employee, I held a status conference on April 8, 2005. Since there were no material facts in dispute, no proceedings were held. The statement of facts were agreed by both parties to be accurate. The record closed on June 15, 2005 after the parties submitted their briefs.

JURISDICTION

The Office lacks jurisdiction over this appeal.

ISSUE

Whether the employee met his burden of proof that this Office has jurisdiction of this appeal.

STATEMENT OF FACTS

The following facts are undisputed:

1. John Hammond ("Employee") began working for the District of Columbia Public Schools ("Agency"), as a ET-15 teacher in July, 1998. The Employee was employed as a classroom teacher at Anacostia Senior High School.
2. ET-15 is an educational schedule employee with a teaching position in a school site. ET-15 teachers do not earn annual leave. Under the Washington Teacher's Union contract, teachers earn personal leave days instead.
3. On or about August 31, 2002, Employee applied for a new position with DCPS as an ET-07, Elementary Math Content Specialist in the Office of Academic Services.
4. On October 8, 2002 an offer of employment was made to the Employee. The new position as an Elementary Math Content Specialist was a twelve month position under a different salary scale paying \$64,102 annually and was located in the Central Administration Offices. The offer was contingent upon Employee successfully completing a background check and other regular administrative requirements. See Agency Exhibit 1.
5. According to the Request for Employment Action, the starting date for the Elementary Math Content Specialist position was September 2, 2002. See Agency Exhibit 3.
6. On April 1, 2003, the D.C. Board of Education held a meeting during which it approved a motion requesting that the Superintendent establish a plan to eliminate school personnel to generate a budgetary savings.
7. Through a letter dated July 15, 2003, Employee was to be notified that, effective August 15, 2003, his Elementary Math Content Specialist position would be abolished and he would be separated from service with the Agency. See Agency Exhibit 2.
8. In a letter dated August 28, 2003, the Agency stated that the "position abolishment notice was issued in error and is hereby rescinded." This letter was addressed to "HAMMOND, JOHN, ELEMENTARY MATH CONTENT SPECIALIST, STANDARDS AND CURRICULUM, [SIC]" and the salutation was made to "HAMMOND, JOHN." However, the letter contained no street address and was never sent to Employee. Until the letter was produced in this matter, Employee was unaware of its existence.
9. On August 15, 2003, the ET-07, Elementary Math Content Specialist position was abolished. Employee was never returned to the Elementary Math Content Specialist position.

10. In September 2003 there was a vacancy announcement for the position of Content Specialist, K-12 Math, EG-15. It is not the same position that was occupied by the Employee prior to the abolishment of his position. Instead, the Employee was an Elementary Math Content Specialist. The job title for Elementary Content Specialist encompasses less than a job title for kindergarten -12 grades. In addition, on its face the entry salary for an Elementary Mathematics Content Specialist was \$66,300. The vacancy announcement for Content Specialist K -12 has an entry salary of \$72,498, with a salary range of \$72,498- \$93,441.

Positions of the parties:

Employee makes the following arguments:

1. That although it was the only party with knowledge of its error, the Agency made no effort to notify Employee that, as of August 15, 2003, he still held the ET-07, Elementary Math Content Specialist position.

2. That Employee relied on the Agency's erroneous representation that his position had been abolished and, in September 2003, applied for an Elementary Math Content Specialist position.

3. That the Agency's scheme to keep Employee unaware that the RIF was erroneous was evidenced by an acknowledgement letter that it sent him upon receipt of his employment application in which it stated that it "hope[d] to have the opportunity to discuss employment opportunities with [him]." According to the Agency's own records, however, such a discussion was unnecessary as Employee was still employed as an Elementary Math Content Specialist.

4. That Employee was never returned to the Elementary Math Content Specialist position.

5. That Agency abused the RIF system by deceiving Employee into believing a RIF that was not only illegal, but also unrecognized by the Agency, was effective. As a result, Employee did not assert his right to remain in the Elementary Math Content Specialist position and, instead, was forced to reapply for it.

6. Therefore, Agency should be compelled to put Employee into the Math Content Specialist position.

Agency argues that the D.C. Code mandates an employee must be in a position for one year before she/he is considered a permanent employee, and therefore subject to the jurisdiction of OEA. Clearly, The Employee was probationary when his position was abolished based on the time period he served in that position title. (See OEA matter No.J-0023-03) Therefore, the instant case should be dismissed based on lack of jurisdiction.

ANALYSIS AND CONCLUSIONS

Employee's arguments center on his contention that his Elementary Math Content Specialist position was never abolished by Agency despite being so notified. He bases his contention on the August 28, 2003 letter that purports to rescind the abolishment of his position. Employee concludes that because he was never informed that he still had his job, he relied to his detriment on Agency's earlier announcement in applying for Content Specialist, K-12 Math position.

The factual problem with Employee's argument is that his Elementary Math Content Specialist position *was* abolished by Agency. This is so notwithstanding that the August 28, 2003 letter was never sent and therefore never made official. In fact, Employee admits that he was not even aware of its existence until after his appeal was filed.

The second factual problem with Employee's argument is that the Math Content Specialist position is not the same as his Elementary Math Content Specialist position. Employee does not dispute that the two positions have different pay scales and different job requirements. Thus, Employee cannot argue that he was forced to reapply for his position as it was not the same position he held previously.

The position that Employee held mandates a probationary period of one year. The standing date of the Elementary Math Content Specialist position was September 2, 2002. This position was abolished effective August 15, 2003, less than a year after his hire. Therefore, Employee was terminated from his position during his probationary period.

D.C. Code Ann. § 1-617.1(b) (1992 repl.) provides as follows:

A permanent employee in the Career or Educational Service *who is not serving a probationary period* . . . may be . . . removed from service only for cause and only in accordance with the provisions of this subchapter and subchapter VI of this chapter.

(emphasis added).

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 one-year probationary period began on September 2, 2002. Thus, it would have ended on September 2, 2003. However, Employee was separated from service on August 15, 2003, within the probationary period. Therefore, I conclude that this Office has no jurisdiction over this appeal, and that it must be dismissed.

ORDER

It is hereby ORDERED that this matter is DISMISSED.

FOR THE OFFICE:



JOSEPH E. LIM, Esq.

Senior Administrative Judge