THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
PARNEY T. JENKINS Employee	OEA Matter No. 1601-0037-01
	Date of Issuance: April 5, 2006
DEPARTMENT OF PUBLIC WORKS Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Mr. Jenkins ("Employee") was a Supervisory Civil Engineer with the Department of Public Works ("Agency"). On June 20, 2000, Agency issued an advance notice of a proposal to remove Employee from his position. The proposed removal was based on adverse action charges of negligence and on duty or employment related conduct that interfered with the efficiency or integrity of government operations.[1]

On August 4, 2000, Agency mailed a letter to Employee that officially informed him that the Career Service ("CS") position that he occupied would be converted to a

[1] *Agency Record*, Exhibit #4 (April 27, 2001).

Management Supervisory Service ("MSS") position. The change was to become effective on August 27, 2000, unless he declined the appointment. The letter went on to provide that if Employee chose to accept the appointment, he would "no longer have Career Service job protection rights and [would] become an 'at-will' employee." However, if Employee decided to decline the appointment, then he would have priority for an appointment to a vacant CS position.[2] According to an August 31, 2000 Personnel Action form, Employee accepted the offer of appointment to the MSS position.[3]

On February 27, 2001, Employee received a notice of the Agency's final decision. Employee was to be effectively removed from his position as a Supervisory Civil Engineer on March 2, 2001.[4]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on March 8, 2001, opposing Agency's decision. In his petition, Employee provided that he was not negligent and performed his duties according to long-standing practices used by the Agency. Employee was with the Agency for 15 years with no prior disciplinary actions and received excellent or better evaluations.[5]

Agency filed its response to Employee's Petition for Appeal on April 27, 2001. It alleged that Employee was indeed negligent and that his conduct interfered with the efficiency or integrity of the government's operation. Agency requested that OEA sustain its decision to remove Employee.[6]

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[2] *Agency's Motion to Dismiss*, Exhibit # 2 (January 9, 2004).
[3] *Id.*, Exhibit #3 (January, 9, 2004). The remarks section of this form also indicated that acceptance of the offer would result in termination of any career service job protection rights.
[4] *Id.*, Exhibit #4 (January 9, 2004).
[5] *Petition for Appeal*, p. 2 of *Statement of Reasons in Support of Appeal* (March 8, 2001).
[6] *Agency's Record*, Exhibit # 8 (April 27, 2001).

This matter was assigned to an Administrative Judge ("AJ") on March 14, 2003. According to the AJ, on December 9, 2003, during a pre-hearing conference, Agency verbally contested OEA's jurisdiction to adjudicate this matter.[7] Thereafter, the AJ ordered both the Agency and Employee to file briefs on the issue of jurisdiction.

On January 9, 2004, Agency filed a Motion to Dismiss. It reasoned that at the time Employee accepted the offer of the MSS position, he was considered an employee at-will with no appeal rights regarding the adverse action filed against him. Therefore, OEA lacked jurisdiction to hear his case.[8] Employee then filed a response opposing the motion. In it he argued that Agency could not assert OEA's lack of jurisdiction as a defense. He reasoned that because Agency waited three and one-half years to raise the defense, then it was waived.[9]

The AJ issued her Initial Decision on May 18, 2004. She held that Employee did not establish OEA's jurisdiction to adjudicate his case because he was a MSS employee. Hence, the case was dismissed on that basis.[10]

Employee responded by filing a Petition for Review. The petition, similar to his response opposing the motion to dismiss, alleged that Agency did not give Employee proper notice that accepting the MSS position would waive his CS rights. He reasoned that Agency never intended to divest him of his CS protection as "evidenced by the fact that the agency continued to process the appeal even after the conversion of his position and even informed employee in February 2001 that he continued to enjoy appeal rights as

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[7] *Order to File Briefs*, p.1 (December 22, 2003); *Initial Decision*, p. 2 (May 18, 2004).
[8] *Agency's Motion to Dismiss*, p. 2-3 (January 9, 2004).
[9] *Employee's Opposition to Agency's Motion to Dismiss*, p. 2-8 (February 9, 2004).
[10] *Initial Decision*, p. 2-4 (May 18, 2004).

to the removal action." Employee's final argument was that Agency's lack of jurisdiction defense is time-barred.[11] Agency filed a response on July 26, 2004, stating that Employee's petition does not raise any of the requirements established under OEA Rule 634.3.[12]

It has been well established that OEA's purpose is to review the agency's final decision without substituting judgment. The office's primary goal is to ensure that the agency's discretion has been legitimately invoked and properly exercised.[13] Agency has clearly established that at the time it issued the February 27, 2001 final decision, Employee was under the MSS designation. Moreover, Employee was on notice that acceptance of the MSS position would waive his rights as previously protected under the CS designation. The consequences of the change were outlined in a letter from Agency and a personnel action form to Employee.[14]

According to D.C. Code §1-609.54(a):

> "an appointment to a position in the Management Supervisory Service shall be an at-will appointment. Management Supervisory Service employees shall be given a 15-day notice

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[11] *Employee's Petition for Review,* p. 2-3 (June 22, 2004).

[12] *Employer's Response to Petition for Review,* p. 2-3 (July 26, 2004). OEA Rule 634.3 provides that "the petition for review shall set forth objections to the initial decision support by reference to the record. The Board may grant a petition for review when the petition establishes that:

(a) new and material evidence is available that, despite due diligence, was not available when the record closed;
(b) the decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
(c) the findings of the Administrative Judge are not based on substantial evidence; or
(d) the initial decision did not address all material issues of law and fact properly raised in the appeal."

[13] *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981); *Stokes v. District of Columbia,* 502 A.2d 1006 (1985).

[14] *Agency's Motion to Dismiss,* Exhibits #2 and 3 (January 9, 2004).

> prior to termination. Upon termination, a person with Career or Educational Service status, or with Excepted Service status due to appointment as an attorney pursuant to §1-609.09, may retreat, at the discretion of the personnel authority, within 3 months of the effective date of the termination, to a vacant position within the agency to which he or she was promoted for which he or she is qualified."

Additionally, D.C. Code § 1-609.58(a) directly addresses Employee's situation. The statute provides:

> "persons currently holding appointments to positions in the Career Service who meet the definition of "management employee" as defined in § 1-614.11(5) shall be appointed to the Management Supervisory Service unless the employee declines the appointment. Persons declining appointment shall have priority for appointment to the Career Service if a vacant position for which they qualify is available within the agency and is acceptable to the employee. If no such vacant position is available, a 30-day separation notice shall be issued to the employee, who shall be entitled to severance pay in the manner provided by §1-624.09."

OEA has consistently held that it lacks jurisdiction over at-will employees. [15] The Court in *Evans v. District of Columbia*, 391 F.Supp. 2d 160 (2005), reasoned that because MSS employees serve at-will, they have no property interest in their employment because there is no objective basis for believing that they will continue to be employed indefinitely. The Court provided that the only rights enjoyed by MSS employees are the "right to 15 days' notice before termination; a separate notice in the event of termination for disciplinary reasons describing the reason for termination; and if the employee

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[15] *Hodge v. Departmetn of Human Services*, OEA Matter No. J-0114-03 (January 30, 2004); *Clark v. Department of Corrections*, OEA Matter No. J-0033-02, Opinion and Order on Petition for Review (February 10, 2004).

requests in writing, a final administrative decision on the issue of severance pay by the personnel authority."[16] Application of this reasoning to the present case, clearly shows that Agency fulfilled its obligation by providing Employee with a written notice of his impending termination while also providing the reasons for his removal.[17]

Employee's next argument was that Agency never intended to divest him of his CS position because they informed him of his appeal rights and responded to the appeal action. He reasoned that if Agency considered him a MSS employee, then he could not appeal this action to OEA. Employee's argument is flawed. District of Columbia government agencies are required to inform all employees of their appeal rights regardless of their employment designation. It is then up to the body that employees appeal to, in this case OEA, to determine if they have a basis for reversal of the agency's final decision. Employee seems to confuse Agency's requirement to inform him of his appeal rights and its argument to the administrative body that Employee lacks the ability to reverse Agency's final decision.

As for Employee's final argument that Agency's Motion to Dismiss for lack of jurisdiction is time-barred, OEA Rule 629.2 provides that "the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." Employee was aware that he no longer enjoyed the rights of a CS employee at the time the he filed his

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[16] *Evans v. District of Columbia,* p. 166 (2005).
[17] *Agency Record,* Exhibit #4 (April 27, 2001); *Agency's Motion to Dismiss,* Exhibit #4 (January 9, 2004).

Petition for Appeal.[18] The issue would have probably been addressed sooner by the AJ had Employee not misled the office by indicating on his Petition for Appeal that he was a Career Service employee. The burden rests solely on him to establish jurisdiction, so he cannot argue that Agency failed to raise the defense in a timely fashion.

Moreover, it should be noted that according to the Federal Rules of Civil Procedure, a defense of lack of jurisdiction over a person is only waived if it is omitted from a motion or not included in a responsive pleading.[19] As previously stated, Agency first presented the defense of lack of jurisdiction during a pre-hearing conference before the AJ and then again in its Motion to Dismiss. Because the lack of jurisdiction argument was raised in a motion, Agency did not waive the defense.

Employee has the ultimate burden of proving the office's jurisdiction. Because OEA lacks jurisdiction over MSS employees, we cannot address the issues raised in Employee's appeal. Accordingly, we hereby deny Employee's Petition for Review.

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[18] *Agency's Motion to Dismiss,* Exhibits #2 and 3 (January 9, 2004); *Employee's Pre-hearing Statement,* Exhibit G (December 2, 2003).

[19] OEA has statutory authority to adjudicate adverse action cases, however, it lacks jurisdiction over MSS employees. Therefore, the basis of the lack of jurisdiction is over the person and not the subject matter. USCS Federal Civil Procedure Rule 12(g) provides in part that ". . . If a party makes a motion under this rule by omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted . . . ." According to Rule 12(h)(1), "a defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course."

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

Brian Lederer, Chair

Horace Kreitzman

Jeffrey J. Stewart

Keith E. Washington

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.