

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

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| In the Matter of: |) | |
| |) | |
| JESSICA DILLON, |) | |
| Employee |) | |
| |) | OEA Matter No. J-0030-18 |
| v. |) | |
| |) | Date of Issuance: July 12, 2018 |
| D.C. BOARD OF ETHICS & |) | |
| GOVERNMENT ACCOUNTABILITY, |) | |
| Agency |) | Michelle R. Harris, Esq. |
| |) | Administrative Judge |
| | | |
| Jessica Dillion, Employee <i>Pro Se</i> | | |
| Joseph A. Mokodean, Esq., Agency Representative | | |

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 7, 2018, Jessica Dillion (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Board of Ethics and Government Accountability Department’s (“Agency” or “BEGA”) decision terminate her from service. The effective date of the termination was close of business January 8, 2018. This matter was assigned to the undersigned Administrative Judge (“AJ”) on February 12, 2018. On March 12, 2018, Agency filed its Answer. On March 14, 2018, I issued an Order requiring Employee to address the jurisdiction issue in this matter because Agency noted in its Answer that Employee was in probationary status at the time of termination. Employee had until March 30, 2018 to submit her brief. Agency had the opportunity to submit a response by or before April 13, 2018.

Employee did not respond by the prescribed deadline. As a result, on April 5, 2018, I issued an Order for Statement of Good Cause to Employee. Employee had until April 17, 2018, to submit her brief along with a statement of good cause for her failure to respond to the March 14, 2018 Order. Employee submitted her response on April 17, 2018. On the same day, I issued an Order Scheduling a Status/Prehearing Conference for May 8, 2018. Both parties appeared for the scheduled conference. Following the conference, I issued an Order requiring both parties to submit briefs with regard to the jurisdiction issue in this matter. Employee’s brief was due on or before May 25, 2018, and Agency’s brief was due on or before June 15, 2018. Both parties submitted their briefs in accordance with the prescribed deadline. I have determined that an Evidentiary Hearing is not warranted. The record is now closed.

ISSUE

Whether OEA has jurisdiction to adjudicate this appeal.

JURISDICTION

For the reasons cited below, the undersigned finds that OEA has jurisdiction over this matter pursuant to D.C. Official Code § 1-606.03 (2001).

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. “Preponderance of the evidence” shall mean:

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.

OEA Rule 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

(Emphasis Added)

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

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). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 (“OPRAA”), D.C. Law 12-124, which took effect on October 21, 1998. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions. According to 6-B of the District of Columbia Municipal Regulation (“DCMR”) § 604.1¹, this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting:

- (a) A performance rating resulting in removal;
- (b) An adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more; or
- (c) A reduction-in-force; or
- (d) A placement on enforced leave for ten (10) days or more.

The threshold issue in this matter is one of jurisdiction. This Office has no authority to review issues beyond its jurisdiction.² Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding. OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), states that “[t]he employee shall have the burden of proof as to issues of jurisdiction.” Pursuant to this rule, the burden of proof is by a preponderance of the evidence which is defined as “[t]hat degree of

¹ See also, Chapter 6, §604.1 of the District Personnel Manual (“DPM”).

² See *Banks v. District of Columbia Public School*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

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.”

In the instant matter, Employee was hired as a Program Analyst at Agency, effective January 8, 2017, and was subject to a one year probation period beginning this same date.³ In a letter dated, January 8, 2018, Agency terminated Employee effective close of business. Agency cited that Employee was in probationary status at the time of termination, and as a result, has no appeal rights to OEA. Employee asserts that she was not in probationary status at that time. Employee argues that January 8, 2018, was her 366th day at Agency, and as a result she was a permanent employee afforded Career Service protections.⁴ Further, Employee cites that because she was a Career Service employee, Agency could not terminate her without cause.

Agency asserts that Employee was still in probationary status at the time of the termination, and as a result, Employee’s appeal has no jurisdiction before this Office. Agency cites that pursuant to 6B DCMR §813.2, that “a person hired under a Career Service Appointment (Probational) shall be required to serve a probationary period of one (1) year.”⁵ Further, Agency cites that in accordance with 6B DCMR §814.3, a termination during a probationary period is not appealable.⁶ To support its contention, Agency proffers that Employee’s start date did not begin on January 8, 2017, but rather on January 9, 2017, pursuant to the calculation of “days” as defined in 6B DCMR §899.⁷ This definition cites that the date triggering an event is not included in computation, and that the last day of a period cannot be on a Saturday, Sunday or legal holiday.⁸ As a result, Agency maintains that Employee’s probationary term began on January 9, 2017. Agency also asserts that a probationary period can be extended if an employee has one (1) or more work-days in non-pay status pursuant to 6B DCMR §813.10(a).⁹ Agency argues that Employee had three (3) hours of non-pay status on November 28, 2017.¹⁰ Additionally, Agency avers that even if Employee’s probationary status had not been extended, and “even if Sunday, January 7, 2018 was the 365th day of the probationary period, the probationary period would have ended at the “end of the next day” which was Monday, January 8, 2018, the day Employee was terminated.”¹¹

This Office has held that an employee’s probationary period ends at 12:00am on the one-year anniversary of an employee’s start date.¹² Here, Employee’s Personnel Form SF-50 reflects Employee’s probationary term commenced on January 8, 2017.¹³ Employee worked on January 8, 2018, and was terminated effective at the close of that business day.¹⁴ Further, the undersigned finds that Agency’s argument with regard to Employee’s three (3) hours of non-pay status taken during her probationary term, does not meet the statutory requirement of one (1) workday; and as a result those three (3) hours cannot be added to Employee’s probationary term. The undersigned also finds that

³ Agency Answer at Tab 5 – Employee’s Notice of Personnel Action SF-50, which cites that the probationary period began on January 8, 2017. (March 12, 2018).

⁴ Employee’s Brief (May 23, 2018).

⁵ Agency Brief on Jurisdiction at Page 2 (June 15, 2018).

⁶ *Id.*

⁷ Agency’s citation appears to be referencing the glossary, specifically the definition of “days” in this code provision.

⁸ January 8, 2017 was a Sunday.

⁹ Agency’s Brief on Jurisdiction at Page 3 (June 15, 2018).

¹⁰ Agency Brief on Jurisdiction at Page 3 (June 15, 2018).

¹¹ *Id.*

¹² *Nancy Wilson v. DC Department of Transportation*, OEA Matter No. 1601-0170-13 (January 22, 2014). *See also. Nicolau v. D.C. Metropolitan Police Department*, OEA # 1601-0005-05 *Opinion and Order on Petition for Review* (April 5, 2007).

¹³ Agency’s Answer at Tab 5- Employee’s SF-50 (March 12, 2018).

¹⁴ Employee’s Petition for Appeal at Final Notice (February 27, 2018).

Agency's argument that "*even if no days were excluded from the calculation, the probationary period could not have ended on Sunday, January 7, 2018, pursuant to 6B DCMR §899, and as a result Employee's probationary term would have ended at the end of the next day on Monday, January 8, 2018*"; means that Employee's termination should have been made effective **before** the end of the day to have been levied **prior** to the end of her probationary term. However, Agency's final notice noted that the termination was effective at the **close of business**.

Consequently, because Agency did not initiate the adverse action against Employee prior to 12:00am on January 8, 2018, or before the close of business on January 8, 2018, the undersigned finds that effective 12:00am on January 8, 2018, Employee became a Career Service employee, and as a result, has the right to appeal any adverse action levied against her pursuant to DPR Chapter 16. Moreover, as a Career Service employee, Employee is afforded the right to have an adverse action issued for cause and has appeal rights to this Office. Employees have the burden of proof for issues regarding jurisdiction and must meet this burden by a "preponderance of evidence." Accordingly, I find that that Employee has met her burden of proof in this matter, and as such, this Office has jurisdiction over this Petition for Appeal.

Additionally, pursuant to DPM § 1602.1¹⁵, disciplinary action against an employee may only be taken for cause. As a permanent Career Service employee, Employee has the right to have adverse action issued only for cause, along with the right to appeal any adverse action that leads to termination to this Office. Here, Agency's Final Notice to Employee regarding her termination noted that Employee was being terminated during her probationary period pursuant to § 814 of the D.C. Personnel Regulations. The Final Notice did not indicate any specific cause for termination in compliance with the District Personnel Manual (DPM). Because Agency did not initiate the termination action on the basis of cause or adhere to the guidelines that must be followed when dismissing a Career Service employee, the undersigned finds that Employee's termination should be reversed and Employee restored to her previous position of record.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of terminating Employee from service is **REVERSED**; and
2. Agency shall reinstate Employee and reimburse her all back-pay, benefits lost as a result of her removal; and
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

Michelle R. Harris, Esq.
Administrative Judge

¹⁵ DPM Chapter 16 §1602.1 (May 2017).