

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

In the Matter of:	)	
	)	
AMBER OLIVER	)	OEA Matter No. 1601-0406-10
Employee	)	
	)	Date of Issuance: February 14, 2011
v.	)	
	)	
DISTRICT OF COLUMBIA	)	Rohulamin Quander
PUBLIC SCHOOLS	)	Senior Administrative Judge
Agency	)	

Amber Oliver, Employee, *pro se*  
Bobbie Hoye, Esq., Agency Representative

**INITIAL DECISION**

INTRODUCTION

On September 16, 2010, Employee filed with the Office of Employee Appeals (the “Office” or “OEA”) a petition for appeal against the District of Columbia Public Schools (“DCPS” or “Agency”), challenging Agency decision to terminate her employment at the McKinley Technology High School, effective June 22, 2010, where she served as an English teacher (Grade ET-15). At the time of her termination, Employee was serving within her probationary period. Employee seeks reinstatement and all lost benefits. Agency responded to the appeal, first asserting that Employee’s termination was effectuated in full compliance with the staff equalization procedures and the terms of the Collective Bargaining Agreement (the “CBA”). Employee was declared as “excess” as a component of the established Agency process known as “equalization.” Under the process, the teacher-studio ratio is periodically evaluated, and where student enrollment has declined, among other considered factors, a staff adjustment is made. As a result, some teachers are determined to be “excess” and are separated from the Agency.<sup>1</sup>

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1. Although not germane to the facts of this case, “equalization” can also result in the increase in the number of teachers, where a student-teacher ratio reveals a shortage of staff.

Second, Agency challenged OEA's jurisdiction, noting that Employee was separated while still in a probationary status. Therefore, at the time of her separation, she had not attained a Permanent Employee status as referenced by the D.C. Comprehensive Merit Personnel Act (CMPA) (1978), *D.C. Official Code*, § 1-606.01 *et seq.* (2001), as amended by the Omnibus Personnel Reform Amendment Act (OPRAA), D.C. Law 12-124 (1998), The law and regulations as written an amended confers jurisdiction on OEA to hear appeals of *permanent* (emphasis added) employees in the Educational Service, who have successfully completed a probationary period, which is two full years from the date of contract. See *Sherita Williams v. D.C. Public Schools*, OEA Matter No. 1601-0123-08, Nov. 26, 2008. Agency underscored that, since Employee was not yet in a permanent status at the time of her separation, as directed by the provisions of 5 DCMR § 1307.3, OEA clearly lacked jurisdiction to consider this matter, and that Agency's motion to dismiss the petition should be granted.

### JURISDICTION

Pursuant to the legal parameters of *D.C. Official Code* § 1-606.03 (2001), the Office lacks jurisdiction over this appeal.

### ISSUE

Whether the Employee has met her burden of proof that the Office has jurisdiction over this appeal.

### FINDING OF FACTS, LEGAL ANALYSIS AND CONCLUSIONS

On August 24, 2009, Employee was hired as a teacher of English by Agency, and assigned to the McKinley Technology High School. She served in that capacity until terminated, effective June 22, 2010. Agency conducted a staff equalization analysis, and determined that, consistent with Agency's adopted and established teacher-student ratio, it was appropriate to reduce the number of teachers at the school. Employee was identified as "excess" and terminated. The position that Employee held mandated a probationary period of two years before her status as a Educational Service status employee would be established. However, she encumbered the position in question for approximately ten months. Therefore, she was still a probationary employee at the time of her separation.

#### *Probationary Employees*

Effective October 21, 1998, and except as otherwise provided by the Act, pursuant to the *D.C. Official Code*, §1-606.03 and OEA Rule 604.2, a D.C. government employee may appeal a final agency decision affecting: (a) A performance rating which results in removal of the employee; (b) An adverse action for cause that results in removal, reduction in grade, or suspension for ten

(10) days or more; or, (c) A reduction in force.

Effective June 9, 2000, the Council of the District of Columbia adopted amended regulations for the updated implementation of the Act and, at the outset of the new regulations, provided at Chapter 16, § 1600.1(b), that the newly adopted regulations apply to each employee of the District government in the Career Service, who has completed a probationary period.<sup>2</sup>

Further, the District Personnel Manual at § 813.2, provides as follows:

An employee who is appointed to a Career Appointment (Probational), including initial appointment with the District government in a supervisory position, shall be required to serve a probationary period of one (1) year, except in the case of an individual appointed on or after the effective date of this provision to an entry-level police officer position in the Metropolitan Police Department or an entry-level correctional officer position in the Department of Corrections or Department of Youth Rehabilitation Services, who shall be required to serve a probationary period of eighteen (18) months.

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. \_\_ ( ).

In addition to the above referred probationary status mandate, pursuant to Title 5, DCMR § 1307.3, which focuses upon the Educational Service status in particular, the probationary period for

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<sup>2</sup> See also, *D.C. Official Code §1-608.01(5)*, which reflects that attaining status as a permanent Career Service employee requires completion of a probationary period of at least one year.

initial appointees to the ET salary status class (i.e., the teachers), directs that Career Status is earned upon completion of a two year probationary period.

In the matter before me, the record reflects that Employee's two year probationary period began on August 24, 2009, the date she was hired as a teacher, and would have ended on August 23, 2011. However, Employee was separated from service effective June 22, 2010, within the probationary period. Regardless of any other component, including Employee's seeking to claim further protection under the terms of the CBA, 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:

S/S  
ROHULAMIN QUANDER Esq.  
Senior Administrative Judge