THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ROBIN SUBER,	)	
Employee	)	OEA Matter No. 1601-0107-07-R10
	)	
v.	)	Date of Issuance: January 22, 2010
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge

Robin Suber, Employee *Pro-Se*
Harriet Segar, Esq., Agency Representative

SECOND INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 6, 2007, Robin Suber ("the Employee") filed a Petition for Appeal contesting the District of Columbia Public Schools ("the Agency") adverse action of removing her from service as a Teacher ET-15. On October 12, 2007, I issued an Order Convening a Prehearing Conference set for November 6, 2007. As part of the Order Convening a Prehearing Conference, the parties were required to submit prehearing statements by October 30, 2007. The Agency failed to submit her prehearing statement as was required by my Order. On November 6, 2007, Employee and I were present and ready to proceed with the scheduled prehearing conference, while the Agency Representative failed to appear. Accordingly, on November 6, 2007, I issued an Initial Decision wherein I faulted the Agency for its failure to properly defend the aforementioned petition for appeal.

The Agency timely submitted a petition for review to the Board of the Office of Employee Appeals ("OEA" or "the Office"). On November 23, 2009, the Board of the OEA issued an Opinion and Order on Petition for Review wherein it remanded this

matter to the undersigned for proceedings on the merits of the appeal. A Prehearing Conference was held on December 15, 2009. During this conference, the issue of whether the OEA may exercise jurisdiction over the instant matter was discussed. I then verbally ordered the parties to submit written briefs regarding the OEA's jurisdiction over the instant matter. The Employee submitted her brief. After thoroughly reviewing the facts, law, and circumstances relative to Employee's removal, I have determined that no further proceedings are warranted. The record is closed.

JURISDICTION

As will be explained below, the jurisdiction of this Office has not been established.

ISSUE

Whether this Office has jurisdiction over this matter.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

While Employee has submitted documentation that would establish that she had enjoyed a certain amount of success in the performance of her duties, Employee had not, at the time of her removal, completed all of the requirements for attaining appropriate licensure consistent with her position as a Teacher ET-15.

Since Employee was unable to obtain permanent status with the Agency because of her lack of proper licensure, I have determined that the threshold issue in this matter is one of jurisdiction. This Office's jurisdiction is conferred upon it by law, and was initially created by the District of Columbia Comprehensive Merit Personnel Act of 1978 (the "Act"), *D.C. Official Code* (the "Code") § 1-601-01, *et seq.* (2001) and then amended by the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which became effective on October 21, 1998. Both the Act and OPRAA confer jurisdiction on the 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. The Code § 1-608.01(a)(2)(E) confers permanent Educational Service status upon employees who have been appointed to a position, upon completion of a probationary period of at least one year. Employee was unable to achieve permanent status because she lacked the requisite license. *See* 5 DCMR § 1601.1.

I find that Employee did not fully complete the certification requirements necessary to obtain her license by the effective date of her removal. Accordingly, she served solely in an "at will" capacity, subject to Agency's discretion with regard to whether she qualified for continued employment. It is well established that in the District of Columbia, an employer may discharge an at-will employee "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 did not have any job tenure or protection. *See* Code § 1-

609.05 (2001). Further, as an "at will" employee, Employee had no appeal rights with this Office. *Davis v. Lambert,* MPA No. 17-89, 119 DWLR 204 (February 13, 1991).

Employees have the burden of proof on issues of jurisdiction, pursuant to OEA Rule 629.2, 46 D.C. Reg. 9317 (1999). Employee must meet this burden by a "preponderance of the evidence" which is defined in OEA Rule 629.1, *id*, 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". I conclude that Employee did not meet the burden of proof, and that this matter must be dismissed for lack of jurisdiction.

It is regrettable that Agency elected to not grant this Employee, and others similarly situated, a further extension of time to finalize the earning of their credentials and licenses. However, Agency's decision is beyond my jurisdiction to set aside, based upon Agency's decision regarding how it will address the continued non licensure status of its "at will" employees who were nearing, but still had not completed all of the certification requirements. Hopefully, Employee will soon obtain all of the necessary credentials and a license, so that she can resume the important mission of educating the youth of the District of Columbia.

I further find that Employee's other arguments, as presented during her appeal process before the OEA, are best characterized as grievances. Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") reads in pertinent part as follows:

> (a) An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . ., an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . ., or a reduction in force [RIF]. . . .

This Office has no authority to review issues beyond its jurisdiction. *See Banks v. District of Columbia Pub. Sch.*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (Sept. 30, 1992), __ D.C. Reg. __ ( ). Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding. *See Brown v. District of Columbia Pub. Sch.*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993), __ 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. __ ( ); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995), __ D.C. Reg. __ ( ).

The jurisdiction of this Office is expressly limited to performance ratings that result in removals; final agency decisions that result in removals, reductions in grade; suspensions of ten days or more; or reductions in force. OEA Rule 604.1, 46 D.C. Reg.

9299 (1999). Based on the preceding statute, OEA rule, and related case law, this Office does not have jurisdiction over grievances.

ORDER

It is hereby ORDERED that this matter be DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

_____
ERIC T. ROBINSON, ESQ.
ADMINISTRATIVE JUDGE