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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
DR. WALTER FAGGETT,	)	
Employee	)	OEA Matter No. J-0264-12
	)	
v.	)	Date of Issuance: December 5, 2012
	)	
D.C. DEPARTMENT OF YOUTH	)	
REHABILITATION SERVICES,	)	
Agency	)	ERIC T. ROBINSON, Esq.
_____	)	Senior Administrative Judge
Dr. Walter Faggett, Employee <i>Pro-Se</i>		
Steven Rubenstein, Esq., Agency Representative		

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 26, 2012, Dr. Walter Faggett (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA”) contesting his removal from service. Employee’s last position of record was Health Services Medical Officer with the District of Columbia Department of Youth Rehabilitation Services (“DYRS” or “the Agency”). I was assigned this matter on or about October 10, 2012. On October 22, 2012, DYRS filed its Answer to Employee’s petition for appeal. In its Answer, DYRS asserted that the OEA lacks jurisdiction over the instant matter because Employee’s last position of record was in the Excepted Service. Agency explains that as part of the Excepted Service, Employee does not have the right to appeal his removal action with the OEA.

On October 23, 2012, I issued an Order wherein Employee was required to address the jurisdictional issue of whether his cause of action was outside of the OEA’s authority to review. Employee’s response to this Order was due on or before November 5, 2012. Employee did not submit a response to this order. Consequently, on November 16, 2012, I issued an Order for Statement of Good Cause (“Good Cause order”) to Employee. Pursuant to this order, Employee was required to provide an explanation for his failure to respond to my October 23, 2012, order and he was required to submit a

response to this order. Employee was required to respond to the Good Cause order on or before November 27, 2012. Employee submitted a response to the Good Cause order. After reviewing the documents of record, including Employee's response to my Good Cause order, I have determined that no further proceedings are warranted. The record is now closed.

### ISSUE

Whether this Office may exercise jurisdiction over this matter.

### JURISDICTION

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

### FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The District Personnel Manual ("DPM") provides in pertinent part as follows:

907.1 A person appointed to a position in the Excepted Service shall not acquire permanent career status.

907.2 A person appointed to the Excepted Service shall serve at the pleasure of the appointing personnel authority; may be terminated at any time, with or without a stated reason, except as provided in this section; and does not have any right to appeal the termination.

Employee has the burden of proof on issues of jurisdiction, pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012). Employee must meet this burden by a "preponderance of the evidence" which is defined in OEA Rule 628.1, 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." DYRS submitted multiple documents that consistently verified that Employee was both hired and removed from an Excepted Service position.<sup>1</sup> During the pendency of this matter, Employee was provided with more than a fair opportunity to address the jurisdictional issue outlined in my Order dated October 23, 2012. Employee did not address the seminal issue of whether this Office may exercise jurisdiction over his appeal but rather argued as to the deficiency of his treatment by the Agency; the overall merits of the removal action; and he lodged multiple Whistleblower allegations. I find that Employee did not submit a credible argument that would lead the undersigned to believe that the OEA may exercise jurisdiction over the instant matter. I also find that Employee did not meet the burden of proof in this matter on the issue of jurisdiction. I further find that Employee was serving in the Excepted Service when he was terminated by DYRS.

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<sup>1</sup> See Agency's Answer at Exhibit Nos. 4, 5, 6 and 7.

## Whistleblower Act

Employee has argued that this Office should exercise jurisdiction over his cause of action through the Whistleblower Act. This Act encourages employees of the District of Columbia government to “report waste, fraud, abuse of authority, violations of law, or threats to public health or safety without fear of retaliation or reprisal.” D.C. Official Code § 1-615.51. To achieve this objective, the Whistleblower Act provides that “a supervisor shall not threaten to take or take a prohibited personnel action or otherwise retaliate against an employee because of the employee's protected disclosure or because of an employee's refusal to comply with an illegal order.” D.C. Official Code § 1-615.53. Furthermore, § 1-615.54(a) states that:

An employee aggrieved by a violation of § 1-615.53 may bring a civil action before a court or a jury in the Superior Court of the District of Columbia seeking relief and damages, including but not limited to injunction, reinstatement to the same position held before the prohibited personnel action or to an equivalent position, and reinstatement of the employee's seniority rights, restoration of lost benefits, back pay and interest on back pay, compensatory damages, and reasonable costs and attorney fees. A civil action shall be filed within one year after a violation occurs or within one year after the employee first becomes aware of the violation...

It is evident from the foregoing that the D.C. Superior Court has original jurisdiction over Whistleblower Act claims. This Office was not granted original jurisdiction over such claims. Rather, the original jurisdiction of this Office was established in §1-606.03 of the D.C. Official Code:

(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]. . . .

Based on the preceding language, some causes of action under the Whistleblower provisions may be adjudicated by this Office. However, this does not mean that *all* causes of action pertaining to the Whistleblower Act may be appealed to this Office. It bears noting the relevant language contained within § 1-615.56 of the Whistleblower Act:

### Election of Remedies

(a) The institution of a civil action pursuant to § 1-615.54 shall preclude an employee from pursuing any administrative remedy for the same cause of action from the Office of Employee Appeals...

(b) No civil action shall be brought pursuant to § 1-615.54 if the aggrieved employee has had a final determination on the same cause of action from the Office of Employee Appeals...

Thus, if an aggrieved employee has a matter with OEA that may otherwise be adjudicated by this Office, said employee may include, as part of his petition for appeal, any pertinent Whistleblower violations. This Office has previously held that when it lacks jurisdiction to adjudicate the merits of an employee's petition for appeal, this Office is unable to address the merit(s) of the Whistleblower claim(s) contained therein. *See Rebecca Owens v. Department of Mental Health*, OEA Matter No. J-0097-03 (April 30, 2004), \_\_\_ D.C. Reg. \_\_\_.

Based on the preceding statutes, case law, and regulations, it is plainly evident that the OEA lacks the jurisdictional authority to review adverse action appeals of Excepted Service employees. As part of the Excepted Service, Employee was serving in an at-will capacity bereft of the right to have his petition for appeal reviewed by the OEA. Since the Employee's last position of record was obtained through an Excepted Service appointment, I find that I cannot adjudicate his appeal and it therefore must be dismissed for lack of jurisdiction. Moreover, since Employee failed to establish the jurisdiction of this Office in this matter, I further find that I am unable to address the substantive claims that Employee noted in his appeal. I further find that since this Office does not have jurisdiction over Employee's adverse action that consequently this Office does not have the jurisdiction to adjudicate the merits of his Whistleblower Act claims.

#### ORDER

Based on the foregoing, it is hereby ORDERED that this matter be DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

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ERIC T. ROBINSON, ESQ.  
SENIOR ADMINISTRATIVE JUDGE