**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| WENDY LABENOW, | ) | |
| Employee | ) | OEA Matter No. 1601-0074-17 |
| | ) | |
| v. | ) | Date of Issuance: February 9, 2018 |
| | ) | |
| D.C. PUBLIC SCHOOLS, | ) | |
| Agency | ) | Eric T. Robinson, Esq. |
| | ) | Senior Administrative Judge |
| | ) | |

Wendy Labenow, Employee *Pro-Se*
Nicole C. Dillard, Esq., Agency Representative

## INITIAL DECISION

### INTRODUCTION AND PROCEDURAL HISTORY

On July 25, 2017, Wendy Labenow ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting the District of Columbia Public Schools' ("DCPS" or the "Agency") adverse action of removing her from service. Employee's last position of record was Bilingual School Counselor. On September 11, 2017, DCPS filed a Motion to Dismiss and Answer to Employee's Petition for Appeal ("Motion to Dismiss"). In it, DCPS notes that Employee was first hired on August 9, 2015. Agency notes that Employee herein was evaluated pursuant to IMPACT which "is the effectiveness assessment system which DCPS used for the 2016-2017 school year to rate the performance of school-based personnel."[1] For this rating period, Employee was rated as "minimally effective." Regrettably, Employee was notified that she was being removed from service. The effective date of Employee's removal was July 28, 2017. Agency asserted that Employee was being terminated during her probationary period.

This matter was assigned to the Undersigned on or around October 3, 2017. However, the Undersigned was involved in a serious motorcycle accident and was out of the Office, recuperating, for an extended period of time. On December 28, 2017, after the Undersigned

[1] *See* Motion to Dismiss at 2 (September 13, 2017).

returned to the Office, an Order was issued whereby Employee was required to respond to Agency's Motion to Dismiss. This Order required Employee to submit her response on or before February 1, 2018. Employee timely submitted her response. After reviewing the documents of record, the Undersigned has determined that no further proceedings are warranted. The record is now closed.

## JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

## ISSUE

Whether this matter should be dismissed.

## FINDINGS OF FACT, ANALYSIS AND CONCLUSION

*Probationary Employee*

In its Motion to Dismiss, Agency contends in pertinent part as follows:

> … The [OEA] can hear appeals of permanent employees in the career and education services who have successfully completed their probationary periods. Permanent employees who serve in either the career or educational service are entitled to removal for cause. A term employee or an employee removed during the probationary period, is not so entitled, and therefore cannot appeal their removals to OEA…[2]

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Protections Act (hereinafter "CMPA"), sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") states in pertinent part that:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.

[2] DCPS Motion to Dismiss and Answer at 1 – 2 (September 11, 2017).

The above referenced career/education service rights conferred by the CMPA may be exercised by aggrieved employees. The District Personnel Manual ("DPM") § 814.3, provides in relevant part that "a termination during a probationary period is not appealable or grievable..." According to 5 DCMR §1307.3 "an initial appointee to the ED salary class shall serve a two (2) year probationary period requirement." 5 DCMR §1307.6 states in pertinent part that "failure to satisfactorily complete the requirements of the probationary period shall result in termination from the position." Thus, according to aforementioned sections of the DCMR and DPM, educational service employees who are serving in a probationary period are precluded from appealing a removal action to this Office until their probationary period is finished. Employee started working for DCPS on August 9, 2015. The effective date of her removal was July 28, 2017.

Employee asserts that the OEA should exercise jurisdiction over this matter by regurgitating OEA's enabling statute. In doing so, Employee did not provide any relevant facts or circumstances that would lead the Undersigned to believe that she was not serving during her probationary when she was removed from service. Employee further argued that since the Agency noted in its letter removing her from service that she may elect to appeal the adverse action to this Office that said notification confers jurisdiction to the OEA. I disagree. I find that the Agency does not have the authority to unilaterally confer jurisdiction Although the Agency provided the Employee with information regarding her alleged appeal rights to this Office, Agency's action was incorrect, since this Office has no jurisdiction. The confusion this caused the Employee is regrettable. However, it is well established that this Office's jurisdiction cannot be enlarged by misinformation to Employee regarding appeal rights. *Alvarez v. Department of Veterans Affairs,* 49 M.S.P.R. 682 (1991). Unless an employee has permanent status in the Career or Educational Service, the employee has no statutory right to be given a statement of cause for a discharge and no statutory right to utilize the appeal processes of this Office.[3]

I find that when Employee was removed from service, she was still within her two year probationary period. Because Employee was in a probationary status at the moment of her removal, I find that Employee is precluded from appealing said removal to this Office.

***Conclusion***

Taking into account the discussion above, I find that Employee has failed to meet her burden of proof regarding the OEA's ability to exercise jurisdiction over the instant matter.[4][5]

[3] *See* D.C. Official Code § 1-606.03 et al.

[4] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin,* 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater,* 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

Accordingly, I conclude that I must dismiss this matter for lack of jurisdiction.

ORDER

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

FOR THE OFFICE:

_____
ERIC T. ROBINSON, Esq.
Senior Administrative Judge

[5] Since I have found that he OEA lacks jurisdiction over this matter, I am unable to address the factual merits, if any, contained within Employee's petition for appeal.