THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BRIAN HUBBARD	)	OEA Matter No. J-0047-07
Employee	)	
	)	Date of Issuance: June 8, 2007
v.	)	
	)	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA EMERGENCY MANAGEMENT SERVICES	)	Administrative Judge
Agency	)	
	)	

Debra D'Agostino, Employee Representative
Barbara Childs-Pair, Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Employee filed a petition for appeal with the Office of Employee Appeals (Agency) on February 5, 2007, appealing Agency's final decision to terminate his employment, effective January 17, 2006.[1] At the time of his removal, Employee was employed as a Supervisory Special Projects Officer and in the Management Supervisory Service (MSS).

This matter was assigned to me on March 19, 2007. After reviewing the file, I determined that this Office's jurisdiction was at issue, and on March 20, I issued an Order directing Employee to submit legal and/or factual argument to support his position regarding this Office's jurisdiction with addressing his MSS status and timeliness issue. Employee's submission was due by April 13, 2007. Agency's response was due by April 30, 2007. Employee filed his answer in a timely manner. Agency did not file a response. The record closed on April 30, 2007.

JURISDICTION

This Office's jurisdiction was not established.

[1] The notice is dated January 2, 2006.

ISSUE

Should this matter be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The threshold issue in this case is one of jurisdiction. 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); and 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 not relevant to this case, of permanent employees in the Career or Education Service who are not serving in a probationary period.

Section 1-609.54 of the D.C. Official Code provides that an appointment to a position in the Management Supervisory Service "shall be an at-will appointment". In *Grant v. District of Columbia*, 908 A2d 1173, 1178 (D.C. 2006), the District of Columbia Court of Appeals concluded that "MSS employees are statutorily excluded from the Career Service and thus cannot claim [the] protections" afforded to Career Service employees who are subject to adverse employment actions, such as notice, hearing rights, and the right to be terminated only for cause.

As an MSS employee, Employee was "at-will" employee with no expectation of 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). In "at will" status, Employee did not have job tenure or protection from removal. *See* Code § 1-609.05 (2001). He had no appeal rights with this Office. *Davis v. Lambert*, MPA No. 17-89, 119 DWLR 204 (February 13, 1991). *See also, Leonard et al v. Office of Chief Financial Officer*, OEA Matter Nos. 1601-0241-96 *et al.* (February 5, 1997), ___ D.C. Reg.____. ( ), The District Personnel Manual (DPM) mirrors this language at Chapter 38, § 3819.1:

> An appointment to the Management Supervisory Service [MSS] shall be an at-will appointment. A person appointed to a position in the Management Supervisory Service shall not acquire Career Service status, shall serve at the pleasure of the appointing personnel authority, and may be terminated at anytime.

Employee argues, however, that although he was in MSS status at the time of his removal, OEA has jurisdiction of the matter pursuant to the Whistleblower Protection Act, (WPA), D.C. Official Code § 1-615.51 *et seq*. (2001) and not the CMPA.[2] He relies on § 1-615.56 (Election of Remedies) of the WPA to support this position. That provision states in pertinent part:

[2] The Administrative Judge has not addressed whether the WPA is applicable to this matter since the

(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…

The Supreme Court stated in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 753, 756 (1975), "[t]he starting point in every case involving construction of a statute is the language itself". If the language is clear and unambiguous on its face it is not open to interpretation. The Administrative Judge has reviewed the language of the WPA carefully. She does not find it to be ambiguous or unclear. The language in the WPA does not authorize this Office to assume jurisdiction of an MSS employee, even if the MSS employee is seeking the protection of the WPA. Employee has submitted no law, rule or regulation to the contrary. The WPA provisions cited by Employee provide only that an employee cannot seek judicial relief while at the same time pursuing an appeal with OEA. However, this language does not extend the jurisdiction of this Office over an MSS or other "at-will" employees. Since OEA lacks such jurisdiction, it lacks authority to adjudicate the appeal. *Bank v. D.C. Public Schools,* OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992) ___ D.C. Reg.___ . ( ).

In addition, Employee did not establish that his appeal with OEA was filed in a timely manner. OEA Rule 604.2, 46 D.C. Reg. at 9299, requires that appeals be filed "within thirty (30) days of the effective date of the appealed agency action". The manner in which this time limitation is calculated is provided in OEA Rule 603.1, 46 D.C. Reg. at 9298:

> In the computation of time periods which involve calendar days, the first day counted shall be the next calendar day following the day the event occurs from which the time period begins to run. For calendar days, if the last day of the time period is a Saturday, Sunday, or legal holiday, the time period shall be extended to the end of the next business day.

Employee filed his petition for appeal with this Office on February 5, 2007. The effective date of his termination was January 17, 2006. The appeal was filed almost thirteen months after the effective date of his removal, far beyond the 30 day period. Employee has not argued either that his petition was filed in a timely manner or that there is any basis to excuse the untimely filing. The time limits for filing an appeal with administrative

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appeal is being dismissed on jurisdictional grounds.

adjudicatory agencies, such as OEA, "are mandatory and jurisdictional matters". *District of Columbia Public Employee Relations Board, v. District of Columbia Metropolitan Police Department,* 593 A.2 641 (D.C. 1991), *White v. D.C. Fire Department,* OEA Matter No. 1601-0149-91, Opinion and Order on Petition for Review (September 2, 1994) ___ D.C. Reg.___ . ( ).

Employee has the burden of proof on issues of jurisdiction, pursuant to OEA Rule 629.2, 46, D.C. Reg. 9317 (1999). He must meet this burden by a "preponderance of the evidence" which is defined in OEA Rule 629.1, 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". After carefully reviewing the arguments and the applicable laws, rules and regulations in this matter, the Administrative Judge concludes that Employee did not meet his burden of proof, thus this matter must be dismissed for lack of jurisdiction.

ORDER

It is hereby ORDERED that the petition for appeal is DISMISSED.

FOR THE OFFICE:

Lois Hochhauser, Esq.
Administrative Judge