THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MARK JAMES,	)	
Employee	)	
	)	
v.	)	OEA Matter No. J-0003-08
	)	
	)	Date of Issuance: November 23, 2009
OFFICE OF THE CHIEF TECHNOLOGY OFFICER,	)	
Agency	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Mark James ("Employee") worked as the Director of Special Projects with the Office of the Chief Technology Officer ("Agency"). On September 20, 2007, Employee received a reprimand notice for insubordination, incompetence, neglect of duty, and unreasonable failure to assist fellow employees.[1] As a condition of his reprimand, Employee was placed on paid administrative leave and directed to attend stress and anger management classes. On October 4, 2007, Employee filed an appeal with the Office of

[1] Employee's misconduct included incompetence in a major assignment; being absent without leave from his assigned duties supporting the police department; and obstructing a major office move of his office and the offices of several colleagues.

Employee Appeals ("OEA"). He argued that the reprimand was in response to a Whistleblower complaint that he made against Agency's director and deputy director, who were his supervisors.[2]

The OEA Administrative Judge ("AJ") asked both parties to submit briefs on OEA's jurisdiction in this matter. Employee argued that OEA's jurisdiction in this case was established by the District of Columbia Whistleblower Amendment Act of 1998 which is outlined in D.C. Official Code § 1-615.51 *et. seq.* He reasoned that he was retaliated against because of reports to his supervisors that the priorities that they set for the Metropolitan Police Department ("MPD") were inconsistent with the priorities of the Chief of Police. He also informed his supervisors that the goals set for the MPD were unrealistic, wasteful, and ultimately doomed. Consequently, he felt that he was disciplined for not being a "team player" and that these actions were a violation of the Whistleblower Protection Act.[3]

Agency argued that the reprimand was the result of Employee's unsatisfactory performance and conduct. Agency asserted that he was placed on paid administrative leave which is "an excused absence with full pay and benefits that is not charged to annual leave, sick leave, or leave without pay." Agency also provided that this case clearly did not fall under OEA's jurisdiction because OEA was authorized to hear those cases involving adverse action, reduction-in-force, or suspensions for ten days or more. It reasoned that OEA's authority did not extend to reprimands. Additionally, Agency

[2] *Petition for Appeal* (October 4, 2007).
[3] Employee cited to D.C. Official Code § 1-615.52 to establish that he was protected from reprimand for disclosing evidence of gross mismanagement, misuse, and waste of public resources. He also asserted that Agency could not prove that the reprimand would have occurred independent of any legitimate reasons even if he had not engaged in the protected act of disclosing waste.

argued that the Whistleblower Amendment Act of 1998, D.C. Official Code § 1-615.51 *et. seq.* does not enlarge OEA's jurisdiction to include reprimands. Agency contended that an employee could retaliate against a whistleblower action through one of the actions that are within OEA's jurisdiction but not those actions beyond the scope of its jurisdiction. Moreover, Agency provided that if Employee wanted to challenge his reprimand, the proper place to bring that action would have been through the grievance process.[4] Thus, Agency requested that Employee's case be dismissed because OEA lacked the requisite jurisdiction to consider the case.[5]

On January 11, 2007, the AJ issued his Initial Decision. He found that in accordance with OEA Rule 629.2, Employee had the burden of proving issues of jurisdiction. The AJ held that although certain Whistleblower actions may be considered by this Office, it does not mean that *all* Whistleblower actions may be appealed to OEA. He held that according to D.C. Official Code §1-606.03, reprimands and other grievances fall outside of OEA's jurisdiction, therefore, OEA is unable to address the merits of the Whistleblower claims presented by Employee. He then dismissed the case for lack of jurisdiction.[6]

Employee disagreed and filed a Petition for Review with the OEA Board. He asserted the same arguments that were presented in his Brief on OEA's jurisdiction. He also provided that the AJ failed to consider the broad purpose of the Whistleblower Protection Act ("WPA") which is to enhance the rights of employees to challenge the

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[4] Agency cited to the District Personnel Manual § 1604.2, 1617.1, and 1636.1 *et. seq.*
[5] *Agency's Response to Employee's Brief and Motion to Dismiss Employee's Petition for Appeal,* p. 3-7 (December 14, 2007).
[6] *Initial Decision,* p. 2-5 (January 11, 2007).

actions of their agencies and express their views without fear of retaliation. He stated that the AJ viewed the WPA as merely offering an alternative to appealing disciplinary action. Consequently, Employee felt that the Initial Decision failed to take into account the broad remedy and public-interest purpose of the WPA.[7]

Although OEA does have authority to consider *some* Whistleblower cases, OEA's jurisdiction must be established before the Office can adjudicate those matters. OEA has previously held that when it lacks jurisdiction to adjudicate the merits of an employee's petition for appeal, the Office is also unable to address the merits of the Whistleblower claim contained therein.[8] OEA's authority was established by D.C. Official Code §1-606.03(a). It provides that:

> "[a]n employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIIII-A of this chapter), an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more (pursuant to subchapter XXIV of this chapter), or a reduction-in-force (pursuant to subchapter XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which 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."

Therefore, OEA can only consider adverse actions that result in removal, reductions-in-grade, suspensions of 10 days or more, or reductions-in-force.

In the current case, Employee was placed on paid administrative leave and directed to attend stress and anger management classes as a condition of his reprimand.

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[7] *Petition for Review*, p. 2-3 (February 1, 2008).

[8] *Rebecca Owens v. Department of Mental Health*, OEA Matter No. J-0097-03 (April 30, 2004), ___ D.C. Reg. ___ and *Ernest Hunter v. District of Columbia Water and Sewer Authority,* OEA Matter Nos. 2401-0036-05 and 1601-0046-05 (November 9, 2005), ___ D.C. Reg. ___.

As the AJ provided, reprimands are not one of the matters that may be considered by OEA. They are handled separately under D.C. Official Code §1-616.52(a). That section of the Code provides that "an official reprimand or a suspension of less than 10 days may be contested as a grievance pursuant to § 1-616.53 except that the grievance must be filed within 10 days of receipt of the final decision on the reprimand or suspension." This Board has consistently held that OEA does not have authority to consider grievances.[9] As a result, Employee's reprimand falls outside the scope of this Office's jurisdiction. Because this Office does not have jurisdiction over the Employee's reprimand, we cannot consider the merits of his Whistleblower Act claims. Thus, Employee's Petition for Review is **DENIED**.

[9] *Rebecca Owens v. Department of Mental Health*, OEA Matter No. J-0097-03, Opinion and Order on Petition for Review (January 25, 2006), ___ D.C. Reg. ___ and *Lillian Randolph v. District of Columbia. Water and Sewer Authority*, OEA Matter No. 2401-0085-02, Opinion and Order on Petition for Review (July 16, 2006), ___ D.C. Reg. ___ . The OEA Board relies on D.C. Official Code §1-606.02 which provides that "[a]ny performance rating, grievance, adverse action or reduction-in-force review, which has been included within a collective bargaining agreement under the provisions of subchapter XVII of this chapter, shall **not** be subject to the provisions of this subchapter."

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED.**

FOR THE BOARD:

_____
Sherri Beatty-Arthur, Chair

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Barbara D. Morgan

_____
Richard F. Johns

_____
Hilary Cairns

_____
Clarence Labor, Jr.

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.