

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: J-0027-13
Michelle A. Cooper,)	
Employee)	
)	Date of Issuance: February 26, 2013
v.)	
)	
Department of General Services,)	Joseph E. Lim, Esq.
Agency)	Senior Administrative Judge
_____)	

Michelle A. Cooper, Employee *pro se*
C. Vaughn Adams, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On November 28, 2012, Michelle A. Cooper (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the Department of General Services’ (“Agency”) action of terminating her employment.

I was assigned this matter on or around January 18, 2013. Agency had submitted a Motion to Dismiss for lack of jurisdiction over Employee’s appeal. I subsequently issued an Order to Employee to address the jurisdictional issue. Employee submitted a brief on the issue.

JURISDICTION

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

ISSUE

Whether this Office has jurisdiction over Employee’s appeal.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

The following facts are undisputed:

1. Employee was hired as a Contract Specialist on August 10, 2012. The position was subject to the satisfactory completion of a one year probationary period, to be completed on August 10, 2013.

2. On October 5, 2012, Agency issued Employee an amended letter of termination with an effective date of October 19, 2012.

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999), states that “the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing.” OEA Rule 629.1, states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. “Preponderance of the evidence” shall mean: “[t]hat 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.”

Effective October 21, 1998, and except as otherwise provided in the District of Columbia Government Comprehensive Merit Personnel Act of 1978, DC Code 1 601.1 et seq. or Rule 604.2 below, any District of Columbia government employee may appeal a final agency decision affecting:

- a. A performance rating which results in removal of the employee;
- b. An adverse action for cause that results in removal, reduction in grade, or suspension for ten (10) days or more;
or
- c. A reduction-in-force

District Personnel Manual (“DPM”) § 813.2 states that:

A person hired to serve under a Career Service Appointment (Probational), including initial appointment with the District government in a supervisory position in the Career Service, shall be required to serve a probationary period of one (1) year, except in the case of individuals appointed on or after the effective date of this provision to the positions listed below, who shall serve a probationary period of eighteen (18) months:

- (a) Individuals hired into entry-level police officer positions in the Metropolitan Police Department;
- (b) Individuals hired into entry-level correctional officer positions in the Department of Corrections or the Department of Youth Rehabilitation Services; and
- (c) Individuals hired into emergency or non-emergency operations positions in the Office of Unified Communications.

Employee argues that OEA has the authority to adjudicate this matter, notwithstanding her status as a probationary employee. According to Employee, the DPM regulations on

probationary employees are ambiguous and do not specifically apply to her as she never waived her rights as a Career Service employee. In addition, Employee asserts that she is not a supervisory employee, police officer, corrections employee or any emergency or non-emergency operations employee. Employee cites her prior nineteen years of service for the District Government, and thus, presumably, should not be a probationary employee again.

It is Agency's position that this Office does not have jurisdiction over Employee's appeal. Agency submits that Employee's status as a probationary employee at the time she was terminated prevents OEA from asserting subject matter jurisdiction over this appeal. Furthermore, according to Agency, Employee was offered and accepted employment on August 12, 2013, pursuant to a letter which specifically advised that her employment would "be subject to the satisfactory completion of a one-year probationary period."¹ With respect to Employee's claim of having previously served a probationary period, Agency states that Employee previously worked for the District government but left in 2001 before returning to work with Agency in 2012. Thus, Employee was indeed a probationary employee when she was hired in 2012. Agency concludes that OEA is not the proper venue to address such grievances.

Employee did not complete the one year probationary period as required by DPM § 813.2 and therefore remained in a probationary status at the time she was terminated. Accordingly, we must look to § 814 of the District Personnel Manual to determine if Agency properly terminated Employee during her probationary period. District Personnel Manual §§ 814.1-814.3 states that:

814.1 Except for an employee serving a supervisory or managerial probationary period under section 815 of this chapter, an agency shall terminate an employee during the probationary period whenever his or her work performance or conduct fails to demonstrate his or her suitability and qualifications for continued employment.

814.2 An employee being terminated during the probationary period shall be notified in writing of the termination and its effective date.

814.3 A termination during a probationary period is not appealable or grievable. However, a probationer alleging that his or her termination resulted from a violation of public policy, the Whistleblower protection law, or District of Columbia or federal anti-discrimination laws, may file action under any such laws, as appropriate.

Agency complied with District Personnel Manual §814.2 and §814.3 by providing Employee with a written notice of her termination and the effective date of such termination. DPM §

¹ See Agency Tab 1 (August 9, 2012 offer of employment letter to Employee).

814.1 does not require Agency to provide the specific reasoning for an employee's termination. Instead, it offers a general reason why termination is allowable during the probationary period.²

Employee's claim that she is not a probationary employee is belied by the documents submitted by the parties. In addition, Employee's claim to permanent employee status despite a separation of eleven years from District government employment has no basis in law or fact.

I find that Employee was still in a probationary status at the time she was terminated. OEA has consistently held that an appeal to this Office by an employee serving in a probationary status must be dismissed for lack of jurisdiction.³

ORDER

It is hereby ORDERED that Employee's appeal is dismissed for lack of jurisdiction.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge

² See *Codling v. DC Office of the Chief Technology Officer*, OEA Matter No. J-0151-09 (December 4, 2009) *Opinion and Order on Petition for Review* (December 6, 2010).

³ See, e.g., *Day v. Office of the People's Counsel*, OEA Matter No. J-0009-94, *Opinion and Order on Petition for Review* (August 19, 1991) D.C. Reg. ().