

**DISTRICT OF COLUMBIA COMMISSION
ON JUDICIAL DISABILITIES AND TENURE**

**Judicial Tenure Commission Begins Review Of
Judge Frederick H. Weisberg**

This is to notify members of the bar and the general public that the Commission has begun inquiries into the qualifications of Judge Frederick H. Weisberg of the Superior Court of the District of Columbia. Judge Weisberg is a declared candidate for reappointment as an Associate Judge upon the expiration of his term on December 15, 2007.

Under the provisions of the District of Columbia Self-Government and Governmental Reorganization Act, P.L. 93-198, 87 Stat. 796 (1973), §443(c) as amended by the District of Columbia Judicial Efficiency and Improvement Act, P.L. 99-573, 100 Stat. 3233, §12(1) provides in part as follows:

"...If a declaration (of candidacy) is so filed, the Tenure Commission shall, not less than sixty days prior to the expiration of the declaring candidate's term of office, prepare and submit to the President a written statement of the declaring candidate's performance during his present term of office and his fitness for reappointment to another term. If the Tenure Commission determines the declaring candidate to be well qualified for reappointment to another term, then the term of such declaring candidate shall be automatically extended for another full term, subject to mandatory retirement, suspension, or removal. If the Tenure Commission determines the declaring candidate to be qualified for reappointment to another term, then the President may nominate such candidate, in which case the President shall submit to the Senate for advice and consent the renomination of the declaring candidate as judge. If the President determines not to so nominate such declaring candidate, he shall nominate another candidate for such position only in accordance with the provisions of subsections (a) and (b). If the Tenure Commission determines the declaring candidate to be unqualified for reappointment to another term, then the President shall not submit to the Senate for advice and consent the nomination of the declaring candidate as judge and such judge shall not be eligible for reappointment or appointment as a judge of a District of Columbia Court."

The Commission hereby requests members of the bar, litigants, interested organizations, and members of the public to submit any information bearing on the qualifications of Judge Weisberg which it is believed will aid the Commission. The cooperation of the community at an early stage will greatly aid the Commission in fulfilling its responsibilities. The identity of any person submitting material shall be kept confidential unless expressly authorized by the person submitting the information.

All communications shall be mailed or delivered by **September 21, 2007**, and addressed to:

District of Columbia Commission on Judicial
Disabilities and Tenure
Building A, Room 312
515 Fifth Street, N.W.
Washington, D.C. 20001
Telephone: (202) 727-1363
Fax: (202) 727-9718

The members of the Commission are:

William P. Lightfoot, Esquire, Chairperson
Hon. Gladys Kessler, Vice Chairperson
Gary C. Dennis, M.D.
Noel J. Francisco, Esquire
Eric H. Holder, Jr., Esquire
Ronald Richardson
Claudia A. Withers, Esquire

BY: /s/ William P. Lightfoot
Chairperson

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
ALFRED RICHARDS	)	OEA Matter No. 1601-0063-04AF, and
	)	J-0055-04AF
Petitioner/Employee)	
)	
v.)	
)	
D.C. PUBLIC SCHOOLS,	)	Date of Issuance: December 22, 2006
)	
DIVISION OF TRANSPORATATION)	
Respondent/Agency)	
)	
STEPHENOS ULIS)	
	)	OEA Matter No. 1601-0092-04AF
Petitioner/Employee,)	
	)	Rohulamin Quander, Esq.
	)	Senior Administrative Judge
)	
v.)	
)	
D.C. PUBLIC SCHOOLS,)	
DIVISION OF TRANSPORATION)	
Respondent/Agency)	
)	

Stewart D. Fried, Esq., Employee’s Representative
Sara White, Esq., Agency Representative

ADDENDUM DECISION ON ATTORNEY FEES

INTRODUCTION AND PROCEDURAL HISTORY

On May 25, 2006, I issued two *Initial Decisions* (the “IDs”) on behalf of the D.C. Office of Employee Appeals (the “Office”). The joint decision in OEA Matter No. J-0055-04 and No. 1601-0063-04 was favorable to Alfred Richards (“Employee Richards” or “Richards”). The decision in OEA Matter No. 1601-0092-04, was favorable to Stephenos Ulis, (“Employee Ulis” of “Ulis”). Although two separate decisions were issued, all three cases were consolidated for disposition, with the two IDs issued on the same date, as noted above. Both decisions also denied Agency’s respective *Motions to*

consistent legal position, that the Office lacked jurisdiction to consider and decide either of the above-noted matters. The IDs reversed the action of the D.C. Public School's, Division of Transportation's (the "Agency"), and vacated Employees' dismissal. Agency was ordered to reinstate Employees, with all back pay and benefits.

The effect of my decision rendered Employees as the prevailing parties. Agency appealed the IDs, but the OEA Board, giving the case an expedited consideration, determined that the appeals were not timely filed, and dismissed the petitions. With the appeal option exhausted, and no further efforts taken in the D.C. courts, the decisions became final on or about June 30, 2006, which reaffirmed the parties in their status as the prevailing parties. On July 19, 2006, and pursuant to OEA Rule 635.1,¹ Employees, through counsel, filed two petitions for counsel fees. The first fee petition was filed on behalf of Alfred Richards, *Petitioner's Motion For Award Of Attorneys' Fees And Costs*, \$26,468.75 (fees) and \$910.68 (costs). According to the fee petition, professional services were initiated on July 26, 2004, with enumerated professional services ending on June 28, 2006.

The second fee petition was filed on behalf of Stephenos Ulis, *Petitioner's Motion For Award Of Attorneys' Fees And Costs*, \$32,243.75² (fees) and \$1,882.59 (costs). According to the fee petition, professional services were initiated on June 2, 2004, with enumerated professional services ending on June 28, 2006. Agency submitted no response to either attorneys fees and costs motion. The record is now closed in this matter.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.08 (2001).

ENTITLEMENT OF EMPLOYEE TO ATTORNEY FEES

D.C. Official Code § 1-606.08 provides that "[An Administrative Judge of this Office] may require payment by the agency of reasonable attorney fees if the appellant is the prevailing party and payment is warranted in the interest of justice." *See also* OEA Rule 635.1, *supra* at n.1.

1. Prevailing Party

"[F]or an employee to be a prevailing party, he must obtain all or a significant part of the relief sought. . . ." *Zervas v. D.C. Office of Personnel*, OEA Matter No. 1602-

¹ OEA Rule 635.1, 46 D.C. Reg. 9320 (1999), reads as follows: "An employee shall be entitled to an award of reasonable attorney fees, if: (a) He or she is a prevailing party; and (b) The award is warranted in the interest of justice."

² Although counsel listed "\$32,243.75" as the requested fee amount, his hourly monetary calculations and amount of time spent on behalf of this client, did not add up to this dollar amount. A more detailed discussion, and other considerations, follows.

0138-88AF92 (May 14, 1993), ___ D.C. Reg. ____ (). See also *Hodnick v. Federal Mediation and Conciliation Service*, 4 M.S.P.R. 371, 375 (1980). On July 19, 2006, Employees, through counsel, filed two motions for an award of attorneys' fees and costs. On December 18, 2006, counsel for Employees advised me by telephone that as of that date, Agency had neither reinstated Employees nor issued a check representing a partial issuance of back wages. As such, and consistent with prior representations from counsel, he reasserted that he seeks to have the attorneys fees and costs record remain open in these matters. Additional legal services are continuously being provided to each Employee, both individually and collectively, incidental to efforts to get them re-instated, issuance of back pay, and correction of their official D.C. government personnel records. Counsel seeks to remove adverse information and to adjust their personnel records to reflect that Employees did not sustain a break in service.

Although served a copy of the each motion, Agency did not respond, nor pursue or defend any legal position contrary to either Employees' respective, individual claims. Nor did Agency indicate that neither or both Employees were not in fact the prevailing parties. Based upon the record of this case, I conclude that Employees herein are the prevailing parties, and are thus entitled to an award of reasonable attorney fees and costs.

2. Interest of Justice

In *Allen v. United States Postal Service*, 2 M.S.P.R. 420 (1980), the Merit System Protection Board (MSPB), this Office's federal counterpart, set out several circumstances to serve as "directional markers toward the 'interest of justice' (the "Allen Factors") - a destination which, at best, can only be approximate." *Id.* at 435. The circumstances to be considered are:

1. Where the agency engaged in a "prohibited personnel practice";
2. Where the agency's action was "clearly without merit" or was "wholly unfounded", or the employee is "substantially innocent" of the charges brought by the agency;
3. Where the agency initiated the action against the employee in "bad faith", including:
 - a. Where the agency's action was brought to "harass" the employee;
 - b. Where the agency's action was brought to "exert pressure on the employee to act in certain ways";
4. Where the agency committed a "gross procedural error"

which “prolonged the proceeding” or “severely prejudiced the employee”;

5. Where the agency “knew or should have known that it would not prevail on the merits”, when it brought the proceeding, *Id.* at 434-35.

These matters began on April 26, 2004, with both Employees’ being terminated as a result of each having been incorrectly considered by Agency as “temporary” or “probationary” Employees who had no appeal rights, rather than full time, career services employees who enjoyed certain procedural protections. As well, Employee Richards was initially demoted on August 29, 2003, but was not served with a proper notice prior to the effective date of the personnel action.

In both cases, and after a comprehensive evaluation of the record, an analysis of the decision of Judge Friedman in *Petties v. District of Columbia*, No 95-0148 (D.D.C.), and a consideration of the applicable law and regulations, I determined that neither Employee was serving in either a “temporary” or “probationary” capacity, and likewise vacated the demotion. As such, Agency was obligated to give them the proper notice and opportunity to contest Agency’s initial demotion of Richards and subsequent termination actions against both Employees. Additionally, Agency has not argued that attorneys fees are not warranted in the interest of justice. I conclude that Agency’s delay in effecting the relief to which Employee was entitled is a manifestation of Allen Factors #1 (prohibited personnel practice), #4 (gross procedural error), and #5 (knew or should have known that it would not prevail on the merits), above. Therefore, I further conclude that an award of reasonable attorney fees is warranted in the interest of justice.

REASONABLENESS OF ATTORNEY FEES

Counsel’s two separate submissions were detailed and included the specifics of the services provided on behalf of each Employee.

Employee Alfred Richards

With regard to Employee Richards, counsel’s fee petition lists exactly 96.25 hours of legal service time at counsel’s enumerated rate of \$275.00 per hour, for a total fee request of \$26,468.75.³ The requested enumerated costs total \$910.68.

³ Although counsel for Employee Richards listed the fee requested as \$26,468.75, the calculated figures when added, totaled \$26,588.75, a difference of \$120.00.

Employee Stephenos Ulis

With regard to Employee Ulis, counsel's fee petition lists exactly 100.00 hours of legal service time at counsel's enumerated rate of \$275.00, with amount totals of \$27,500.00.⁴ The requested enumerated costs total \$1,882.59.

Nature of legal services provided

According to the two attorney fee request documents, counsel performed innumerable professional services over a sustained period of time. In many instances, the services provided were continued over consecutive days. Further, in most instances, the services provided on behalf of each Employee were relatively, if not exactly, identical in nature. Typically, counsel's services were as follows:

- a) on an ongoing basis, investigated the several components of all three cases;⁵
- b) maintained sustained telephone contact with each of his clients;
- c) maintained sustained telephone contact with Agency officials as well as Agency's in house legal counsel, D.C. government, Office of the Attorney General, and outside legal counsel;
- d) maintained sustained correspondence and e mail contact with both clients, Agency officials, and Agency, D.C. government, and outside legal counsel;
- e) drafted diverse motions, designed to achieve various objectives, including in pursuit of jurisdictional discovery, opposition to various motions and efforts by Agency to have both cases dismissed, exploring possible settlement, case management, and enforcement of various orders and directive issued by the presiding AJ, issuance of subpoenas for depositions;
- f) drafted interrogatories, requests for productions of documents, and requests for admissions;
- g) in-depth review of the answers and information received in response to formulated interrogatories, request for production of documents and request for admissions;
- h) conducted several depositions of Agency officials, exploring the history and background behind the actions taken, in an effort to verify/establish that the Office had jurisdiction to continue with the cases, and to likewise expand the base of discovered information available to Employees in their efforts to contest Agency's actions against them;
- i) in-depth review of the deposition transcripts and information received in

⁴ Counsel listed a fee request of \$32,243.75, which at \$275.00 per hour, would represent 117.25 hours of legal services on behalf of Employee Ulis. However, he also listed 100.0 hours as the amount of legal service time rendered on behalf of his client. This calculation (100 hours x \$275.00 per hours) is \$27,000.00, a reduced difference of \$5,243.75.

⁵ Employee Richards case has two different components, initially a demotion (J-0055-04), and subsequently a termination (1601-0063-04). Both aspects were addressed by counsel, and subsequently considered and decided by me. Employee Ulis case (1601-0092-04) related solely to the issue of termination.

response to discovery efforts;

j) formulated drafted memorandums/brief addressing the issue of the role of the Division of Transportation, as a separate entity within the D.C. Public Schools (Agency);

k) researched the applicable law on the several components of the one Employee Ullis and the two Employee Richards matters;

l) in depth review and response to each document filed on Agency's behalf, with counter request, where deemed necessary;

m) attended Status Conferences before me at the Office; and

n) participated in numerous extended telephonic Status Conferences with me, the presiding AJ, and other counsel.

Reasonableness Standard

This Office's determination of whether an attorney fees request is reasonable is based upon a consideration of the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate. *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980). See also *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C. Cir. 1982). Although it is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted, the fee application must contain sufficient detail to permit an informed appraisal of the merits of the application. *Copeland, supra*. The number of hours reasonably expended is calculated by determining the total number of hours and *subtracting nonproductive, duplicative, and excessive hours*. (emphasis added) *Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985).

The burden is on the fee applicant to produce satisfactory evidence that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, or reputation. *Blum v. Stenson*, 465 U.S. 886 (1984). The best evidence of the prevailing hourly rate is ordinarily the hourly rate customarily charged in the community in which the attorney, whose rate is now under consideration, practices. *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988). The OEA Board has determined that the administrative judges of this Office may consider the so-called "Laffey Matrix" in determining the reasonableness of a claimed hourly rate.⁶

⁶ The Laffey Matrix, used to compute reasonable attorney fees in the Washington, D.C.-Baltimore Metropolitan Area, was initially proposed in *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985). It is an "x-y" matrix, with the x-axis being the years (from June 1 of year one to May 31 of year two, e.g., 92-93, 93-94, etc.) during which the legal services were performed; and the y-axis being the attorney's years of experience. The axes are cross-referenced, yielding a figure that is a reasonable hourly rate. The matrix also contains rates for paralegals and law clerks. The first time period found on the matrix is 1980-81. It is updated yearly by the Civil Division of the United States Attorney's Office for the District of Columbia, based on the change in the Consumer Price Index for All Urban Consumers (CPI-U) for Washington-Baltimore, DC-

Employees' attorney fees request document contains four detailed professional fee statements, two each for Employee Richards and Employee Ulis. The initial professional services were provided by counsel when he was located at the law firm of Baise Miller. The professional services continued when counsel relocated to the law firm of Kilpatrick Stockton. However, all of the professional services were provided at the hourly rate of \$275.00, calculated and subdivided into hourly increments of 0.25 (15 minutes per increment, or \$68.75 per quarter hour). The Description Line of the statements sets forth in detail all of the respective services provided. Counsel has also provided a professional resume reciting his educational background, employment history, and professional experience.

According to his resume, he graduated from law school in May 1995. He was admitted to the District of Columbia bar in 1998. I have used the Laffey Matrix rates⁷ as the guide for my determination of a reasonable hourly rate for an attorney who has performed the enumerated legal services on behalf of these Employees. I take administrative notice that \$290.00 per hour is an accepted hourly rate for professional services performed in 2004-2005 by a person who graduated from law school between eight and 10 years prior to the date of services. Further, \$305.00 per hour is an accepted hourly rate for professional services performed in 2005-2006.⁸

1. Number of hours expended

In our telephone conversation of December 18, 2006, counsel telephonically represented to me that because the nature of the services provided were intertwined, the calculations for the professional time and services provided were adjusted, to divide the amount of time expended and to avoid duplicative charging.⁹ However, this representation does not appear in writing in either of his submitted petitions for fees and costs.

MD-VA-WV, as announced by the Bureau of Labor Statistics for May of each year. A copy of the Laffey Matrix, complete through June 1, 2003 - May 31, 2004, June 1, 2004 - May 31, 2005, and June 1, 2005 - May 31, 2006, is attached to this addendum decision.

⁷ The "Experience" column of the matrix refers to the years following the attorney's graduation from law school.

⁸ See Laffey Matrix 1980-2007, issued by the Civil Division of the U.S. Attorney's office for the District of Columbia, pursuant to the initial adoption of an attorney compensation scheme approved by the Court in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983).

⁹ Because of how the issues were addressed, and considering that both Employees won a total of three cases, it was both impractical and unnecessary to separate the two lines of professional service. However, the number of hours expended on behalf of the two Employees was significantly duplicative, considering that both Employees worked at the same place, were under the same Agency administration, and faced largely identical disciplinary action.

The total amount of professional services time that counsel asserts was expended on behalf of Employee Richards was 96.25 hours. The total amount of professional services that counsel asserts was expended on behalf of Employee Ulis was 100.00 hours.

I have reviewed the hours claimed, and although Agency did not respond or object to the fee request, I have determined that the hours listed as expended were excessive, considering that the services were largely duplicative in nature. The claims on behalf of each Employee were considerably the same, and the language setting forth the enumerated services was essentially identical. I base this determination upon my delineated comparison of the professional services provided to each Employee. Perhaps as much as 75% of the Description Line of services provided is identical. Counsel indicated to me in our telephone conversation of December 18, 2006, that where there is an enumerated duplication, the amount of time expended on the professional service, as well as the amount listed as charged for that service, was split between the parties. I presume that the division of service was essentially on an equal basis.

Fifteen randomly selected abbreviated¹⁰ typical examples of the duplicative services are enumerated below:¹¹

Date	Client	Service	Time	Amount
12-2-04	Both	Motion hearing at OEA	1.25	343.75U
			1.25	343.75R
12-9-04	Both	Drafting brief; telephone conference with DCPS, etc.	1.50	412.50U
			1.50	412.50R
12-14-04	Both	Draft & edit post hearing brief, etc.	2.75	756.25U
			2.50	687.50R
2-11-05	Both	Telephone conf. (U & R), etc; review brief in support of motion to intervene; telephone conf. w/ DCPS counsel	1.75	481.25U
			1.75	481.25R
2-16-05	Both	Telephone conf. w/ DCPS counsel, AJ Quander, and B. Hudson, regarding hearing, brief	0.75	206.25U
			0.75	206.25R
3-1-05	Both	Telephone conf. w/ B. Hudson; telephone conf/ w/ Malson; draft letter to AJ Quander; draft Order to AJ Quander regarding jurisdictional discovery	1.50	412.50U
			1.50	412.50R
3-4-05	Both	Telephone conf. w/ H. Segar re jurisdiction; letter to, and telephone conf w/ AJ Quander; drafting order re jurisdiction and discovery	1.25	343.75U
			1.25	343.75R
3-23-	Both	Draft motion for expedited discovery; draft	1.00	275.00U

¹⁰ It is not necessary to fully insert the verbatim Description Line, as it is sufficient for me to underscore that much of the service is duplicative, as stated in counsel's submission, without having to recite it in this decision.

¹¹ "R" refers to Employee Richards; "U" refers to Employee Ulis.

05		interrogatories; draft request for production of documents and request for admissions	2.25	618.75R
4-25-05	Both	Prepare for and attend jurisdictional discovery conference; draft amended interrogatories, amended request for production of documents, proposed order, new settlement demand, and letters to Segar	2.25 2.25	618.75U 618.75R
5-23-05	Both	Telephone conf. w/ Hudson re Gilmore; review e mails; telephone conf. w/ AJ Quander; conf. w/ DCPS counsel; correspondence to H. Segar	1.25 1.25	343.75U 343.75R
5-24-05	Both	Attended meeting in prep. for Gilmore and Pettigrew depositions; review DCPS's amended answers to interrogatories; prep. for Gilmore deposition	3.75 3.75	1,031.25U 1,031.25R
5-25-05	Both	Finish prep. For deposition of Gilmore; deposition of Gilmore; conf. w/ U & R	2.50 2.50	687.50U 687.50R
6-15-05	Both	Conduct depositions of Pettigrew and Sheppard	3.00 3.00	825.00U 825.00R
8-22-05	Both	Continue drafting opposition to DCPS motion to dismiss; research case law; review depositions of Gilmore, Sheppard, Pettigrew for use in opposition	1.50 5.25	412.50U 1,443.75R
5-30-06	Both	Review AJ Quander's initial decision, denying DCPS's motion to dismiss; conf. w/ AJ Quander regarding decision, appeal, reinstatement; correspondence to Segar; conf. w/ Hudson	1.75 1.75	481.25U 481.25R

2. Reasonable hourly rate

As noted above, the OEA Board has decided that the AJ's of this Office may consider the Laffey Matrix in determining reasonableness of a claimed hourly rate. In reviewing the fee request and evaluating the academic and professional credentials of Employees' counsel, as well as his legal experience as recited on his law firm's web page and his submitted resume of his professional experience, I have determined that the requested hourly rate of \$275.00 is reasonable *vis à vis* the Laffey Matrix.¹² He earned his J.D. degree in 1995, and was admitted to the District of Columbia Bar in 1998. It has been previously determined that the year that the requesting attorney graduated from law school, shall be used as the measure for allocating the hourly legal services rate recited in the Laffey Matrix.

3. Costs

a) *Richards* - According to the information supplied by counsel, costs associated with his

¹² As noted, following the Laffey Matrix guideline, \$290.00 per hour is an accepted hourly rate for professional services performed by counsel in 2004-2005, and \$305.00 per hour is an accepted hourly rate for professional services performed in 2005-2006.

representation in this matter totaled \$910.68, itemized as follows:

Law firm of Baise Miller:

Postage	1.66
---------	------

*Law firm of Kilpatrick Stockton:*¹³

Document Reproduction	183.52
Deposition Transcripts	710.50
Service of subpoenas	<u>15.00</u>

Total Costs	\$910.68
-------------	----------

b) *Ulis* - According to the information supplied by counsel, costs associated with his representation in this matter totaled \$1,882.59, itemized as follows:

Law firm of Baise Miller:

Document Reproduction	67.90
Westlaw Legal Research	792.37
Postage	13.73

Law firm of Kilpatrick Stockton:

Document Reproduction	253.88
Deposition Transcripts	710.50
Service of Subpoenas	15.00
Westlaw Legal Research	22.79
Postage	<u>6.42</u>

Total Costs	\$1,882.59
-------------	------------

4. *Attorney fees requested:*

a) Fees Claimed: 96.25 hours at the rate of \$275.00 per hour:

Alfred Richards: \$8,387.50 (Baise Miller), plus \$18,081.25 (Kilpatrick Stockton)
= \$26,468.75

b) Fees Claimed: 100.00 hours at the rate of \$275.00 per hour:

Stephenos Ulis: \$8,318.75¹⁴ (Baise Miller), plus \$19,181.25 (Kilpatrick

¹³ Counsel changed law firms during the course of the period of representing the Employees.

¹⁴ Although counsel listed the claimed dollar amount of legal services provided as "\$13,062.50", he also listed "30.25" as the amount of legal service hours provided. When I calculated 30.25 hours x \$275.00 per hour, my calculated figure is \$8,318.75, not

Stockton) = \$ 27,500.00¹⁵

5. *Summary of requested attorney fees and costs:*

Requested attorneys fees: \$26,468.75, plus \$27,500.00 = \$53,968.75

Claimed Costs - \$910.68 (Richards), plus \$1,882.59 (Ulis) = \$2793.27

Having evaluated counsel's request for reasonable attorney's fees, and likewise having determined that a significant amount of the professional services provided appear to be duplicative, I have decided that it is more than appropriate to impose a one third reduction in the amount of the attorney fee award. Pursuant to OEA Rule 635.1, I have authority to award *reasonable* (emphasis added) attorney fees to the prevailing party. The Employees herein have certainly prevailed, and their counsel is entitled to an award of attorney fees. What is "reasonable" must be determined by the overall circumstances, including the complexity and extent of the work required, and the degree of difficulty; the duration of the matter's pendency; and the extent of duplication that might be involved, especially when there is more than one person being represented in the same proceeding. The three separate proceedings were joined into one consolidated matter in the interest of judicial economy. The effect of that action likewise significantly reduced the amount of individualized work and time that each party, including Employees' single counsel of record, would have to devote in pursuit of the eventual favorable outcome.

ORDER

The foregoing having been considered, it is hereby

ORDERED, that Agency pay Employee, within thirty (30) days from the date on which this addendum decision becomes final, \$35,975.57 in attorney fees, plus \$2,793.27 in costs, for a total amount due of \$38,768.84; and it is

FURTHER ORDERED, that there shall be no interest due and payable between July 19, 2006, the date on which the two fee petitions were filed with the Office, and the date of the issuance of this Addendum Decision.

FOR THE OFFICE:

ROHULAMIN QUANDER
Senior Administrative Judge

\$13,062.50, a subtracted difference of \$4,743.75.

¹⁵ Because of the error in addition, counsel listed his fee request as \$32,243.75, the same \$4,743.75 subtracted difference referred to in *N 14, supra*.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

STEPHANOS ULIS
Petitioner/Employee,
v.
DISTRICT OF COLUMBIA PUBLIC SCHOOLS, Division of Transportation
Respondent/Agency
OEA Matter No. 1601-0092-04
Date of Issuance: May 26, 2006
Rohulamin Quander, Esq.
Senior Administrative Judge

Harriet Segar, Esq. and Sara Moskowitz-White, Esq., Agency co-counsel
Daniel A. Rezneck, Esq., Assistant Attorney General
Stewart Fried, Esq., Employee's counsel

INITIAL DECISION

The Petition for Appeal in the above-noted matter was filed on June 10, 2004, to contest the Employee's termination from his position as an Assistant Terminal Manager (the "ATM") at the D.C. Public Schools (the "Agency" or "DCPS"), Division of Transportation ("DOT") effective April 26, 2004. Initially hired on April 18, 2003, as an Investigative and Compliance Manager, on or about August 21, 2003, he was transferred from that position to the ATM position, the effect of which purportedly represented two temporary positions being held by him within one year's time frame.

After addressing a series of procedural matters, Agency filed a motion to dismiss the appeal on April 5, 2005. Because there was a question raised by the Agency regarding whether the Office of Employee Appeals (the "Office") had jurisdiction, a period of jurisdictional discovery was conducted, pursuant to an Order issued by me on April 13, 2005. At the conclusion of obtaining some level of discovery, although significantly less than what Employee's counsel was seeking, on August 26, 2005, Employee filed an opposition to the motion to dismiss the Petition.

Agency responded on September 26, 2005. As the assigned administrative judge (the "AJ"), I have evaluated the extensive record created to date, and taken into consideration the respective parties' legal positions with regard to the motion to dismiss and opposition, the law and governing regulations and policies that address the subject of this motion, and the procedures utilized at the time of Employee's being reassigned from one position to another.

I have determined that Agency's motion should be DENIED. I have likewise determined that, with the denial of the Agency's motion to dismiss, the effect of which

vacates the summary termination of the Employee, that this decision should be issued as an *Initial Decision* in favor of the Employee.

Summary of the Parties' Respective Arguments

Agency's Arguments:

1. *The Office lacks jurisdiction over Employee's appeal because he was in a temporary appointment status both at the time of the alleged adverse action and when he filed the Petition for Appeal.*

Pursuant to Chapter 14 of the Agency's personnel regulations, an employee serving a temporary appointment may be terminated for any reason and has no right to notice, appeal, or other procedural protections. See 14 DCMR § 1400.2(a), and D.C. Official Code § 1-608.01(a)(6). Further, pursuant to 5 DCMR § 1307.4, the personnel regulations provide that all Agency employees serve a one year probationary period upon being initially appointed to a supervisory or management position.

The Office has long recognized that only permanent, non-probationary employees are entitled to removal for cause. See *Wyder v. D.C. Public Schools*, OEA Matter No. J-0199-95, 47 D.C. Reg. 1584 (Sept. 21, 1998). The AJ in *Wyder* also noted that, pursuant to OEA Rule 629.2, a Petitioner "has the burden of proof as to the issue of jurisdiction." The Employee in this matter began serving a temporary, term appointment at the time of his demotion on August 21, 2003, and the time of his termination on April 26, 2004, was still serving in the term appointment, which was specifically limited so as not to extend ("NTE") beyond one year. The temporary appointment conveyed no permanent tenure.

2. *Employee was an "at will" employee, serving in a Management Supervisory Service ("MSS") position, and as such, the Office has no jurisdiction in this case.*

Although both of the Employee's Form 1's recite that he was in a career service position, such recitations were erroneous personnel statements, as the Employee's official personnel record clearly notes that he was non competitively selected and converted from his prior career status to an "at will" Management Supervisory Service ("MSS") category as of August 27, 2000, at which time his prior career status was officially terminated. The notification on the relevant Form 1, also dated August 27, 2000, recited that, "... acceptance of offer will result in termination of career status job protection rights."¹

Agency further asserted that any personnel action incorrectly done by the Agency cannot subsequently confer or create an employment protection status or job protection that, under the law, an employee is not legally entitled to receive. Agency then admitted that any Form 1 reference to the Employee herein as having a career or permanent status, was a clerical oversight which should not have occurred, and while such error was committed, the commission of the error could not legally change the Employee's of-record MSS status, and re-convey a career status upon him.

¹ See Agency Exhibit "C", "Personnel Action", box 10 and the "Remarks" box at the bottom of the form.

3. *The Office lacks jurisdiction over this appeal of termination because Employee failed to file a timely Petition for Appeal.*

Even if the Employee was not a temporary, probationary employee at the time of his termination, the Office lacks jurisdiction to entertain his appeal because he failed to comply with the statutory requirements of D.C. Official Code, § 1-606.3, and 6 DCMR § 604.2, by filing his appeal within 30 days of the effective date of the action in question. Rather, he filed his appeal on June 10, 2004, approximately 45 days after the adverse action took place. The courts have held that an administrative Agency's jurisdiction cannot be enlarged beyond the terms of the enabling statute. See *Beeton v. D.C. Department of Corrections*, OEA Matter No. J-0198-95, 47 D.C. Reg. 9932 (2000). As with jurisdiction in general, the Employee herein also has the burden of proving that his appeal was filed timely. See OEA Rule 632.2, 6 DCMR § 629.2, and *Hayward v. Department of Human Services*, OEA Matter No. J-0195-96, 47 D.C. Reg. 8691 (2000).

4. *There has been no final Agency action, as Employee neglected to exhaust all administrative remedies, as he failed to initially note his appeal at the Agency level, by filing it with the Office of the Superintendent.*

The Office further lacks jurisdiction because the Employee cannot show that he ever sought to file a written appeal with the Agency, and there has never been a final Agency decision with respect to either of the alleged adverse actions. Pursuant to 5 DCMR § 1406, *et seq.*, a covered employee who wishes to challenge an adverse action must file a written appeal with the Superintendent within 10 days of receipt of the notice of adverse action, or the employee shall be considered to have waived the right to appeal. The Employee filed his internal written appeal to the Superintendent 17 days after he received the notice of his termination, which was too late.

Further, OEA Rule No. 604.1 states that the Office's jurisdiction is limited to a review of a final agency decision, which has never been rendered in this matter. As well, although Employee contested his termination and filed an appeal letter with Gilmore on May 13, 2004, he also filed his Petition for Appeal with the Office on June 10, 2004. As such, Agency was never accorded an opportunity to provide Employee with a hearing pursuant to Agency's regulations or to provide Employee with a final decision on the alleged adverse action. See *White v. District of Columbia*, 852 A.2d 922 (D.C. App. 2004), where the D.C. Court of Appeals held that neither the Superior Court nor the Office had jurisdiction over a petition for appeal where the petitioner (the employee) had failed to first pursue his grievance through Agency processes.

Employee's Arguments:

1. *Employee was not hired on a temporary basis*

Agency argues that the Employee was hired on a temporary basis and that his appointment "conveyed no permanent tenure", and that, "it was understood that he would serve at the pleasure of the DCPS appointing authority." Agency further claims that during his employment at DCPS, he was transferred from one temporary managerial position to another. However, Agency's arguments are supported by no documentary evidence of temporary status, and solely constitute the argument of counsel.

Although the Agency appears to rely upon the Request for Employment Action, dated March 26, 2003, a review of that partially illegible form indicates that Employee had been previously detailed² from the Department of Parks and Recreation to DCPS.³ The form, however, does not necessarily confirm or refute that the Employee was transferred from one temporary appointment to another within the one year period in question.

Agency also conveniently ignores that its own post-termination personnel action form, dated May 10, 2004, clearly indicates that Employee had been a full-time career employee of DCPS. (See DCPS Attachment B, at Boxes 36 and 37) Further, the insertion of Code "01" in Box 36 directly contradicts Agency's claim that Employee was only given a temporary appointment, for if that were true, either Code "3" (for full-time temporary) or Code "4" (for part-time temporary) would have been selected.⁴ Although the Agency contends that Boxes 36 and 37 were incorrectly completed, the evidence demonstrates that the Employee was not hired on a temporary basis. Therefore, the notations in his personnel records as to being "full-time" and in a "career" position were in fact correct, and the Agency cannot, after-the-fact and in response to litigation, pick and choose which portions of the Employee's personnel records are correct and which are incorrect.

The Employee's sworn affidavit directly contradicts Agency's claims that he was not hired on a permanent basis. In his affidavit, Employee attested that: a) he was originally detailed from Parks and Recreation to DCPS for a period not to exceed 60 days. (See Employee Exhib. "A", Ulis Affidavit, at 3-5.); and b) that period was extended by mutual agreement for another 30 days, i.e. to April 18, 2003, at which time he was formally hired by DCPS on a permanent basis as a full-time career employee. *Id.* The Employee then executed various DCPS employment documents, all noting April 18, 2003, as the day that he commenced work as a full-time career DCPS employee.⁵

² Only Career Service employees of the D.C. Government can be detailed from one agency to another. (See D.C. Personnel Regulations §841) Normally, details are for up to 120 days but can, in certain circumstances, be made for up to one year. *Id.* During the time an employee is detailed, an employee is not paid by the agency to which an employee is detailed to. Employee was paid by Parks and Recreation until April 2004 and by DCPS after that date. (See Affidavit of Stephanos Ulis, at 3-5; See also DCPS's Amended Response to Request for Admission No. 2)

³ It is interesting to note that Superintendent Vance personally signed this form. Given that it is highly doubtful that the busy Superintendent of schools has time to review and sign a personnel action form for a temporary employee, it is clear that all references to temporary are errors. Although Superintendent Vance appears to have written "see attached," DCPS has not produced any such attachment.

⁴ DOT Human Resources Director Keith Pettigrew, who drafted Employee's termination letter, acknowledged in his deposition that "DCPS has been known to incorrectly do stuff." See Pettigrew deposition, at 70. Similarly, Valerie Sheppard, DCPS representative with the most knowledge regarding the Employee's personnel records, agreed that their records are "flawed." See Sheppard deposition, at 68-69.

⁵ The Employee's CAPPs form lists his start date as 4/18/03, and his position end date is listed as 99/99/9999. Given that this form did not list 4/17/04 as his termination date, the CAPPs entry likewise refutes Agency's contention that his position would last no more than one year. (See CAPPs form, dated April 19, 2003, Employee's Exhibit "G")

Other record evidence supports a rejection of the Agency's claims. Specifically, a) Pettigrew testified that he was not aware that anyone from either DCPS or DOT ever discussed with the Employee that he was only being hired on a temporary basis; (*See* (Pettigrew deposition, at P 62) b) the Agency has produced no admissible evidence that indicates that the Employee was told by *anyone* at the Agency that he was only being hired on a temporary basis; c) no documents bearing the Employee's signature purport to advise him that he was being hired on a temporary basis; and d) even Agency's supposedly "corrected" Personnel Action Form 1, dated January 31, 2005, indicates that the Employee was a full-time Career Service Employee. The conclusion, then, is that the foregoing evidence makes clear that the Employee was simply not hired on a temporary basis.

2. Employee had completed any probationary period at the time of his termination

The record establishes and Agency admits, as it must, that the Employee's employment at DCPS commenced on April 18, 2003, and ended over one year later, on April 26, 2004⁶. (*See* DCPS Amended Responses to Request for Admissions, No. 1, 17) A review of the applicable regulations also strongly supports that the Employee was no longer in a probationary status at the time of his termination. Section 815.4 of the D.C. Personnel Regulations provides that "[a]n employee who is promoted, reassigned, demoted or transferred to another supervisory or managerial position while serving a probationary period under this section shall have the service completed in the former position credited toward completion of the probationary period in the new position." Section 813.3 further provides, in pertinent part, that "an employee who once satisfactorily completes a probationary period in the Career Service shall not be required to serve another probationary period." Finally, Gilmore testified that he did not believe that a DOT employee's probationary time period started anew based upon a mere reassignment. (*See* Gilmore Deposition Transcript, Employee's Exhib. "H", at 43, 92)

LEGAL ANALYSIS AND FINDINGS OF FACT

1. The Employee was not serving in a temporary position, nor was he still in a probationary status.

DCPS argues that the Employee was reassigned to a second position, and was "temporarily appointed to an Assistant Terminal Manager position", and within one year of his reappointment, he was terminated during his probationary period. This argument should be summarily rejected as the record as presented clearly indicates that: a) the Employee was not hired on a temporary basis; b) no evidence supports the Agency's claim that Employee's informal demotion, without loss of pay or reduction of grade, to an ATM Position was for a temporary period of time; and c) §815.4 explicitly credits him with the time he served as Investigation and Compliance Manager towards completion of his probationary period. Inasmuch as any probationary period applicable to the Employee ended no later than April 17, 2004, the day before the one-year anniversary of his hiring at the Agency, the Employee was entitled to the procedural rights set forth in Chapter 16 of the D.C. Personnel Regulations, which governs appeals from adverse employment actions. Finally, even assuming *arguendo* that the Employee was not a permanent career service

⁶ DCPS even appears to concede that the Employee completed any applicable probationary period at the time of his termination based upon its use of "arguably probationary" on page 5 of its motion.

employee, given that his service with DCPS was longer than one year, he was still entitled to those procedural protections, pursuant to §826.3.

2. The Employee was no longer serving in an MSS status

Although Agency stated in the initial background statement of its motion that the Office lacked jurisdiction over this appeal because the Employee was serving at will, due to his being in the MSS employment status, the Agency elected not to pursue this claim in the body of the motion, and presumably has abandoned this assertion. However, because the claim was raised, I feel it incumbent to comment. While the record is clear that the Employee did serve in an at will MSS capacity while employed at the D.C. Department of Recreation, once he was reassigned to the Agency (the D.C. Public Schools), his career status changed for two particular reasons. First, the Agency does not utilize the MSS career status for its personnel. Second, the MSS status is a characteristic that attaches to a particular position of employment, and the incumbent in the position is considered to be an "MSS employee" as long as he or she serves in that position. However, upon leaving that position and going to work elsewhere in the D.C. government, the MSS status does not automatically follow with the employee, whose new position might not be in the MSS category,⁷ as is the case now before me.

3. Employee's petition for appeal was timely filed

Agency argues that the Office lacks jurisdiction over the Employee's Petition for Appeal because it was not timely filed within 30 days of the challenged adverse action, or because he cannot show a final agency decision. While posing this argument, Agency similarly neglected to mention that the Employee: a) should have been given no less than 10 days advance notice of the decision to terminate him; b) was never advised of what procedures he needed to follow or the time limits for his appeal; c) was never informed of the specifics of the alleged unsatisfactory performance; d) was never provided with a copy of the regulations which address employee termination or given the relevant forms to complete to institute the appellate process; and e) was never given access to his personnel file, in order to obtain copies of any relevant potentially adverse documents contained therein. (*See* Employee's Affidavit, Employee Exhibit "A" at 15-17)

It is an elementary principle of administrative law that, in order to start the running of time for appeal, an agency is obliged to give notice which was reasonably calculated to apprise the petitioner of the adverse action decision and an opportunity to contest that decision through an administrative appeal." *See Ploufe v. D.C. Dept. of Employment Services*, 497 A.2d 464, 465 (D.C.1985); *Selk v. D.C. Dept. of Employment Services*, 497 A.2d 1056, 1058 (D.C. 1985). As in *Ploufe* and *Selk*, the notice to the Employee was so ambiguous and insufficient in not apprising him of the specific grounds for his termination or the procedures to follow in order to appeal, as to render it inadequate as a matter of law. *See Ploufe* at 466. Agency's unclean hands should preclude it from seeking to dismiss the Employee's appeal based upon its alleged untimely filing.

⁷ This clarification information was provided by the D.C. Office of Personnel staff, explaining to me the effect of an MSS employee transferring from a position classified as such, to another position or agency, where the newly encumbered position is not MSS or where the MSS classification is not utilized.

4. *Gilmore's decision to terminate the employee constituted final agency action*

Gilmore, as court appointed administrator of DOT, was granted with authority to "hire and fire" by Judge Friedman in *Petties v. District of Columbia*, No 95-0148 (D.D.C.). (See also Pettigrew deposition, at 26) Gilmore testified that his decision to terminate an employee of DOT was final for purposes of DOT, and that he was the "ultimate authority" with respect to those employees. (See Gilmore Deposition, at 30-31, 34, Employee's Exhibit "B"; See also Pettigrew deposition, at 26; 107) While Pettigrew agreed that, with regard to personnel matters, Gilmore and DOT had wide hiring and firing authority, he also asserted that they were still required to comply with the mandates of the CMPA. (See Pettigrew Deposition, at 33-34)

During his deposition testimony, Gilmore either testified or conceded that: a) the *Petties* Order granted him broad powers, including the authority to make decisions with regard to personnel matters; (*Id.* at 33-34) b) that "all employees serve at [his] pleasure in the Department of Transportation."; (*Id.* at 89) c) that the April 26, 2004, termination letter did not reasonably inform the Employee of the specific grounds and reasons for his termination: (*Id.*, at 70-71) d) the Employee's termination was effective immediately, and that he was not given a copy of Title V, Chapter 14 of the DCMR; (*Id.*, at 73) e) DOT had not promulgated any new and separate personnel regulations at the time of the Employee's termination; (See Pettigrew Deposition, at 32) f) Employee was not given advance notice of adverse action, as required by 5 DCMR §1403, which requires 10 days advance notice of termination; (See also Pettigrew Deposition at 45) and, g) Employee was neither properly apprised of his appeal rights, nor alerted to the specific grounds for his termination, nor provided with access to his adverse action file. (*Id.*, at 73-74) In asserting its position, Agency has elected to ignore Gilmore's deposition testimony which irrefutably establishes that the decision to terminate the Employee constituted the final decision of the Agency. (See deposition testimony of Gilmore, Employee Exhib. "H", Pp. 30-31; 34)

Based upon the above, it is apparent that no complete adverse action file was ever created by the Agency, despite the requirement that such a file must be prepared and maintained. As well, the Employee was never given a copy the D.C. Municipal Regulations, as required by 5 DCMR §1403.4(e). On May 13, 2004, the Employee attempted to administratively appeal his termination decision, initially via letter to Gilmore, and subsequently via letter to the Superintendent. Neither Gilmore, DOT, nor the Agency ever responded and scheduled a hearing in reply to Employee's request. Further, Gilmore, despite signing a termination letter which explicitly recited that Employee had due process rights to appeal his termination, either ignored the request for a hearing or devoted so little attention to the formal request, that he did not recall ever reviewing the Employee's appeal letter. (See Gilmore Deposition, at 82-83)

Given the court-issued *Petties* order, it is unclear whether the Superintendent of DCPS has any authority to review employment decisions of the Transportation Administrator. Further, Agency's Office of Human Resources is likewise uncertain of the effect of the *Petties* order on Gilmore's adverse employment actions against Agency employees and its application to existing Agency and D.C. regulations regarding those employees' due process rights.

As such, an appeal to this Office is the only readily apparent appellate avenue open to adverse employment actions taken by Gilmore. While Agency notes that the Employee

did appeal to the Superintendent, Agency omitted any reference as to what the Superintendent did in response. It is clear, however, that the Superintendent never scheduled a hearing or took any action, including advising the Employee that his appeal was untimely.

CONCLUSIONS OF LAW

Having considered the entire record created to date, I conclude that the Employee's personnel records conclusively indicate that he was a full time, career service employee who was terminated more than one year after his employment at the Agency commenced and over seven years after his employment with the D.C. government commenced on March 31, 1997. As such, he was entitled to certain procedural protections under D.C. law and applicable regulations, including a proper notice for cause, as well as appeal information, which included being provided with the relevant appeal forms that he could submit to this Office.

However, he was neither properly advised of, nor granted the procedural protections that he was entitled to, despite being generically advised in writing of his right to appeal under "DCPS, DOT rules and regulations." Further, while the Employee attempted to appeal his termination, initially to Gilmore and subsequently to the Superintendent of schools, neither of them responded to his request. I should not condone the Agency's failures committed in the process of summarily dismissing the Employee, or by granting the Agency's motion to dismiss this Petition. Accordingly, the Agency's claim that the Employee was a temporary or probationary employee should be rejected.

I further conclude that the Employee's summary dismissal was intended as a final agency decision by DOT, as both Gilmore and Pettigrew testified to such during their respective depositions. The Employee's appeal from this summary dismissal was timely, despite any assertion by the Agency that Employee failed to initially note his appeal with the Superintendent of schools, instead of filing it with Gilmore at the outset, and then shortly thereafter with the Superintendent, neither of whom had the courtesy to respond, or even acknowledge receipt of the appeal letter.

ORDER

The foregoing having been considered, it is hereby,

ORDERED, that the Agency's Motion to Dismiss the Petition for Appeal is DENIED; and, it is

FURTHER ORDERED that Agency's summary dismissal of the Employee, effective April 26, 2004, is hereby reversed, and that the Agency immediately reinstate the Employee to the position of Assistant Terminal Manager, with all back pay, benefits, and without a break in his employment service or status, and that all documents prepared incidental to his summary termination be removed from his D.C. government personnel file and destroyed; and, it is

FURTHER ORDERED, that if the position of Assistant Terminal Manager is no longer available, that the Employee be reinstated and given an equivalent position; and, it is

FURTHER ORDERED, that the Agency file with the Office within 30 days, documents to indicate a full compliance with this Initial Decision.

FOR THE OFFICE:

ROHULAMIN QUANDER, Esq.
Senior Administrative Judge

policies that address the subject of this motion and the procedures utilized at the time of Employee's initial demotion and subsequent termination.

I have determined that Agency's motion should be **DENIED**. I have likewise determined that, with the denial of Agency's motion to dismiss, the effect of which vacates the summary termination of the Employee, this decision should be issued as an *Initial Decision* in favor of the Employee.

Summary of the Parties' Respective Arguments

Agency's Arguments:

1. *The Office lacks jurisdiction over Employee's two appeals because he was in a temporary appointment status both at the time of the alleged adverse actions and when he filed the Petitions for Appeal.*

Pursuant to Chapter 14 of the Agency personnel regulations, an employee serving a temporary appointment may be terminated for any reason and has no right to notice, appeal, or other procedural protections. See 14 DCMR § 1400.2(a), and D.C. Official Code § 1-608.01(a)(6). Further, pursuant to 5 DCMR § 1307.4, the personnel regulations provide that all Agency employees serve a one year probationary period upon being initially appointed to a supervisory or management position.

The Office has long recognized that only permanent, non-probationary employees are entitled to removal for cause. See *Wyder v. D.C. Public Schools*, OEA Matter No. J-0199-95, 47 D.C. Reg. 1584 (Sept. 21, 1998). The AJ in *Wyder* also noted that, pursuant to OEA Rule 629.2, a Petitioner "has the burden of proof as to the issue of jurisdiction." The Employee in this matter was serving a temporary, term appointment at the time of his demotion on August 21, 2003, and the term of his appointment was defined so as not to extend ("NTE") beyond August 31, 2003.

2. *The Office lacks jurisdiction over this appeal regarding the alleged demotion because Employee failed to file a timely Petition for Appeal.*

Separate from the issue of Employee's alleged demotion, the Office lacks jurisdiction to entertain his appeal because he failed to comply with the statutory requirements of D.C. Official Code, § 1-606.3, and 6 DCMR § 604.2, by filing his appeal within 30 days of the effective date of the action in question. Rather, he filed his appeal of the alleged demotion almost eight months after the adverse action took place. The courts have held that an administrative Agency's jurisdiction cannot be enlarged beyond the terms of the enabling statute. See *Beeton v. D.C. Department of Corrections*, OEA Matter No. J-0198-95, 47 D.C. Reg. 9932 (2000). As with jurisdiction in general, the Employee herein also has the burden of proving that his appeal was filed timely. See OEA Rule 632.2, 6 DCMR § 629.2, and *Hayward v. Department of Human Services*, OEA Matter No. J-0195-96, 47 D.C. Reg. 8691 (2000).

3. *There has been no final Agency action, as Employee neglected to exhaust all administrative remedies, as he failed to initially note his appeal at the Agency level, by filing it with the Office of the Superintendent.*

The Office further lacks jurisdiction because the Employee cannot show that he ever sought to file a written appeal with the Agency, and there has never been a final Agency decision with respect to either of the alleged adverse actions. Further, although Employee contested his termination and filed an appeal letter with Gilmore on April 28, 2004, he also filed his Petition for Appeal with the Office on May 6, 2004, just eight days later. As such, Agency was never accorded an opportunity to provide Employee with a hearing pursuant to Agency's regulations or to provide Employee with a final decision on either of the alleged adverse actions. See *White v. District of Columbia*, 852 A.2d 922 (D.C. App. 2004), where the D.C. Court of Appeals held that neither the Superior Court nor the Office had jurisdiction over a petition for appeal where the petitioner (the employee) had failed to first pursue his grievance through Agency processes.

Employee's Arguments:

These Petitions concern the Gilmore-initiated August 21, 2003, demotion and the April 26, 2004, termination of the Employee, who was demoted over one year after he commenced work at the Agency's Division of Transportation (the "DOT"), and was terminated over twenty months after he started working at DOT.

1. *Although the Agency denies that the Employee commenced his employment on August 5, 2002, as Employee asserts, it is undisputed that he was demoted more than one year later, and was terminated after the expiration of his one year probationary period without any advance notice and without being afforded any due process.*²

Moreover, a review of the demotion letter which the Employee signed at Gilmore's express direction, does not reveal that it constituted a new appointment or contained any time limitation which would make him a temporary employee. It is also undisputed that Employee had been with the agency for over 20 months at the time of his termination.

Neither the Agency, nor its DOT adhered to any of the procedural notice requirements of the D.C. Personnel Regulations before Employee was demoted or terminated. DOT, prior to relinquishing authority in this matter, and then later the DCPS, as the Agency, after it replaced Gilmore and DOT as Respondent/Agency, promptly undertook to be the party respondent in this proceeding. Each respectively ignored Employee's written requests for a hearing and an opportunity to be heard related to his demotion and subsequent termination, the latter despite the fact that his Gilmore initial termination letter, dated April 26, 2004, expressly indicated that he had a right to appeal.

² Due process requires pre-termination proceedings of some kind prior to the discharge of employees with constitutionally protected interests in their jobs. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493 (1985). See also D.C. Official Code §1-617.

Accordingly, Employee discounts the Agency's arguments that Employee was a probationary or temporary employee at the time of his demotion and termination, and maintains that Agency's arguments are fatally flawed and should be rejected.

2. *Agency argues that Employee's appeal of his demotion³ was untimely, despite Agency's unilateral non compliance with the notice requirements.*

According to D.C. laws and regulations, when an employee is subjected to adverse employment action, which requirements mandate the service of written notice to the employee, the employee must be apprised of his or her rights to appeal the proposed action. It is not disputed that Employee was never: a) advised of what procedures he was required to follow; b) advised of any deadlines he was required to meet in order to properly appeal his demotion or his termination, or both; c) provided with advance written notice of any adverse action, including the specific reasons for the action, a notice of the right to review any material upon which the action was based; d) provided a copy of the relevant OEA appeal forms as required. (See D.C. Personnel Regulations, at §§1608, 1613; Employee's Affidavit, at 30; and Pettigrew Deposition, at 107)

3. *Although Agency asserts that no final Agency action occurred, and as such, the Employee cannot maintain either appeal, this argument ignores the deposition testimony of Gilmore, that no other remedies existed within DOT for Employee to challenge what DOT considered as final Agency action with regard to both Employee's initial demotion or his subsequent termination. (See Gilmore deposition at 30-31, 34; See also Pettigrew deposition at 107.⁴)*

Therefore, Gilmore's actions and decisions constituted final Agency action for purposes of this appeal. When Employee timely initially responded to the demotion and subsequently to the termination actions, requesting a hearing before the Agency, DOT's failure to acknowledge the Employee's written request and to schedule the hearings or to respond to Employee's written requests for hearings constituted a waiver of any right of the Agency to belatedly assert that he failed to exhaust administrative remedies, by appealing to the Superintendent of Schools. (See Employee's Affidavit, Exhibit "A", at 23, 29-33)

Agency, through its DOT office, set the tone for how these matters were to be handled. Not having handled it correctly, all to the negative benefit of the Employee, Agency should not now be allowed to place an agency-created obstacle in Employee's path, and use it to justify the denial of due process at this time, on a false claim of failure to exhaust administrative remedies.

³ Agency does not appear to argue that the appeal of his termination, filed eight days after the adverse action, is untimely.

⁴ At the time of Employee's demotion and termination, DOT was holding itself out as operating independently of DCPS, although DOT had not previously adopted its own set of personnel regulations. Only subsequent to the Employee's demotion and termination did DOT concede that in personnel matters relating to employee discipline, including demotion and termination, it must still defer to the Agency (DCPS) and its personnel regulations, which regulations provide a detailed process for contesting a personnel action.

LEGAL ANALYSIS AND FINDINGS OF FACT1. *Employee Was Not Hired On A Temporary Basis*

The crux of Agency's argument is that the Employee was hired on a temporary basis and that his *initial* appointment "conveyed no permanent tenure." The Employee does not dispute that the agreement that he initially signed contains statements to that effect. However, he disputes Agency's assertions that he was demoted prior to the expiration of the one year period after he started working at the Agency, August 5, 2002. Additionally, although the letter of employment, attached as Exhibit "B" to Agency's motion to dismiss is dated August 30, 2002, the letter does not indicate what the Employee's start date was. Nor does it address his uncontroverted assertion that he started work on August 5, 2002, well over one month prior to September 19, 2002, the date that he executed the initial employment letter.⁵ (*See* Affidavit of Employee, Exhibit "A", at 5, 9)

Agency also claims that Employee commenced another probationary and another temporary period after his demotion to Assistant Terminal Manager. A review of his demotion letter and all other documentation in the record reveals no evidence that this second position was either temporary or probationary, or both. Rather, this position was of indefinite duration and could – and did - continue beyond any applicable probationary period.⁶ While it is critical to note Agency's argument that Employee was demoted or terminated prior to the one-year anniversary of his commencing work in his second position, i.e., Assistant LSTM, Agency has not supported its assertion with any documentary evidence, only the much contested argument of Agency's counsel.

A review of Employee's CAPPs summary, a payroll and tax data statement created as a discovery document dated June 16, 2005, indicates that he was listed as a "Regular", not a "Temporary", Employee. Although the CAPPs form and the information contained therein might not always be accurate, this Office had found that the information contained therein, since it relates to both personnel and compensation matters, has a fairly high degree of accuracy and credibility, despite a statement to the contrary offered in the deposition testimony of Valerie Sheppard, Director of Staffing and Employment Services, D.C. Public Schools, who testified that the system is "flawed". (*See* Exhibit "D", at 69)

Pettigrew testified that the Form 1 is created by the personnel office and is used to finalize an employment action, and that the Employee should definitely have been given a copy of the Form 1 for both his demotion and termination. (*Id.* at 64-65) The absence of

⁵ Part of the difficulty in understanding how this case proceeded to this point is due to confusion regarding relevant dates. The Employee has listed certain key dates, while some Agency typographical errors have occasionally used the wrong dates, sometimes reciting "2003", instead of "2002", and using "2005", which clearly was not applicable, instead of "2004". Further, certain clearly relevant documents, including Form "1"s, which would bear significant dates of record, were not submitted for the record, and presumably were either lost or never created.

⁶ Even under Agency's disputed version of the facts, the Employee's probationary period ended no later than August 29, 2003, on the one-year anniversary of the formal documentation of his hiring.

relevant personnel forms to document Agency's claimed action is highly suspect, and would tend to indicate an impermissible irregularity in the required procedures for the implementation of both the demotion and the termination. Agency conveniently omits any reference to the glaring absence of D.C. Personnel Form 1's related to both Employee's demotion or termination, which documents would have clearly indicated the Employee's official start, demotion, and termination dates, his status and other critical information relevant to his claim.

However, the Employee, by affidavit, stated that he was never provided a Form 1 incidental to either his demotion or his termination. I find that there is no evidence to indicate that a Form 1 was ever created to reflect Employee's demotion, and similarly no Form 1 was ever created to reflect Employee's termination.

I further find that the Agency's adverse action records related to the Employee were very poor. Given Agency's admission regarding the disarray of certain crucial personnel records incidental to the Employee's employment status, I will not rely upon excerpts from other documents in lieu of the incomplete personnel record, find facts that are crucial to the Employee's career, and then draw conclusions which would result in the Employee being denied due process. It is better to err on the side of caution in these circumstances and direct that Agency provide Employee with the proper notice, including the opportunity to eventually have an evidentiary hearing at this Office, if necessary, at which time a decision based upon the merits can be reached.

Otherwise, the effect of the Agency's motion, if granted, would be in direct conflict with the affidavits of the Employee and others, plus the sworn deposition testimony of Gilmore and Pettigrew, and Valerie Sheppard, the latter being Agency's representative with the most knowledge regarding Employee's personnel records, who agreed that the Agency's records are "flawed", even as she tried to distance herself and her Agency from the disarray that affects certain CAPPs records. (*See* Sheppard deposition, at 68-69)

Of additional significance is the affidavit of Elliott Jones ("Jones"), former Deputy General Manager, DOT, which directly contradicts Agency's claims in significant respects. First, Jones indicates that Employee was supposed to be hired on a full-time, career employment basis. Second, he also believed that had the Employee been offered the position on a temporary basis, he would have declined. Third, there were many instances in which the Agency improperly processed a new employee's employment paperwork, resulting in that individual reporting to work duty prior to the proper completion of personnel documents. (*See* Affidavit of Elliott Jones, Exhibit "I", at Items 5, 6, & 7. *See also* Employee's Affidavit, Exhibit "A", at items 10 and 11, essentially stating the identical position)

I find that Agency's argument that Employee was a probationary or temporary employee at the time of his termination must fail. Agency has admitted that Employee had been employed at the Agency for more than one year at the time of his termination, and that Gilmore's demotion letter neglected to assert or mention that Employee was a

temporary employee or that his new position was limited to a specific term of employment.⁷

Further, pursuant to § 815.4 of the D.C. Personnel Regulations D.C. regulations, Employee must be credited with the time previously employed at the Agency in each position towards satisfaction of his probationary period. It appears that the objective of the regulation is to protect governmental employees who, but for the existence of the regulation, could lawfully remain in a “permanent” or “indefinite” probationary period, as long as their positions were changed on less than an annual basis.

Whether Employee signed his demotion letter under duress is not certain or dispositive of this matter, although he asserts the same in his Affidavit. (See Exhibit “A”, items 20 & 21) However, it is undisputed that he neither discussed nor agreed with Gilmore that he was accepting his new position as Assistant Terminal Manager on a temporary basis or for a specific term. Indeed, Gilmore’s deposition testimony reflects that he did not believe that a DOT employee’s probationary period started anew based upon a reassignment. (See Gilmore Deposition, at 43, 92) Accordingly, Agency’s argument that Employee was but a temporary or probationary employee at the time of his termination is not credible.

Section 5 DCMR, Chapter 14 states the rules and procedures applicable to adverse actions, including dismissals and demotions for cause. See §1400.1. §1400.3 provides that the provisions of §§1400 and 1401 are applicable to all employees of the Board of Education of the District of Columbia. It is not disputed that Employee was an employee of the Board of Education. Although Agency argues that Employee was a temporary employee, the exclusionary section of §1400.2 does not apply to him because I have found that he was neither a temporary employee, nor was he terminated upon the expiration of any term of employment.

That section provides that §§1401 through 1409 are not applicable to the “termination of a temporary appointment *upon the expiration of the stated term of appointment.*” Agency does not and cannot contend that Employee was terminated based upon the alleged expiration of what Agency claims to be his temporary appointment. Accordingly, I find that Employee is entitled to appeal his termination in accordance with 5 DCMR, Chapter 14. It is likewise clear, in light of my finding, that Agency failed to follow the notice requirements set forth in §1403, prior to demoting, and terminating the Employee.

⁷ Agency also inconsistently argues that Mr. Richards was also a “term employee”. See Agency motion, at 4. See also Agency Responses to Request for Admission No. 42 and 43 (“Alfred Richards was either a probationary, NTE term or a temporary employee at the time of his termination.”). Employee was not a term employee, but even assuming *arguendo* that he was, given that he was an employed for more than one year, the requisite probationary period, Agency was required to follow the requirements of Section 826.3 of the D.C. Personnel Regulations, which requires that “separation of a term appointee for cause shall be in accordance with Chapter 16 of these regulations.”

2. *Employee had completed probationary period at the time of his termination*

Agency admits that Employee's employment commenced during August or September, 2002, and ended, almost twenty months later, on April 26, 2004. (See Agency's Amended Responses to Request for Admissions, No. 42) A review of the applicable regulations supports the Employee's claim that he was no longer a probationary employee at the time of his termination. §815.4 of the D.C. Personnel Regulations provides that:

An employee who is promoted, reassigned, demoted or transferred to another supervisory or managerial position while serving a probationary period under this section shall have the service completed in the former position credited toward completion of the probationary period in the new position.

As well, §813.3 further provides, in pertinent part, that:

An employee who once satisfactorily completes a probationary period in the Career Service shall not be required to serve another probationary period.

As well and in confirmation of the above two sections of the regulations, Gilmore testified during his deposition that he did not believe that a DOT employee's probationary time period starts anew based upon a reassignment. (See Gilmore Transcript, at 92, Employee's Exhibit "F")

Employee's Petition For Appeal Was Timely Filed and Gilmore's Decision to Terminate Him Constituted Final Agency Action

Agency argues that this Office lacks jurisdiction over the Employee's Petition because it was not timely filed, and also because he cannot show a final Agency decision. Agency's effort to derail Employee's appeal ignores the uncontroverted testimony of Gilmore which irrefutably establishes that the decision to terminate the Employee constituted the Agency's final decision. Yet, Agency assumes an inconsistent legal position by asking me to also ignore the fact that Gilmore's and/or DOT's actions also constituted a failure to follow the applicable laws and regulations of the District of Columbia. Those laws and regulations compel Agency to follow certain notification and documentation procedures applicable to terminated employees. Operating in this context, Agency's unclean hands preclude it from benefiting from asserting that final Agency action occurred, from which Employee neglected to note a timely appeal, when the established record demonstrates that Agency neglected to give proper notification to this Employee.

3. *Employee's' petition was not untimely*

Although Agency argues that the demotion-related Petition was not filed with the Office within 30 days of the challenged adverse action (the demotion of August 2003), and therefore should be dismissed, Agency neglected to mention that the Employee should have been given no less than 10 days advance notice of the proposed decision to terminate him, and what procedures he needed to follow if he wanted to contest the proposed demotion and the time limits within which to note an appeal. (See Employee's Affidavit, Exhibit

“A”. at 20-25) It is an elementary principle of administrative law that, in order to start the running of time for appeal, an agency is obliged to give notice which was reasonably calculated to apprise a petitioner of the adverse action decision and an opportunity to contest that decision through an administrative appeal. See *Ploufe v. D.C. Dept. of Employment Services*, 497 A.2d 464, 465 (D.C. 1985); *Selk v. D.C. Dept. of Employment Services*, 497 A.2d 1056, 1058 (D.C. 1985).

As in *Ploufe* and *Selk*, the notice to the Employee was ambiguous and insufficient as to render it inadequate as a matter of law. As well, the demotion letter did not apprise the Employee of the specific grounds for his demotion, nor provide him with notice of the procedures to follow in order to appeal. Accordingly, I find that Agency’s or DOT’s notice to the Employee was inadequate as a matter of law.

4. *Gilmore’s Decision to Terminate the Employee Constituted Final Agency Action*

Gilmore, as the court appointed administrator of DOT, was granted authority over his personnel by Judge Friedman in *Petties v. District of Columbia*, No. 95-0148 (D.D.C.). He testified during his deposition that his decision to terminate an employee of DOT was final for purposes of DOT, as he was the “ultimate authority” with respect to those employees. (See Gilmore Deposition Transcript, at 30-31, 34, Exhibit “F”; See also Pettigrew deposition, Exhibit “C”, at 107) Further, Pettigrew asserted, and Agency has likewise agreed, that despite Gilmore’s authority, both DOT and Gilmore were still required to comply with the CMPA when making personnel decisions. (See Pettigrew Deposition, at 33-34)

However, this is a position regarding personnel matters that Gilmore did not initially subscribe to.⁸ Gilmore and DOT withdrew their assertions of complete independence and autonomy with regard to that issue only after the D.C. Government filed a Motion to Intervene on June 21, 2005, seeking to join the D.C. government and the D.C. Public Schools (the “Agency”) as party respondents, replacing Gilmore and DOT as a stand alone party respondents, thereby challenging and discounting the assertion that neither he nor DOT was limited by the CMPA with regard to the procedural due process rights of affected employees.

As such, and in the exercise of what Gilmore considered to be his personal prerogative, Employee was never given advance notice of adverse action, as required by 5 DCMR §1403; never properly apprised of his appeal rights; never alerted to the specific grounds for his termination; never advised what procedures he needed to follow in order to pursue an appeal; and not provided with access to his adverse action file. Based upon the

⁸ Gilmore further testified that Agency ceded and the *Petties* Order granted those powers to him. *Id.*, at 33-34. He believes that “all employees serve at [his] pleasure in the Department of Transportation.” (*Id.* at 89), but agreed that the April 26, 2004, termination letter did not reasonably inform the Employee of the specific grounds and reasons for his termination. *Id.*, at 70-71; 118-119. Gilmore’s testimony also makes clear that Employee’s termination was effective immediately and that he was not given a copy of Title V, Chapter 14 of the DCMR *Id.*, at 73. Pettigrew testified that DOT had not promulgated its own personnel regulations at the time of Employee’s termination. (See Pettigrew Deposition, at 32)

record before me, I find that apparently no complete adverse action file was ever created by Agency, despite the clear requirement that such a file must be created. Further, I find that the Employee was never given a copy of the relevant D.C. Municipal Regulations, as required by 5 D.C.M.R. §1403.4(e). (*See* Employee's Affidavit, at 30-32)

Despite the lack of being provided adequate notice, on April 28, 2004, Employee still attempted to administratively appeal his termination decision via letter to Gilmore, a copy of which was attached to this case file as Employee's Exhibit "H". Neither Agency, DOT, nor Gilmore responded to the letter or scheduled a hearing, despite Gilmore's termination letter explicitly reciting that the Employee had a right to appeal his termination. Operating in this atmosphere, it is difficult to see how Agency can argue that the Employee failed to exhaust administrative remedies at the Agency level before noting an appeal with the Office. The failure to provide adequate notice and any applicable time requirements constitutes "special circumstances", warranting the application of an exception to the doctrine of exhaustion of administrative remedies. *See Barnett v. District of Columbia Dep't of Employment Servs.*, 491 A.2d 1156, 1161 (D.C.1985).

CONCLUSIONS OF LAW

Based upon the evaluation of the record as a whole, I conclude that the Employee was employed at the Agency for more than one year, and as such, was entitled to certain procedural protections under D.C. law and applicable regulations. However, he was neither advised of, nor granted the mandated specific procedural protections to which he was entitled, despite being generically advised in writing of his right to appeal under "Agency, DOT rules and regulations." Further, it is clear that although the Employee attempted to appeal both his initial demotion and subsequent termination, neither Gilmore nor anyone else responded, and he was not provided with an opportunity to be heard.

I conclude, therefore, that the procedure by which Agency purported to demote and later to terminate Employee was fatally flawed, due to the lack of notice to the Employee, no opportunity for the Employee to be heard before he was demoted and then terminated, and the ultimate failure on the part of the Agency to prepare the mandatory documentation to support Agency's claim that this Employee was initially demoted, and then subsequently terminated.

I conclude that Agency's argument that Employee was temporarily appointed to an Assistant Terminal Manager position within one year of his termination, and was terminated during his probationary period, to not be supported by the governing regulations and documentation.

I conclude that Gilmore's respective letters of demotion and termination each constituted final agency action, as Agency did not intend to issue any other employment-related documents to the Employee. This Office will not condone Agency's failure to adhere to the legal requirements by dismissing this Petition, and will not endorse Agency's failure to comply with its own regulations and permit it to escape liability based upon its own unclean hands and failure to adhere to D.C. law and regulations.

ORDER

The foregoing having been considered, it is hereby,

ORDERED, that the Agency's Motion to Dismiss the Petition for Appeal is DENIED; and, it is

FURTHER ORDERED that Agency's summary dismissal of the Employee, effective April 26, 2004, is hereby reversed, and that the Agency immediately reinstate the Employee to the position of Logistics Specialist Terminal Manager, with all back pay, benefits, and without a break in his employment service or status, and that all documents prepared incidental to his summary termination be removed from his D.C. government personnel file and destroyed; and, it is

FURTHER ORDERED, that if the position of Logistics Specialist Terminal Manager is no longer available, that the Employee be reinstated and given an equivalent position; and, it is

FURTHER ORDERED, that the Agency file with the Office within 30 days, documents to indicate a full compliance with this Initial Decision.
FOR THE OFFICE.

ROHULAMIN QUANDER, Esq.
Senior Administrative Judge

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
RHONDA R. CRITTENDON-ALLEN	)	OEA Matter No. 1601-0091-06
Employee)	
	)	Date of Issuance: November 29, 2006
v.)	
)	
D.C. PUBLIC SCHOOLS	)	Rohulamin Quander, Esq.
Agency	)	Senior Administrative Judge

Rhonda R. Crittendon-Allen, *pro se*, Employee
Michael D. Levy, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Employee filed a petition for appeal with the Office of Employee Appeals (the "Agency") on July 12, 2006, appealing Agency's final decision, dated June 21, 2006, to terminate her employment effective June 30, 2006. Although the termination letter indicated that June 30th was the effective date of Agency's action, the letter also advised Employee that she would receive a summer pay credit. Therefore, a question arises of whether Employee's actual termination date was extended to the day on which the summer payment credit ended, as Agency had the option of reversing the termination notice, returning Employee to work, without a break in service, pay, or benefits.¹

This matter was assigned to me on September 11, 2006. I convened a prehearing conference on October 24, 2006. Prior to the prehearing conference, both Agency and Employee submitted prehearing statements to supplement the record. Employee is *pro se*. Based upon an evaluation of the record, I have determined that an evidentiary hearing was not needed, and relied upon the documents submitted. The record closed on October 24, 2006.

¹ Because of the ultimate ruling in this case, the issue of whether a letter dated June 21, 2006, effective June 30, 2006, constitutes sufficient legal notice is not being addressed here. I take administrative notice, however, that Agency has served this type notice upon other teachers, but then reinstated them to teaching positions without a break in service, or loss of pay and benefits during the pendency of the summer pay credit, the effect of which cancelled the letter of termination.

1601-0091-06

Page 2

JURISDICTION

This Office's jurisdiction was not established.

ISSUE

Should this matter be dismissed?

ANALYSIS AND CONCLUSIONS

On February 16, 2001, Employee was issued a three-year provisional license as a special education teacher at the elementary level. The license expired on February 15, 2004. In the Fall 2005, Agency issued a letter to Employee reminding her that her continued employment was contingent upon her completing and maintaining teacher certification requirements, which also included becoming licensed. Subsequently, on May 2, 2006, Agency issued another letter to Employee, directing her to submit by May 15, 2006, documents to verify her status towards becoming certified. Although she submitted a plethora of documents, none of them was indicative of her having become either certified or of having secured the mandatory teaching license.

The documents verified, however, that she was continuing to make substantial progress towards completing the certification requirements, including nearing completion of the Agency-sponsored TOPS ("Transitioning Our Provisional Stars") program at the American University. Upon successful completion of this program in May 2006, Employee was awarded a master's degree in elementary education, which Employee referred to as "a master of arts in teaching." The awarding of the degree significantly increased the percentage of educational requirements completed as condition precedent to obtaining the credentials. According to Michael D. Levy, Agency's representative, the completion of the coursework and the earning of the degree, without having also passed all of the mandatory examinations by the designated May 15, 2006, compliance date, increased her percentage towards completion, but did not meet the compliance standard. Agency maintained that had Employee also passed both the Praxis I and II examinations by that date, she would have been awarded the credential and been issued the license.

Agency concluded its argument by underscoring that despite Employee's efforts to come into compliance, the fact still remains that the provisional license was expired, and Employee did not obtain the full license by the May 15, 2006. Not having done so, Agency has full discretion, on a case by case evaluation, to determine whether to extend the time within which the affected Employee must complete all prelicensing requirements. Unlike in many of the other Agency case files that have been evaluated by me, Agency's submission did not include a Transcript Evaluation Statement form, quantifying Agency's staff's assessment of the percentage of Employee's completion of the pre-certification and pre-licensure requirements. Therefore, I cannot make a finding whether Employee completed a specific percentage of the requirements by the date of her separation from Agency employment, as well as make a determination whether Employee was likely to be certified and licensed by June 30, 2007. However, Agency clearly determined that Employee had not submitted the

1601-0091-06

Page 3

required documents by the mandatory date of May 15, 2006. Consistent with well established educational licensure law, Agency asserted that, as of the above-noted date, all unlicensed teaching employees were converted to an "at will" status, once their provisional licenses expired.

Agency noted that it is well established that substantial compliance with the requirements for obtaining or renewing teacher certification does not satisfy the certification requirements and does not protect termination of employment. See *Mount Adams School District v. Cook, et al*, 54 P.3d 1213 (Was. 2002), Further, the Supreme Court has held that, "a mere subjective 'expectancy' is not liberty or property protected by the Due Process Clause.", *Id*, citing *Perry v. Sinderman*, 408 U.S. 593 (1972). Viewed in this light, Agency argued that Employee still could not prove that she had a claim that entitled her to the relief sought.

Conversely, Employee asserted arguments which dissented from Agency's position. First, she argued that Agency has totally ignored her good faith efforts to come into compliance, which efforts were mitigating factors to her benefit. Included in that effort was enrolling in the Agency-sponsored TOPS program and obtaining a masters degree in elementary education as a component of that program. Second, she argued that, according to certain statistical records, Agency spent several thousand dollars² on each TOPS candidate, and it was a tremendous waste of both monetary and professional resources to invest that kind of money in upgrading the academic credentials of Agency's teaching staff, only to terminate them, thereby blocking the opportunity for Employee and the other similarly situated teachers from providing the benefits of their increased educational knowledge, techniques, and credentials to the children of the D.C. public schools. As of July 21, 2006, she passed portions of the Praxis I examination (passed reading and writing, but not the math), and then on August 5, 2006, she passed the Praxis II examination. Agency countered both statements, by noting that neither component of the examination had been completed by the May 15, 2006, established compliance date.

As the deciding AJ, I have determined that the threshold issue in this case is one of jurisdiction. This Office's jurisdiction is conferred upon it by law, and was initially created by the District of Columbia Comprehensive Merit Personnel Act of 1978 (the "Act"), *D.C. Official Code* (the "Code") § 1-601-01, *et seq.* (2001) and then amended by the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which became effective on October 21, 1998. Both the Act and OPRAA confer jurisdiction on the 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. The Code § 1-608.01(a)2)(E) confers permanent Educational Service status upon employees who have been appointed to a position, upon completion of a probationary period of at least one year. It is undisputed that Employee was not in a probationary status. However, there is no evidence in the record that Employee became a permanent employee of

² Other expired provisional licensees have proffered to me that Agency spent an average of \$40,000.00 per TOPS candidate, and decried what they considered to be a great waste of academic resources, when Agency elected to dismiss these candidates, after giving them assurances that they would not be terminated, due to their recognized progress towards attaining full credentials and licensure.

1601-0091-06

Page 4

Agency at the expiration of the probationary period. She was unable to achieve permanent status because she lacked the requisite license. *See* 5 DCMR § 1601.1.

But one thing is certain. Employee did not fully complete the certification requirements and obtain her license by June 30, 2006, and once her provisional license expired, she served solely in an “at will” capacity, subject to Agency’s determinations with regard to whether she qualified for 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). As an “at will” employee, Employee did “not have any job tenure or protection.” *See* Code § 1-609.05 (2001). Further, as an “at will” employee, Employee had no appeal rights with this Office. *Davis v. Lambert*, MPA No. 17-89, 119 DWLR 204 (February 13, 1991).

Employees have the burden of proof on issues of jurisdiction, pursuant to OEA Rule 629.2, 46 D.C. Reg. 9317 (1999). Employee must meet this burden by a “preponderance of the evidence” which is defined in OEA Rule 629.1, *id.*, 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”. I conclude that Employee did not meet the burden of proof, and that this matter must be dismissed for lack of jurisdiction.

However, assuming *arguendo* that Employee had met the burden of proof on the issue of jurisdiction, the claim would still fail because she lacked the credentials required to challenge the standards set by Agency. In *Nunez v. Simms*, 341 F.3d 385 (5th Cir, 2003), Nunez was hired by the El Paso, Texas Independent School District in 1996 and issued a three-year probationary license because, like Employee, she did not qualify for a standard teaching certificate at the time of hire. She was terminated in November 2000 for failing to meet the requirements and sued the school district.³ The Court concluded that Nunez was not qualified to serve as a teacher following the expiration of her provisional license because she lacked the credentials and had no reasonable expectation of or property interest in continued employment.

Further, in a recent decision from this Office, I concluded that by failing to obtain the qualifying performance standards and obtain a teaching license, an employee, terminated under circumstances not too dissimilar to Employee in this case, failed to meet the enumerated performance standards and “[s]uch deficiency is, without a doubt, a condition affecting the performance standards, which is itself a basis for removing an employee”. *Carson v. District of Columbia Public Schools*, OEA Matter No. 1601-0032-06 (June 13, 2006), ___ D.C. Reg. __ (). *See also, Sandra Weekes v. District of Columbia Public Schools*, OEA Matter No. 1601-0022-06 (July 14, 2006), ___ D.C. Reg. __ (). Thus, this analysis provides an alternative basis for sustaining Agency’s action.

³ Unlike the instant case, in *Nunez*, the teacher initiated her lawsuit while she was teaching under a “continuing contract” authorized by Section 21.153 of the Texas Education Code. The District of Columbia has no similar provision. Employee’s last contractual relationship with Agency ended with the expiration of her contract.

1601-0091-06

Page 5

Although Agency provided 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 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). This Office simply has no authority to review matters that are beyond its jurisdiction. *Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (July 7, 1995), __ D.C. Reg. __ (). Unless an employee has permanent status in the Career or Educational Service or is appointed under special authority in the Excepted 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.

Employee argues that Agency's action in terminating her was "unjust". However, as the Court stated in *Nunez*, she "knew at the time she entered into the contract, or should have known from the language in the contract and the provisions of . . . law, that the contract gave her no right to continued employment while she remained uncertified when her certificate expired by its own terms. Accordingly, she could have no reasonable expectation of continued employment". *Nunez* at 391. While it can be argued that Agency should have communicated with Employee more regularly regarding her lack of credentials, it did remind her of this deficiency. Agency's use of its resources is questionable and perhaps even uneconomical. Much effort was expended to assure that the TOPS enrollees were fully certified and licensed by a certain date, which included joint employees-Agency efforts to assure that the enrolled employees completed their master's degrees on time, and then promptly took the qualifying examinations.

It is regrettable that Agency elected to not grant this Employee, and others similarly situated, a further extension of time, until June 30, 2007, to finalize their earning their credentials and licenses. However, Agency's decision is beyond my jurisdiction to set aside, based upon Agency's decision regarding how it will address the continued non licensure status of its "at will" employees who were nearing, but still had not completed of all of the certification requirements. Hopefully, Employee will soon obtain all of the necessary credentials and a license, so that she can resume the important mission of educating the youth of the District of Columbia.

ORDER

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

FOR THE OFFICE:

ROHULAMIN QUANDER, Esq.
Senior Administrative Judge

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
DARLENE P. DEGRAFFINREIDTE	)	OEA Matter No. 1601-0089-06
Employee)	
	)	Date of Issuance: November 1, 2006
v.)	
)	
D.C. PUBLIC SCHOOLS	)	Rohulamin Quander, Esq.
Agency	)	Senior Administrative Judge

Darlene P. DeGraffinreidte, *pro se*, Employee
 Michael D. Levy, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Employee filed a petition for appeal with the Office of Employee Appeals (the “Agency”) on July 11, 2006, appealing Agency’s final decision, dated June 21, 2006, to terminate her employment effective June 30, 2006. Although the termination letter indicated that June 30th was the effective date of Agency’s action, the letter also advised Employee that she would receive a summer pay credit. Therefore, a question arises of whether Employee’s actual termination date was extended to the day on which the summer payment credit ended, as Agency had the option of reversing the termination notice, returning Employee to work, without a break in service, pay, or benefits.¹

This matter was assigned to me on September 11, 2006. I convened a prehearing conference on October 24, 2006. Prior to the prehearing conference, Agency submitted a prehearing statement to supplement the record. Employee, who is *pro se*, did not submit a prehearing statement, but relied upon the documents of record that she had previously filed. I have determined that an evidentiary hearing was not needed and rely upon the documents submitted. The record closed on October 24, 2006.

¹ Because of the ultimate ruling in this case, the issue of whether a letter dated June 21, 2006, effective June 30, 2006, constitutes sufficient legal notice is not being addressed here. I take administrative notice, however, that Agency has served this type notice upon other teachers, but then reinstated them to teaching positions without a break in service, or loss of pay and benefits during the pendency of the summer pay credit, the effect of which cancelled the letter of termination.

1601-0089-06

Page 2

JURISDICTION

This Office's jurisdiction was not established.

ISSUE

Should this matter be dismissed?

ANALYSIS AND CONCLUSIONS

Employee began teaching at one of Agency's public schools, pursuant to a three year provisional license issued on August 26, 2002. The license expired on August 26, 2005. In the Fall 2005, Agency issued a letter to Employee reminding her that her continued employment was contingent upon her completing and maintaining teacher certification requirements, which also included becoming licensed. Subsequently, Agency issued another letter to Employee, directing her to submit by May 15, 2006, documents to verify her status towards becoming certified. Although she submitted a plethora of documents, none of them was indicative of her having become either certified or of securing the mandatory teaching license.

The documents did verify, however, that she was continuing to make substantial progress towards completing the certification requirements, including nearing completion of the Agency-sponsored TOPS ("Transitioning Our Provisional Stars") program at the American University. Upon successful completion of this program in May 2006, Employee was awarded a master's degree in elementary education. The awarding of the degree significantly increased the percentage of educational requirements completed as condition precedent to obtaining the credentials but, according to Agency, the completion of the coursework and the earning of the degree, without having also passed the mandatory examinations by the May 15, 2006, compliance date, only lifted her percentage of completion from 40% to 62%. Agency maintained that had Employee also passed both the Praxis I and II examinations by that date, she would have been awarded the credential and been issued the license.

Agency concluded its argument by underscoring that despite Employee's efforts to come into compliance, the fact still remains that the provisional license was expired, and Employee did not obtain the full license by the May 15, 2006, compliance date. Not having done so, Agency has full discretion, on a case by case evaluation, to determine whether to extend the time within which the affected Employee must complete all prelicensing requirements. Having determined that Employee had only a 62% completion, including consideration of her course work and master's degree, Agency determined that Employee did not meet the threshold of a 75% completion, which rate was selected as the measure used for determining whether an Employee was likely to be certified and licensed by June 30, 2007. Agency then elected to terminate Employee. Consistent with well established educational licensure law, Agency asserted that all unlicensed employees are converted to an "at will" status, once the provisional license expires.

1601-0089-06

Page 3

Agency noted that it is well established that substantial compliance with the requirements for obtaining or renewing teacher certification does not satisfy the certification requirements and does not protect termination of employment. See *Mount Adams School District v. Cook, et al*, 54 P.3d 1213 (Was. 2002), Further, the Supreme Court has held that, “a mere subjective ‘expectancy’ is not liberty or property protected by the Due Process Clause.”, *Id*, citing *Perry v. Sinderman*, 408 U.S. 593 (1972). Viewed in this light, Agency argued that Employee still could not prove that she had a claim that entitled her to the relief sought.

Conversely, Employee asserted several arguments which dissented from Agency’s position. First, she argued that Agency has totally ignored her good faith efforts to come into compliance, which efforts were mitigating factors to her benefit. Included in that effort was enrolling in the Agency-sponsored TOPS program and obtaining a masters degree in elementary education as a component of that program. Second, she argued that, according to certain statistical records, Agency spent an average of about \$40,000 on each TOPS candidate, and it was a tremendous waste of both monetary and professional resources to invest that kind of money in upgrading the academic credentials of Agency’s staff, only to terminate them, thereby blocking the opportunity for Employee and the other similarly situated teachers from providing the benefits of their increased educational knowledge, techniques, and credentials to the children of the D.C. public schools.

Third, she has subsequently taken and passed the Praxis II examination, and would have also scheduled and taken the Praxis I examination, had she realized that the November 14, 2005, statement made to her in an e mail note from Erika Wesley, Agency’s Licensure Administrator, that, “Valerie Sheppard² ... confirmed that TOPS participants will not be placed on the termination list as long as they are in good standing with the TOPS program”, did not have the full effect of being a formal policy decision.

As the deciding AJ, I have determined that the threshold issue in this case is one of jurisdiction. This Office’s jurisdiction is conferred upon it by law, and was initially created by the District of Columbia Comprehensive Merit Personnel Act of 1978 (the “Act”), *D.C. Official Code* (the “Code”) § 1-601-01, *et seq.* (2001) and then amended by the Omnibus Personnel Reform Amendment Act of 1998 (“OPRAA”), D.C. Law 12-124, which became effective on October 21, 1998. Both the Act and OPRAA confer jurisdiction on the 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. The Code § 1-608.01(a)2)(E) confers permanent Educational Service status upon employees who have been appointed to a position, upon completion of a probationary period of at least one year. It is undisputed that Employee was not in a probationary status. However, there is no evidence in the record that Employee became a permanent employee of Agency at the expiration of the probationary period. She was unable to achieve permanent status because she lacked the requisite license. *See* 5 DCMR § 1601.1.

But one thing is certain. Employee did not fully complete the certification requirements and obtain her license by June 30, 2006, and once her provisional license expired, she served solely in an

² Ms. Sheppard is the Director of Agency’s Office of Staffing and Employment Services.

1601-0089-06

Page 4

“at will” capacity, subject to Agency’s determinations with regard to whether she qualified for 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). As an “at will” employee, Employee did “not have any job tenure or protection.” See Code § 1-609.05 (2001). Further, as an “at will” employee, Employee had no appeal rights with this Office. *Davis v. Lambert*, MPA No. 17-89, 119 DWLR 204 (February 13, 1991).

Employees have the burden of proof on issues of jurisdiction, pursuant to OEA Rule 629.2, 46 D.C. Reg. 9317 (1999). Employee must meet this burden by a “preponderance of the evidence” which is defined in OEA Rule 629.1, *id.*, 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”. I conclude that Employee did not meet the burden of proof, and that this matter must be dismissed for lack of jurisdiction.

However, assuming *arguendo* that Employee had met the burden of proof on the issue of jurisdiction, the claim would still fail because she lacked the credentials required to challenge the standards set by Agency. In *Nunez v. Simms*, 341 F.3d 385 (5th Cir, 2003), Nunez was hired by the El Paso, Texas Independent School District in 1996 and issued a three-year probationary license because, like Employee, she did not qualify for a standard teaching certificate at the time of hire. She was terminated in November 2000 for failing to meet the requirements and sued the school district.³ The Court concluded that Nunez was not qualified to serve as a teacher following the expiration of her provisional license because she lacked the credentials and had no reasonable expectation of or property interest in continued employment.

Further, in a recent decision from this Office, I concluded that by failing to obtain the qualifying performance standards and obtain a teaching license, an employee, terminated under circumstances not too dissimilar to Employee in this case, failed to meet the enumerated performance standards and “[s]uch deficiency is, without a doubt, a condition affecting the performance standards, which is itself a basis for removing an employee”. *Carson v. District of Columbia Public Schools*, OEA Matter No. 1601-0032-06 (June 13, 2006), ___ D.C. Reg. __ (). See also, *Sandra Weekes v. District of Columbia Public Schools*, OEA Matter No. 1601-0022-06 (July 14, 2006), ___ D.C. Reg. __ (). Thus, this analysis provides an alternative basis for sustaining Agency’s action.

Although Agency provided 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 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*

³ Unlike the instant case, in *Nunez*, the teacher initiated her lawsuit while she was teaching under a “continuing contract” authorized by Section 21.153 of the Texas Education Code. The District of Columbia has no similar provision. Employee’s last contractual relationship with Agency ended with the expiration of his contract.

1601-0089-06

Page 5

Veterans Affairs, 49 M.S.P.R. 682 (1991). This Office simply has no authority to review matters that are beyond its jurisdiction. *Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (July 7, 1995), __ D.C. Reg. __ (). Unless an employee has permanent status in the Career or Educational Service or is appointed under special authority in the Excepted 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.

Employee argues that Agency's action in terminating her was "unjust". However, as the Court stated in *Nunez*, she "knew at the time she entered into the contract, or should have known from the language in the contract and the provisions of . . . law, that the contract gave her no right to continued employment while she remained uncertified when her certificate expired by its own terms. Accordingly, she could have no reasonable expectation of continued employment". *Nunez* at 391. While it can be argued that Agency should have communicated with Employee more regularly regarding her lack of credentials, it did remind her of this deficiency. Agency's use of its resources is questionable and perhaps even uneconomical. Much effort was expended to assure that the TOPS enrollees were fully certified and licensed by a certain date, which included joint employees-Agency efforts to assure that the enrolled employees completed their master's degrees on time, and then promptly took the qualifying examinations.

It is regrettable that Agency elected to not grant this Employee, and others similarly situated, a further extension of time, until June 30, 2007, to finalize their earning their credentials and licenses. However, Agency's decision is beyond my jurisdiction to set aside, based upon Agency's decision regarding how it will address the continued non licensure status of its "at will" employees who were nearing, but still had not completed of all of the certification requirements. Hopefully, Employee will soon obtain all of the necessary credentials and a license, so that she can resume the important mission of educating the youth of the District of Columbia.

ORDER

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

FOR THE OFFICE:

ROHULAMIN QUANDER, Esq.
Senior Administrative Judge

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
JOSIAH AKINNUSO	)	OEA Matter No. J-0139-06
Employee)	
	)	Date of Issuance: October 11, 2006
v.)	
	)	Rohulamin Quander, Esq.
	)	Senior Administrative Judge
D.C. DEPARTMENT OF HEALTH)	
Agency)	

Josiah Akinnuso, *Pro se*
Frank McDougald, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

On August 16, 2006, Employee who is currently employed by the D.C. Department of Health, Addiction Prevention and Recovery Administration, (the "Agency"), filed at Petition for Appeal with the D.C. Office of Employee Appeals (the "Office"). In his petition he alleges that he was illegally demoted from his former position as Reimbursement Specialist, DS-13, Step 2, located at D.C. General Hospital, now closed, and reassigned to the position of Compliance Specialist (Fiscal), DS-12, located at 1300 First Street, N.E., Washington, D.C., the site of Agency's current operation. According to the Position Vacancy Announcement, the position to which Employee was assigned was listed as Position Grade 11/12/13.

Employee complained that at the time of reassignment, he was never advised that his grade was being adjusted downward to DS-12, and only learned of such realignment during the job orientation that was conducted on September 22, 2002. He immediately protested to the personnel authorities about the improper demotion in position, and an investigation was conducted. However, to date he has received no satisfaction or been able to get his grade and salary levels restored. In addition, Employee asserts that he has been and continues to be the victim of discrimination based upon his national origin, citing three instances in which Agency's employees, including himself, who are natural born Africans, have been discriminated against at the hands of African Americans in terms of hiring, promotions, and performance evaluations.

This matter was assigned to me on August 31, 2006. Since a decision could be rendered based on the documents contained in the case file, no proceedings were held. The record is now closed.

007860

JURISDICTION

The Office lacks jurisdiction over this appeal.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

ANALYSIS AND CONCLUSIONS

This Office was established by the D.C. Comprehensive Merit Personnel Act (CMPA), *D.C. Official Code* § 1-601.01 *et seq.* (2001) (the “Code”) and has only that jurisdiction conferred upon it by law. The types of actions that employees of the District of Columbia government may appeal to this Office are stated in *Code* § 1-606.03. Employee’s appeal is the proper subject of a grievance. As will now be discussed, this Office lacks jurisdiction over grievance appeals, including this appeal.

Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (“OPRAA”), D.C. Law 12-124, amended certain sections of the CMPA. Of specific relevance to this Office, § 101(d) of OPRAA amended § 1-606 of the *Code* in pertinent part as follows:

(1) *D.C. Code* § 1-606.3(a) is amended as follows:

(a) An employee may appeal 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. . . .

Thus, *Code* § 101(d) restricted this Office’s jurisdiction to appeals from the following personnel actions only:

- a performance rating that results in removal;
- a final agency decision effecting an adverse action for cause that results in removal, reduction in grade, or suspension of 10 days or more; or
- a reduction in force.

Therefore, as of October 21, 1998, this Office no longer has jurisdiction over appeals from grievances.

The plain language of OPRAA compels the dismissal of this appeal for lack of jurisdiction. “The starting point in every case involving construction of a statute is the language

itself.” *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 753, 756 (1975). “A statute that is clear and unambiguous on its face is not open to construction or interpretation other than through its express language.” *Banks v. D.C. Public Schools*; OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992), __ D.C. Reg. __ (); *Caminetti v. United States*, 242 U.S. 470 (1916); *McLord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980).

Here, as of October 21, 1998, § 101(d) of OPRAA “clearly and unambiguously” removed grievance appeals from the jurisdiction of this Office. Further, since the passage of OPRAA, this Office has consistently held that appeals involving grievances are not within our jurisdiction. See, e.g., *Brown, et al. v. Metropolitan Police Department*, OEA Matter Nos. J-0030-99 *et seq.* (February 12, 1999), __ D.C. Reg. __ (); *Phillips-Gilbert v. Department of Human Services*, OEA Matter No. J-0074-99 (May 24, 1999), __ D.C. Reg. __ (); *Farrall v. Department of Health*, OEA Matter No. J-0077-99 (June 1, 1999), __ D.C. Reg. __ (); *Anthony v. Department of Corrections*, OEA Matter No. J-0093-99 (June 1, 1999), __ D.C. Reg. __ (); *Lucas v. Dept. of Corrections*, OEA Matter No. J-0024-02 (February 20, 2002), __ D.C. Reg. __ (); *Wells v. Department of Human Services*, OEA Matter No. J-0001-04 (October 23, 2003), __ D.C. Reg. (); *Nadybal v. Office of the Chief Financial Officer*, OEA Matter No. J-0029-04 (February 2, 2004), __ D.C. Reg. __ ().

Employee’s appeal of a grievable matter was filed on August 16, 2006, over seven years after the right to appeal such matters to this Office statutorily ended. Further, although he did sustain a loss in grade level, there is nothing in the record to indicate that the reduction in grade was caused by an *adverse action for cause* (emphasis added) initiated against him by the Agency, the threshold activity that is required before this Office would have any jurisdiction. As well, while the Employee may well be the victim of an unfair labor practice or discrimination, this Office has no jurisdiction to consider those issues or to award punitive damages. Thus, his petition for appeal must be dismissed.

ORDER

It is hereby ORDERED that this appeal is DISMISSED.

FOR THE OFFICE:

ROHULAMIN QUANDER, Esq.
Senior Administrative Judge

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
CHRISTINE E. WHEELER	)	OEA J-1056-06
Employee)	
	)	Date of Issuance: October 2, 2006
v.)	
	)	Rohulamin Quander, Esq.
	)	Senior Administrative Judge
DISTRICT OF COLUMBIA)	
FAMILY AND CHILD SERVICES)	
<u>Agency</u>)	

Christine E. Wheeler, *pro se*, Employee

INITIAL DECISION

INTRODUCTION AND FINDINGS OF FACT

On September 28, 2006, Employee, a Management Supervisory Service (“MSS”) employee at the DC Family and Child Services Agency (the “Agency”), filed a Petition for Appeal with the Office of Employee Appeals (the “Office”). At the time of her most recent employment, Employee served as a Supervisory Resource Development Specialist, MS-301-13/9, which represented a reassignment (“demotion” in Employee’s words) from her prior position of Social Work Program Manager, MS-301-14/8. Agency was not notified of the filing of this appeal at the Office, and, as such, has filed no answer or response to this appeal.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

JURISDICTION

This Office's jurisdiction has not been established.

ANALYSIS AND CONCLUSION

Based upon my review of the record, a question arose as to whether this Office has jurisdiction over Employee's appeal. The rules of this Office require that the employee bear the burden of proof as to matters of jurisdiction. *See* OEA Rule 629.3, 46 D.C. Reg. 9317 (1999). The level of proof must be by a "preponderance of the evidence", which is defined as "[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."

It is undisputed that at the time of her removal, Employee was an MSS employee, and, according to her narrative statement, had been in that employment status since June 2002. The jurisdiction of this Office is established by statute. Section 1-606.03 (a) of the *D.C. Official Code* (2001) describes the jurisdiction of this Office. It states in relevant part:

An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . . [or] an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . . or a reduction in force.

Employee would have me adjudicate her removal based on the above jurisdictional provision.

However, the above provision is amplified in Chapter 16 of the District Personnel Manual (DPM), which contains rules and regulations implementing the system of general discipline and grievances in the District government. At § 1600.1, the DPM states "[These provisions] apply to each employee of the District government *in the Career Service*." (Emphasis added.) Furthermore, at § 1601.1, the DPM further provides that:

An employee covered by § 1600.1 may not be officially reprimanded, suspended, reduced in grade, removed, or placed on enforced leave, except as provided in this chapter or in Chapter 24 of these regulations. Except as otherwise required by law, an employee not covered by § 1600.1 is an *at-will employee* and may be subjected to any or all of the foregoing measures at the sole discretion of the appointing personnel authority. (Emphasis added.)

Thus, Career Service employees in general are distinguished from at-will employees.

With regard to MSS employees, their removal from service is governed by statute in *D.C. Official Code* § 1-609.54 (a):

An appointment to a position in the Management Supervisory Service shall be an at-will appointment. [MSS] employees shall be given a 15-day notice prior to termination.

Because Employee had an MSS appointment, she was likewise an at-will employee.

It is well settled that at-will employees may be terminated “for any reason at all.” *Cottman v. D.C. Public Schools*, OEA Matter No. JT-0021-92, *Opinion and Order on Petition for Review* (July 10, 1995), ___ D.C. Reg. ___ (). Further, at-will employees may also be removed without cause, which also means that they can be removed for no reason at all. *See Leonard et al. v. Office of the Chief Financial Officer*, OEA Matter Nos. 1601-0241-96 *et al.* (February 5, 1997), ___ D.C. Reg. ___ (). The DPM echoes this 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.

There is no law, rule or regulation expanding the jurisdiction of this Office over an at-will employee. Because this Office lacks jurisdiction over at-will employees, we lack the authority to grant Employee any relief and cannot adjudicate her appeal. In view of this, her appeal must be dismissed for lack of jurisdiction.

ORDER

It is hereby ORDERED that this matter is DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

ROHULAMIN QUANDER, ESQ.
Senior Administrative Judge

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
MICHELLE D. MOOREHEAD	)	OEA Matter No. 1601-0020-06
Employee)	
	)	Date of Issuance: October 13, 2006
v.)	
)	
D.C. PUBLIC SCHOOLS	)	Rohulamin Quander, Esq.
Agency	)	Senior Administrative Judge

Michelle D. Moorehead, *pro se*, Employee
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Employee intermittently served as a D.C. Public School (the "Agency") teacher for several years, beginning in 1986. However, this Petition for Appeal was filed with the Office of Employee Appeals (the "Office") on January 6, 2006, appealing Agency's final decision letter, likewise dated on January 6, 2006, which terminated her employment with Agency, effective February 4, 2006.

This matter was assigned to me on February 27, 2006. A rescheduled Status Conference was held on June 6, 2006, with both parties present. At the Status Conference, Employee asserted that it was her belief, as a result of her longevity with Agency, that she was "grandfathered" into an exception to the mandate that all of Agency's teachers were required to have a license. She did not have any documentation to support her basic assertion, but the record was left open until July 1, 2006, to allow Employee to identify and provide to the Office whatever law, regulation, prior evidentiary decision, or policy she could find, which would support her basic assertion. Likewise, Sara White, Esq., Agency's representative, agreed to inquire of Agency whether such a supposed exemption existed, and if so, to provide documentation of same to me.

No such documentation could be located, and no additional information has come to my attention which would tend to support Employee's prior claim of entitlement to a grandfathered exemption to the basic certification and licensing requirements as a condition precedent to being employed as a teacher at Agency. At the Status Conference, the parties agreed that an evidentiary

1601-0020-06

Page 2

hearing was not needed and that they would rely on the documents submitted and respective statements provided at the Status Conference. The record closed on July 1, 2006.

JURISDICTION

This Office's jurisdiction was not established.

ISSUE

Should this matter be dismissed?

ANALYSIS AND CONCLUSIONS

On January 28, 1998, Employee executed a Contract to Receive Standard Certification ET-15 agreement, which awarded her status as a probationary teacher and paved the way for her to be issued a provisional teaching license. Item #1 of the agreement specifically recited that Employee was, "... required, by September 1, 1999, to pass a subject-content test as well as meet applicable licensure requirement(s) in the level of subject area specified." The specified areas were indicated as taking and passing the Praxis I (Reading and Writing) and Praxis II (enumerated elementary education subjects) examinations.

On February 23, 1998, Employee was issued an Elementary Education/Grades 1-6 Level Provisional license, which document bore an expiration date of September 1, 1999. Although her provisional license expired on the latter date, Agency continued Employee's services as an elementary school teacher for several years beyond the expiration date. Although Employee neither passed the Praxis I and II examinations nor obtained her license during the relevant period in question, she successfully completed some courses required for elementary school level certification and licensure.

Subsequently, by notice dated January 6, 2006, Agency terminated Employee's employment. The notice stated that Employee was teaching under an expired provisional license and that she had been informed at the time of her appointment that her continued employment "was contingent upon satisfactory completion and maintenance of the teacher certification requirements", and that those requirements had not been met. Employee was directed to notify Agency if she had in fact obtained her license, but if she had not, her employment was terminated as of February 4, 2006. Her employment was thus terminated on that date. In addition, Agency's actions were most assuredly motivated by the impact of federal law, i.e., the "No Child Left Behind Act", 20 U.S.C.S. § 6301, which prohibits Agency from retaining Employee in a teaching position because she lacks the "highly qualified" status required of all licensed teachers employed by Agency.

The threshold issue in this case is one of jurisdiction. This Office's jurisdiction is conferred upon it by law. OEA's jurisdiction was initially created by the District of Columbia Comprehensive Merit Personnel Act of 1978 (the Act), D.C. Official Code (the "Code") § 1-601-01, *et seq.* (2001) and then amended by the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which became effective on October 21, 1998. Both the Act and OPRAA confer

1601-0020-06

Page 3

jurisdiction on OEA 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. Code § 1-608.01(a)2)(E) confers permanent Educational Service status upon employees who have been appointed to a position, upon completion of a probationary period of at least one year.

It is undisputed that Employee was not in a probationary status. However, there is no evidence in the record that Employee became a permanent employee of Agency at the expiration of her probationary period, as she was unable to achieve permanent status due to her lacking the requisite license. See 5 DCMR § 1601.1. Rather, she was only granted a nonrenewable provisional license which expired on September 1, 1999. As well, the contractual relationship between Employee and Agency also expired on that date. Consequently, since Employee did not complete the requirements and obtain her permanent license before the expiration of her nonrenewable provisional license, her continued employment with Agency was converted to an “at will”¹ status.

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”. See *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). As an “at will” employee, Employee did “not have any job tenure or protection.” See Code § 1-609.05 (2001). Further, as an “at will” employee, Employee had no appeal rights with this Office. See *Davis v. Lambert*, MPA No. 17-89, 119 DWLR 204 (February 13, 1991).

Employees have the burden of proof on issues of jurisdiction, pursuant to OEA Rule 629.2, 46 D.C. Reg. 9317 (1999). Employee must meet this burden by a “preponderance of the evidence” which is defined in OEA Rule 629.1, *id*, 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”. As the AJ, I conclude that Employee did not meet her burden of proof, and that this matter must be dismissed for lack of jurisdiction.

However, assuming *arguendo* that Employee had met her burden of proof on the issue of jurisdiction, her claim would still fail because she lacked the credentials required to challenge the standards set by Agency. In *Nunez v. Simms*, 341 F.3d 385 (5th Cir, 2003), Nunez was hired by the El Paso, Texas Independent School District in 1996 and issued a three-year probationary license, because like Employee, she did not qualify for a standard teaching certificate at the time of hire. She was terminated in November 2000 for failing to meet the requirements and sued the school district.² The Court concluded that Nunez was not qualified to serve as a teacher following the expiration of her provisional license because she lacked the credentials and had no reasonable expectation of or property interest in continued employment.

¹ Nor could Employee claim that a contract still existed, because where certification is required by law, any contract entered into by Agency that guaranteed continued employment after the expiration of provisional and probationary periods, would be invalid and *ultra vires*. See *Montez v. South San Antonio ISD*, 817 F.2d 1124 (5th Cir 1987).

² Unlike the instant case, in *Nunez*, the teacher initiated her lawsuit while she was teaching under a “continuing contract” authorized by Section 21.153 of the Texas Education Code. The District of Columbia has no similar provision. Employee’s last contractual relationship with Agency ended with the expiration of her nonrenewable provisional license.

1601-0020-06

Page 4

Further, in a recent decision from this Office, I concluded that by failing to obtain the qualifying teaching license, an employee, terminated under circumstances similar to the employee in this case, failed to meet the enumerated performance standards. I noted that, “[s]uch deficiency is, without a doubt, a condition affecting the performance standards, which is itself a basis for removing an employee”. See *Carson v. District of Columbia Public Schools*, OEA Matter No. 1601-0032-06 (June 13, 2006), ___ D.C. Reg. ___ (). See also, *Sandra Weekes v. District of Columbia Public Schools*, OEA Matter No. 1601-0022-06 (July 14, 2006), __ D.C. Reg. __ (). Thus, this analysis provides an alternative basis for sustaining Agency’s action.

Agency provided Employee with information regarding her appeal rights to this Office. Agency was incorrect, since this Office has no jurisdiction. The confusion this caused Employee is regrettable. However, it is well established that this Office’s jurisdiction cannot be enlarged by misinformation to Employee regarding her appeal rights. See *Alvarez v. Department of Veterans Affairs*, 49 M.S.P.R. 682 (1991). This Office simply has no authority to review matters that are beyond its jurisdiction. See also *Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (July 7, 1995), __ D.C. Reg. __ (). Unless an employee has permanent status in the Career or Educational Service or is appointed under special authority in the Excepted 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.

As the Court stated in *Nunez*, she “knew at the time she entered into the contract, or should have known from the language in the contract and the provisions of . . . law, that the contract gave her no right to continued employment while she remained uncertified when her certificate expired by its own terms. Accordingly, she could have no reasonable expectation of continued employment”. 341 F.3d at 391. While it could be argued that Agency could have communicated with Employee more regularly regarding her lack of credentials, it did remind her several times of this deficiency prior to the expiration of her provisional license. Agency was under no obligation to continuously remind Employee of her need to comply with the licensure requirements. The onus was on Employee to do so if she wanted to continue employment with Agency. Presumably Employee was a good teacher who worked hard on behalf of her students. Hopefully she will obtain the necessary credentials so that she can resume the important mission of educating the youth of the District of Columbia.

ORDER

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

FOR THE OFFICE:

ROHULAMIN QUANDER, Esq.
Senior Administrative Judge

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
)
JOSEPH SAWYER)
Employee)
)
v.)
)
INTERGRATED DESIGN AND)
ELECTRONICS ACADEMY)
CHARTER SCHOOL)
Agency)

OEA Matter No. 1601-0104-06

Date of Issuance: October 4, 2006

Rohulamin Quander, Esq.
Senior Administrative Judge

Joseph B. Gebhardt, Esq., Counsel for Employee
Norman N. Johnson, Director

INITIAL DECISION

INTRODUCTION AND FINDINGS OF FACT

On July 19, 2006, Employee, a former teacher with the Integrated Design Electronics Academy (“IDEA”) filed a Petition for Appeal with the Office of Employee Appeals (the “Office”). At the time of his most recent employment, Employee served as a mathematics teacher at IDEA, earning \$44,000 per year, pursuant to an offered letter of employment for the period August 2005 – June 2006. IDEA was notified of the filing of this appeal at the Office, and filed an answer to this appeal on September 29, 2006.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

JURISDICTION

This Office's jurisdiction has not been established.

ANALYSIS AND CONCLUSION

Based upon my review of the record, a question arose as to whether this Office has jurisdiction over Employee's appeal. The rules of this Office require that the employee bear the burden of proof as to matters of jurisdiction. *See* OEA Rule 629.3, 46 D.C. Reg. 9317 (1999). The level of proof must be by a "preponderance of the evidence", which is defined as "[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."

At the time of his removal, Employee was a math teacher at IDEA, and had been in that employment status for one academic year, beginning August 2005. The jurisdiction of this Office is established by statute. Section 1-606.03 (a) of the *D.C. Official Code* (2001) describes the jurisdiction of this Office. It states in relevant part:

An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . . [or] an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . . or a reduction in force.

Employee would have me adjudicate his removal based on the above jurisdictional provision.

However, the above provision is specifically curtailed by a provision enumerated at *D.C. Official Code* § 38-1702.08(d), which states in relevant part:

Notwithstanding any other provision of law, employees of charter schools shall not be considered to be employees of the District of Columbia public schools or the District of Columbia government.

Thus, an employee who teaches at a charter school, even if specifically chartered by an agency of the District of Columbia government, is specifically recited as not an employee of that governmental agency. Further, pursuant to *D.C. Official Code* § 1-601.01, *et seq.*, the Council of the District of Columbia adopted a comprehensive merit personnel system, which was directed at guaranteeing certain rights and benefits to incumbent employees of the D.C. government. Those provisions did not reach out to or include persons who are employed in the private sector, whose employment-related rights must be addressed through other forums. Employee elected to pursue a grievance through

the process that IDEA established, such that it was. The fact the he was not successful, and that his termination was upheld, does not accord him the right to now pursue an appeal before this Office.

Finally, even if Employee did have a statutorily granted right to appeal his termination to this Office, the Office also lacks jurisdiction on the additional basis that Employee was an *at will* (emphasis added) employee, and this Office has no jurisdiction over at will employees. The District Personnel Manual (the "DPM") at Chapter 38, § 3819.1, provides that persons who are given at will appointments do not acquire Career Service status, and shall serve at the pleasure of the appointing personnel authority, and may be terminated at anytime.

It is well settled that at-will employees may be terminated "for any reason at all." *Cottman v. D.C. Public Schools*, OEA Matter No. JT-0021-92, *Opinion and Order on Petition for Review* (July 10, 1995), ___ D.C. Reg. ___ (). Further, at-will employees may also be removed without cause, which also means that they can be removed for no reason at all. *See Leonard et al. v. Office of the Chief Financial Officer*, OEA Matter Nos. 1601-0241-96 *et al.* (February 5, 1997), ___ D.C. Reg. ___ ().

For the reasons enumerated above, this Office lacks jurisdiction to grant Employee any relief and cannot adjudicate his appeal. In view of this, his appeal must be dismissed.

ORDER

It is hereby ORDERED that this matter is DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

ROHULAMIN QUANDER, Esq.
Senior Administrative Judge

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

MONICA FENTON)	
)	
Employee)	
	)	OEA Matter No. 1601-0013-05
v.)	
	)	Rohulamin Quander, Esq.
D.C. PUBLIC SCHOOLS	)	Senior Administrative Judge
)	
Agency	)	Date of Issuance: October 2, 2006

Monica Y. Fenton, *pro se*, Employee
Sara White, Esq., Agency Representative

INITIAL DECISION

BACKGROUND

On December 20, 2004, Employee, *pro se*, filed a Petition for Appeal with the D.C. Office of Employee Appeals (the "Office"), challenging her termination from employment as an Educational Aide by the D.C. Public Schools (the "Agency"), based upon a charge of violation of Title 5, DCMR § 1401.2(t), "Violation of the rules, regulations or lawful orders of the Board of Education or any directive of the Superintendent of Schools, issued pursuant to the rules of the Board of Education."

The specifications enumerated in the Notice of Termination letter, issued to the Employee on August 5, 2003, stated:

On July 1, 2003, the Division of Security issued an investigative report which stated that on April 3, 2003, you were involved in a verbal confrontation with a student in which you threw keys that struck the student in the back, causing two small cuts to his back. On June 25, 2003, the Office of General Counsel concluded that there was sufficient evidence to warrant a disciplinary action.

The same letter set forth a step by step scenario addressing the incident, and advised Employee of her appellate rights before Agency. However, the document neglected to advise Employee that there was an alternative to pursuing an in-house grievance before Agency, and that she also could elect to pursue her termination complaint before this Office. On August 30, 2005, Agency filed with the Office a *Motion*

to *Dismiss* the Petition for Appeal, asserting that the Office had no jurisdiction in this matter, primarily because: a) Employee had allegedly exhausted her administrative remedies at Agency level, by pursuing the grievance procedure at the Agency; and b) she filed her appeal to this Office five days beyond the 30 day notice period.

I issued an Order on November 8, 2005, denying the Agency's Motion, noting that prior to being terminated, Agency had not properly advised Employee of her appeal rights. In that Order I stated:

Employee filed her Petition for Appeal on December 20, 2004. Agency's response, in addition to addressing other substantive matters, also requested that Employee's Petition be dismissed, noting that the Petition was filed five days late, and not in compliance with the mandatory 30-day requirement of final Agency action. Agency's request for a dismissal begs the question. Nowhere in the Agency's initial termination letter of August 5, 2003, which was issued after the investigation of the alleged assault, was the Employee advised at the outset of her being fired, that she had an option to select which of two legally established avenues of appeal she preferred. She was not informed that she could either pursue her claim through the union and its collective bargaining agreement procedures, or by filing a Petition for Appeal with the Office of Employee Appeals (the "Office")

At *D.C. Official Code* § 1-616.52(e), it states that:

Matters covered under this subchapter that also fall within the coverage of a negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either pursuant to § 1-606.03¹, or the negotiated grievance procedure, but not both.

In *Tatum v. DCPS*, OEA Matter No. 1601-0013-03 (June 6, 2003) __ D.C. Reg. __, this Office held that Agency erred when it failed to advise the employee that he had a right to appeal his termination to this Office, which it was required to do, pursuant to *D.C. Official Code* § 1-606.04(e) (2001 ed.). The Office held that because Agency did not give Employee notice of his right to contest its decision through an appeal in this Office, the Agency was estopped from invoking the jurisdictional bar by asserting that employee's choosing to pursue his case through the union, operated as a bar to now, belatedly, seek to present the matter to this Office. See also *Bailey v. District of Columbia Dep't of Employment Services*, 499 A.2d 1223, 1224-25 (D.C. 1985), *Ploufe v. District of Columbia Dep't of Employment Services*, 497 A.2d 464, 465 (D.C. 1985) (D.C. 1985); *Thomas Hammond v. Department of Human Services*, OEA Matter No.

¹ *D.C. Official Code* § 1-606.03, is the employee appeals procedure that vests jurisdiction with the Office to adjudicate final agency decision employment matters.

1601-0080-88, Opinion and Order on Petition for Review (May 22, 1998),
__D.C. Reg. __.

Further, Loretta Blackwell's² letter of November 15, 2004, which purports to advise Employee herein that, since her grievance appeal through the union was not successful, she can now pursue her appeal through this Office, is grossly misleading. The letter attempts to belatedly confer a right upon Employee that vested at the outset of her termination, which notice of due process right should have been accorded to her 15 months previously.

I conducted a Prehearing Conference on August 30, 2005. Having evaluated this matter in my Order of November 8, 2005, referenced above, I concluded that Agency erred when it failed to give Employee a proper notification of her legal rights with regard to her appeal. She was then entitled to have her case brought before this Office for an evidentiary hearing. I convened the evidentiary hearing on three dates, December 15, 2005, and January 11, and 12, 2006. Agency filed its post hearing brief and proposed final order on May 8, 2006, while the Employee filed her proposed final order on May 9, 2006. The record is now closed.

JURISDICTION

The Office has jurisdiction over Employee's appeal pursuant to D.C. Official Code § 1-606.03(a) (2001).

ISSUES

The issues to be decided are:

- a. Whether the evidence will support a finding of "cause", i.e., a "[v]iolation of the rules, regulations or lawful orders of the Board of Education or any directive of the Superintendent of Schools, issued pursuant to the rules of the Board of Education", Title 5 DCMR § 1401.2 (t), to justify Employee's termination of employment by Agency.

By its terms, the definition of "cause"³ set forth at 6 DCMR § 1603.3 includes, "any on-duty or employment related act or omission that the employee knew or should reasonably have known is a violation of the law." Therefore, Agency must prove that Employee committed such an act or omission in the performance of her job-related duties.

² Loretta Blackwell is Director of Labor Management and Employee Relations, in Agency's Office of Human Resources.

³ Although Agency's regulations do not specifically contain a definition of "cause" in 5 DCMR 1400, *et seq.*, Agency's adverse action chapter, I have incorporated the D.C. Government's general definition of "cause", to determine whether Employee's action were sufficiently violative of the Board's regulations, such as to justify the termination action that Agency elected to pursue.

- b. If Agency's action was taken for cause, whether Employee's violation of the cause standard was "*de minimus*".

Agency could not have subjected Employee to an adverse action if her violation of the cause standard was *de minimus*. See DCOP Rule 1603.5, 47 D.C. Reg. at 7097. The DCOP rules do not, however, define the term "*de minimus*".

- c. If Employee's violation of the cause standard was not *de minimus*, whether the penalty Agency imposed was appropriate, given any aggravating or mitigating circumstances that may have existed.

FINDINGS OF FACT, LEGAL ANALYSIS AND CONCLUSIONS

The following facts are not in dispute:

1. Monica Y. Fenton (the "Employee") was employed as an Educational Aide at W. Bruce Evans Middle School on April 3, 2003, the date that the incident complained of occurred.
2. At the time of her termination, she had been employed in this capacity for approximately eight years, although not necessarily at the same public school.
3. After pursuing a grievance at the Agency level, including a Step 3 evidentiary hearing, which resulted in an unfavorable ruling, she noted her appeal with this Office on December 20, 2004.
4. In response to Agency's motion to dismiss the appeal as both untimely filed and on the basis that administrative remedies had already been exhausted elsewhere, I ruled on November 8, 2005, that Agency failed to properly advise Employee of her appellate rights at the time of her termination, and that under the applicable law and prior determinations of this Office, she still had the right to have her case presented before the Office.
5. An evidentiary hearing was convened on three dates, and several witnesses testified on behalf of Employee and Agency. Further, both Agency and Employee were allowed to supplement the record with documents that each deemed to be sufficiently probative of their respective cases.

Summary of the Testimony and Other Factual Considerations:

Testimony of Robert Johnson: Robert Johnson ("Johnson" or "the witness") was the Assistant Principal at Evans Middle School, and was serving in the capacity of acting principal on April 3, 2003, the date that the incident complained of occurred. On that date, he observed BD⁴ running down a stairwell at the school, and as Johnson approached the stairwell, he confronted BD, obviously excited, visibly upset, frustrated, cursing, and yelling. To Johnson's query as to what was wrong, BD advised the witness that

⁴ "BD" are the initials of the child that Employee is alleged to have assaulted. Since the child was a juvenile on the date of the incident, I will identify him solely as "BD".

Employee had thrown her keys at him and hit him in his back. See *Transcript ("Tr")*. 117.

At about the same time, the witness observed Employee coming down the stairwell, and when she saw the witness, she said, "I'm tired of him cursing and carrying on and all that stuff." Without being asked or prompted, Employee admitted to the witness that she had thrown her keys at BD because he was disturbing the classroom. *Tr. 119, 121, 150*. The witness took BD into his office, where BD once again explained exactly what had happened, i.e., that Employee had thrown a set of keys at him, which struck him on the back. BD then lifted his shirt and showed the witness exactly where the keys stuck him. The witness observed red marks and some blood where BD indicated the keys had hit him. The witness then directed BD to immediately go to the school nurse. *Tr. 117-119*.

The witness contacted Principal Joyce Thompson about the incident, and following her directive to contact the authorities to report the incident, the witness reported the incident to DCPS security to file a corporal punishment complaint. Shortly thereafter a case was opened, and Don Harper ("Harper"), a DCPS security officer, was subsequently assigned to investigate the complaint. The record reflects that during the course of the investigation, Harper interviewed several people, including BD, Nurse Earnestine Brogsdale, Principal Joyce Thompson, Teacher LeAnn Holden-Martin and Assistant Principal Robert Johnson. See, "DCPS Security Investigative Report", dated May 28, 2003, *Agency Exhibit # 5*. When Harper interviewed BD, the witness was present and believes that the account of the incident given to Harper, and which was subsequently incorporated into Harper's report, was both accurate and correct. *Tr. 125*.

Employee knew that throwing keys at a student was a violation of Agency's Board of Education's (the "Board") rules regarding corporal punishment, despite BD's behavior, which included cursing and using inappropriate language. Further, she also knew that she could be terminated for just cause from her position with Agency for throwing keys at a student. *Tr. 119; 126-127*.

Testimony of Joyce Thompson: Joyce Thompson ("Thompson" or the "witness") is the former Principal of Evans Middle School, but was the principal on the date of the incident. The witness was on leave the day the incident between Employee and BD occurred, but received a telephone call from Johnson, her assistant principal, who was very upset. He advised the witness that he had spoken with Employee, who admitted to throwing her keys at BD. Johnson wanted to know what the procedure was for reporting corporal punishment. The witness instructed him to notify DCPS security, Metropolitan Police, and the Agency's Central Office. *Tr. 27*.

Security Officer Harper ("Harper") was assigned to investigate the incident. BD and all of the witness cooperated and made themselves available to Harper. However, he had a difficult time trying to obtain a written statement from or interview with Employee, despite visiting the school on up to six occasions in an effort to question Employee about the incident and to take her statement. *Tr. 79, 92, 95-96*. Although it cannot be

determined whether all six visits were specifically for the purpose of interviewing Employee, on one occasion when Employee was in the building, she responded to a call from the witness for her to come down to the office to be interviewed by Harper. However, Employee never showed up. Subsequently, Security Officer Nelson ("Nelson"), an assigned Evans Middle School security officer, told Thompson that Employee had stated that if Harper wanted to talk to her, he would have to speak with her at her house. Employee left the school grounds without being interviewed. *Tr. 98.*

Although Employee claimed that BD's injuries might have come from an incident between BD and his mother, which resulted in BD being stabbed, Employee never reported such an alleged incident to the witness. Further, regardless of any injury sustained, whether at school or at the hands of a parent, throwing keys at a student is still corporal punishment, and even if no injury occurred, the act of throwing keys at a student is cause for termination. *Tr. 83-84.* "[Throwing keys at a student] specifically violates board policy because the board policy states that any time a child is physically moved, touched...in an effort to correct behavior or whether it was intentional or recklessly done then that constitutes corporal punishment." *Tr. 84.*

After the incident and during the investigatory period, the witness allowed BD to stay in the classroom where Employee was assigned because there was also a teacher in that classroom, and Employee was not the only adult present in that setting. Under the circumstances, the witness felt that there was no need to remove BD from the classroom. *Tr. 65.*

Thompson was Employee's direct supervisor, and in that capacity conducted training for her teachers and teacher's aides which addressed Board rules regarding corporal punishment. The witness made copies of the rules and distributed them. Each faculty member who was present for the training, including Employee, signed a document (*Agency Exhibit # 1B*) verifying that they received, read, and understood the Board rules on corporal punishment. *Agency Exhibit # 1A.*⁵ *Tr. 25.*

The witness has supervised at least one other teacher who was terminated for corporal punishment, but the act of corporal punishment for which that teacher was terminated was not as severe as the incident between Employee and BD. *Tr. 28.* Despite any assertions or insinuations to the contrary, the decision to terminate Employee was neither retaliatory nor made by the witness. Rather, the decision to terminate Employee was reached by Agency's personnel office, and came from Blackwell, Director of Agency's Labor Management and Employee Relations. During the investigatory period there was no intermediate or final communication to the witness from Agency, including no communication to the witness from Blackwell or her office, prior to a courtesy copy of the notice of termination that was directed to Employee's attention. *Agency Exhib.# 4. Tr. 31-32.*

⁵ See *Student Rights and Responsibilities*, published as 5 DCMR § 2400, *et seq.* Final Rulemaking published at 24 DCR 1005, 1039 (July 29, 1977); as amended by Final Rulemaking published at 35 DCR 6013 (August 5, 1988) and by 49 DCR 3485, 3485-86 (April 12, 2002).

Testimony of Gartrell Franklin: (Fenton's witness). Gartrell Franklin ("Franklin" or the "witness"), a retired former teacher at Evans, was called by Employee as a character witness. The essence of his testimony was that Employee had a good working relationship with the students. She frequently handled difficult classroom situations alone, often due to teacher absences and the need to provide adult supervision in several locations simultaneously. She cheerfully and voluntarily undertook additional work-related assignments, such as cafeteria duty, often functioning in otherwise chaotic environments, in which fights often broke out, food was thrown, and tougher students preyed upon those who were less tough or younger. Although there were many fights that Employee had to break up, he never saw her commit any assaults on anyone during the process, and was then recently retired and off the premises on April 3, 2003, when the BD-Employee incident occurred. *Tr. 374-376.*

Testimony of LeAnn Holden-Martin (Jointly Subpoenaed Witness): LeAnn Holden-Martin ("Holden-Martin" or the "witness") was a teacher at Evans on the date of the alleged incident, noting that Employee was the educational aide assigned to her class. When the witness walked into the classroom, she observed BD without his shirt on, and noted that he smelled musty, having directly come from gym class. While other students were working on assignments, BD was restless, walking about the classroom, and not doing what he supposed to. In essence he was both disrespectful and disruptive to both Employee and the class. She observed him walking out of the classroom, followed by Employee. *Tr. 480.* On occasion, BD was known to make gestures to indicate that he was going to hit someone. *Tr. 492.*

Although she was not a witness to the alleged incident, including BD's claim that he was struck in his back by a set of keys, she heard about the matter later. As well, there was no physical contact between BD and Employee either in her presence or inside the classroom. *Tr. 481-482.*

Testimony of Earnestine Brogsdale (Agency's witness): Earnestine Brogsdale ("Brogsdale" or the "witness") is a contract person from Children's Hospital, who works at Agency as a school nurse. She was assigned to Evans school on the day of the incident. *Tr. 503.* Allowed to refresh her recollection of the incident, she referred to the statement that she gave to the Division of Security investigating officer (Harper) as a component of his investigation, which statement was prepared by her and dated May 15, 2003. *Agency Exhib. # 5, Attachment #3.*

In the statement she stated:

Student was seen in the health suite at 3 pm, 4/3/03. Stated that his back hurts. Student stated that an adult female had thrown a set of keys at him striking his midback area. Two small scratched areas were observed. Area cleansed and band-aids applied. Ref. for evaluation of a TdB last one on file was 7/30/94.

Q – Did (name blotted out) tell you who threw the keys that struck him in his back.

A – Yes – Mrs. Fenton.

Tr. 505.

The two scratches on BD's back had a little blood on each of them, and were about one and a half inch in length. *Tr. 506.* No other bruises or scratches were observed on his back at that time. *Tr. 510.* Although Harper may have concluded that the witness gave BD a tetanus booster inoculation, the witness emphasized that she did not give such an inoculation, nor did she tell Harper that she did do so. Rather, she told BD that he needed to get one and referred him for one to be given as soon as possible. According to the medical records on hand, the last booster was given in 1994. It is recommended that a new booster be given at least every five years. *Tr. 512.* Observing the two small scratches, she formed an opinion that they were freshly received. *Tr. 520.*

Testimony of Monica Y. Fenton, *pro se*, Employee: At the time of the April 3, 2003, incident complained of, Monica Y. Fenton (the "Employee") had served as an educational aide with Agency for approximately eight years, most all of which service was at Evans Middle School. At the time of the incident. She was continuing to work with special education students, including BD. On that date BD came running into the classroom, very late and immediately disruptive, chasing some girls around the classroom without regard for the need to be orderly and quiet. He disrupted the other students' ongoing tasks, and immediately demanded access to one of the room's computers, which access is generally denied until the requesting student has completed his work assignments for that class period. *Tr. 205-206.*

BD disliked being identified with the special education component of the school, feeling that the non special education students made fun of him because of his limitations. He wanted to be included with the students who did not have mental limitations. *Tr. 206-208.* At one point in that academic year BD was placed into non special education classes, at his mother's request, but was so disruptive that he was suspended on several occasions. On at least one occasion BD had to be restrained by Dr. Mabry, the special education coordinator, for disruptive behavior during science class. *Tr. 209.*

It was during this same time frame that the incident between BD and Employee occurred. BD came from gym class to Employee's class extremely late. Knowing that the rules of the classroom required that at least one assignment had to be completed before a student could access a computer, BD disregarded the classroom rules and demanded immediate access to a computer. Employee whispered and advised BD that he needed to apply some underarm deodorant, because he was smelly. Instead of following Employee's deodorant-related directive, BD immediately went into a pattern of disrupting the entire class, jumping, cursing, and fussing, even tossing some of the desks. In front of the entire class, including Holden-Martin, the assigned teacher, and all of the other students, BD loudly and repeatedly called Employee several extremely abusive and foul names. In her estimation, his behavior towards her was becoming very aggressive. *Tr. 210-211.*

Relying upon the training that she received from Agency in 1998 regarding how to deal with and, if necessary, restrain special education or emotionally disturbed students, she placed one hand at the top of BD's back area, in the region of his neck, and the other hand on his arm, in an effort to physically establish contact, but to also cajole BD into cooperation, rather than pushing him. Her keys were in the hand that she placed in BD's neck region. She denied grabbing him, but rather sought to restrain him, in an effort to get him out of the classroom. His behavior had already influenced a number of the other children to start acting up. *Tr. 212-214.*

Breaking away from Employee, BD ran out of the class, and as he did Employee's keys fell. BD yelled to Employee, "I'm going to get you fired!" Out in the hallway, now in the presence of some girls who were wandering the halls, BD continued to curse and call Employee names, causing a general disruption in the hallway and attracting attention. At that moment Johnson, Assistant Principal, came up the stairs and inquired what was going on. *Tr. 215-216.* Because it was about 3:00 p.m., and Employee had to get her special education students on the school bus immediately, and seeing that both BD and the girls were in Johnson's custody, she said, "Oh you have them now, I'll write it up later!", and left BD and the girls with Johnson. *Tr. 216.* After she got her students on their buses, she wrote up a DCPS Security Incident Report, to document what had occurred in the classroom and the hallway. *Employee Exhib. #2. Tr. 218.*

Shortly thereafter, Employee was confronted by Johnson, who inquired whether she had thrown her keys at BD. Employee denied having done so, and considered that the matter was closed as of that time, since reports of disruptive student behavior are universally prepared by the faculty, but nothing is usually done by Agency or the school administration to address the matter, unless the student in question has committed an abuse against the principal or assistant principal. *Tr. 220*

Subsequently, on May 15, 2003, almost six weeks after the incident, Principal Thompson summoned Employee to her office, whereupon Employee was met by Security Officer Harper, the assigned investigator, who advised Employee that he was investigating BD's assault allegations against Employee. She was then given a blank Division of Security Statement form to complete, to narrate the details of the April 3, 2003, incident. *Employee Exhib. # 5. Tr. 223-226.* It was only from the date of that May 15th meeting that Employee came to realize the severity of the alleged incident. She completed the form at home on Thursday evening and a few days later, on Monday morning, Employee inquired of office personnel if Harper had returned to the school. She preferred to personally give the form to him, rather than leave it with someone in the office to deliver to him. Employee acknowledged that when he returned on May 16th, she was not at school that day.

Since Thompson took over as principal, the attitude of trust and cooperation was erased, as many of the staff did not trust each other, engendered by the feeling among many that if Thompson did not like someone, then the other staff should not be seen talking to that person. In Employee's case, she felt that Thompson did not like her, and

believed that if she surrendered her incident statement to staff, sabotage might be committed by the school administration, and the confidentiality of the document and its contents might be compromised. *Tr. 227-228*. Because she lives two to three blocks from school, she would usually go home at lunch time. Upon returning from lunch, no one ever told her during this period that Harper might have been at the school looking for her. She never did see him in order to personally give him her completed statement. *Tr. 230*.

Consequently, when Harper issued his Investigative Report on May 28, 2003, (*Agency Exhib. # 5, same as Employee Exhib. # 1*), it did not include Employee's written statement. The original document was still in her possession on August 5, 2003, the date of the Agency-issued termination letter. *Tr. 247*. Harper's Report, on pages 2-3, briefly refers to an oral interview he conducted with Employee on May 15, 2003, at which time he gave her the form to complete, advising her that he would return the following day to collect it from her.

Subsequently, in August 2003, while Employee was performing various school-based tasks incidental to preparing for the forthcoming academic year, she received a Notice of Termination letter, dated August 5, 2003, from Blackwell. *Employee Exhib. # 4. Tr. 244*. On August 9, 2003, following the outline of the appeal rights set forth in the termination notice, Employee immediately appealed the notice of termination, sending a 15-point responsive letter to Blackwell. *Employee Exhib. # 7. Tr. 245*. However, nowhere in Agency's letter of termination was Employee apprised of the additional right to elect an appeal alternative by filing a Petition for Appeal with this Office, which neglect resulted in Employee being denied a timely fundamental appeal right at the outset of her termination. *Tr. 246*.

During the early part of initiating her appeal, Employee submitted at least two additional letters to Agency. One letter, dated September 12, 2003, was directed to Valerie Jones, a personnel officer at Agency, requesting that the investigation be reopened so that Employee could meaningfully participate in the process. *Employee Exhib. #9*. Employee appended a copy of her Division of Security Statement to the letter, the first time for the record that she filed a copy of the statement with anyone. *Employee Exhib. #5. Tr. 250-251*. A follow-up letter, dated October 20, 2003, was directed to Blackwell, addressing the status of a previously issued request for an administrative hearing. *Employee Exhib. #10*. None of the requested relief was granted.

Upon returning to school the following Monday, she was advised by staff that Harper had been there on May 16th. She requested that staff advise her when next he was in the building. However, she neither saw or heard from him again, and did not surrender the statement until the following September. As well, she did not see Harper again until the day of the grievance hearing, by which time his investigation was long completed. *Tr. 413*. Employee was determined not to give the statement to anyone else but Harper, and in the absence of his returning to the school, she did not know what else to do. She still had the statement in her possession on the date that she was subsequently notified of her pending termination. *Tr. 410*.

Although Employee initiated a grievance against Agency, with some initial assistance from AFSCME Union Local 2921, it was soon determined by the union that she was not a member of the union. The union then declined to represent her. *Tr. 249*. Employee obtained legal counsel, and was represented at the Agency level grievance hearing. Although Employee asserted that her legal counsel was restricted by Montague Buck ("Buck"), Esq., Agency's designated hearing officer, in the scope allowed in the cross examination of BD regarding the key throwing incident and injuries complained of, she did admit that cross examination was allowed on the central issue. *Tr. 429*.

Agency completed the step three grievance process and, between December 3, 2003, and February 18, 2004, conducted an administrative hearing over four dates, pursuant to Employee's timely appeal. BD, Johnson, Thompson, Harper, Brogsdale, Nelson, Franklin, Holden-Martin, and Employee each testified during the hearing. Buck received the evidence presented at the hearing, took the matter under advisement, and, according to a letter to Employee from Blackwell, dated November 15, 2004, allegedly issued a proposed decision on March 18, 2004, upholding Agency's termination.⁶ *Employee Exhibit #16A. Tr. 262*.

Employee was not provided a timely copy of Buck's purported decision of March 18, 2004, nor an opportunity to respond to it, and only learned that an adverse decision had allegedly been issued after she persistently pursued an inquiry at Agency regarding why there was a delay in reaching a decision in her case. When she finally obtained a copy of the proposed decision on or about August 16, 2004, she was shocked to learn that the termination had been upheld. *Tr. 263-264*. Unclear regarding her appellate rights, Employee filed a petition for review with the D.C. Court of Appeals on September 16, 2004, which was subsequently rejected by the court on September 22, 2004, due to Employee's failure to exhaust administrative remedies. *Employee Exhib. # 12. Tr. 265*.

Uncertain what the next step was, Employee inquired of Agency what the remedies were since the grievance had failed and the Court of Appeals had denied her appeal. By letter of November 15, 2004, Blackwell erroneously advised Employee that she could now proceed to the Office of Employee Appeals (the "Office"). Prior to then, she had never heard of this Office and was likewise unaware of the fact that at the outset of her case, she had the option to either pursue her termination through an Agency-sited grievance, or to go outside of Agency and initiate her appeal with the Office. *Employee Exhibit # 16A; Tr. 271*. The content of the notice was grossly deficient in many respects, and did not comport with the regulations regarding Employee's notice of appeal rights. This was approximately 15 months beyond the date that Agency was legally obligated to provide Employee proper notice regarding her appeal rights.

⁶ Although Agency telephonically advised Employee that the proposed decision was issued by Buck on March 18, 2004, Employee was unable to track down and obtain a copy of any purported decision until on or about August 16, 2004. The then proposed decision bore the approximate date of August 4, 2004. It appears to me, as the deciding judge, that Employee's reference to the date of March 18, 2004, during the hearing was erroneous, as nothing in the record before me supports any indication that Buck's ultimate decision was issued prior to August 4th. The initial source of the erroneous date and information is unknown. Neither party elected to introduce a copy of Buck's proposed decision, which would have borne an issuance date, into this record.

Employee admitted that it was inappropriate for a teacher to throw keys or any objects at a child, and that such conduct is likewise prohibited under the corporal punishment rules of the Board of Education. *Tr. 419*. Further, in September 2002, Employee, like all of the staff at Evans, signed a form indicating that she had read the Board issued memorandum about corporal punishment, and was aware that certain conduct, including corporal punishment, grabbing of students, throwing of objects, and unreasonable restraint were all inappropriate. *Tr. 423*. She admitted that, knowing the intent and context of the policy and its design to encourage uses other than physical restraint, if possible, she never asked BD to sit down or attempted to calm him down while still inside the classroom, prior to seeking to physically restrain him, which act involved some physical contact between the two of them in order to remove him from the classroom. *Tr. 423-424*. She steadfastly denied that she ever told Harper or Nelson that she threw keys at BD, and asserted that Brogsdale's testimony regarding the keys was solely a restatement of what BD allegedly told her, not the result of any direct communication between Employee and her. *Tr. 424-426; 428*.

Discussion:

The tone of this matter was set early on, as Employee asserted that Agency misled her in terms of the seriousness of the allegations, as well as what her appellate rights were. Valuable time was wasted as Agency committed two grievous errors. First, at the time of Employee's termination, Agency provided appellate information that limited Employee's appeal rights solely through Agency's grievance process. After the grievance hearing was completed, and the assigned hearing officer ruled against Employee, Agency committed a second serious error, when it incorrectly informed Employee that, having lost at Agency-based grievance level, she could now note an appeal at this Office.

Only then was Employee made aware of the existence of the D.C. Office of Employee Appeals, and apprised of the statutorily provided for option of pursuing her termination appeal through the Office. By then, about 15 months has passed, which seriously delayed Employee being accorded her "day in court". Even then, Agency proved to be most disingenuous in its behavior, as Agency's representatives attempted to have Employee's appeal to the Office dismissed on the basis of non timely noting of the appeal, despite the fact that it was Agency's own administrative failure that resulted in no timely or correct notice being given to Employee about what her statutorily provided for rights are. On November 8, 2005, I issued an Order rejecting Agency's motion to dismiss Employee's Petition for Appeal for its being untimely, noting that Agency failed to provide Employee the proper notice, the effect of which cancelled the otherwise mandatory 30-day time within which to note an appeal to the Office.

The above having been noted, I reaffirm my finding as stated in my Order of November 8, 2005, and conclude in this Initial Decision that Agency committed a grave injustice against Employee when it failed to give her timely information to aid her in a more expeditious approach to pursuing her statutorily granted appeal rights. Such having been concluded, I turn to the substantive issues

before me related to the charge of her misconduct, i.e., having inflicted corporal punishment upon a student.

Although Employee stated on the record that initially she had no knowledge that she was being investigated, she did admit elsewhere in her sworn testimony that she was called to the office by Principal Thompson because Harper was in the building to investigate the incident that occurred between BD and herself. She also admitted that Harper gave her a blank form, Division of Security Statement (*Employee Exhib. # 5*), on May 15, 2003 (a Thursday), and requested that she complete it and give it back to him the following day. She did not come to school the following day, May 16, 2003 (a Friday), although she testified that she brought the completed form to school the following Monday (May 19, 2003).

Not trusting to leave the completed form with anyone on staff, she asked them to notify her when Harper was in the building, so that she could personally deliver it to him. That never occurred, and Harper's multiple efforts to collect the form and include it as a component of his investigation, was not successful. Based upon the foregoing, I find that, at least from May 15, 2003, when Harper met briefly with Employee and requested that she complete the form, she was on full notice that she was being investigated for the incident which occurred between BD and herself on April 3, 2003. She even indicated that she would complete the form and return it to him the next day. At least from that date, she should have made every effort to protect herself and provide whatever information Harper was seeking.

To do otherwise created a situation where she appeared to be uncooperative or attempting to conceal some important aspect of the incident. Even if Employee's sole objective was to not share with others on staff that she was under investigation, and fearful that the confidentiality of her statement would be compromised if it fell into hostile hands, including the principal, Employee exercised poor judgment in not making a more concerted effort to reach Harper, who had already made several visits to the school, including attempts to get her statement while the investigation was ongoing. Even months after Harper requested the statement, and the investigation was closed, Employee did not submit her statement until after she was notified of her termination, which was too late to have been considered during the investigatory period. Her tactics only contributed to suspicion of wrongdoing on her part, the overall hostility of the total situation, and her eventual conclusion that "everyone" was conspiring against her.

Employee was accorded a Step III grievance proceeding, which included a full evidentiary hearing at Agency level. Employee, who was represented by counsel, presented her case in chief, and likewise had the opportunity to examine all of Agency's exhibits and to cross examine all of Agency's witnesses, including BD, her accuser, and Harper, the investigator. At the grievance hearing BD was present and testified that Employee threw keys at him and that he sustained an injury to his back. Likewise, Johnson testified at the grievance hearing that Employee told them that she threw her keys at BD. Said statement is reflected in Harper's Investigative Report, *Employee Exhib. # 1*, dated May 28, 2003. Although Harper testified at the grievance level hearing, he did

not testify at the evidentiary hearing held in the Office. Finding all of Agency's witnesses credible, including BD, Thompson, Johnson, Harper, Brogsdale, Holden-Martin, and the security investigators, on or about August 4, 2004, Hearing Officer Montague A. Buck, Esquire, issued a proposed decision denying Employee's grievance and upholding her termination.

Although neither party introduced a copy of Buck's decision into the current record, it is clear to me that Buck determined that the investigation into the incident was conducted correctly, that the grievance procedures accorded to Employee were properly adhered to, and, most importantly, that the evidence sustained his decision to uphold the termination.

Employee would like me to believe that the injuries sustained by BD occurred either because she had her keys in her hand when she sought to restrain BD by placing her hand in his neck and back area, and he might have been cut when she applied pressure, or due to an alleged altercation between BD and his mother. However, during the evidentiary hearing before me, she admitted that the alleged altercation between BD and his mother occurred after the April 3, 2003, incident, and likewise the injuries allegedly incurred in that altercation were inflicted on his chest area, not his back, and that BD allegedly had a bandage on his chest and was even holding his chest while describing the injury.

During Employee's testimony she said different things about the incident, the restraint applied, how the injury might have incurred, and where the incident occurred, including the keys perhaps dropping from her hand to the floor during the restraint altercation.⁷ Although these statements are not necessarily in conflict, they raised more questions than they answered. As well, Johnson testified that any physical restraint is absolutely inappropriate when a child is simply using improper language in the classroom. Further, Agency maintained, both through Johnson and Thompson, that even if Employee restrained BD, instead of throwing keys at him and injuring him, an allegation of corporal punishment still would have been substantiated, given that she used some measure of force when only inappropriate language, although accompanied by a refusal to sit down, was involved.

Employee, a mature adult who had several years of working experience with Agency, always knew that throwing keys or any other objects at a student was prohibited conduct and a violation of the Board rules on corporal punishment. Therefore, although BD was cursing or using inappropriate language, I find that her physical contact, and especially throwing keys at BD, was not an appropriate response to handle the situation under any circumstance. She acknowledged that, during school year 2002-2003 and not too long before the incident, she received and read Agency's memorandum on corporal punishment that Principal Thompson handed out during a training session for teachers and teacher's aides.

⁷ Holden-Martin testified that the incident did not occur in her classroom, but rather after Employee and BD left the classroom. Further, she did not see or hear any keys fall to the floor within either her sight or hearing distance.

As such, she knew or should have known that she would face disciplinary action and probable termination for misconduct, if she threw her keys at anybody. Based upon the credible evidence presented during this evidentiary hearing, as well as documents in the record in support of the allegation, I find that Employee threw her keys at BD on April 3, 2003, thus causing him to sustain the injury complained of. I further find that her conduct was highly inappropriate, and was a knowing violation of Agency's published rules expressly forbidding the infliction of corporal punishment upon a student. Although BD's personal conduct on that day was most certainly reprehensible and obviously got on Employee's last nerve, the rules are written for a reason, and adults who are entrusted with the care and responsibility for children, and especially children with special needs, must always comport themselves befitting that responsibility. In Employee's case, "She lost it!" Understandably she was tired and frustrated at BD's conduct, and especially his calling her repugnant, foul names, plus his alleged use of sexually inappropriate language and making comments that were degrading to women. Still, while not excusing his actions, I cannot excuse hers under the circumstances.

Employee also believes she was wrongfully terminated from her position because of a Thompson-led conspiracy against her that was designed to get rid of her at the school. She cites as her "evidence", activities that occurred at Evans School after she was terminated, especially, Security Officer Nelson's getting promoted to coach a team, in addition to his existing duties, and Johnson's being promoted to principal from his prior assistant principal position. Her conspiracy theory conveniently ignores the fact that, upon the occurrence of the incident, Johnson, as the acting principal, and then later Thompson, as the principal and chief executive officer of Evans School, each respectively followed all the procedures and policies relevant to termination for striking a student. Even more significant is the fact that, once Agency's central administration was notified of the incident, it was they, not Thompson and not Johnson, that took over the matter, conducted the investigation, and put forth Agency's case at both the grievance hearing before Buck and the evidentiary hearing before me. I find no evidence of a conspiracy whatsoever, and determine that Employee's apprehension about how this matter unfolded are without a basis in fact.

I find that Employee's removal from her position with Agency was with "just cause", and that termination, the penalty imposed upon Employee for injuring a student when she threw her keys at him, was appropriate, given all of the existing circumstances. Principal Thompson supervised at least one other teacher who was terminated for corporal punishment. She testified that the act of corporal punishment for which that teacher was terminated was not as severe as the incident between Employee and BD, and that she agreed with Agency's decision to terminate Employee for her conduct in this incident.

I further find that Employee's violation of the just cause standard was not *de minimus*. Under the Board rules, a justification, i.e., "cause", for adverse action may include, but is not necessarily limited to, one or more of the following grounds: "Violation of the rules, regulations or lawful orders of the Board of Education or any

directive of the Superintendent of Schools, issued pursuant to the rules of the Board of Education.” See Title 5 DCMR § 1401.2 (t).

Furthermore, except where a less restrictive standard is provided by statute or other provision of law, a corrective or adverse action including without limitation, a reprimand, suspension, reduction in grade, or removal may only be taken for cause. See Title 6 DCMR § 1603.2. For the purpose of Title 6, chapter 16, “cause” means...any on-duty or employment related act or omission that the employee knew or should reasonably have known is a violation of the law.

“Corporal punishment” is defined as the use, or attempted use, of physical force upon, or against, a student, either intentionally or with reckless disregard for the student’s safety, as a punishment, or discipline. See Title 5 DCMR § 2403.1.⁸ The use of corporal punishment in any form is *strictly prohibited* (emphasis added), in and during all aspects of the public school environment or school activities, and no student shall be subject to the infliction of corporal punishment by any teacher, other student administrator, or other school personnel. See Title 5 DCMR. § 2403.2.

Conduct prohibited by this section includes actual or attempted use of physical force against a student in accordance with §2403.1, provided that the conduct is not prompted by reasonable efforts at self defense or the defense of others; is necessary to maintain or regain order; or it is necessary for the safety of the educational environment. Examples of prohibited conduct include, but are not limited to, the following: (f) Throwing of objects; and (g) Unreasonable restraint.

Furthermore, the penalty imposed was appropriate given all of the existing circumstances. Employee did not throw her keys at BD in self defense or in the defense of others. Nor was it necessary for her to throw her keys at BD to maintain or regain order or for the safety of the educational environment. Employee admitted that she never specifically told BD to stop using profanity or to stop acting up in the classroom, the least intrusive means of addressing BD’s conduct. Had Employee not thrown her keys at BD, but in the process of restraining him, still caused bloody scratches on his back with her keys, a charge of corporal punishment might still have been substantiated.

Principal Thompson made certain to advise her teachers and teacher’s aides on the Board rules regarding corporal punishment. Employee received and read the memorandum from then Superintendent Vance, and signed a sheet acknowledging that she knew and understood the regulations regarding the prohibition of inflicting corporal punishment. Yet, on April 3, 2003, she abandoned both her training and explicit instructions on the subject, and threw her keys at a child or restrained him unreasonably.

Her first line of action should have been to ask BD to settle down or to stop using profanity, and if she had incorporated this approach, even if having to repeat her efforts several times, BD might well have taken a seat or quieted down. She did not do that, but rather immediately resorted to force, which conduct she knew was considered corporal

⁸ See Footnote 4, *supra*.

punishment. Up until that point, BD's conduct, although reprehensible, did not call for any contact from Employee, let alone contact that would cause him injury.

I find that violation of the for cause standard was not, therefore, *de minimus*, and that the penalty imposed was appropriate given all of the existing circumstances. I conclude that Employee inflicted corporal punishment on a DC Public Schools student and knew that her actions violated Agency's longstanding and published rules regarding corporal punishment. Therefore, Employee's termination should be upheld.

ORDER

It is hereby **ORDERED** that Employee's termination is **UPHELD**.

Rohulamin Quander, Esq.
Senior Administrative Judge

**DISTRICT OF COLUMBIA
STATE HISTORIC PRESERVATION OFFICER**

**NOTICE OF INTENT TO NOMINATE HISTORIC DISTRICTS
TO THE NATIONAL REGISTER OF HISTORIC PLACES**

The State Historic Preservation Officer hereby provides public notice of his intent to nominate the following historic districts to the National Register of Historic Places. The Historic Preservation Review Board recently designated these properties as an historic district after a duly noticed public hearing on July 26, 2007.

Under the provisions of the Historic Protection Act (D.C. Code §6-1102(5)(c)), this district becomes effective when the State Historic Preservation Officer nominates or issues a written determination to nominate the properties to the National Register of Historic Places. Thirty (30) days after the date of this notice, the properties will become subject to the D.C. Historic Landmark and Historic District Protection Act of 1978.

**Designation Case No. 07-33
Foxhall Village Historic District**

Affected Properties:

Square 1324, Lots 42, 43 and 44;

Square 1327, all lots;

Square 1350, Lots 48 through 154;

Square 1351, all lots;

Square 1352, all lots;

Square 1353, Lots 31, 51 through 89, 94, 95 and 820 through 829; and

Square 1354, Lots 40 and 41;

also presently known as:

1432, 1449, and entire 1500 and 1600 blocks 44th Street, NW;

4300 block and 4437 through 4447 P Street, NW;

4400 block of Q Street, NW;

1500 through 1617, odd numbers, Foxhall Road, NW;

4400 block Greenwich Parkway, NW; 4300 block Park Lane, NW;

4400 through 4478, even numbers, Reservoir Road, NW;

1700 block Surrey Lane, NW; and

4400 block of Volta Place, NW

Listing in the D.C. Inventory of Historic Sites and the National Register of Historic Places provides recognition of properties significant to the historic and aesthetic heritage of the nation's capital, fosters civic pride in the accomplishments of the past, and assists in preserving important cultural assets for the education, pleasure and welfare of the people of the District of Columbia.

ELSIE WHITLOW STOKES COMMUNITY FREEDOM PUBLIC CHARTER SCHOOL
3220 16TH STREET, NW
WASHINGTON, DC 20010
REQUEST FOR PROPOSALS

NOTICE OF REQUEST FOR PROPOSAL

The Elsie Whitlow Stokes Community Freedom Public Charter School, in compliance with Section 2204 (c) of the District of Columbia School Reform Act of 1995 ("Act"), hereby solicits expressions of interest from Accounting and Business Service contractors for the following tasks and services:

- General accounting services to the school in accordance with Generally Accepted Accounting Principles; payroll preparation; monthly financial reports; grant reports; annual audit preparation and audit or interface; preparation of annual tax documents.

For a copy of the complete RFP or to submit questions, please send email to lindam@ewstokes.org, using the subject line "Accounting Services". This contract term is slated to begin August 17, 2007 and end August 16, 2008. Deadline for submissions is August 16, 2007. To submit a bid, please send two hard copies of proposal to:

Linda R. Moore
Elsie Whitlow Stokes Community Freedom Public Charter School
3220 16th Street NW
Washington, DC 20010

**EXECUTIVE OFFICE OF THE MAYOR
OFFICE ON ASIAN AND PACIFIC ISLANDER AFFAIRS**

NOTICE OF FUNDING AVAILABILITY

Community Grant

Background Information on the grant:

The Mayor's Office on Asian and Pacific Islander Affairs (OAPIA) is soliciting grant applications from qualified community-based organizations (CBOs) serving the District's Asian and Pacific Islander (API) residents. The FY 2008 Asian and Pacific Islander Community Grant Program offers grants of up to \$50,000 to CBOs located in the District of Columbia. The grant funds are intended to enhance existing and startup programs focused on improving API residents' and/or merchants' need in health, education, housing, legal, public safety, business, and employment.

Amount of grant funds available and number of awards:

OAPIA expects to award between 4-8 grants to eligible community-based organizations with awards up to \$50,000.

Eligible organizations and entities:

Nonprofit (501(c)3) organizations located in the District of Columbia that:

- Serves primarily Asian and Pacific Islander residents and/or merchants
- Demonstrates cultural understanding of Asian and Pacific Islander community
- Demonstrates capacity to work effectively with language minority populations

Program scope:

Focus of the grant will be to provide culturally and linguistically appropriate health, education, housing, legal, public safety, business, and employment services to the District's API residents and merchants.

Release Date of RFA: August 3, 2007.

Pre-bidder's conference: August 10, 2007
10:00 am – 12:00 pm

441 4th Street, NW
11th Floor, **Conference Room 1114 South**
Washington, DC 20001

Deadline for Submission: Monday August 27, 2007 at 12:00 pm

441 4th Street, NW **Suite 805 South**
Washington, DC 20001

Contact Names: Thanh Nguyen, OAPIA, (202) 727-3120, thanh.nguyen@dc.gov

FRIENDSHIP PUBLIC CHARTER SCHOOL**REQUEST FOR PROPOSALS**

Friendship Public Charter School is seeking bids from prospective candidates to provide the following services:

- 1.) **Communications and Social Marketing Services** in accordance with requirements and specifications detailed in the Request for Proposal.
- 2.) **Invitation for Bid (IBF) for Groceries** for the National School Breakfast and Lunch Program in accordance with requirements and specifications detailed in the Invitation for Bid..

Prospective candidates can obtain an electronic copy of the full Request for Proposal (RFP) and Invitation for Bid (IBF) for each service by contacting:

Valerie Holmes
vholmes@friendshipschools.org
202-281.1722

Ideal Academy Public Charter School**INVITATION OF BIDS**

The Ideal Academy Public Charter School, serving students in grades preschool through 11th, will receive bids until Monday, August 27, 2007 at 4pm for special education related/support services for its special education students. These services are provided to students in a primarily inclusive setting. Related/support services that may be required include but, may not be limited to the followings:

- **Psycho-educational assessments**
- **Psychological counseling**
- **Speech/language assessments**
- **Speech/language therapy**
- **Physical therapy evaluations**
- **Physical therapy**
- **Occupational therapy**
- **Participation in IEP development**
- **Participation in multidisciplinary team meetings**
- **Consultations with teachers/administrators/other professional/parents**

The proposal should clearly state the capability for providing the wide range of services needed in a school of over 400 students with a possible 10 -15% requiring some services. Proposal must include hourly and/or flat rate costs for all services with a projection for cost of services for a school year.

The successful providers must possess certification/license in their areas of specialty. Police clearances and tuberculin test results must be provided for all service providers.

Send proposals to:

**c/o Zuella Evans, Business Manager
Ideal Academy Public Charter School
Rabaut Building, Second Floor
100 Peabody Street, NW
Washington, DC 20011**

Ideal Academy Public Charter School**INVITATION OF BIDS**

The Ideal Academy Public Charter School will receive bids until Monday, August 27, 2007 at 4pm for the delivery of breakfast, lunch and snack to children enrolled at the school for the 2007-2008 school year with a possible extension of (4) one year renewals. All meals must meet, but are not restricted to, minimum National School Breakfast, Lunch, and Snack meal pattern requirements. Meal pattern requirements and all necessary forms may be obtained from:

**Zuella Evans
100 Peabody Street, NW
2nd Floor
Washington, DC 20011
202/723-6798**

OFFICE OF CAMPAIGN FINANCE
DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS

SUMMARY OF REGISTERED LOBBYISTS INFORMATION

The Director of Campaign Finance herewith publishes a summary of registered lobbyists' information submitted to the Office of Campaign Finance on or before August 15, 2007 by persons registered as lobbyists with the Director, pursuant to the District of Columbia Campaign Finance Reform and Conflict of Interest Act of 1974, as amended, D.C. Official Code § 1-1105.04 (2001 Edition).

A person is required to register as a lobbyist with the Director of Campaign Finance on or before January 15th each year, or not later than 15 days after becoming a lobbyist, if such person receives compensation or expends funds in an amount of \$250 or more in any three (3) consecutive calendar month period for communicating directly with any official in the legislative or executive branch of the District of Columbia government with the purpose of influencing any legislative action or an administrative decision. D.C. Official Code §§ 1-1105.02 and 1-1105.04(a).

If information, pertaining to a lobbyist registered with the Office of Campaign Finance, is not contained herein and/or if a person requires additional information regarding District of Columbia lobbying statutes, please contact the Office of Campaign Finance, at 2000-14th Street, N.W., Suite 420, Washington, D.C., 20009 or telephone at (202) 671-0547.