THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
EMPLOYEE,	OEA Matter No. 1601-0020-24
	Date of Issuance: July 16, 2024
v.	
	JOSEPH E. LIM, Esq.
D.C. DEPARTMENT OF CORRECTIONS,	Senior Administrative Judge
Agency	

Alexis Martinez, Esq., Employee Representative
Millicent Jones, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on January 8, 2024, appealing the decision of the D.C. Department of Corrections ("DOC" or "Agency") to suspend him from his position as a Correctional Officer for thirty (30) days without pay due to alleged charges of failure/refusal to follow instructions and neglect of duty. After OEA requested Agency's response on January 8, 2024, Agency submitted its Answer to the Petition for Appeal on February 7, 2024. The matter was assigned to me on or about February 7, 2024. I held a Prehearing Conference on March 12, 2024, wherein Agency indicated that jurisdiction was an issue and that it intended to file a Motion to Dismiss for lack of jurisdiction on March 18, 2024. I ordered Employee to respond to Agency's motion by March 26, 2024. Agency was given the opportunity to submit its final reply brief on April 25, 2024, while Employee submitted his sur-reply on May 9, 2024. After review, I have determined that this matter can be resolved by the documents submitted by the parties and that no further proceedings are required. The record is now closed.

JURISDICTION

Jurisdiction in this matter was not established.

ISSUE

Should the petition for appeal be dismissed for lack of jurisdiction?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Pursuant to OEA Rule 631.2, Employee has the burden of proof on issues of jurisdiction.[1] OEA Rule 631.1 states that Employee must meet this burden by a "preponderance of the evidence" which is defined as that "degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." In this matter, Employee has not provided any evidence that OEA has jurisdiction over his appeal.

The following uncontroverted facts are based on the documents and pleadings submitted by the parties. On March 7, 2023, Employee was assigned to a special conveyance trip to Howard University Hospital ("HUH") and was one (1) of two (2) correctional officers assigned to maintain the custody and control of an inmate receiving treatment at the HUH Medical Outpost. At approximately 8:50 A.M., that day, the DOC's Office of Investigative Services ("OIS") was notified that this Inmate had escaped from HUH while under the custody and control of DOC. OIS initiated an internal administrative review of the escape and worked in conjunction with the United States Marshals Service ("USMS"), United States Attorney's Office ("USAO") and the Metropolitan Police Department ("MPD") to recapture the escaped inmate.

On March 7, 2023, OIS interviewed Employee in reference to the escape of the inmate from DOC's custody at HUH. Employee advised that the Inmate's belly chain, box, and lock (restraints) were removed in response to a nurse's request for the restraints to be loosened for the application of a blood pressure device to the Inmate's arm. The restraints were removed during Employee's shift and were never re-applied, contributing to the inmate's ability to escape from DOC's custody at HUH. In his brief, Employee blamed his fellow correctional officer, Sergeant JW, for inmate's escape.[2] He also alleged that Agency's investigation and subsequent disciplinary processing was procedurally flawed and biased.[3]

On May 17, 2023, OIS completed its administrative investigation of the matter and submitted its Internal Administrative Report to the Agency's Director, Thomas Faust, and Acting Deputy Director of Operations, Gloria Robertson.[4] On August 29, 2023, Deputy Director Lennard Johnson proposed Employee's termination.

In a letter designated as the "Final Decision regarding the proposal to remove you from your position as a Correctional Officer" dated December 7, 2023, from DOC Director Thomas Faust, Employee was informed that his proposed penalty of termination had been reduced to a thirty-day suspension without pay from December 11, 2023, to January 10, 2024.[5] The Letter further provided in relevant part that:[6]

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[1] 68 DCR 012473 (December 27, 2021), 6-B DCMR Ch. 600.
[2] Employee's Opposition to Agency's Motion to Dismiss (March 26, 2024),
[3] *Id.*
[4] Gloria Robertson's service as Acting Deputy Director of Operations ended on July 14, 2023, and Lennard Johnson assumed the role of Deputy Director of Operations effective July 17, 2023.
[5] Agency's Answer, Exhibit 2.
[6] *See* Agency Answer to Employee's Petition for Appeal and Motion to Dismiss at Tab 2 and 3.

> You are herewith informed of your right to grieve this final decision either through the negotiated grievance procedures set forth in the Collective Bargaining Agreement ("CBA") between the Agency and the FOP; or Appeal to the Office of Employee Appeals ("OEA"). You may elect only **one (1) of the grievance procedures. Once you have selected a grievance procedure, it is binding.**
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> Should you elect to appeal through the negotiated grievance procedure, your appeal should be forwarded to me, Thomas Faust, Director, D.C. Department of Corrections, 2000 14th Street, N.W., Seventh Floor, Washington, DC 20009. Your appeal may be made by completing a grievance resolution form and forwarding it to the above address during the period beginning with the day after the effective date of this letter, but not later than ten (10) calendar days after the effective date.
>
> Or,
>
> In the event that you elect to file an appeal with the Office of Employee Appeals (OEA), you must do so within thirty (30) calendar days of the effective date of this action. The OEA is located at 955 L'Enfant Plaza, SW, Suite 2500, Washington, DC 20024. Enclosed are the OEA Petition for Appeal Form and instructions, and OEA regulations. For additional information on filing an appeal, you should contact OEA, at (202) 727-0004.
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> **Emphasis added.**

On December 19, 2023, Employee submitted a written grievance to Director Faust via email to initiate the parties' negotiated grievance process.[7] That same day, Director Faust forwarded the grievance to DOC's Human Resources Department. However, due to a mixture of holiday travel and employees being out of the office due to COVID-19, Agency failed to submit a response to the grievance within the prescribed time.[8]

On January 5, 2024, Employee's union representative contacted Agency and the Office of Labor Relations and Collective Bargaining ("OLRCB") to request arbitration of his grievance pursuant to the terms of the parties' Collective Bargaining Agreement.[9] That same day, Employee received a response acknowledging receipt of his demand for arbitration from the OLRCB.[10] On January 8, 2024, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals. Pursuant to D.C. Code § 1-616.52(f), Employee was deemed to have exercised his option to raise this matter under the parties' negotiated grievance procedure when he submitted his written grievance to Director Faust on December 19, 2023.

In his brief, Employee did not dispute Agency's allegation that he as well as his union filed a grievance on his behalf with his consent prior to his filing a petition to OEA.[11] Instead, Employee

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[7] Agency's Exhibit 6.
[8] Agency Motion to Dismiss, page 5.
[9] *See* Agency's Exhibit 7
[10] Agency's Exhibit 1.
[11] Employee's Opposition to Agency's Motion to Dismiss (March 26, 2024),

focused on Agency's continued failure to act on his grievance. Employee alleges that Agency's dereliction denied him justice and due process. Agency points out that if it refuses to act on Employee's grievance, Article 10, Section E (2) of the CBA states that the employee can seek redress with an appeal to the District of Columbia Superior Court.[12] Employee counters that he should not have to take additional steps and incur additional legal costs to seek justice.

To support his argument that OEA should take jurisdiction, Employee points out that the D.C. Court of Appeals ("DCCOA") has held that in *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Dist. Of Columbia Metro. Police Dep't* ("*FOP v. MPD*") the first filing rule relied upon by the Agency is not an "inflexible command."[13] In *FOP v. MPD*, a police officer, unsure of whether his union would agree to demand arbitration on his behalf after MPD failed to properly serve him his termination notice, had first appealed to OEA to protect his options before invoking the negotiated grievance procedure such as arbitration. The officer then withdrew his OEA appeal after his union filed for arbitration.

The arbitrator, who the parties agreed would decide the threshold question of arbitrability, found that the officer's initial filing with OEA did not bind him to that forum as the officer's OEA appeal was merely a protective filing necessitated by the agency's inadequate service of his termination notice. The arbitrator reasoned that due to the unique facts and circumstances in this case, they could proceed to arbitration. The District of Columbia Public Employee Relations Board ("PERB"), under its limited review of arbitral awards, affirmed that decision, finding it was not "on its face ... contrary to law." But the Superior Court overturned the arbitrator's award and the issue went to the D.C. Court of Appeals.

The DCCOA reinstated PERB's decision upholding the arbitral award after finding that the D.C. Official Code section 1-616.52(f) 's first-filing rule is not a mandatory claim processing rule as neither its text nor its legislative history show clear intent to preclude equitable relief. In *FOP v. MPD*, the agency failed to personally serve the employee with his termination notice as required. The DCCOA held that by the time the employee learned of his adverse action, his decision to file an appeal with OEA despite his preference for arbitration was a reasonable and prudent action towards preserving his appeal rights.

These facts and circumstances in *FOP v. MPD* are not present in this instant matter. Neither party claims improper service of the adverse action. The only notable fact is that Agency had not acted on Employee's grievance at the time he filed his OEA appeal. While DCCOA held that section 1-616.52(f) was not an inflexible rule, neither did it hold that the rule should be disregarded. I find that the equitable course was to allow Agency to adhere to its CBA and section 1-616.52(f).

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[12] Agency's Reply to Employee's Opposition Agency's Motion to Dismiss, Exhibit 2. CBA. (April 30, 2024).
[13] *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Dist. Of Columbia Metro. Police Dep't.,* 277 A.3d 1272, 1274 (D.C. 2022) (internal citations omitted).

As was noted above, on January 8, 2024, Employee filed his Petition for Appeal with OEA. Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the CMPA, sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") reads in pertinent part as follows:

> (a) An employee may appeal [to this Office] 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 [RIF]. . .
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> Of note, D.C. Official Code § 1-616.52, provides as follows:
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> (a) An official reprimand or a suspension of less than 10 days may be contested as a grievance pursuant to § 1-616.53 except that the grievance must be filed within 10 days of receipt of the final decision on the reprimand or suspension.
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> (b) An appeal from a removal, a reduction in grade, or suspension of 10 days or more may be made to the Office of Employee Appeals. When, upon appeal, the action or decision by an agency is found to be unwarranted by the Office of Employee Appeals, the corrective or remedial action directed by the Office of Employee Appeals shall be taken in accordance with the provisions of subchapter VI of this chapter within 30 days of the OEA decision.
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> (c) A grievance pursuant to subsection (a) of this section or an appeal pursuant to subsection (b) of this section shall not serve to delay the effective date of a decision by the agency.
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> (d) Any system of grievance resolution or review of adverse actions negotiated between the District and a labor organization shall take precedence over the procedures of this subchapter for employees in a bargaining unit represented by a labor organization. If an employee does not pay dues or a service fee to the labor organization, he or she shall pay all reasonable costs to the labor organization incurred in representing such employee.
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> (e) 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 § 1-606.03, or the negotiated grievance procedure, **but not both.** (Emphasis Added.)
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> (f) An employee shall be deemed to have exercised their option pursuant to subsection (e) of this section to raise a matter either under the applicable statutory procedures or under the negotiated grievance procedure at such time as the employee timely files an appeal under this section or timely files a grievance in writing in accordance with the provision of the negotiated grievance procedure applicable to the parties, **whichever event occurs first.** (Emphasis Added.)

Based on the preceding, a District government employee who is otherwise covered by the protections afforded to most District government employees under D.C. Official Code § 1-606.03, may elect to have an Agency's action reviewed under the auspices of the OEA. However, some District government employees, like Employee herein, have other protection afforded to them pursuant to various collective bargaining agreements entered by and between an employees' union and a District government agency.

In the instant matter, as referenced in the December 7, 2023, Notice of Adverse Action Letter, Employee initially had concurrent avenues available for reviewing the Agency's adverse action – file a petition with the OEA or file a grievance through the CBA, but not both. As the Letter noted, the Employee had to choose which avenue in which to contest his removal. The Letter warned Employee, in layman's terms, of the election of review as generally provided for pursuant to D.C. Official Code § 1-616.52 *et seq*. According to D.C. Official Code § 1-616.52 (e), an aggrieved employee cannot simultaneously review a matter before the OEA and through a negotiated grievance procedure. Also, D.C. Official Code § 1-616.52 (f), further provides that once an avenue of review, either through the OEA or through a negotiated grievance procedure is first selected, then the possibility of review via the other route is closed. OEA has consistently held that it lacks jurisdiction to adjudicate an appeal when an employee elects to grieve a matter through their union prior to filing an appeal with this Office.[14] I find that Employee initially opted to contest his suspension under the auspices of the Collective Bargaining Agreement as noted in the adverse action letter. Consequently, I further find that the OEA lacks jurisdiction over the instant matter.[15]

ORDER

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

FOR THE OFFICE: /*s/Joseph Lim, Esq.*
JOSEPH E. LIM, ESQ.
Senior Administrative Judge

[14] *Boyd v. D.C. Public Schools*, OEA Matter No. J-0002-08 (August 6, 2008); *Boone v. D.C. Public Schools*, OEA Matter No. J-0293-10 (January 10, 2011); *Alonseza Belt v. Office of the State Superintendent of Education*, OEA Matter No. 1601-0244-10 (March 31, 2014); *Charles Brown v. Department of Human Services*, OEA Matter No. 1601-0058-07, *Opinion and Order on Petition for Review* (November 23, 2009); *Taylor v. D.C Public Schools*, OEA Matter No. 1601-0206-12 (June 26, 2014); and *Bustamante v. Department of the Environment*, OEA Matter No. 1601-0049-12 (July23, 2012).

[15] Since this decision is predicated on the Office's lack of jurisdiction, I am unable to address the factual merits, if any, of the Employee's appeal.