Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DWIGHT ROBBINS,	)	OEA Matter No. 1601-0213-11R16
Employee	)	
	)	
v.	)	Date of Issuance: January 30, 2018
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
REMAND

This matter was previously before the Board. Dwight Robbins ("Employee") worked as a teacher with D.C. Public Schools ("Agency"). At the close of the 2009-2010 school year, Employee was classified as an excessed teacher with an "Effective" rating under IMPACT, Agency's performance assessment system. As a result, he was given the choice to accept a buyout; take an early retirement; or take an additional year to secure a new placement. Employee selected to take an additional year to secure placement, but he was unable to obtain a position by mutual agreement for the 2011-2012 school year. On July 15, 2011, Agency notified Employee that he would be terminated effective August 12, 2011 because he failed to secure a new position.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on

September 9, 2011. He argued that Agency violated Chapter 8 of the D.C. Personnel Regulations ("DCPR") when the principal at Jefferson Middle School refused to interview him for a Health and Physical Education position. Employee also stated that Agency retaliated against him. Lastly, he contended that Agency violated his civil rights because the Health and Physical Education position was given to a younger, white female. Therefore, Employee requested to be placed in a full-time position at Jefferson Middle School.[1]

In response, Agency denied that it violated the DCPR. It asserted that Employee was terminated because he failed to secure another position by mutual consent within the required timeframe pursuant to the Collective Bargaining Agreement ("CBA") between Washington Teachers' Union ("WTU") and Agency. In addition, Agency stated that the principal of Jefferson Middle School was not obligated to interview Employee for a position. It further posited that Employee's civil rights were not violated. As a result, Agency believed that the termination was proper.[2]

The OEA Administrative Judge ("AJ") held a status conference on March 11, 2014 and determined that an evidentiary hearing was unwarranted. The parties were then ordered to submit briefs addressing whether Employee was terminated in accordance with all applicable laws, rules, and regulations.[3] In its brief, Agency's reiterated its previous arguments regarding why Employee's termination was proper.[4] Employee's brief provided, *inter alia,* that he should have been eligible to retire from Agency and that Agency was ". . . using collusion against [him] causing [him] to sign for the extra year which was not need[ed]."[5]

An Initial Decision was issued on June 16, 2014. The AJ held that Employee received

[1] *Petition for Appeal,* p. 6 (September 9, 2011).
[2] *District of Columbia Public Schools' Answer to the Petition for Review,* p. 3 (October 12, 2011)
[3] *Order Convening a Status Conference* (January 17, 2014) and *Order Requiring Briefs* (March 11, 2014).
[4] *District of Columbia Public Schools' Brief* (April 1, 2014).
[5] *Employee's Brief,* p. 3 (April 22, 2014). Thereafter, Employee submitted another brief which highlighted the arguments made in his pre-hearing statement. *Employee's Brief* (May 1, 2014).

notice from Agency advising him that he needed to secure a new teaching position by mutual consent on or before June 22, 2010. The AJ noted that Employee signed an Additional Year Selection Form ("AYSF") on December 27, 2010, but was unable to secure a new position before the proscribed deadline. He also concluded that Agency correctly utilized the 2007-2012 CBA, and not the 2004-2007 CBA, to excess teachers. Consequently, Employee's termination was upheld.[6]

Employee filed a Petition for Review with OEA's Board on July 21, 2014. He argued that the Initial Decision was based on an erroneous interpretation of statute because the AJ failed to evaluate Agency's actions under the correct CBA. Employee also opined that Agency violated the CBA because he was not provided a full year to secure a new position. Finally, Employee maintained that Agency misled him with regard to his retirement options, which left him with only six months to obtain a position.[7] Therefore, Employee requested that the Board reinstate him to his positon with back pay and benefits.[8]

The OEA Board issued an Opinion and Order on Petition for Review on February 16, 2016. It first noted that OEA was not jurisdictionally barred from considering an employee's claims that an adverse action violated the express terms of an applicable CBA.[9] Next, the Board explained that the AJ failed to provide an analysis in support of his conclusion that the 2007-2012 CBA, and not the 2004-2012 CBA, should govern this appeal. It stated that analyzing Agency's actions under each CBA could possibly result in different conclusions. Because the Board was unable to conclude that the Initial Decision was based on substantial evidence, Employee's Petition for Review was granted and the matter was remanded to the AJ for further

[6] The AJ held that OEA lacked jurisdiction to consider Employee's grievances concerning retirement, assignment, and lack of interviews. *Initial Decision*, p. 3-4 (June 16, 2014).
[7] *Petition for Review* (July 21, 2014).
[8] *Employee's Supplemental Brief in Support of Petition for Review of Initial Decision,* p. 3-4 (August 11, 2014).
[9] *See Brown v. Watt*, 933 A.2d 529 (D.C. 2010).

consideration.[10]

On September 12, 2016, the AJ held a status conference to discuss the issues on remand. The parties were subsequently ordered to submit briefs addressing whether OEA has jurisdiction over Employee's appeal; which CBA was applicable to the instant matter; and whether Agency followed all applicable laws, rules, and regulations when it excessed Employee.[11]

In its brief, Agency argued that Employee's challenges to its implementation of the excessing procedures in 2010 constituted grievances, over which OEA lacks jurisdiction. Agency also stated that Employee waived his right to claim that it was required to adhere to the excess process as provided in the 2004-2007 CBA because he failed to file a grievance in 2010. In addition, it asserted that the AJ correctly concluded that Employee's termination was proper. Lastly, Agency posited that OEA could not exercise jurisdiction over the matter because Employee elected to file a grievance prior to filing an appeal with this Office.[12]

In response, Employee contended that the Comprehensive Merit Personnel Act ("CMPA") gives OEA the broad authority to exercise jurisdiction over this matter. Employee also echoed his position that the 2004-2007 CBA applies to his case because the 2007-2012 CBA was not in effect at the time Agency initiated the excessing process. According to Employee, Agency wrongfully discharged him without just cause by failing to terminate him pursuant to the terms of the correct CBA. As a result, Employee requested that he be able to continue to challenge Agency's excessing process before OEA.[13]

An Initial Decision on Remand was issued on March 23, 2017. First, the AJ concluded that the excessing process began on June 11, 2010, when Agency first notified Employee that he was subject to removal. He noted that the 2004-2007 CBA had an intended duration of October

[10] *Opinion and Order on Petition for Review* (February 16, 2016).
[11] *Post-Status Conference Order* (September 13, 2016).
[12] *Agency Supplemental Brief* (October 13, 2016); *Agency Supplemental Reply* (November 30, 2016). In its reply brief, Agency stated that the 2007-2012 CBA should apply to this matter.
[13] *Employee's Responsive Brief in Opposition to Agency's Supplemental Brief* (November 14, 2016).

1, 2004 through September 30, 2007, as stated in Article XLIV of its terms. The AJ further provided that Agency and WTU subsequently entered into a new CBA in 2007. Under the new agreement, the expressed duration of the CBA was October 1, 2007 through September 30, 2012. In comparing the two CBAs, their corresponding duration clauses, and D.C. Council Resolution 18-530, the AJ determined that the 2007-2012 CBA should govern the instant appeal. Accordingly, the AJ held that Agency followed the correct excessing procedures because Employee was unable to secure employment at the end of the 2009-2010 school year. He further provided that Employee's other ancillary arguments constituted grievances over which OEA lacks jurisdiction. Therefore, Employee's termination was upheld.[14]

Employee disagreed with the Initial Decision on Remand and filed a second Petition for Review on April 27, 2017. He claims that the AJ's conclusion regarding the retroactivity of the 2007-2012 CBA must be reversed because nothing within the language of the contract indicates that the parties intended the excessing provisions to be retroactive. Employee further reasons that Agency violated the terms of the 2004-2007 CBA because it failed to follow the correct execessing procedures. Lastly, he argues that even if the AJ was correct in concluding that the 2007-2012 CBA should govern this appeal, the Initial Decision on Remand failed to properly analyze whether Agency complied with the procedures for excessing teachers under the new agreement. Therefore, Employee asks this Board to grant his Petition for Review and reverse the Initial Decision on Remand.[15]

Agency filed a Response to Employee's Petition for Review on June 1, 2017. It argues that the AJ correctly concluded that the 2007-2012 CBA controlled Employee's excessing process. Agency further restates its claim that OEA lacks jurisdiction over this appeal because Employee filed a grievance prior to filing an appeal with this Office. Consequently, it requests

[14] *Initial Decision on Remand* (March 23, 2017).
[15] *Petition for Review* (April 27, 2017).

that the Board uphold the Initial Decision on Remand and dismiss Employee's Petition for Review.[16]

Jurisdiction

After this matter was remanded by the Board, Agency filed a Status Conference Statement on July 7, 2016; a Supplemental Brief on October 13, 2016; and a Supplemental Reply Brief on November 30, 2016. In each filing, Agency challenged OEA's jurisdiction, arguing that WTU filed several grievances on Employee's behalf to contest the instant excessing process prior to the date on which Employee filed an appeal with OEA. Thus, it claims that Employee is precluded from pursuing an appeal before this Office because he elected to contest his termination through the grievance process. Agency further claims that the grievances advanced by WTU and Employee include the same issue before OEA, including whether the 2004-2007 CBA or the 2007-2012 controlled the excessing process. Since WTU has filed grievances that are currently pending, Agency reasons that the arbitrator assigned to the matter is in the best position to resolve issues pertinent to the applicable CBA. The AJ failed to address this issue in his Initial Decision on Remand; therefore, this Board will address Agency's argument.

This Office has no authority to review issues beyond its jurisdiction.[17] Therefore issues regarding jurisdiction may be raised at any time during the course of the proceeding.[18] OEA Rule 628.2 provides that Employee has the burden of proof for establishing jurisdiction. The agency shall have the burden of proof as to all other issues.[19] With respect to appeals before OEA, the Comprehensive Merit Personnel Act ("CMPA") contains specific provisions which require an

[16] *Agency Response to Petition for Review* (June 1, 2017).
[17] *See Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order Petition for Review* (Sept. 30, 1992).
[18] *See Brown v. District of Columbia Public Schools,* OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Mayfield v. Department of Mental Health*, OEA Matter No. J-0105-08 (September 4, 2008); *Jordan v. Department of Human Services,* OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review,* (Jan. 22, 1993); *Lu v. Department of General Services*, OEA Matter No. J-0153-13 (November 25, 2013); and *Maradi v. District of Columbia General Hospital*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).
[19] 59 DCR 2129 (March 16, 2012).

employee to choose procedures either under the CMPA or under the parties' Collective Bargaining Agreement but not both.[20] Additionally, D.C. Official Code § 1-616.52 provides the following in pertinent part:

> (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 [providing appeal rights to OEA] for employees in a bargaining unit represented by a labor organization.
>
> (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 Section 1-606.03, or the negotiated grievance procedure, but **not both**. (emphasis added).
>
> (f) An employee shall be deemed to have exercised their option (sic) pursuant to subsection (e) of this section to raise a matter either under the applicable statutory procedures or under the negotiated grievance in writing in accordance with the provision of the negotiated grievance procedure applicable to the parties, **whichever occurs first**. (emphasis added).

OEA has consistently held that it lacks jurisdiction to adjudicate an appeal when an employee elects to grieve a matter through their union prior filing an appeal with this Office.[21] Accordingly, this Board must determine whether Employee has satisfied his burden of proof in establishing OEA's jurisdiction, or whether he first elected to pursue a grievance with his union.

Article 6, Section 6.1.1 of the 2007-2012 CBA defines a grievance as "a complaint involving a work situation or a complaint that there has been a deviation from, misinterpretation of, or misapplication of a practice or policy; or a complaint that there has been a violation,

[20] *See* D.C. Official Code § 1-606.2.
[21] *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).

misinterpretation, or misapplication of any provision of this Agreement.[22] Under Section 6.3.1, either an employee or WTU may raise a grievance, and, if raised by the employee, WTU may associate itself with the grievance at any time unless otherwise provided. If the grievance is raised by WTU, the employee may not subsequently raise the grievance himself. A grievance raised by WTU on behalf of an employee must identify the employee. The WTU may not process a grievance on behalf of an employee without that employee's consent.

By way of procedural background, Employee received the initial notice on June 14, 2010 that his position was removed from the 2010-2011 staffing plan as a result of equalization. On August 6, 2010, WTU invoked a Step 2 class action grievance with former Chancellor, Michelle Rhee. The grievance was filed on behalf of all teachers who were excessed at the end of the 2009-2010 school year and charged Agency with violating the excessing procedures provided in both the 2004-2007 and 2007-2012 CBAs.[23]

On July 15, 2011, Employee received notice from Agency that his position would be terminated effective August 12, 2011 because he failed to secure placement for the following school year. The notice provided that Employee could appeal to his termination by filing a grievance pursuant to Article 6 of the WTU Agreement or by filing an appeal with OEA within thirty calendar days of the effective date of termination. On September 9, 2011, WTU filed a group grievance on behalf of all teachers who were terminated because they were unable to secure placement despite being rated as "Effective" or "Highly Effective."[24] The grievance identified Employee as one of the teachers who made proper use of "Option 3: A Year to Secure

[22] The 2004-2007 CBA contains identical language with respect to the definition of a grievance and procedure for filing a grievance.
[23] *See Agency Status Conference Statement*, Exhibits 4-6. WTU requested that affected excessed teachers be reinstated with back pay and benefits. WTU also grievances with Chancellor Rhee on and August 31, 2010 September 2, 2010 based on the same issues. On November 19, 2010, WTU advanced the August 6, 2010 and August 31, 2010 grievances to arbitration. The arbitration addressed Agency's excessing process for teachers during the summer of 2010.
[24] *Id*., Exhibit 7.

a New Placement." Employee also filed a Petition for Appeal with OEA on September 9, 2011.[25]

Employee argues that he did not authorize his union to file group grievances on his behalf.[26] However, this contention is belied by the record. Employee, by his own admission in his Petition for Appeal, states that he was a member of the Washington Teachers Union at the time he was terminated. When asked whether he previously filed an appeal, grievance, or complaint with an agency, Employee responded "yes."[27] Moreover, Employee's name has been explicitly included in the group grievances filed by WTU to address its arguments that Agency violated the excessing process. There is no evidence in the record to indicate that Employee rescinded his authorization for the union to act on his behalf. Therefore, this Board concludes that WTU was authorized to file its September 9, 2010 grievance for Employee.

The facts in this case present a unique issue because Employee filed a Petition for Appeal with OEA on the same date that WTU filed a grievance to contest Agency's excessing process. In the context of determining which exclusive remedy Employee intended to pursue, it is necessary to consider the totality of the circumstances. The record reflects that WTU began filing grievances on behalf of excessed teachers, including Employee, as early as August of 2010. The current grievance is still pending before an arbitrator. Employee's appeal before OEA also advances the same issues that are currently being grieved by WTU. Namely, the assigned arbitrator is tasked with determining whether the 2004-2007 or the 2007-2012 CBA applies to the teachers who were excessed in 2010. At its conclusion, this process will affect over seventy teachers who were unable to secure placement at the end of the 2009-2010 school year.[28]

After careful consideration, this Board finds that Employee intended to initially appeal his termination through the grievance process with his union. Employee was aware that WTU

[25] Employee signed his appeal with a date of September 10, 2011. However, OEA's time stamp reflects that his appeal was received by the front office on September 9, 2011 at 1:35 p.m.
[26] Employee's Reply Brief in Opposition to Agency's Motion to Dismiss (August 2, 2016).
[27] *Petition for Appeal*, page 4, Section E.
[28] *Agency Status Conference Statement*, p. 9.

filed a grievance on his behalf prior to the date on which he filed a Petition for Appeal with OEA. D.C. Official Code § 1-616.52 requires that employees select an exclusive remedy for appealing certain agency actions by way of the applicable statutory procedures, or under the negotiated grievance process, but not both. While Employee may take issue with WTU's efforts in resolving the issues surrounding his excessing process, he cannot be permitted to simultaneously prosecute his appeal before OEA and with his union. Contrary to Employee's contention, whether the grievance filed by WTU was untimely is not relevant to establishing jurisdiction in this matter. This is an issue that should be decided by an experienced, knowledgeable arbitrator who is in a better position to address both Agency's and WTU's arguments pertinent to CBA contract disputes.

Accordingly, this Board finds that Employee has failed to meet his burden of proof with respect to jurisdiction. Employee elected to file a grievance with his union in lieu of prosecuting an appeal before this OEA. Employee's election of remedies is binding. Consequently, his Petition for Review must be dismissed for lack of jurisdiction.[29]

[29] Assuming *arguendo* that OEA has jurisdiction over Employee's appeal, this Board agrees with the AJ's assessment regarding the applicability of the 2007-2012 CBA. The express duration clause for the 2007-2012 CBA states that the agreement was in effect from October 1, 2007 through September 30, 2012. Employee's excessing was initiated in 2010 and his termination became effective on August 12, 2011. Thus, Agency was permitted to rely upon the express terms of the agreement as provided in the 2007-2012 CBA. Employee argues that the 2007-2012 CBA did not become effective until June 29, 2010, when the D.C. City Council approved the agreement by way of DC Council Resolution 18-530. *See* CBA, Article 42. However, the resolution states that "the negotiated collective bargaining agreement establishes the compensation and working conditions for all members of the Washington Teachers' Union for fiscal year 2008 through year 2012." Agency initiated Employee's excessing process after fiscal year 2008, therefore, the 2007-2012 CBA was the proper agreement to utilize.

ORDER

Accordingly, it is hereby ordered that Employee's Petition for Review is **DIMISSED** for lack of jurisdiction.

FOR THE BOARD**:**

_____
Sheree L. Price, Chair

_____
Vera M. Abbott

_____
Patricia Hobson Wilson

_____
P. Victoria Williams

_____
Jelani Freeman

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.