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 of Employee Appeals' Chief Operating Officer 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:	
EMPLOYEE, Employee	OEA Matter No. J-0039-24
v.	Date of Issuance: July 23, 2024
METROPOLITAN POLICE DEPARTMENT, Agency	ERIC T. ROBINSON, ESQ. SENIOR ADMINISTRATIVE JUDGE

Johnny Norris, Jr., Employee *Pro-Se*
Andrea G. Comentale, Esq., Agency Representative

INITIAL DECISION

Prior to the instant removal action, Employee's last position of record was with the Metropolitan Police Department ("MPD" or the "Agency") as a Police Officer. According to Agency's Answer to the Petition for Appeal filed in this matter, on May 23, 2021, while off duty, Employee was involved in an incident with officers of the Alexandria (Virginia) City Police Department. MPD investigated the incident and on September 15, 2021, Assistant Chief of Police issuing the Final Investigative Report Concerning the Allegation of Misconduct (Conduct Unbecoming an Officer) against Employee, recommending Employee be cited for adverse action regarding the following violations of Department General Order Series 120.21, Drinking Alcohol—off duty; Orders & Directives Violation; Prejudicial Conduct; Conduct Unbecoming; and Criminal Conduct. On September 29, 2021, Employee was served with the Department's Notice of Proposed Adverse Action charging Employee with Drinking Alcohol (off duty), Orders & Directives Violations, Prejudicial Conduct, Conduct Unbecoming, and Criminal Conduct.

On March 4 through March 7, 2022, MPD held an Adverse Action Hearing where both Employee and the Agency presented witness testimony, documentary evidence, and the representations and arguments of their respective legal counsel. On March 25, 2022, Employee was served with the Adverse Action Panel ("AAP") Findings of Fact and Conclusions of Law which upheld all the charges and specifications, except Charge 3, Spec. 1 (Prejudicial Conduct—interfering in another law enforcement agency investigation). Further, Employee was also served

with MPD's Final Notice of Adverse Action which sustained the findings and penalties from the AAP. On April 8, 2022, Employee appealed the Final Notice to the Chief of Police. On May 9, 2022, the Chief of Police issued a Final Agency Action ("FAA") denying Employee's appeal and making Employee's termination effective that day.

On May 26, 2022, Employee, represented by Union counsel, served the Department with a written demand for arbitration pursuant to the Department and D.C. Police Union's Collective Bargaining Agreement ("CBA"). On February 13, 2023, Arbitrator H. Joseph Schimansky issued his Arbitration Opinion and Award denying Employee's grievance, finding that MPD had met its burden of proof by a preponderance of the evidence and further finding that termination was an appropriate penalty for Employee's misconduct.

On March 3, 2023, Employee appealed the Arbitration Opinion and Award to the District's Public Employee Relations Board ("PERB"). This appeal was initially dismissed on March 17, 2023. It was then amended and refiled and ultimately denied again by PERB on June 15, 2023. Employee then appealed PERB's denial to the District of Columbia Superior Court. On January 11, 2024, voluntarily dismissed his appeal of PERB's decision. On March 25, 2024, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting MPD's adverse action of removing him from service. On March 25, 2024, the OEA's Executive Director executed a letter to MPD requiring it to provide an Answer to Employee' s Petition for Appeal. On April 25, 2024, MPD provided its Answer and as part of its response, asserted that the OEA cannot exercise jurisdiction over Employee's appeal. This matter was assigned to the Undersigned on or about April 26, 2024. On April 29, 2024, the Undersigned issued an order to Employee requiring him to provide a response to MPD's assertion that OEA cannot exercise jurisdiction over this matter. Employe timely submitted his response. After careful review, I have determined that no further proceedings are warranted. The record is now closed.

JURISDICTION

As will be explained below, the OEA lacks jurisdiction over the instant matter.

BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021) states:

> The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> 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.

OEA Rule 631.2 id. States:

> For appeals filed under §604.1, the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Election of Remedies

D.C. Official Code § 1-616.52 et seq. provides, in relevant part, as follows:

> (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.
>
> (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.
>
> (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.
>
> (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.
>
> **(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.**
>
> **(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).**

The Agency asserts that almost two years have passed since the incident in question that led to Employee's removal occurred and that an Arbitration was conducted and ruled upon on Employee's behalf through his Union prior to filing his Petition for Appeal with the OEA. MPD further noted that in the interim, Employee also filed a dispute with PERB (and a decision was rendered) prior to his filing with the OEA. Given the instant circumstance, Agency further asserts that once an avenue is chosen, Employee is precluded from seeking redress through the other avenue. If Employee wanted to seek redress with the OEA, Agency asserts he should have asserted as much in a timely and forthright manner. Agency contends, and I agree, that D.C. Official Code § 1-616.52 (f) plainly provides that whichever avenue of redress is first chosen, is the sole venue through which an employee may pursue redress. Taking into consideration D.C. Official Code §1-616. 52 (e) and (f), I find that Employee's decision, through his Union, to first grieve this cause of action through the CBA's Arbitration clause (and then filing a dispute with the Public Employee Relations Board) prevents him from subsequently filing with the OEA. Taken plainly, Employee's grievance withdrawal cannot give rise to OEA's jurisdiction given the instant circumstances presented. I find that Employee's attempt at a second bite at the apple cannot stand. I find that the affirmative defense of laches is applicable here and I further find it precludes Employee's attempt at invoking OEA's jurisdiction.[1]

Employee has presented arguments regarding both the jurisdiction of this Office to hear his appeal as well as the legality of the process that the Agency utilized in effectuating his removal.[2] Despite these arguments, I find that the OEA lacks jurisdiction over the instant matter and accordingly, I have no authority to address the merits of his arguments regarding the legality of Agency's action of removing him from service.

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[1] This affirmative defense is based upon considerations of public policy which require, for the peace of society, the discouragement of stale claims. It recognizes the need for speedy vindication or enforcement of rights so that courts may arrive at safe conclusions as to the truth. *See Brundage v. United States*, 504 F.2d 1382 (Ct. Cl. 1974); *Shafer v. United States*, 1 Ct. Cl. 437, 438 (1983). To establish the defense of laches, the defendant must show undue delay by the plaintiff resulting in prejudice to the defendant. *See Brundage*, 504 F.2d at 1382; *Deering v. United States*, 620 F.2d 242, 245 (Ct. Cl. 1980); *National Wildlife Fed'n v. Burford*, 835 F.2d 305 (D.C. Cir. 1987); *Beins v. Board of Zoning Adjustment*, 572 A.2d 122, 126 (D.C. 1990); *Interdonato v. Interdonato*, 521 A.2d 1124, 1137 (D.C. 1987).

[2] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

<u>ORDER</u>

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

FOR THE OFFICE:

/s/ Eric T. Robinson
ERIC T. ROBINSON, ESQ.
Senior Administrative Judge