THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	OEA Matter No. J-0063-24
Employee	)	
	)	Date of Issuance: September 23, 2024
v.	)	
	)	LOIS HOCHHAUSER, Esq.
DISTRICT OF COLUMBIA PUBLIC SCHOOLS	)	Administrative Judge
Agency	)	

Employee, *Pro Se*
Gehrrie D. Bellamy, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL HISTORY AND BACKGROUND

On July 1, 2024, Employee filed a petition with the Office of Employee Appeals ("OEA") appealing the May 9, 2024 decision by the District of Columbia Public Schools ("Agency") to "excess" him from his teaching position at Dorothy Height Elementary School ("ES"), effective June 18, 2024. By memorandum dated July 1, 2024, Sheila Barfield, Esq., OEA Executive Director, sent Dr. Lewis Ferebee, DCPS Chancellor, a copy of the Petition for Appeal ("PFA") and advised him that pursuant to OEA Rule 612.1, the filing deadline for Agency response was July 31, 2024. On July 24, 2024, Agency filed its Answer and Motion to Dismiss ("Answer"). This Administrative Judge ("AJ") was appointed to hear the appeal on or about July 24, 2024.

On August 15, 2024, the AJ issued an Order notifying Employee that the jurisdiction of this Office was at issue for a number of reasons. First, there was insufficient information to determine if there was a final agency decision issued regarding an adverse action over which this Office has jurisdiction. Second, Employee stated in the PFA that he had not yet filed a grievance with the Washington Teachers' Union ("WTU"), his collective bargaining representative, although he intended to do so. However, Agency submitted a copy of a grievance filed by WTU on Employee's behalf dated May 20, 2024 regarding the same issue. In addition, Agency represented that the appeal was moot since Employee was offered, and had accepted a teaching position at John Lewis ES. Finally, Employee stated in the PFA that he did not know the type of service or appointment he held. This information is needed to ascertain if the type of service is one over which this Office has jurisdiction. The Order stated that employees have the burden of proof on all issues of jurisdiction. Employee was directed to submit legal and/or factual argument to support his position on this Office's jurisdiction on each issue delineated in the Order by September 3, 2024. The Order also

[1] Employees are not identified by name in decisions published on the Office of Employee Appeals website.

stated that if Employee no longer wanted to pursue the appeal, he could file a request seeking dismissal by the deadline. Employee was notified that failure to file a timely response could be considered as concurrence that this Office lacks jurisdiction or as a failure to prosecute, for which sanctions, including dismissal of the appeal, could be imposed. The parties were advised that the record would close at 5:30 p.m. on September 3, 2024 unless they were notified to the contrary

Employee telephoned the AJ on August 20, 2024, saying that he had questions about the Order and how to proceed. After explaining the prohibition on *ex parte* communications, the AJ said that he could ask the questions, and she would respond, if appropriate, since AJs can provide *pro se* employees some assistance, primarily on procedural matters.[2] Employee stated that he had filed a grievance through the Union prior to filing this PFA, which was pending. He also confirmed that he had accepted the appointment to John Lewis ES. After the call, Employee emailed a statement to the AJ stating that he was now aware that he could not proceed with both the Union grievance and the PFA, and would "continue…with the grievance filed through the union only." Employee did not otherwise respond to the Order. The record closed at 5:30 p.m. on September 3, 2024.

JURISDICTION

The jurisdiction of this Office was at issue in this matter.

ISSUES

Did Employee meet his burden of proof regarding this Office's jurisdiction of this appeal? If he did not, should this appeal be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Employee has held the position of General Education Teacher with Agency since July 2011. In a letter dated May 9, 2024, Agency notified him that in accordance with Section 4.5 of the Collective Bargaining Agreement ("CBA") between Agency and the WTU, his position at Dorothy I. Height ES would be "be excessed" on June 18, 2024. On May 20, 2024, WTU invoked a a Step 1, Stage 3 grievance on Employee's behalf, in accordance with the CBA contending that Agency violated the CBA by "excessing" Employee. On May 24, 2024, Agency notified Employee that he had "been chosen to fill a permanent full-time teaching position at John Lewis ES, which Agency contends Employee accepted. It is undisputed that Employee accepted the position.

The threshold issue in this matter is jurisdiction. This Office has no authority to hear matters beyond its jurisdiction. *See, e.g., Banks v. District of Columbia Public Schools*, OEA Matter 1602-

[2] Employee began by expressing concern about representing himself. The AJ responded that *pro se* employees can successfully represent themselves, and stressed the importance of knowing OEA Rules and asking questions if uncertain. Employee asked if accepting the new position barred him from pursuing this PFA. The AJ replied that the question was substantive in nature so she could not offer a response or guidance. Employee apologized for being unaware that he could not file the PFA after filing the grievance. He informed the AJ that he would proceed with the grievance. Employee asked if there would be a "negative consequence" if he did not respond to the Order. After she reviewed the pertinent language in the Order on that issue, she said that she could not rely on his oral representations, but he could email his decision. She reminded him to send Agency a copy of the email. She stated that she would send Agency counsel a summary of the conversation, and did so after the call ended.

0030-90, *Opinion and Order* (September 30, 1992). The jurisdiction of this Office was first established by the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Official 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. The CMPA and OPRAA both confer jurisdiction on this Office to hear the appeal of a final agency decision filed by a permanent District of Columbia Government employee in the Career or Education Service affecting (a) a performance rating that results in removal, (b) an adverse action for cause that results in removal, (c) a reduction in grade, (d) a suspension for ten days or more, (e) a reduction-in force; or (f) a placement on enforced leave for ten days or more. *See*, OEA Rule 604.1.

OEA Rule 631.2 provides that employees bear the burden of proof on all issues of jurisdiction. The burden must be met by a preponderance of evidence, which is defined as "the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find a contested fact is more likely to be true than untrue." *See,* OEA Rules, p. 31 In this matter, the AJ concludes that Employee failed to establish the jurisdiction of this Office for several independent reasons. First, Employee was assigned as classroom teacher at another school before June 18, 2024, the effective date of Agency's decision to excess him, and he accepted the assignment. Therefore, his employment as a classroom teacher was uninterrupted. Employee did not offer evidence or argument that the new assignment constituted an adverse action. Therefore, assuming *arguendo*, this Office initially had jurisdiction, there is no longer a controversy which this Office is authorized to hear. In addition, Employee filed a grievance pursuant to the CBA between Agency and WTU, on May 20, 2024 well before filing the PFA on July 1, 2024. The grievance and PFA challenge the same Agency action. D.C. Official Code § 1-616.52(e) (2001) provides that all matters over which this Office has jurisdiction that "also fall within the coverage of a negotiated grievance procedure," the employee is limited to one method of appealing an adverse action. In this matter, Employee chose to pursue the challenge through the grievance process and therefore cannot seek redress with this Office.[3]

For these reasons, the AJ concludes that Employee did not establish by a preponderance of evidence that this Office has jurisdiction to hear his appeal. She further concludes, therefore, that this appeal should be dismissed.

ORDER

It is hereby:

ORDERED: The petition for appeal is dismissed.[4]

Lois Hochhauser

FOR THE OFFICE: Lois Hochhauser, Esq.
Administrative Judge

[3] Although this Initial Decision does not address all of the jurisdictional challenges, the AJ thoroughly reviewed and considered each in her decision. *Antelope Coal Company/Rio Tino Energy America v. Goodin, 743 F.3d 1331, 1350 (10th Cir. 2014). See also, Gardner v. Department of Veterans Affairs, 123 M.S.P.R. 647 (2016)..*

[4] Based on the dismissal of this PFA, Agency's motion to dismiss is denied as moot.