THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1],	)	
Employee	)	OEA Matter No. 1601-0045-20
	)	
v.	)	Date of Issuance: May 17, 2022[2]
	)	
DISTRICT OF COLUMBIA	)	MONICA DOHNJI, Esq.
METROPOLITAN POLICE DEPARTMENT,	)	Senior Administrative Judge
Agency	)	
	)	

Pamela Keith, Esq., Employee Representative
Anna Kent, Esq., Agency's Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On May 22, 2020, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Metropolitan Police Department's ("Agency") decision to terminate her from her position as a Cadet, effective April 22, 2020. OEA issued a Request for Agency Answer to Petition for Appeal on June 23, 2020. Agency filed its Answer to Employee's Petition for Appeal on July 20, 2020. This matter was assigned to the undersigned on February 26, 2021.

After several postponements, a Telephonic Status/Prehearing was convened on June 24, 2021. Both parties were in attendance. Thereafter, on June 28, 2021, the undersigned issued a Post Status/Prehearing Order requiring the parties to submit briefs addressing the issues raised during the Status Conference. After several requests for extensions, on September 10, 2021, Agency filed a Motion for an Extension of Time and Bifurcation of the Jurisdictional Issue from the Merits. Agency argued that Employee appealed her termination from MPD's Cadet Corps Program, which is not a permanent position of employment. In an Order dated September 13, 2021, the undersigned ordered

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] This decision was initially issued on May 16, 2022; however, it had the incorrect date of issuance. The current decision is issued for the sole purpose of correcting the Date of Issuance.

Employee address the jurisdictional issue raised by Agency in its September 10, 2021, submission. Employee filed her Memorandum of Points and Authorities on the question of jurisdiction on November 12, 2021. Upon receipt of additional written submissions from the parties addressing the jurisdiction issue, a Prehearing Conference was convened on February 24, 2022. Prior to the February 24, 2022, Prehearing Conference, Agency filed a Motion to Dismiss, or in the Alternative, a Motion for Summary Disposition. During the Prehearing Conference, Employee requested additional time to file a response to Agency's Motion. This request was granted. Employee filed her Opposition to Agency's Motion to Dismiss on March 14, 2022. Agency filed a Reply in further Support of its Motion to Dismiss on March 25, 2022. Because this matter could be decided on the basis of the documents of record, I determined that no Evidentiary Hearing was warranted. The record is now closed.

JURISDICTION

The jurisdiction of this Office, pursuant to *D.C. Official Code, § 1-606.03 (2001)*, has not been established.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to 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 628.2 *id.* states:

> 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

The following findings of fact, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of Employee's appeal process with OEA. Employee was appointed as a Police Cadet in Agency's Cadet Corps Program effective December 26, 2017, with Term employment status and a NTE date of December 26, 2020. The Cadet program is established by the Chief of Police pursuant to D.C. Code § 5-109.01(a). The Cadet program is an apprenticeship program for Washingtonian senior year high school students and young adults between the ages of 17 and 24 who are interested in becoming Police Officers. The purpose of the program is to instruct, train, and expose interested persons to the operations of the Metropolitan Police Department and the duties, tasks, and responsibilities of serving as a police officer with the Metropolitan Police Department

Upon graduation from high school, part-time cadets will be converted into a full-time member of the Cadet Corps, and they will be enrolled in the University of the District of Columbia ("UDC") and complete the remainder of their training.[3] The Cadets in this program gain insight into Agency's operations, while earning a salary. The Cadet Corps Program is a pathway for young District residents to obtain the educational requirement to be able to apply for a permanent position in Agency's Police Officer Recruit Program. Cadets are required to serve a one (1) year probationary period. After completing the Cadet Corps Program, Graduates of the Cadet Corps Program must still apply for Metropolitan Police Department's ("MPD") Recruit Officer Training Program and go through the selection process to become a recruit officer. Graduates of the Cadet Corps Program also receive full preference for appointment into MPD or Fire and Emergency Medical Services Department if they meet all other requirements pertaining to membership in the chosen department.[4] All recruit officers, whether or not they were previously cadets, are required to complete an 18-month probationary period to obtain permanent career service status. Here, Employee completed her one (1) year probationary period while she was in the Cadet Corps Program as required. However, she was terminated from the Cadet Program on April 22, 2020, prior to the expiration of her NTE date. Employee was a dues-paying member of the NAGE union. The NAGE and Agency had a CBA in effect at the time of Employee's termination. Employee filed a Petition for Appeal with this Office on May 22, 2020, challenging Agency's decision to terminate.

Employee's Position

Employee notes that Article 24 of Collective Bargaining ("CBA") Agree between her Union, National Association of Government Employees. ("NAGE") and Agency provides that all bargaining unit members are subject to protection from termination without cause.[5] Employee avers that "the cadet corps is incorporated by reference, and subject to the NAGE CBA by way of the Compensation Supplement for Units 1 & 2, that also makes clear that Cadets are subject to the Grievance & Arbitration provisions of the NAGE CBA in Article 14."[6] Employee states that Agency's jurisdictional objection was improperly raised on appeal for the first time. Employee asserts that when a final determination was made about her termination, Agency actively participated in the appeal process without raising the question of whether or not Employee was a "probationary" employee. She highlights that based on the Notice of Final Decision, Agency resolved to terminate her on the merits of the charge against her, and never mentioned that she was a "probationary employee" without appeal rights. Employee notes that she was a term bargaining-unit employee well beyond her probationary period.[7] Employee further explains that she entered the Cadet program in December of 2017. Her probationary period ended in December of 2018. She was charged with an adverse action in February of 2020, and terminated in April of 2020, well past the end of her probationary period.[8] Employee maintains that Agency's jurisdiction claim is fundamentally flawed. Employee further provides that;

> "it is absurd to suggest that OEA would be going "beyond what the legislature has permitted it to do" by providing an appellate review of a termination in concert with what both the MPD and the Union agreed to, and what the very same City Council

[3] https://joinmpd.dc.gov/career-position-2020/cadet Retrieved on April 21, 2022.
[4] D.C. Code § 5-109.01(b).
[5] Employee's Memorandum of Points and Authority on the Question of Jurisdiction (November 12, 2021).
[6] *Id*. *See also*, Employee's Reply Memorandum on the Question of Jurisdiction (December 17, 2021).
[7] Employee's Memorandum of Points and Authority on the Question of Jurisdiction, *supra.*
[8] *Id*. *See also*, Employee's Reply Memorandum on the Question of Jurisdiction, *supra*.

> ratified. To the extent that the City Council intended OEA review not to be available to term or contract employees, it clearly set-aside that intention by extending OEA review to all NAGE members. It now must honor that extension of agency review." To conclude otherwise would be to allow the District to bargain in bad faith, to give benefits at the bargaining table with one hand, and take them back with the other, by means of litigation. … but there can be no dispute that all parties believed that [Employee] could appeal her termination to OEA. [Employee] asserts that the terms of the CBA are clear, and that such terms give her a right to appeal her termination to OEA, and to enforce the "just cause termination" provision of the contract by that means. Both the MPD and NAGE believe the same thing, and MPD informed [Employee] of her rights in writing."[9]

Citing to case law, Employee argues that when there is a conflict between state law provisions and the terms of a collective bargaining agreement, the terms of the CBA take precedence as being supported and enforced under federal law provisions.[10] Employee concludes that she is a dues-paying NAGE member beyond her probationary period. It states that regardless of what the city regulations might be with respect to OEA review of the terminations of non-union contract employees, Agency extended such review rights to NAGE employees in the collective bargaining process. It would be clear error to allow Defendant to renege on that bargained-for agreed-to process now.[11]

In her Opposition to Agency's Motion to Dismiss, Employee asserts that the executive branch of the District of Columbia government is a party to the applicable collective bargaining agreement and was thus in a position to disagree to the negotiated appeals process if it believed that "term" NAGE employees should be foreclosed from appealing to OEA. It failed to do so at the bargaining table and is now foreclosed from arguing that such a limitation exists before the OEA.[12] Employee contends that OEA's enabling statute makes it plain that its jurisdiction and procedures are subject to collectively bargained terms. Employee explains that CBAs are protected and enforced as part of a federal law scheme. Further, Employee asserts that it is well established law that when such a conflict arises, protecting the federal scheme and maintaining the labor management relationship takes precedence over municipal regulation or policy. Employee avers that to find otherwise would be to allow the municipality to act in duplicity in bargaining, and to divide a bargaining unit in a way that is impermissible.[13]

Citing to D.C. Code § l-616.52(b)[14], Employee argues that this section says nothing about the jurisdiction of the OEA being limited or proscribed only to permanent employees.[15] Also citing to D.C. Code § l-616.52(d) – (f)[16], Employee maintains that the enabling statute makes clear on its face

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[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] Employee's Opposition to Agency's Motion to Dismiss (March 14, 2022).
[13] *Id*.
[14] 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.
[15] Employee's Opposition to Agency's Motion to Dismiss, *supra*.
[16] **(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

that OEA jurisdiction and procedures can be modified by a collective bargaining agreement and that such modification would take precedence over any other OEA rule or procedure. She states that the operable language is not permissive.[17] Employee asserts that Agency relies on D.C. personnel principles that proscribe the appeal rights of employees not of the OEA itself. She maintains that the policy upon which the Agency relies serves as a gate holding back those who can seek OEA review. She notes that to the extent that the regulation is a gate that constrains employees, according to § 1-616.52(d), that gate can be opened by the terms of a CBA, as is the case here.[18]

Additionally, Employee reiterates that where there is a conflict between the regulation and the CBA, as in the current matter, the regulation is preempted.[19] She notes that the enabling statue of OEA recognizes this very fact, and plainly envisions that the act of collective bargaining can change any aspect of the OEA procedures, which would include affording bargaining unit members rights to an appeal that they might not otherwise have. Employee also states that the "Agency's principle (sic) mistake is relying on the Merit System Protection Board enabling statute to argue that Ms. Miller has no appeal rights at OEA. *See* D.C. Code § 1 -608.01 (a)(6). The statute that establishes who is a "career services" employee for the purposes of the MSPB is not germane to who has appeal rights at OEA. Appeal rights at OEA are governed by the statute cited and discussed above, D.C. Code § 1-616.52."[20] Employee concludes that for the reason stated above the undersigned should conclude that OEA has jurisdiction to hear Employee's appeal.[21]

Agency's Position

Agency states in its Motion for Extension of Time and Bifurcation of the Jurisdictional Issue from the Merits that Employee is appealing her termination from MPD's Cadet Corps Program, which is not a permanent position of employment.[22] Agency argues that OEA's jurisdiction is generally limited to permanent employees who are serving in the career or educational services and who have successfully completed their probationary periods.[23] Agency maintains that, because Employee's removal was from MPD's Cadet Corps Program, this matter should be dismissed for lack of jurisdiction.

Citing to D.C. Code § I-608.01(a)(6), Agency asserts that OEA lacks jurisdiction over this appeal because Employee's position as a police cadet was classified as a term appointment, which

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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.

[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] Motion for Extension of Time and Bifurcation of the Jurisdictional Issue from the Merits (September 10, 2021).
[23] *Id*. Citing *Roxanne Smith v. D.C. Department of Parks and Recreation*, Opinion and Order on Petition for Review, OEA Matter J-0103-08 (May 23, 2011).

does not confer permanent career service status.[24] Agency reiterates that OEA's jurisdiction is limited to termination appeals by career service employees with permanent status. Agency explains that this appeal should be dismissed for lack of jurisdiction because Employee was terminated from a time-limited appointment in MPD's Cadet Corps Program, which does not confer permanent career service status. Citing to *Richard Troen v. Metropolitan Police Department*,[25] Agency maintains that OEA lacks subject matter jurisdiction over both term and temporary employees.

Additionally, Agency provides that, the position of a cadet falls within the category of "[t]emporary, term, and other time-limited appointments . . . which do[es] not confer permanent status" under the CMPA[26] Agency also highlights 6-B DCMR § 823.8 which reads as follows: "An employee serving under a term appointment shall not acquire permanent status on the basis of the term appointment, and shall not be converted to a regular Career Service appointment, unless the initial term appointment was through open competition within the Career Service and the employee has satisfied the probationary period." Agency maintains that the governing regulations recognize that term and temporary employees are subject to removal prior to their Not-to Exceed ("NTE") date. Agency also notes that, 6- DCMR § 823.9 provides that; "Employment under a term appointment shall end automatically on the expiration of the appointment, unless the employee has been separated earlier." Agency asserts that here, the Standard Form 50 (SF-50) documenting Employee's appointment cited D.C. Code § l-608.01(a)(6) in Box 5-D as the legal authority for the personnel action.[27] Agency concludes that Employee's appointment as a cadet does not afford her the appeal rights of a permanent career service employee under the CMPA. It reiterates that because Employee received a time-limited appointment that would not convert to a permanent career service position; she did not accrue the same appeal rights as a permanent career service employee.[28]

Addressing Employee's argument that the jurisdictional issue was untimely raised, Agency notes that issues regarding jurisdiction may be raised at any time during the course of the proceeding, as OEA has no authority to review issues beyond its jurisdiction.[29]

Agency avers that, Employee's union arguments lack merit.[30] Agency contends that contrary to Employee's claims, her membership in the National Association of Government Employees, Local R3-05 (NAGE), is not relevant to OEA's jurisdictional inquiry because OEA derives its authority from statute. Agency explains that NAGE's collective bargaining agreement (CBA) does not expand OEA's jurisdiction, which is a creature of statute. It notes that the OEA appeal process may be available as an alternative to a union's bargained-for procedures, but NAGE cannot, and has not, bargained for an expansion of OEA's statutorily created subject matter jurisdiction. Agency highlights that Cadets, as dues-paying members of NAGE, are no more entitled to appeal to OEA

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[24] Agency's Response to Employee's Brief on Jurisdiction (December 8, 2021).
[25] OEA Matter No. l60l -0313- l0 at 2 (November 30,2012) (dismissing appeal by senior police officer terminated prior to the expiration of his NTE date).
[26] D.C. Code § l-608.01(a)(6).
[27] Agency's Response to Employee's Brief on Jurisdiction, *supra*.
[28] *Id. See also,* Agency's Motion to Dismiss, or in the alternative, Motion for Summary Disposition (February 14, 2022); Agency's Prehearing Statement (February 14, 2022) and Agency's Reply in Further Support of its Motion to Dismiss (March 25, 2022).
[29] *Id*.
[30] Agency's Motion to Dismiss, or in the alternative, Motion for Summary Disposition, *supra*.

than recruit officers, who are dues-paying members of the Fraternal Order of Police (FOP). Agency states that their union membership does not give these groups a right to appeal to OEA.[31]

Agency further concludes that this matter should be dismissed as OEA lacks jurisdiction over any contractual dispute between NAGE and MPD, and any allegations of unfair labor practices should be heard by PERB, not OEA. As such, the undersigned "should not permit Employee to present testimony from the local NAGE President Harvey Cannon, a national NAGE representative named Andre Phillips, an unidentified "note-taker" from a 2007 bargaining session, or any other witness, as such testimony is unnecessary to determine that, as a matter of law, OEA lacks jurisdiction over Miller's appeal."[32]

Analysis[33]

The threshold issue in this matter is one of jurisdiction. This Office has no authority to review issues beyond its jurisdiction.[34] Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.[35] The dismissal of this appeal is based solely upon the determination that this Office lacks subject matter jurisdiction, as both Term and temporary employees are specifically excluded from the jurisdictional authority of the OEA.

Citing to D.C. Code § l-616.52(b), (d)-(f), Employee argues that these Code sections say nothing about the jurisdiction of the OEA being limited or proscribed only to permanent employees. Employee maintains that the enabling statute makes clear on its face that OEA jurisdiction and procedures can be modified by a collective bargaining agreement and that such modification would take precedence over any other OEA rule or procedure. She states that the operable language is not permissive. Employee asserts that Agency relies on D.C. personnel principles that proscribe the appeal rights of employees not of the OEA itself. She maintains that the policy upon which the Agency relies serves as a gate holding back those who can seek OEA review. Employee asserts that, to the extent that the regulation is a gate that constrains employees, according to § I -616.52(d), that gate can be opened by the terms of a CBA, as is the case here.

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

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[31] *Id*.
[32] *Id*.
[33] 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").
[34] *See Banks v. District of Columbia Public School*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).
[35] *See Brown v. District of Columbia Public. School*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (January 22, 1993); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).

> adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . ., or a reduction in force [RIF]. . . .

The Omnibus Personnel Reform Amendment Act (OPRAA), which amended the CMPA in 1998 authorizes OEA to hear appeals of *permanent employees* in the Career and Education services who have successfully completed their probationary period (emphasis added). Contrary to Employee's assertions, this Office has consistently held that, OEA lacks jurisdiction over "Term" employees.[36] It is clear from the record that Employee was a Term employee who had completed her probationary period. Employee's Personnel Action from the date she was hired to when she was terminated identifies Employee's appointment as a Term appointment, with a "Not-to-Exceed" ("NTE") date of December 26, 2020.[37] Employee was employed effective December 26, 2017, and she was subsequently terminated from the Cadet Corps Program on April 22, 2020.[38] She was removed before the expiration of her NTE date. Pursuant to 6-DCMR §§ 823.8 and 9, - 823.8: "[a]n employee serving under a term appointment shall not acquire permanent status on the basis of the term appointment, and shall not be converted to a regular career service appointment, unless the initial term appointment was through open competition within the Career Service and the employee has satisfied the probationary period. **823.9**: [e]mployment under a term appointment shall end automatically on the expiration of the appointment, unless the employee has been separated earlier."[39] Here, Employee was separated from the Cadet program, a Term appointment, prior to becoming a permanent sworn member of Agency, and also prior to the expiration of her Term appointment with the Cadet Corps. Furthermore, although Employee had completed the required probationary period of her Term appointment, her appointment into the Cadet Corps was not through open competition within the career service. Moreover, the above-referenced law does not guarantee a Term employee, such as the current Employee, a permanent position, or any position at all. Because of Employee's status as a Term employee under the Cadet program, I find that she was not in permanent status upon her removal and as such, her appeal cannot be heard by this Office.

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[36] *Kyanna Feliciana v. Department of Behavioral Health*, OEA Matter No. J-0014-18, *Opinion and Order on Petition for Review* (September 4, 2018); *Roxanne Smith v. D.C. Department of Parks and Recreation*, OEA Matter No. J-0103-08, *Opinion and Order on Petition for Review* (May 23, 2011); *Carolynn Brooks v. D.C. Public Schools*, OEA Matter No. J-0136-08, *Opinion and Order on Petition for Review* (July 30, 2010); *Carla Norde v. Department of Human Resources*, OEA Matter No. J-0103-16, *Initial Decision* (January 6, 2017).

[37] Agency's Response to Employee's Brief on Jurisdiction, *supra*, at Exhibits 1 and 2.

[38] Agency explained that participants in the Cadet program must complete the terms of the Cadet Corps Program and then apply for and be accepted to MPD's Police Officer Recruit Program. The new recruits must then successfully complete the probationary period, as a probationary officer, before becoming a permanent sworn member. Agency further explains that the position of a cadet falls within the category of "[t]emporary, term, and other time-limited appointments . . . which do[es] not confer permanent status" under the CMPA, D.C. Code § 1-608.01(a)(6) because cadets are not selected through open competition, and the position is not on the career service ladder. Rather, cadets must apply for and be selected as a probationary recruit officer before they are converted to a career service appointment.

[39] *See also* 6-DCMR § 826.1 and 5, which provides that: 826.1 - "[t]he employment of an individual under a temporary or term appointment shall end on the expiration date of the appointment, on the expiration date of the extension granted by the personnel authority, or upon separation prior to the specified expiration date in accordance with this section." 826.5 – "[a] temporary appointee may be separated without notice prior to the expiration date of the appointment." The regulations for Term employees was amended on March 19, 2021, after the current adverse action commenced. The new regulation for Term employees can now be found under 6-DCMR § 209. Therefore, the undersigned will cite to the old provision found in Chapter 8 of the DCMR.

Collective Bargaining Agreement

Employee noted that she was a term bargaining-unit employee well beyond her probationary period at the time of her termination. Citing to several federal cases, Employee asserts that the terms of the CBA between her union and Agency are clear, and that such terms give her a right to appeal her termination to OEA, and to enforce the "just cause termination" provision of the contract by that means. Additionally, Employee notes that where there is a conflict between the regulation and the CBA, as in the current matter, the regulation is preempted. Again, citing to case law, Employee asserted that when there is a conflict between state law provisions and the terms of a collective bargaining agreement, the terms of the CBA take precedence as being supported and enforced under federal law provisions.

While it is unfortunate that despite being a dues-paying member of a union, Employee can not appeal her adverse action to OEA due to her Term employment status. Thus, I find that OEA is not the right forum to address issues related to unfair bargaining practices. The District of Columbia Public Employee Relation Board ("PERB") is tasked with addressing such issues.

In *Brown v. Watts*, 933 A.2d 529 (April 15, 2010), the Court of Appeals held that OEA is not jurisdictionally barred from considering claims that a termination violated the express terms of an applicable collective bargaining agreement. The Court explained that the Comprehensive Merit Personnel Act ("CMPA") gives this Office broad authority to decide and hear cases involving adverse actions that result in removal, including "*matters covered under subchapter [D.C. Code §1-616] that also fall within the coverage of a negotiated grievance procedure.*" (Emphasis added). I find that this holding does not expand OEA's jurisdiction. It simply provides that OEA can interpret the provisions of a CBA in a matter wherein, OEA already has jurisdiction over. That is not the case here. In the instant matter, OEA does not have jurisdiction over Term employees; as such, it cannot interpret the relevant provisions of the CBA between NAGE and Agency, as it relates to the adverse action in question. Moreover, pursuant to DCMR§ 1600.2, the provisions of Chapter 16 "apply to all District government employees *except* the following: **1600.2(b)** *Employees serving in a temporary appointment in the Career Service*". (Emphasis added). Therefore, although Employee's action resulted in an adverse action of removal, I find that because Employee does not have a permanent appointment, she is not covered by D.C. Code §1-616, and accordingly, her appeal does not meet the standard of review set forth by the Court of Appeals in *Brown v. Watts*.[40]

Additionally, Employee avers that the enabling statue of OEA recognizes that the CBA can change any aspect of the OEA procedures, which would include affording bargaining unit members rights to an appeal that they might not otherwise have. Employee argued that to the extent that the City Council intended OEA review not to be available to term or contract employees, it clearly set-aside that intention by extending OEA review to all NAGE members. It now must honor that extension of agency review. Employee cited to D.C. Code §l-616.52(d) in support of this argument which provides that: Pursuant to D.C. Code §l-616.52(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.

[40] "Term" Employees were covered under Chapter 8, at the time of the current adverse action. However, the regulations were amended in 2021and the provision governing "Term" employees has moved to Chapter 2.

> (Emphasis added). 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 organization incurred in representing such employee.

The above provision simply provided that the CBA *procedures of this subchapter* will supersede any other *procedure* within Chapter 16. (Emphasis added). This provision, however, does not in any way expand OEA's jurisdiction to include issues outside of Chapter 16 or outside of OEA's original jurisdiction. Assuming *arguendo* that D.C. Code §l-616.52 (d) did in fact expanded OEA's jurisdiction to all bargaining units represented by a labor organization, OEA would still not have jurisdiction over the current Employee because she is a Term employee, and Term employees are explicitly excluded from Chapter 16. Consequently, I conclude that because of her status as a Term employee at the time of her termination, OEA does not have jurisdiction over this matter.

Employee has the burden of proof on issues of jurisdiction, pursuant to OEA Rule 628.2.[41] Employee must meet this burden by a "preponderance of the evidence" which is defined in OEA Rule 628.1, *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." Based on the foregoing, I conclude that Employee has not meet the required burden of proof, and that this matter must be dismissed for lack of jurisdiction. Consequently, I am unable to address the factual merits, if any, of this matter.

ORDER

It is hereby **ORDERED** that the Petition for Appeal is **DISMISSED** for lack of jurisdiction and Agency's Motion to Dismiss is **GRANTED**.

FOR THE OFFICE:

/s/ *Monica N. Dohnji*
MONICA DOHNJI, Esq.
Senior Administrative Judge

[41] 59 DCR 2129 (March 16, 2012).