THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 1601-0412-10-R23
EMPLOYEE,	)	
Employee	)	
	)	Date of Issuance: May 9, 2024
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	ERIC T. ROBINSON, ESQ.
	)	SENIOR ADMINISTRATIVE JUDGE

Mark R. Carter, Esq., Employee Representative
Gehrrie Bellamy, Esq., Agency Representative

INITIAL DECISION ON REMAND

Employee was hired by the District of Columbia Public Schools' on January 3, 2010, and was a member of The Washington Teachers' Union, Local #6 ("WTU" or the "Union"). The 2007-2012 Collective Bargaining Agreement ("CBA") between The Washington Teachers' Union, Local #6 of the American Federation of Teachers, AFL-CIO and the District of Columbia Public Schools ("DCPS" or the "Agency") is applicable to the instant matter. Employee was placed at Spingarn Senior High School. Six months after her hire, Employee received notice that her position would be excessed from the school, and thus she was terminated August 23, 2010. On September 20, 2010, Employee filed a petition for appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting the District of Columbia Public Schools' ("DCPS" or the" Agency") action of removing her from service. At the time of her removal, Employee was an English Teacher at Spingarn Senior High School. Employee's tenure with DCPS started on January 3, 2010.[1] According to a letter dated August 23, 2010, addressed to Employee and signed by then DCPS Chancellor Michelle Rhee, Employee was removed from service effective August 23, 2010.[2] In its Answer to Employee Petition for Appeal, DCPS argued that the OEA lacks jurisdiction over the instant matter because Employee was removed from service during her probationary period.[3] Accordingly, the undersigned issued an Order on August 20, 2012, wherein Employee was required to address whether the OEA may exercise jurisdiction over the instant

[1] *See* Agency's Answer at Tab 2 (October 21, 2010).
[2] *Id*. at Tab 1.
[3] *Id*. at 3 – 4.

matter. On January 29, 2013, the Undersigned issued an Initial Decision dismissing Employee's Petition for Appeal due to a determination that OEA lacked jurisdiction since Employee was deemed to be a probationary employee at the time of her removal.

After lengthy review, this matter was remanded back to the Undersigned by the District of Columbia Court of Appeals for an additional determination as to whether the OEA may exercise jurisdiction over this matter.[4] After this matter was remanded, DCPS filed a Motion to Dismiss dated April 5, 2023. In this motion, DCPS asserted the following:

> The CBA provides that either an employee or the WTU may raise a grievance; WTU can process a grievance on behalf of an employee with that employee's consent; and when WTU files a grievance, the employee may not later raise the grievance herself. S.R. 399-400. Pursuant to these procedures, WTU filed and settled two grievances on [Employee] behalf challenging DCPS's decision to excess her position and separate her from employment. S.R. 478-79, 488, 491, 498, 501-02. And these grievances were filed before [Employee] filed her September 20, 2010, OEA appeal, on August 31 and September 2 respectively. Pursuant to D.C. Code § 1-616-52(e), Employee may file a grievance or an appeal for a matter, but not both.

DCPS further asserted that Employee was removed during her probationary period, which provides an additional reason mandating dismissal of this matter. Agency also notes that any miscues related to the filing of a grievance on Employee's behalf were of no fault of its own and that those issues (if they exist) may constitute a separate matter that pertains solely between the WTU and Employee. A Status Conference was held on May 11, 2023. It is uncontroverted that the WTU, on behalf of Employee and several of her colleagues, filed the grievance on their collective behalf in 2010. It is further noted that Employee did not voice her wish to be disassociated from the grievance until November 2018. The parties were ordered to provide briefs which they provided in a timely manner. It should be noted that the same facts and circumstances that gave rise to the Petition for Appeal are identical to the facts and circumstances that were settled by the WTU and DCPS. After reviewing the documents of record, I find 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:

[4] Employee v. DCPS, No. 18-CV-1350 (February 13, 2023).

> 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

The CBA guides labor relations between DCPS and the WTU members. Regarding grievance procedures, the CBA states:

> 6.3.1. Either an employee or the WTU may raise a Grievance, and, if raised by the employee, the WTU may associate itself with the Grievance at any time except as otherwise provided. If raised by the WTU, the employee may not thereafter raise the Grievance himself, and if raised by the employee, he may not thereafter cause the WTU to raise the same Grievance independently. Any Grievance raised by the 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.

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).**

DCPS asserts that a grievance was filed on Employee's behalf through her Union prior to filing her Petition for Appeal with the OEA. Employee did not seek to formally sever the grievance until almost seven years had passed. 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 on her own, Agency asserts she should have asserted as much in a timely and forthright manner. DCPS notes that the WTU was in contact with Employee throughout the lengthy grievance and settlement process and it was not until the end of 2018, almost seven years later, that Employee expressed a desire to disassociate from the grievance.[5] Agency further notes that the Union led grievance was successful and that Employee, through the WTU and DCPS settlement, was awarded approximately $38,000.00.

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 her Union, to first grieve this cause of action through the CBA prevents her from subsequently filing with the OEA. Notwithstanding the fact that Employee sought to withdraw from the grievance, I note that this withdrawal came almost seven years after it was first filed. 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

[5] Agency notes that Employee gave the WTU permission to pursue the class action grievance on her behalf when she gave signed over direct access to her employment file. *See*, DCPS Surreply to Employee's Opposition Post Status Conference Brief pp. 2-3 and Tab 1.

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.[6]

Employee has presented arguments regarding both the jurisdiction of this Office to hear her appeal as well as the legality of the process that the Agency utilized in effectuating her removal.[7] 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 her arguments regarding the legality of Agency's action of removing her from service.

ORDER

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

[6] 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).

[7] 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").