THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	
	)	OEA Matter No. 1601-0412-10R23
v.	)	
	)	Date of Issuance: January 16, 2025
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

This matter was previously before the Office of Employee Appeals' ("OEA") Board. Employee was a Teacher with the District of Columbia Public Schools ("Agency"). On August 23, 2010, Agency issued a final notice of separation informing Employee that she would be removed from her position because she was not a permanent status employee; she failed to secure a position within sixty days of being excessed; and she did not receive a final rating of at least "Effective" under IMPACT, Agency's performance assessment system. Consequently, she was terminated from employment effective August 23, 2010.[2]

The Administrative Judge ("AJ") issued an Initial Decision on January 29, 2013. The AJ

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] *Petition for Appeal* (September 20, 2010).

found that Employee was an Education Service employee, and "…educational service employees who are serving in a probationary period are precluded from appealing a removal action to [OEA] until their probationary period is finished."[3] He found that Employee started working for Agency on January 3, 2010, and the effective date of her removal was August 23, 2010. As a result, the AJ held that pursuant to § 814.3 of the District Personnel Manual ("DPM"), OEA lacked jurisdiction over the matter. Accordingly, Employee's appeal was dismissed.[4]

On February 27, 2013, Employee filed a Petition for Review with the OEA Board. She argued that the AJ did not address all issues of the facts and law raised in her appeal. Employee opined that the relevant section of the DPM, used by the AJ, which addressed appeals by probationary employees, did not apply to Educational Service positions.[5] It was Employee's position that any employee can appeal a final agency decision to OEA which resulted in removal. Therefore, she requested that the Board reverse the Initial Decision and hold that OEA has jurisdiction over her appeal.[6]

In response to the Petition for Review, Agency provided that Employee was not terminated based on any of the provisions provided in D.C. Code § 1-606.03, which outlined OEA's jurisdiction. It argued that she was excessed in accordance with the procedures of the Collective Bargaining Agreement ("CBA") that existed between it and the Washington Teachers' Union ("WTU"). Lastly, Agency reasoned that because Employee was in a probationary status, she had no statutory right to appeal to OEA.[7]

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[3] The AJ explained that pursuant to 5 D.C. Municipal Regulations ("DCMR") § 1307.3, Employee needed to serve a two-year probationary period and in accordance with 5 DCMR § 1307.6, her failure to do so would result in termination. *Initial Decision*, p. (January 29, 2013).
[4] *Id.* at 4.
[5] Employee also provided that OEA's rules do not mention the word probation, nor do they exclude probationary employees from OEA's jurisdiction. *Petition for Review of Initial Decision*, p. 8 (February 27, 2013).
[6] *Id.* at 9.
[7] *District of Columbia Public Schools' Response to Employee's Petition for Review* (March 21, 2013).

This Board issued its Opinion and Order on Petition for Review on June 10, 2014. It found that Employee was correct that the AJ incorrectly applied DPM § 814.3 to uphold her removal. The Board explained that DPM § 814.3 applies to Career Service employees and not Educational employees. Thus, it determined that the AJ improperly cited to this section of the regulation in the Initial Decision. However, the Board opined that the reference was *de minimis* because the AJ properly relied on 5 DCMR § 1307 in reaching his decision that Employee was properly removed. The Board explained that in accordance with 5 DCMR § 1307.3, Employee was required to serve a two-year probationary period. Because Employee was hired by Agency on January 3, 2010, the Board determined that the probationary period would not have ended until January 3, 2012. Specifically, it held that District government employees serving a probationary period did not have a statutory right to be removed for cause and could not utilize the procedures under the Comprehensive Merit Personnel Act, which includes appealing those actions to this Office. Consequently, the Board denied Employee's Petition for Review for lack of jurisdiction.[8]

Employee appealed the matter to the Superior Court of the District of Columbia. The Court found that there was substantial evidence in the record to support that the AJ properly relied on 5 DCMR § 1307.3 to conclude that Employee was required to serve a two-year probationary period. It held that Employee's probationary period ended on January 3, 2012, and Employee was terminated on June 21, 2011, before her probationary period ended. Accordingly, the Court upheld the AJ's decision.[9]

The matter was then appealed to the District of Columbia Court of Appeals. On appeal before the D.C. Court of Appeals, Agency conceded that Employee had rights under the CBA,

[8] *Opinion and Order on Petition for Review*, p. 4-6 (June 10, 2014).
[9] *[Employee] v. District of Columbia Office of Employee Appeals*, *et al.*, 2014 CA 006579 P(MPA) (D.C. Super Ct. December 6, 2018).

which according to Agency, made Employee neither an at-will employee nor a permanent employee but rather "something in between." Accordingly, it requested that this matter be remanded to OEA. The Court of Appeals remanded the matter for OEA to determine whether it had jurisdiction over Employee's appeal because Agency argued that Employee was indeed serving within her probationary period. Finally, the Court declined to consider Agency's belated argument that Employee's prior use of the grievance process stripped OEA of jurisdiction to consider Employee's appeal. As a result, it remanded the matter to OEA for further consideration.[10]

After conducting a status conference, the AJ issued a Post-Conference Order on May 15, 2023. He requested that the parties submit briefs on whether the grievance, and subsequent settlement, filed by the WTU precluded Employee from prosecuting her petition for appeal before OEA. Additionally, he asked the parties to brief whether Employee's attempt (intentional or unintentional) at "splitting" her cause of action prevented OEA from exercising jurisdiction over the matter.[11]

Agency filed its brief and argued that the grievance filed by the WTU was a class action litigation that included Employee. It explained that Employee filed her appeal with OEA after the WTU grievance was filed. According to Agency, D.C. Code § 1-616.52(f) provides that an employee shall be deemed to have exercised their option pursuant to subsection (e) to raise a matter either under the applicable statutory procedures or under the negotiated grievance procedure, whichever event occurs first. Thus, it posited that since Employee's WTU grievance was filed before the OEA appeal was filed, the resolution from the grievance would take precedence. Additionally, Agency noted that Employee's attempt to remove herself from the grievance matter

[10] *[Employee] v. District of Columbia Office of Employee Appeals*, *et al.*, No. 18-CV-1350 (D.C. 2023).
[11] *Post-Status Conference Order* (May 15, 2023).

was in 2018, eight years after the initial filing of the grievance in 2010.[12] While Agency noted that Employee's assertion was that she was not made aware of the WTU grievance filed on her behalf, it argued that the grievance process was a legal proceeding in which the resolution should be acknowledged and upheld. Thus, it opined that Employee should be barred from seeking additional redress before OEA.[13]

In her brief, Employee asserted that she did not consent to joining the WTU's grievance process. Consequently, she argued that she is not bound by the terms of the WTU settlement agreement. Moreover, Employee claimed that she did not accept a settlement, nor did she receive funds from the settlement between her union and Agency. Additionally, she contended that OEA did not lack jurisdiction to adjudicate the instant matter and that pursuant to D.C. Code § 1-612.52(e)(f), she was not prohibited from filing an appeal before OEA.[14]

Agency filed a sur-reply to Employee's Post-Status Conference brief. It made many of the same assertions in its previous brief and maintained that since Employee was a member of the union, she gave tacit consent for WTU to act on her behalf in litigious matters. Agency contended that after the grievance was filed, Employee's appeal was impermissible because her union filed a grievance on her behalf first.[15]

On May 9, 2024, the AJ issued an Initial Decision on Remand. He held that OEA lacked jurisdiction and thus, did not have authority to address the merits of Agency's removal action. The AJ explained that D.C. Code § 1-616.52 (f) provides that whichever avenue of redress is first chosen, is the sole venue through which an employee may pursue redress. He determined that

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[12] Agency provided that the executed WTU settlement agreement was submitted in February 2019, and Employee was awarded the settlement.
[13] *Respondent's Post-Status Conference Brief*, p. 3-11 (June 7, 2023).
[14] *Petitioner [ ] Opposition to Respondent District of Columbia Public Schools' Post-Status Conference Brief*, p. 13-26 (June 21, 2023).
[15] *District of Columbia Public Schools' Sur Reply to Employee's Opposition Post-Status Conference Brief*, p. 2-5 (July 18, 2023).

Employee's decision, through her union, to first grieve this cause of action through the CBA prevented her from filing with OEA. Additionally, he noted that Employee's grievance withdrawal came seven years after it was first filed. The AJ opined that Employee could not have a second attempt to appeal. Consequently, he ordered that the matter be dismissed for lack of jurisdiction.[16]

Employee disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on June 7, 2024. She reiterates several arguments made throughout the appeal. Employee asserts that OEA has jurisdiction and provides that her only course of action is the appeal before OEA. She emphasizes that she did not consent to join the WTU's grievance and has not accepted any settlement or received funds from Agency related to any settlement. Therefore, she requests that the Initial Decision on Remand be vacated and that the matter be remanded to the AJ for further consideration.[17]

D.C. Code §§1-616.52(e) and (f) provide the following:

> (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* (emphasis added).
>
> (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).

D.C. Code §1-616.52(e) provides that matters may be raised pursuant to Section 1-606.03, which outlines issues that may be appealed to the Office of Employee Appeals,[18] or through the

[16] *Initial Decision on Remand*, p. 4-5 (May 9, 2024).
[17] *Petitioner [ ] Petition for Review After Remand*, p. 16-26 (June 7, 2024).
[18] D.C. Official Code §1-606.03(a) provides the following:

> An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an

negotiated grievance procedure but not both. Employee does not dispute that she is a member of the WTU. However, she does argue that the above-mentioned statute does not prohibit her from filing an appeal with OEA despite the WTU first filing a grievance under the CBA. Employee contends that the statute does not provide that if she allegedly filed a grievance under the CBA, then OEA must dismiss her appeal.[19] Given the recent D.C. Court of Appeals ruling addressing this issue, this Board agrees with Employee's position.

The D.C. Court of Appeals in *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 277 A.3d 1272 (D.C. 2022) held that while D.C. Code §§ 1-616.52(e) and (f) provide that ". . . an aggrieved employee may not pursue both avenues of appeal, and uses mandatory language such as 'shall' to denote when an employee makes their choice of forum, it does not prohibit an employee from *filing* an appeal under their CBA despite first appealing to OEA—or vice versa. The statute does not state that if an employee files in one forum, the second forum must dismiss the appeal." Employee highlighted this case and its ruling in her Supplemental Opposition to Agency's Motion to Dismiss.[20] However, the AJ appears not to have considered this ruling given his reasoning that "whichever avenue of redress is first chosen, is the sole venue through which an employee may pursue redress."[21] In light of the holding in *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, the AJ's

> adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.

[19] *Petitioner[ ] Supplemental Opposition to Respondent District of Columbia Public Schools' Motion to Dismiss*, p. 3 (April 14, 2023).
[20] *Petitioner [ ] Supplemental Opposition to Respondent District of Columbia Public Schools' Motion to Dismiss*, p. 4-7 (April 14, 2023).
[21] *Initial Decision on Remand*, p. 4 (May 9, 2024).

ruling that Employee's grievance being filed first through the CBA prevented her from filing an appeal with OEA is not based on substantial evidence.

Moreover, the court in *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department* ruled that "the [statute's] language suggests that an employee's choice is binding only when the employee has an 'option' that can be 'exercised' in their 'discretion.'" According to Employee, she was unaware and did not consent to the WTU filing a grievance on her behalf. She reasoned that pursuant to CBA Article 6.3.1, the WTU may not process a grievance on behalf of an employee without the employee's consent. Employee provided that she did not consent to joining the class-action grievance; did not file a grievance; and did not receive any money from Agency to settle the grievance.[22]

Agency contends that Employee signed a release form allowing the WTU to litigate this grievance on her behalf.[23] This Board notes that the release that Agency references is titled "Permission to Release Employment Information," and it provides that Employee grants the union access to her Human Resources' files. The release does not provide any language allowing the WTU to file grievances on her behalf. Therefore, this matter must be remanded to the AJ to determine if Employee actually exercised her discretion to have the WTU file a grievance on her behalf, in light of the holding in *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*.

Additionally, this Board believes that it would be prudent to remand this matter for the AJ

[22] *Petitioner [ ] Opposition to Respondent District of Columbia Public Schools' Motion to Dismiss*, p. 12-13 (April 14, 2023).
[23] *District of Columbia Public Schools' Sur Reply to Employee's Opposition Post Status Conference Brief*, p. 2 (July 13, 2023).

to determine, as Agency alleged,[24] if *recovery* in the grievance prevents OEA from rendering a decision in this matter (emphasis added). This is especially important because although Agency claims that the matter has concluded and that Employee has been awarded a cash lump sum payment,[25] Employee contends she has yet to receive compensation from the grievance ruling.[26] Accordingly, this matter is remanded for further consideration by the Administrative Judge.

[24] In its filing of *District of Columbia Public Schools' Sur Reply to Employee's Opposition Post Status Conference Brief*, p. 4 (July 13, 2023), Agency argued that recovery is not allowed in the two forums.
[25] *Id.* at 3.
[26] *Petitioner [ ] Petition for Review After Remand*, p. 22 (June 7, 2024).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **GRANTED**, and this matter is **REMANDED** for further consideration**.**

FOR THE BOARD:

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Dionna Maria Lewis, Chair

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Arrington L. Dixon

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LaShon Adams

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Jeanne Moorehead

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.