

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 Manager 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 <sup>1</sup> ,	)	
Employee	)	OEA Matter No. J-0005-22
	)	
v.	)	Date of Issuance: January 25, 2022
	)	
D.C. FIRE AND EMERGENCY	)	
MEDICAL SERVICES DEPARTMENT,	)	MONICA DOHNJI, Esq.
Agency	)	Senior Administrative Judge
	)	
Employee, <i>Pro Se</i>	)	
Andrea Comentale, Esq., Agency Representative	)	

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On October 14, 2021, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the D.C. Fire and Emergency Medical Services Department’s (“Agency”) decision to demote her from the role of Sergeant to an EMS Captain, effective August 1, 2021. OEA issued a Request for Agency Answer to Petition for Appeal on November 2, 2021. On November 30, 2021, Agency filed its Motion to Dismiss Employee’s Petition for Appeal, stating that Employee’s Petition for Appeal originates from a grievance, and as such, OEA lacked jurisdiction over this matter. Agency did not file an Answer to the Petition for Appeal.

I was assigned this matter on December 2, 2021. Thereafter, I issued an Order on December 7, 2021, requiring Employee to address the jurisdictional issue raised by Agency in its Motion to Dismiss. Employee’s brief on jurisdiction was due on or before December 21, 2021, and Agency had the option to file a reply brief on or before January 4, 2022. While Employee timely filed her jurisdiction brief on December 21, 2021, as of the date of this decision, Agency

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<sup>1</sup> Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website

has not filed a reply brief. Because this matter could be decided on the basis of the documents of record, no proceedings were conducted. 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.

### ***Employee’s Position***

Employee notes in her December 21, 2021 submission, that OEA has jurisdiction over her appeal because she was demoted, and demotion is an adverse action within OEA’s jurisdiction.<sup>2</sup> Employee also states that “[a] demotion is typically associated with a reduction in grade, however, my situation is unique and although I did not receive a reduction in grade, I was demoted which has a negative impact on my career and the higher grades that I would have had the potential to be promoted to had I not been demoted.”<sup>3</sup> Employee further notes that she filed a grievance with Agency and received a Final Agency Decision which denied her grievance, along with her request to go to arbitration.<sup>4</sup> Employee asserts that Agency’s decision to rescind her promotion was wrong and her appeal rights were violated by a pre-arranged agreement between Agency and her union.<sup>5</sup>

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<sup>2</sup> Employee’s Brief on Jurisdiction (December 21, 2021).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

### *Agency's Position*

Agency states in its Motion to Dismiss that OEA lacks jurisdiction over Employee's appeal because the appeal originates from a grievance.<sup>6</sup> Agency asserts that, Employee acknowledged in her Petition for Appeal that she filed a grievance with Agency with respect to the instant claim.<sup>7</sup> Agency explains that Employee filed a grievance with respect to Agency's action correcting the erroneous promotion on August 5, 2021. Agency responded to Employee's grievance on September 17, 2021, and advised her that she could appeal to an arbitrator. Notwithstanding the clear and unambiguous appeal rights set forth within Agency's response, Employee filed the instant appeal. Agency maintains that the case law is clear regarding the only appropriate remedy available to Employee. As such, Employee's appeal of her grievance related matter must be dismissed. Agency avers that OEA has consistently held that an appeal to this Office involving grievances are not within its jurisdiction. Because this matter originates from Employee's grievance, it must be dismissed with prejudice for lack of jurisdiction.<sup>8</sup>

### ANALYSIS AND CONCLUSIONS OF LAW<sup>9</sup>

This Office's jurisdiction is conferred upon it by law and was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Official Code §1-601-01, *et seq.* (2001). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which took effect on October 21, 1998. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions. According to Title 6-B of the District of Columbia Municipal Regulation ("DCMR") § 604.1<sup>10</sup>, this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting:

- (a) A performance rating resulting in removal;
- (b) An adverse action for cause that results in removal, **reduction in grade**, or suspension for 10 days or more; or
- (c) A reduction-in-force; or
- (d) Placement on enforced leave for 10 days or more (emphasis added).

As previously noted, OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), states that "[t]he employee shall have the burden of proof as to issues of jurisdiction..." Pursuant to this rule, the burden of proof is by a preponderance of the evidence which is defined as "[t]hat 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." This Office has no authority

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<sup>6</sup> Agency's Motion to Dismiss (November 30, 2021).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> 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").

<sup>10</sup> See also, Chapter 6, §604.1 of the District Personnel Manual ("DPM") and OEA Rules.

to review issues beyond its jurisdiction.<sup>11</sup> Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.<sup>12</sup>

In the instant matter, Employee noted in her December 21, 2021 submission, that OEA has jurisdiction over her appeal because she was demoted, and demotion is an adverse action within OEA's jurisdiction. However, Employee further stated that "[a] demotion is typically associated with a reduction in grade, however, my situation is unique and although I did not receive a reduction in grade, I was demoted which has a negative impact on my career and the higher grades that I would have had the potential to be promoted to had I not been demoted." Employee admits that she did not receive a reduction in grade. Consequently, although Agency rescinded Employee's promotion to Sergeant approximately two (2) months after she was promoted, I find that Agency's action does not relate to an adverse action that has resulted in reduction in grade/demotion, as Employee would want this tribunal to believe. Therefore, I conclude that this Office does not have jurisdiction over this matter.

Assuming *arguendo* that Employee's Petition for Appeal resulted from a reduction in grade, the fact that she decided to file a grievance with her union on August 5, 2021, prior to filing her current appeal with this Office on October 14, 2021, removes this Office's jurisdiction over her appeal as well. D.C. Code (2001) §1-616.52 reads (in pertinent part) as follows:

(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. organization.

(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 Section 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).

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<sup>11</sup> See *Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

<sup>12</sup> See *Brown v. District of Columbia Public Schools*, 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 General Hospital*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).

In the instant matter, Employee acknowledges that she was a member of a union and she decided to file her appeal with the union in August of 2021, in hopes that the union would help her. It failed to do so; thus the reason Employee is now filing an appeal with OEA. Employee also noted in her Petition for Appeal that she filed a grievance with Agency with respect to the instant claim. Pursuant to the above referenced code section, Employee had the option to appeal her demotion claim with either OEA or through her Union, **but not both**. (Emphasis added). Employee elected to appeal her demotion claim by filing a grievance with her Union, several months before filing the instant Petition for Appeal with OEA. By doing so, Employee waived her rights to be heard by this Office. Based on the foregoing reasons, I conclude that this Office does not have jurisdiction over Employee's appeal.

**ORDER**

It is hereby **ORDERED** that Agency's Motion to Dismiss is **GRANTED**; and it is

**FURTHER ORDERED**, that Employee's Petition for Appeal is **DISMISSED**.

FOR THE OFFICE:

/s/ *Monica N. Dohnji*

MONICA DOHNJI, Esq.  
Senior Administrative Judge