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:	)	
	)	
TAWANDRA GAINES,	)	
Employee	)	OEA Matter No. J-0030-17
	)	
v.	)	Date of Issuance: April 19, 2017
	)	
OFFICE OF THE STATE	)	
SUPERINTENDENT OF EDUCATION,	)	
Agency	)	
	)	Arien P. Cannon, Esq.
	)	Administrative Judge

Tawandra Gaines, Employee, *Pro se*
Hillary Hoffman-Peak, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 17, 2017, Tawandra Gaines ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA"), challenging the Office of the State Superintendent of Education's ("Agency" or "OSSE") decision to remove her from her position as a Bus Attendant. Employee's removal was effective May 1, 2015. This matter was assigned to the undersigned on March 6, 2017.

Agency filed a Motion to Dismiss for Lack of Jurisdiction on March 23, 2017. An Order on Jurisdiction was issued on March 24, 2017, which required Employee to submit a brief addressing why she believed this Office may exercise jurisdiction over her appeal. Employee submitted her response on April 7, 2017. The record is now closed.

JURISDICTION

As discussed below, the jurisdiction of this Office has not been established.

ISSUE

Whether this Office has jurisdiction over Employee's appeal.

BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.[1] "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.

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.[2]

ANALYSIS AND CONCLUSIONS OF LAW

On January 21, 2015, Agency issued a Memorandum to Employee indicating that she had tested positive for a controlled substance. On February 19, 2015, Employee was issued an Advance Written Notice of Proposed Removal by the District of Columbia Department of Human Resources ("DCHR") as a result of her positive drug test.[3] Following an administrative review of this matter, DCHR issued a final Notice of Separation to Employee.[4] Employee's separation from the District government became effective at the close of business on May 1, 2015. The final Notice of Separation advised Employee of her appeal rights in this matter, including the 30 day time limit she had to file her appeal with this Office.[5]

In Employee's response to the Order on Jurisdiction, submitted on April 7, 2017, she raises three arguments: (1) the process to terminate her was inconsistent; (2) she did not receive representation from her local union representative; and (3) she did not receive a fair chance to petition to get her job back in-person with OSSE or DCHR.[6] First, Employee's argument that OSSE and DCHR consistently sent her mail to an old address seems to be supported in the Memorandum of Positive Drug test, which was issued to Employee on January 21, 2015.[7] In a form attached to this Memorandum, titled "Employee Contact Information," a different address is provided for Employee than the address listed on the Advance Written Notice and Final Notice of Separation. While Employee's Advance Written Notice of Proposed Removal and Final Notice of Separation may have been sent to an outdated address, Employee does however, acknowledge that she did ultimately receive the letters, although "several weeks later."[8] Despite

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[1] 59 DCR 2129 (March 16, 2012).
[2] OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).
[3] Although Employee was employed with OSSE, DCHR is the agency which administers drug testing to employees in safety-sensitive positions.
[4] Agency's Motion to Dismiss for Lack of Jurisdiction, Exhibit 3 (March 23, 2017).
[5] *See* OEA Rule 604.2, 59 DCR 2129 (March 16, 2012).
[6] *See* Employee's Response to Order on Jurisdiction (April 7, 2017).
[7] *See* Agency's Motion to Dismiss for Lack of Jurisdiction, Exhibit 1 (March 23, 2017).
[8] *See* Employee's Response to Order on Jurisdiction (April 7, 2017).

not receiving the Advance Written Notice and Final Separation Notice until several weeks later, Employee did not file her appeal with this Office until more than twenty-one (21) months after the effective day of her separation.

Employee's second argument that she did not receive representation from her union in this matter is a grievance that is outside the scope of this Office's jurisdiction. Lastly, Employee argues that the process at the administrative review level was unfair because she did not have the opportunity to present her case in-person, although she acknowledges that she was able to provide a written statement.[9] This is essentially a Due Process argument. The essential requirements of due process are notice and an opportunity to respond.[10] The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.[11] Affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays.[12]

Here, in accordance with the collective bargaining agreement (CBA) between the American Federal of State, County and Municipal Employees (AFL-CIO) District Council 20, Local 1959 and the Government of the District of Columbia, a CBA in which Employee belonged, she received a five (5) day advance written notice of the proposed action to remove her from her positon. In this Advance Written Notice, Employee was afforded the opportunity to prepare a written response, including affidavits and other documentation, within five (5) work days of receipt of the proposed removal notice. Although Employee may not have received the Advance Written Notice of proposed removal until "several weeks" later, she still was able to provide a written statement in response to proposed removal. Thus, I find that Employee was properly afforded her Due Process rights and exercised those rights when she submitted a written response to the Advance Written Notice of Proposed Removal prior to her termination becoming effective.

Furthermore, the District of Columbia Court of Appeals has held that the time limit for filing an appeal with an administrative agency such as this Office is mandatory and jurisdictional in nature.[13] The only exception that has been carved out by the OEA Board in excusing a late filing is when an agency has failed to provide the employee with "adequate notice of its decision and the right to contest the decision through an appeal."[14] "A failure to file a notice of appeal within the required time period divests [OEA] of jurisdiction to consider the appeal."[15]

Here, although it appears that Agency sent notices to Employee's old address after it was made aware of an updated address in writing, Employee, by her own admission, did ultimately receive the Advance Written Notice of Proposed Removal and the final Notice of Separation. In Employee's submission to this Office addressing jurisdiction, she states that she received these

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[9] *Id*.
[10] *See Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532 (1985)
[11] *Id*.
[12] *Id*.
[13] *See District of Columbia Public Employee Relations Board v. Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991)
[14] *See Crockett v. D.C. Department of Public Works*, Initial Decision, OEA No. J-0064-12, April 23, 2012 (citing *McLeod v. D.C. Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003)).
[15] *Zollicoffer v. District of Columbia Public Schools*, 735 A.2d 944 (D.C. 1999).

notifications several weeks later. However, she did not file her appeal with this Office until nearly two years after being notified of her removal. If Employee's appeal was received "several weeks" beyond the thirty (30) day time frame prescribed in OEA Rule 604.2, or even a month beyond this time limit, it would have bolstered her argument for this Office to exercise jurisdiction over her appeal. Even so, for Employee to sit on her appeal rights for well over a year after she acknowledges receiving the Final Notice of Separation does not fit within the exception carved out by the OEA in excusing a late filing with this Office.

Thus, I find that Employee was provided adequate notice of Agency's decision to remove her from her position and the opportunity to contest this decision through a written response. Consequently, Employee's filing of her Petition for Appeal with this Office nearly two years after her removal divests OEA's jurisdiction to consider this appeal on the merits.[16] As such, I find that this Office lacks jurisdiction over this matter.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Motion to Dismiss for Lack of Jurisdiction is hereby **GRANTED,** and Employee's Petition for Appeal be **DISMISSED**.

FOR THE OFFICE:

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Arien P. Cannon, Esq.
Administrative Judge

[16] *See Zollicoffer v. District of Columbia Public Schools*, 735 A.2d 944 (D.C. 1999).