THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
HORTENCIA BUSTAMANTE,	)	
Employee	)	
	)	OEA Matter No.: 1601-0049-12
v.	)	
	)	Date of Issuance: July 23, 2012
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF THE ENVIRONMENT,	)	
Agency	)	SOMMER J. MURPHY, Esq.
	)	Administrative Judge

Nate Nelson, Employee Representative
Kenita Saunders Romero, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On January 17, 2012, Hortencia Bustamente ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the D.C. Department of the Environment's ("Agency") action of terminating her employment based on a charge of "any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations."[1] Employee worked as a Bilingual Investigator in Career service prior to being terminated. On December 29, 2011, Agency served Employee with written notice of her separation from service. The effective date of Employee's termination was December 30, 2011.

I was assigned this matter in February of 2012. On February 27, 2012, Agency filed its answer to Employee's petition for appeal and asked that this matter be dismissed for lack of jurisdiction. Agency argued that Employee had elected to pursue the appeal of her termination through her Union's negotiated grievance process in lieu of filing a petition for appeal with OEA. On March 22, 2012, I issued an order directing Employee to submit a written brief addressing Agency's motion to dismiss. Employee submitted a response to the order. After reviewing the record, I determined that there were no material issues of fact at issue; therefore, the record is now closed.

[1] Specifically, Employee was charged with intentionally making a false statement or omission with respect to other government documents or making a false entry on government records which calls into question the credibility of the document.

ISSUE

Whether OEA has jurisdiction over this matter.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Undisputed Facts

I. Employee worked as a Bilingual Investigator in Agency's Environmental Protection Administration, Lead & Healthy Housing Division.

II. Employee is a member of the American Federation of Government Employees, Local 2978 Union ("the Union").

III. On November 15, 2011, Agency issued Employee an Amended Advance Written Notice of Proposed Removal from her position based on allegations of insubordination and intentionally providing a false statement or omission with respect to government property.

IV. Employee responded to the Advance Written Notice in writing on November 25, 2011.

V. On December 29, 2011, Agency issued its Notice of Final Decision on Proposed Removal. The notice stated that Agency's cause for Employee's proposed removal was supported by substantial evidence. The effective date of Employee's termination was December 30, 2011.

VI. Agency's December 29, 2011 notice stated that she was entitled to appeal the removal action to OEA within thirty (30) days of the final decision. The notice further provided that "[i]f applicable, you may file a grievance through the negotiated grievance procedures outlined in the collective bargaining agreement (CBA) for AFGE 2978. If you choose to file a grievance through the negotiated grievance procedures in your CBA you cannot file an appeal with the OEA."[2]

VII. On January 13, 2012, Employee informed Agency, via Union representation, of her intent to file a Notice of Step 4 Grievance and Intent to Arbitrate.[3]

VIII. On January 17, 2012, Employee filed a petition for appeal with OEA.

IX. On January 17, 2012 at 5:19 a.m., Robert Mayfield sent an email to Agency stating that AFGE Local 2978 would not be pursuing a grievance on Employee's behalf. The email further stated that Employee would appeal her termination through OEA.[4]

X. On January 18, 2012 at 11:44 a.m., Employee sent an email to Agency which stated "I am writing to the present to clarify that yesterday I appear at the petition for appeal office…and

[2] Notice of Final Decision on Proposed Removal (December 28, 2011).
[3] *Agency Brief*, Attachment B (February 27, 2012).
[4] *Id*., Attachment D. It should be noted that the time stamp on this email reads "Martes, enero 17, 2012" which, when translated to English, reads "Tuesday, January 17, 2012".

> they recommended me to file an appeal through my union. Since Robert Mayfield [advised] me to do it; but I want to do it with my union, so please do it. I want the union grieve me, I need this as soon as possible."[5]

Employee's position

Employee, who is represented by her Union, argues that this Office may exercise jurisdiction over this matter. According to Employee, OEA's Rules and the Union's CBA are silent on this issue of the finality of an agency decision in cases where the Union does not invoke arbitration on behalf of the Employee. In support of her position, Employee cites to a January 17, 2012 email from Local 2978's President to Agency, wherein the Union stated that it would not grieve Employee's final removal decision.[6] Employee also argues that she did not receive a "reasonable settlement offer" from Agency and believes that the Union's refusal to invoke arbitration on Employee's behalf leaves OEA as the sole "unbiased decision-maker" available to her.[7] In addition, Employee alleges that Agency violated Article 27 of the CBA by failing to provide Employee with progressive discipline prior to termination.

Agency's position

Agency argues that Employee is precluded from pursuing an appeal before OEA because she elected to file a Step 4 Grievance and Intent to Arbitrate with the Union prior to filing with this Office.[8] Agency also submits that Employee's arguments relevant to allegations of race and age discrimination fall outside the purview of OEA's jurisdiction, as those complaints were previously filed with the Office of Human Rights.

Analysis

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) provides that 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.

According to OEA Rule 628.2 *id.*, 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. Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, amended certain sections of the CMPA. Amended D.C. Code §1-606.3(a) states:

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[5] *Id*. There is no evidence in the record to substantiate Employee's statement that a member of OEA's staff offered her advice regarding which avenue of appeal she should pursue. As a matter of policy, OEA does not provide legal advice to any employees who appear before this Office.
[6] *Employee Brief* (May 2, 2012).
[7] *Amended Employee Brief*, p. 6 (May 4, 2012).
[8] *Agency Brief*, Attachment B (February 27, 2012).

> "An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee…an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more…or a reduction in force…."

Thus, §101(d) restricted this Office's jurisdiction to employee appeals from the following personnel actions only: a performance rating that results in removal; a final agency decision affecting an adverse action for cause that results in removal, a reduction in grade, a suspension of 10 days or more, or a reduction-in-force.[9]

D.C. Official Code § 1-616.52 (2001) states in pertinent part the following:

> (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* (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.

Moreover, District Personnel Manual, Chapter 16, Section 1601 states that:

> 1601.3 If an employee is authorized to choose between the negotiated grievance process set forth in a collective bargaining agreement and the grievance or appellate process provided in these rules, the employee may elect, at his or her discretion, to do one (1) of the following:
>
> (a) Grieve through the negotiated grievance procedure; or

[9] OEA's Rules of Procedure were amended effective March 16, 2012 to include placements of enforced leave for ten (10) days or more.

> (b) Appeal to the Office of Employee Appeals or file a disciplinary grievance, each as provided in these rules.
>
> 1601.4 An employee shall be deemed to have elected his or her remedy pursuant to § 1601.3 when he or she files a disciplinary grievance or an appeal under the provisions of this chapter or files a grievance in writing in accordance with the provisions of the negotiated grievance procedure applicable to the parties, whichever event occurs first. This section shall not be construed to toll any deadlines for filing.

In this case, Employee, a union member with AFGE, Local 2978, elected to file a grievance with Agency on January 13, 2012, approximately four days before she likewise filed a petition for appeal with OEA. Employee's Union representative informed Agency that Employee would be pursuing an appeal with this Office on January 17, 2012; however, on January 18, 2012, Employee sent an email to Agency clarifying her desire to proceed with the negotiated grievance process.[10] I find that Employee's January 18, 2012 email, coupled with the original Notice of Step 4 Grievance and Intent to Arbitrate filed on January 13, 2012, evidence Employee's desire to pursue her appeal through the Union's grievance process and not with OEA.

Under D.C. Code § 1-616.52, employees are given an option of whether to file their complaints with OEA or to pursue a formal grievance with the affected employee's union. However, once an employee has elected a path to remediation, and in this instance, by filing a grievance with the Agency, he or she is specifically barred from also filing a petition for appeal with this Office. Employee, when notified of the two available appeal options in the Notice of Final Decision on Proposed Removal, as referenced and outlined in her termination letter issued on December 29, 2011, elected to invoke the provisions of the Collective Bargaining Agreement, rather than to pursue her appeal through OEA. Accordingly, I find that Employee is precluded from pursuing her appeal before this Office.

Employee further argues in her petition for appeal that Agency discriminated against her because of her race and age. D.C. Official Code § 2-1411.02 (2001) specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR"). Per this statute, the purpose of OHR is to "secure an end to unlawful discrimination in employment…for any reason other than that of individual merit." Complaints classified as unlawful discrimination are described in the District of Columbia Human Right Act.[11] District Personnel Manual ("DPM") Section 1631.1(q) reserves allegations of unlawful discrimination to Office of Human Rights.

Here, Employee submitted a complaint of discrimination to OHR based on Agency's alleged violations of Title VII of the Civil Rights Act on January 5, 2010. According to Agency, this complaint was mediated and the claim was withdrawn by Employee on March 10, 2010. I therefore find that any additional claims regarding race and age discrimination fall outside the scope of OEA's jurisdiction.

Accordingly, I find that Employee elected to pursue her Union's negotiated grievance process as the sole remedy for aggrieving her termination. I further find that Employee is therefore precluded from

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[10] Article 38, Section 1 of the Union's CBA allows an employee or the Union to file a grievance complaint.
[11] D.C. Code §§ 1-2501 *et seq.*

pursing an appeal before OEA. Because this Office lacks jurisdiction over Employee's appeal, I am unable to address the merits, if any, of Employee's substantive claims. Based on the foregoing, Employee's petition for appeal must be dismissed.

ORDER

It is hereby ORDERED that Employee's petition for appeal is DISMISSED based on lack of jurisdiction.

FOR THE OFFICE:

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Sommer J. Murphy, Esq.
ADMINISTRATIVE JUDGE