

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. 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:	)	
	)	
ALFREDA JOHNSON,	)	OEA Matter No.: J-0077-14
Employee	)	
	)	
v.	)	Date of Issuance: July 21, 2014
	)	
D.C. PUBLIC SCHOOLS,	)	Monica Dohnji, Esq.
Agency	)	Administrative Judge
_____	)	
Alfreda Johnson, Employee <i>Pro Se</i>		
Sara White, Esq., Agency's Representative		

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On May 15, 2014, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) contesting the District of Columbia Public Schools’ (“Agency”) decision to terminate her from her position as a Teacher, effective August 23, 2010. On June 19, 2014, Agency submitted its Answer to Employee’s Petition for Appeal.

I was assigned this matter on May 23, 2014. On June 20, 2014, the undersigned Administrative Judge (“AJ”) issued an Order requiring Employee to address the jurisdiction issue in this matter no later than July 1, 2014. Agency was also afforded the option to submit a reply brief no later than July 8, 2014. While Employee submitted a timely brief, as of the date of this decision, Agency has not submitted the optional reply brief. After considering the arguments herein, I have determined that an evidentiary hearing is unwarranted. The record is now closed.

**JURISDICTION**

As will be discussed below, the jurisdiction of this office 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:

For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction

ANALYSIS AND CONCLUSIONS OF LAW

In its Answer, Agency highlights that OEA lacks jurisdiction in this matter because Employee’s appeal was filed with this Office more than thirty (30) days from the effective date of her termination. Agency also alleges that this Office lacks jurisdiction over this matter since Employee elected to grieve her termination under the terms of her Collective Bargaining Agreement (“CBA”) between Agency and Employee’s union, Washington Teachers Union (“WTU”). Lastly, Agency notes that Employee was in probationary status at the time of her termination and as such, OEA lacks jurisdiction over this matter.

In her response to the June 20, 2014, Order on jurisdiction, Employee notes that per the D.C. Superior Court decision dated April 15, 2014, she has to first exhaust her administrative remedies by filing her claim before OEA. Employee explains that the appeal to OEA was filed within thirty (30) days of the D.C. Superior Court Order and equitable tolling should be applicable. Employee also concedes that the union, WTU, filed a grievance on her behalf prior to her filing her Petition for Appeal with this Office. Additionally, Employee asserts that DCPS erroneously classified her as a probationary teacher. She explains that, at the time she was hired, she met the criteria for permanent status employment due to her previous employment with DCPS ranging from 1997-2001. She explained that she completed her probationary period during this time, citing District of Columbia Municipal Regulation (“DCMR”) 1307.(3) and *Karen Loeschner v. D.C. Public Schools*, OEA Matter No. 1601-0415-10 (December 14, 2012).

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 6-B of the District of Columbia Municipal Regulation (“DCMR”) § 604.1<sup>1</sup>, this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting:

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<sup>1</sup> See also, Chapter 6, §604.1 of the District Personnel Manual (“DPM”) and OEA Rules.

- (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.

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 to review issues beyond its jurisdiction.<sup>2</sup> Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.<sup>3</sup>

A “[d]istrict government employee shall initiate an appeal by filing a Petition for Appeal with the OEA. The Petition for Appeal must be filed within thirty (30) calendar days of the effective date of the action being appealed.”<sup>4</sup> The District of Columbia Court of Appeals has held that the time limit for filing an appeal with an administrative adjudicatory agency such as this Office is mandatory and jurisdictional in nature.<sup>5</sup> Also, while this Office has held that the statutory thirty (30) days time limit for filing an appeal in this Office is mandatory and jurisdictional in nature,<sup>6</sup> there is an exception whereby, a late filing will be excused if an agency fails to provide the employee with “adequate notice of its decision and the right to contest the decision through an appeal.”<sup>7</sup>

Here, according to the parties’ submissions to this Office, Employee’s termination was effective on August 23, 2010. Because the effective date of Employee’s termination was August 23, 2010, Employee had thirty (30) days from that date to file an appeal with OEA, but she failed to do so. Instead, upon her termination, Employee, through her union, filed a grievance, and later filed a complaint with the D.C. Superior Court which found that Employee had not exhausted her administrative remedies. After receiving the ruling from the D.C. Superior Court on April 15, 2014, Employee filed her appeal to this Office on May 15, 2014. While this was within thirty (30) days from the April 15, 2014, D.C. Superior Court ruling, the matter in front of the D.C. Superior Court did not toll the mandatory thirty (30) days within which to file an appeal with this Office, unless Agency failed to provide Employee with “adequate notice of its decision and the right to contest the decision through an appeal” in compliance with OEA Rule 605.1.

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<sup>2</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>3</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).

<sup>4</sup> DC Official Code §1-606.03.

<sup>5</sup> See, e.g., *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991); *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162, 1164 (D.C. 1985).

<sup>6</sup> *King v. Department of Human Services*, OEA Matter No. J-0187-99 (November 30, 1999).

<sup>7</sup> OEA Rule 605.1, 59 DCR 2129 (March 16, 2012); See also *Rebello v. D.C. Public Schools*, OEA Matter No. 2401-0202-04, *Opinion and Order on Petition for Review* (June 27, 2008) citing *McLeod v. D.C. Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003); *Jones v. D.C. Public Schools, Department of Transportation*, OEA Matter No. 1601-0077-09, *Opinion and Order on Petition for Review* (May 23, 2011).

A review of the Final Agency Decision (“FAD”) dated August 23, 2010, and submitted by Employee as part of her Petition for Appeal corroborates that Employee was notified of her appeal rights to this Office. The Notice also highlights that, Employee in fact received a copy of the OEA appeal forms and OEA regulations, in compliance with OEA Rule 605.<sup>8</sup> Clearly, Employee was aware of OEA’s jurisdiction over this matter, as well as the rules governing appeals in this Office. Additionally, because Employee was aware of her appeal rights with this Office, as well as the mandatory thirty (30) days time limit for filing an appeal in this Office, I find that Employee’s Petition for Appeal is untimely. Employee was terminated effective August 23, 2010, and she did not file her appeal until May 15, 2014, approximately three years and nine months from the termination effective date. According to the FAD, Agency complied with OEA Rule 605.1 when it terminated Employee, and as such, Employee’s untimely Petition for Appeal does not fall within the exception to the thirty (30) days mandatory filing requirement. Therefore, I conclude that this Office does not have jurisdiction over Employee’s appeal. And for this reason, I am unable to address the factual merits, if any, of this matter.

Assuming *arguendo* that Employee’s Petition for Appeal with this Office is considered timely, the fact that she decided to file a grievance with her union prior to filing her appeal with this Office takes away this Office’s jurisdiction over her appeal. D.C. Official 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 [providing appeal rights to OEA] for employees in a bargaining unit represented by a labor 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 (*sic*) pursuant to subsection (e) of this section to raise a matter either under the applicable statutory procedures or under the negotiated grievance in writing in accordance with the provision of the negotiated grievance procedure applicable to the parties, **whichever occurs first** (emphasis added).

The FAD also advised Employee that she could file a grievance with her union or file an appeal with OEA, but not both. In the instant matter, Employee was a member of the WTU. Employee concedes that the WTU filed a grievance on her behalf after she was terminated, and prior to filing an appeal with OEA. Pursuant to the above referenced code and the FAD, Employee had the option to appeal her termination with either the OEA or through her Union, **but not both**. (Emphasis added). The Collective Bargaining Agreement between the Union and Agency permitted the Union to file a group grievance to resolve issues. Employee elected to appeal her termination by filing a grievance under the CBA between Agency and her Union, several years before filing a

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<sup>8</sup>Petition for Appeal (May 15, 2014). The FAD stated that “a copy of the OEA Rules and the appeal information are attached to this letter.”

Petition for Appeal with OEA.<sup>9</sup> By doing so, Employee waived her rights to be heard by this Office. Therefore, I conclude that this Office does not have jurisdiction over Employee's appeal.

With regards to the issue of probationary employment status, Agency argues that this Office lacks jurisdiction over Employee's appeal because Employee was in probationary status when she was terminated. Employee on the other hand contends that she was erroneously classified as a probationary teacher. She explains that she was a permanent teacher under the Educational Service because of her previous employment with DCPS from 1997-2001.

Pursuant to DCMR § 1307.3, "[a]n initial appointee to the ET salary class shall serve a two (2) year probationary period requirement." Employee was rehired in 2009, and she was terminated in 2010, less than the required two (2) years probationary period. I disagree with Employee's argument that she acquired permanent duty status from her previous employment with DCPS that ended in 2001. Although Employee had previously worked for DCPS, there was a break in service of more than one (1) work day between Employee's employment that ended in 2001 and her employment that commenced on August 17, 2009. As such, when Employee was rehired by DCPS in 2009, she was an initial employee entering into the Educational Service and was required to serve a two (2) year probationary period from her date of hire.

Furthermore, the instant matter is distinguishable from *Karen Loeschner v. D.C. Public Schools, supra*, in that, although the employee in *Loeschner* was also excessed, she attained permanent status prior to the effective date of her termination. Loeschner attained permanent duty status on August 19, 2010, a full three (3) calendar days before the effective date of her termination on August 22, 2010. This is not the case here. In the instant matter, Employee was employed on August 17, 2009, and she was terminated effective August 23, 2010. Therefore, at the time of her termination, Employee had been employed with Agency for approximately one (1) year and six (6) days, less than the required two year probationary period. Based on the foregoing, I further find that Employee was a probationary employee at the time of her termination and therefore, this Office lacks jurisdiction over Employee's Petition for Appeal.

ORDER

It is hereby **ORDERED** that the petition in this matter is **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

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MONICA DOHNJI, ESQ.  
ADMINISTRATIVE JUDGE

<sup>9</sup> *Id.* at pg. 2 (2).