

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Louis Robbins)	OEA Matter No. 1601-0166-11
Employee)	
)	Date of Issuance: November 18, 2013
v.)	
)	Joseph E. Lim, Esq.
D.C. Public Schools)	Senior Administrative Judge
Agency)	
_____)	
Sara White, Esq., Agency Representative		
Louis Robbins, Employee <i>pro se</i> ¹		

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

On August 15, 2011, Employee filed a petition for appeal with this Office from Agency's final decision terminating him from his position as Custodian effective July 29, 2011, for an "Ineffective" IMPACT rating. The matter was assigned to the undersigned judge on March 29, 2013. I issued an Order directing the parties to submit a Prehearing Statement and to attend an April 26, 2013, Prehearing Conference. Employee failed to appear at the conference. In response to my Order for Good Cause Statement, Employee reiterated his desire on May 8, 2013, to pursue his appeal but explained that he had been depressed. I rescheduled and held a prehearing conference on May 13, 2013. Thereafter, I ordered Employee to respond to Agency's Motion to Dismiss for lack of jurisdiction. When Employee failed to respond, I issued another Order for Good Cause Statement on July 1, 2013. Employee then submitted his response on the jurisdiction issue. The record closed afterwards.

JURISDICTION

The jurisdiction of this Office was not established.

ISSUE

Should this petition for appeal be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The threshold issue in this matter is one of jurisdiction. This Office has no authority to

1 Employee was initially represented by Diana Bardes, Esq. However, she withdrew her representation on May 13, 2013.

review issues beyond its jurisdiction.² Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.³ 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 not relevant to this case, of permanent employees in Career and Education Service who are not serving in a probationary period, or who have successfully completed their probationary period.

Employee has the burden of proof on issues of jurisdiction, pursuant to OEA Rule 628.2, 59 D.C. Reg. 2129 (2012). Employee must meet this burden by a "preponderance of the evidence" which is defined in OEA Rule 628.1, as 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".

In its Motion to Dismiss, Agency stated that OEA did not have jurisdiction over Employee's appeal because Employee filed a grievance with the International Brotherhood of Teamsters, Local Union 639 on July 28, 2011, pursuant to the Collective Bargaining Agreement ("CBA") between his Union and DCPS, disputing his termination.⁴

In his response to Agency's Motion to Dismiss, Employee acknowledged filing a grievance regarding his removal pursuant to the terms of a collective bargaining agreement (CBA) between his exclusive bargaining representative and Agency before he filed the appeal now before OEA. Employee informed the undersigned that his grievance is still in process, but that he would like to preserve his right to pursue his appeal with this Office should his grievance falter.

This Office's jurisdiction is conferred upon it by law. It is governed in this matter by D.C. Official Code (2001) §1-616.52 which 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,

² See *Banks v. District of Columbia Public School*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

³ See *Brown v. District of Columbia Public School*, 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 Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).

⁴ Agency's Answer to Employee's Petition for Appeal, tab 5.

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).

Additionally, the Notice of “Ineffective” IMPACT Rating and Termination dated July 23, 2010, informed Employee that he may “elect to file an appeal to [his] termination in **one** of the following ways:

1. You may elect to file a grievance pursuant to the Collective Bargaining Agreement between DCPS and your Union...or
2. You may elect to file an appeal with the D.C. Office of Employee Appeals (OEA)...”

According to Employee’s termination letter and pursuant to the above referenced code, Employee had the option to appeal his termination with either OEA or through his Union, **but not both**. (Emphasis added). Employee elected to appeal his termination by filing a grievance under the CBA between Agency and his local union weeks before he filed his petition for appeal with OEA. And by doing so, Employee waived his rights to be heard by this Office. 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.

ORDER

It is hereby ORDERED that this matter be DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge