THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
CHERYL BERKLEY,	)	OEA Matter No.: J-0147-13
JOSEPHINE FANG,	)	OEA Matter No.: J-0148-13
KIM SMITH,	)	OEA Matter No.: J-0149-13
AUBREY BUCKNER,	)	OEA Matter No.: J-0150-13
SURESH MEHTA,	)	OEA Matter No.: J-0151-13
DIA KAHFRA,	)	OEA Matter No.: J-0152-13
PITTA REDDY,	)	OEA Matter No.: J-0154-13
	)	
Employee	)	
	)	Date of Issuance: November 25, 2013
v.	)	
	)	
DEPARTMENT OF GENERAL SERVICES,	)	Monica Dohnji, Esq.
Agency	)	Administrative Judge

Barbara Hutchinson, Esq., Employees' Representative
Charles Brown, Esq., Agency's Representative
C. Vaughn Adams, Esq., Agency's Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On September 3, 2013, Employees listed in the above-captioned matter filed separate Petitions for Appeals with the Office of Employee Appeals ("OEA") contesting the Department of General Services' ("Agency") action of abolishing their positions through a Reduction-in-Force ("RIF"). Each Employee's termination was effective on March 27, 2009. Subsequently, on September 16, 2013, the parties submitted an Addendum to the Petition for Appeal.

I was assigned these cases in September of 2013. On October 15, 2013, Agency filed a Motion for Extension of Time to file its Answer. This Motion was granted in an Order dated October 17, 2013. On October 30, 2013, Agency submitted its Motion to Dismiss for lack of jurisdiction. On November 1, 2013, the undersigned issued an Order requiring Employees to

address the jurisdiction issue in these matters. Thereafter, counsel for Employees filed a Motion to Consolidate, along with a response to Agency's Motion to Dismiss. The November 1, 2013, Order also provided Agency with the option to submit a reply brief but Agency opted not to do so. On November 21, 2013, Employees filed a Motion to correct their Consolidated Response to Agency's Motion to Dismiss. Employees' request to consolidate the above referenced cases is hereby granted. 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 Motion to Dismiss, Agency highlights that OEA lacks jurisdiction in this matter because Employees' appeals were untimely, as they were filed with this Office more than thirty (30) days from the effective date of their terminations. Agency also alleges that this Office lacks jurisdiction over this matter since Employees elected to grieve their RIF terminations under the terms of their Collective Bargaining Agreement.

In their response to Agency's Motion to Dismiss, Employees note that their appeals were filed within thirty (30) days of the D.C. Superior Court decision related to the Employees' appeal from the Public Employee Relations Board ("PERB"). Employees note that the union's grievance was timely filed and the August 1, 2013 Superior Court decision was the first ruling stating their appeal rights for the instant RIF were limited to OEA. Employees also argue that they were not informed of their rights - they were not given the notice of appeal forms, the

regulations of this Office, as well as their rights under the negotiated grievance procedure when they were RIF'd in 2009. Additionally, Employees submit that their positions were targeted for elimination because the positions were represented by a union. Also, Employees maintain that their positions were contracted out in violation of District law and regulation.

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[1], 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.

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.[2] Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.[3]

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."[4] 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.[5] 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,[6] there is an exception whereby, a late filing will be excused if an agency

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[1] *See also*, Chapter 6, §604.1 of the District Personnel Manual ("DPM") and OEA Rules.
[2] *See Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).
[3] *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).
[4] DC Official Code §1-606.03.
[5] *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).
[6] *King v. Department of Human Services*, OEA Matter No. J-0187-99 (November 30, 1999).

fails to provide the employee with "adequate notice of its decision and the right to contest the decision through an appeal."[7]

Here, according to the parties' submissions to this Office, Employees' termination were effective on March 27, 2009. Because Employees' termination effective date was March 27, 2009, Employees had thirty (30) days from that date to file an appeal with OEA, but failed to do so. Instead, upon their termination, Employees, through their union, filed a grievance. When Agency refused to arbitrate the grievance, Employees filed an Unfair Labor Practice complaint with PERB, and later with the D.C. Superior Court which found that while PERB had jurisdiction over the Unfair Labor Practice claim, Employees affected by a RIF had appeal Rights only to OEA. After receiving the ruling from the D.C. Superior Court on August 1, 2013, Employees filed their appeals on September 3, 2013. While this was within thirty (30) days from the August 1, 2013, D.C. Superior Court ruling, the matter in front of PERB and 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 Employees with "adequate notice of its decision and the right to contest the decision through an appeal" in compliance with OEA Rule 605.1.

In their response to Agency's Motion to Dismiss, Employees submit that they were not given the notice of appeal forms, or the regulations of this Office. I disagree with this assertion. A review of the Final Agency Decision ("FAD") shows that Agency provided Employees with the FAD along with all the enclosures - a copy of the OEA appeal form and OEA regulations, in compliance with OEA Rule 605.1, but Employees refused to sign the Acknowledgment of Receipt.[8] Employees' refusals to sign the FAD Acknowledgement Receipt were of their own doing. Agency complied with OEA Rule 605.1 when it delivered and/or attempted to deliver the FAD and all the enclosures to Employees. Consequently, by refusing to sign the Acknowledgement Receipts, Employees cannot now claim that Agency did not provide them with their appeal rights to this Office. Although they did not sign the Acknowledgment Receipt, Employees were provided with, and were aware of OEA's jurisdiction over this matter, as well as the rules governing appeals in this Office. Because the appeals to PERB and the D.C. Superior Court were from unrelated issues and because Employees would have been aware of their appeal rights with this Office if they had accepted the FAD, I find that Employees' Petition for Appeal is untimely. Moreover, had they not refused to sign the Acknowledgement of Receipt, Employees would have been aware of the mandatory thirty (30) days time limit for filing an appeal in this Office. Employees were terminated on March 27, 2009, and they did not file their appeals until September 3, 2013, approximately four and a half (4.5) years from the termination effective date. According to the FAD, Agency complied with OEA Rule 605.1 when it terminated Employees, and as such, Employees' untimely Petition for Appeal does not fall

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[7] 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).

[8] Employees' Consolidated Response to the Agency's Motion to Dismiss (November 12, 2013), TAB 2. The FAD stated that "a copy of the OEA appeal form and the OEA regulations are enclosed (Enclosure 1)." Employees' refusal to sign the FAD was witness by a third party, who acknowledged that the FAD and all the enclosures were delivered to Employees, but they refused to sign the Acknowledgment Receipt.

within the exception to the thirty (30) days mandatory filing requirement. Therefore, I conclude that this Office does not have jurisdiction over Employees' appeal. And for this reason, I am unable to address the factual merits, if any, of these matters.

Assuming *arguendo* that Employees Petition for Appeal with this Office is considered timely, the fact that they decided to file a grievance with their union prior to filing their appeals with this Office takes away this Office's jurisdiction over their appeals. 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.
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> (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).
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> (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).

In the instant matter, Employees were members of the American Federation of Government Employees, AFL-CIO Local 631 ("Union"). Employees argue that election of remedies is inapplicable in this matter. Employees explain that their appeals were not barred by election of remedies because the D.C. Superior Court determined that jurisdiction in this matter was limited to this Office. I disagree with this assertion. Pursuant to the above referenced code, Employees had the option to appeal their termination with either OEA or through their 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. Employees elected to appeal their RIF by filing a grievance under the CBA between Agency and their Union, several years before filing a Petition for Appeal with OEA.[9] By doing so, Employees waived their rights to be heard by this Office. Therefore, I conclude that this Office does not have jurisdiction over Employees' appeal.

In addition, Employees argue that Agency did not provide them with their rights under the negotiated grievance procedure when they were RIF'd in 2009. I find this assertion to be inconsequential since Employees were members of the Union, and had contacted the Union in order to file a grievance. As such, it can be reasonably assumed that the Union is the best place to get advice with regards to the Collective Bargaining Agreement. Moreover, I find that D.C.

[9] *Id.*

Official Code §1-616.52 does not require Agency to provide employees with this information. Based on the foregoing, I find that this Office lacks jurisdiction over these matters.

ORDER

It is hereby **ORDERED** that the petitions in these matters are DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

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MONICA DOHNJI, ESQ.
ADMINISTRATIVE JUDGE