

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:)	
)	
LOUIS FOSU,)	
Employee)	OEA Matter No. 1601-0044-23
)	
v.)	
)	Date of Issuance: April 10, 2024 ¹
D.C. PUBLIC SCHOOLS,)	
Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Teacher with D.C. Public Schools (“Agency”). On April 6, 2023, Agency issued a notice of termination to Employee. Agency charged Employee with 5-E District of Columbia Municipal Regulation (“DCMR”) section 1401.2(v) – other conduct during and outside of duty hours that would affect adversely the employee’s or the agency’s ability to perform effectively. Specifically, Employee was accused of purchasing a cell phone for a student; tracking the cell phone’s location; and communicating with the student inappropriately.²

¹ This Opinion and Order on Petition for Review was initially issued on March 7, 2024. However, the Opinion and Order on Petition for Review inadvertently reflects a date of March 7, 2023. Additionally, the Opinion and Order on Petition for Review was undelivered to Employee due to an incorrect address. As a result of this mailing error, this Opinion and Order on Petition for Review is being re-issued to ensure appropriate service. There have been no substantive changes to the decision.

² *Petition for Appeal*, p. 20 (May 31, 2023).

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on May 31, 2023. In his petition, Employee explained that he filed this appeal in addition to his grievance filed by his union because his grievance was denied on May 19, 2023. Employee argued that Agency abused its administrative power by deliberately withholding its investigation report which contained material evidence.³ Employee conceded that he purchased a cell phone for a student,⁴ but he provided that he was unaware that doing so would result in an infraction. Moreover, he argued that he did not track the phone’s location and opined that Agency failed to conduct a forensic examination of the phone to determine the accuracy of its allegation.⁵ Finally, Employee attested that he never had inappropriate communication with a student. As a result, he requested that he be reinstated to his position.⁶

On June 8, 2023, Agency filed its answer and a motion to dismiss the petition. It contended that Employee was hired in December of 2022. However, on February 8, 2023, it issued a notice of pending investigation to Employee.⁷ Agency provided that it concluded its investigation on March 16, 2023, and it issued its notice of termination to Employee on April 6, 2023. According to Agency, Employee’s union filed a Step 1, Stage 3 grievance on May 19, 2023, and while the grievance was still pending, Employee filed his Petition for Appeal with OEA on May 28, 2023.

³ Employee contended that Agency ruined or destroyed evidence; fabricated false statements; refused timely-filed pleadings and grievances; and refused to respond to requests to provide material evidence. He also asserted that Agency terminated him in retaliation for his complaints of civil rights abuses and racism. *Id.* at 3.

⁴ Employee explained that he purchased the cell phone for a student because, given her age, a cell phone would benefit her education by allowing her to apply for internships. He also provided that she could remain socially connected with her friends. *Id.* at 9.

⁵ Employee explained that the phone he provided to the student did help her family, friends, and law enforcement locate her when she went missing. He contended that he was “acting naturally as a good father, even though [the student was] not [his] biological child – she [was] a child in his village. . . .” *Id.* at 11.

⁶ *Id.*, 1-25.

⁷ According to Agency, it investigated Employee for engaging in improper conduct with a student because he purchased a cell phone for a student, without her parents’ authorization. Agency also alleged that Employee admitted that when he purchased the phone, he requested that the store associate ensure that the global positioning system (“GPS”) tracker was turned on. Moreover, Agency explained that Employee texted the student during school hours, evenings, and weekends, which the student reported made her uncomfortable. *District of Columbia Public Schools’ Motion to Dismiss and Answer*, p. 1-2 (June 8, 2023).

Agency argued that pursuant to D.C. Code § 1-616.52, Employee could file a grievance or an appeal with OEA but not both. It contended that because Employee elected to grieve his termination first, he was precluded from filing an appeal with OEA. Moreover, Agency explained that Employee was still within his probationary period with Agency, and pursuant to District Personnel Manual (“DPM”) § 814, he could not appeal a termination that occurred during his probationary period.⁸ Agency provided that OEA lacked jurisdiction over probationary employees; therefore, Employee’s petition should be dismissed.⁹

The OEA Administrative Judge (“AJ”) issued an order requesting that Employee submit a brief on OEA’s jurisdiction over his appeal.¹⁰ On June 21, 2023, Employee filed a brief which outlined several of the same arguments raised in his Petition for Appeal. He also provided that his grievance was filed but rejected with prejudice because it was allegedly untimely filed. Employee noted that his grievance was not pending, as Agency alleged in its answer to his petition. He further argued that OEA has jurisdiction over whistleblower matters and highlighted his exposure of civil rights abuses and violations against Agency.¹¹

Agency filed a Sur Reply on July 14, 2023. It asserted that Employee’s grievance was timely filed and was still pending when he filed his Petition for Appeal with OEA. It, again, argued that Employee’s grievance was filed first, and as a result, Employee was precluded from filing an appeal with OEA.¹² Employee filed a Sur Response to Agency’s Sur Reply highlighting that

⁸ Agency provided that Employee was hired on December 5, 2022, and he was terminated effective May 1, 2023. Therefore, he was still within his probationary period. *Id.* at 4.

⁹ *Id.*, 1-5.

¹⁰ *Order* (June 13, 2023).

¹¹ *[Employee’s] Response in Opposition to District of Columbia Public Schools’ Motion to Dismiss* (June 21, 2023).

¹² *District of Columbia Public Schools’ Sur Reply to the Employee’s Opposition* (July 14, 2023).

Agency only conceded that his grievance was timely filed because he filed an OEA appeal with evidence.¹³

On September 13, 2023, the AJ issued an Initial Decision. He held that pursuant to DPM § 814.3, an employee's termination during a probationary period is not appealable to OEA. The AJ noted that Employee admitted in his Petition for Appeal that he worked for Agency for less than one year prior to his termination. Therefore, because he was serving in his probationary status when he was removed from service, the AJ ruled that Employee was not allowed to appeal his removal to OEA. Moreover, the AJ opined that in accordance with D.C. Code §§ 1-616.52(e) and (f), because Employee chose to first grieve Agency's action, this prevents him from subsequently appealing the action to OEA. As a result, Employee's appeal was dismissed.¹⁴

Employee disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on October 18, 2023. In his petition, he argues that because his grievance was denied by Agency, he had no other means of redress except to file an appeal with OEA. He contends that the ruling in the Initial Decision stripped him of his constitutional and civil rights. Thus, he requests that OEA review his appeal.¹⁵

On February 5, 2024, Agency filed its response to Employee's Petition for Review. It asserts that the Initial Decision was based on substantial evidence. Agency contends that it provided evidence that Employee timely filed his grievance, which it provides is still pending. It opines that because Employee's grievance was filed before his appeal to OEA, this appeal must be denied.¹⁶

¹³ *[Employee] Sur Response to District of Columbia Public Schools' Sur Reply to [Employee's] Opposition to the Agency's Motion to Dismiss* (July 19, 2023).

¹⁴ *Initial Decision* (September 13, 2023).

¹⁵ *[Employee] Petition for Review* (October 18, 2023).

¹⁶ *District of Columbia Public Schools' Response to Employee's Petition for Review* (February 5, 2024).

Grievances

D.C. Official Code § 1-616.52 (e) and (f) provides that:

(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.

(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.

Therefore, Employee had the option to either grieve his termination through the negotiated grievance procedure or appeal to OEA, but he could not do both. Hence, we must determine which appeal route Employee elected to use first as it pertains to his appeal options. OEA held in *Robert Mayfield v. D.C. Department of Health*, OEA Matter No. J-0105-08, *Opinion and Order on Petition for Review* (April 5, 2010), that this is of particular importance because if an employee chooses to use the negotiated grievance process, then OEA would lack jurisdiction to consider the matter. Moreover, the Superior Court for the District of Columbia ruled in *Berkley, et al. v. District of Columbia Office of Employee Appeals*, Case No. 2013-CA-008422 P(MPA)(D.C. Super. Ct. January 15, 2015) that if an employee elects to file a grievance, then they waive their rights to be heard by OEA because this Office would not have jurisdiction over the employee's appeal.

The record clearly shows, and Employee concedes, that he chose to file a grievance through his union on May 19, 2023.¹⁷ Employee filed his Petition for Appeal with OEA on May 31, 2023.

¹⁷ *Petition for Appeal*, p. 2, 25-28 (May 31, 2023) and *District of Columbia Public Schools' Motion to Dismiss and Answer*, Exhibit #4 (June 8, 2023).

Thus, as the AJ ruled, Employee's grievance was filed prior to his appeal at OEA. Consequently, in accordance with *Mayfield* and *Berkley*, OEA lacks jurisdiction to consider the appeal.

Probationary Period

The AJ also ruled that he could not consider Employee's Petition for Appeal because he was terminated during his probationary period. DPM § 813.2 provides that employees are required to serve a probationary period of one (1) year. Moreover, DPM section 814.1 provides that ". . . an agency shall terminate an employee during the probationary period whenever his or her work performance or conduct fails to demonstrate his or her suitability and qualifications for continued employment." Employee was hired by Agency on December 5, 2022, and he was terminated on May 1, 2023.¹⁸ Employee was only five months into his employment period, and thus, did not complete his probationary period with Agency. As a result, the AJ's decision that OEA does not have jurisdiction over Employee's appeal is based on substantial evidence.

As for Employee's claims that OEA has jurisdiction because of his whistleblower claim, this Board believes that the argument lacks merit. DPM § 814.3 provides the following:

814.3 A termination during a probationary period is not appealable or grievable. However, a probationer alleging that his or her termination *resulted* from a violation of public policy, the whistleblower protection law, or District of Columbia or federal anti-discrimination laws, may file action under any such laws, as appropriate (emphasis added).

Thus, termination during a probationary period is not appealable unless the employee alleges that their termination resulted from a violation of the Whistleblower protection law. Employee received a notice of investigation into the allegations that led to his removal on February 8, 2023.¹⁹

¹⁸ *Petition for Appeal*, p. 1, 20-22, 24, and 27 (May 31, 2023); *District of Columbia Public Schools' Motion to Dismiss and Answer*, Agency Exhibits #3 and #4 (June 8, 2023); *District of Columbia Public Schools' Sur Reply to the Employee's Opposition*, Exhibit #1 (July 14, 2023); and *[Employee's] Petition for Review*, Exhibit #1 (October 18, 2023)

¹⁹ *District of Columbia Public Schools' Motion to Dismiss and Answer*, Agency Exhibit #1 (June 8, 2023).

Employee provided a notarized copy of his whistleblower claims, which was dated March 8, 2023.²⁰ Agency issued its findings of the investigation on March 16, 2023.²¹ Thus, the investigation – which led to Employee’s termination – started before he made his Whistleblower claims. Accordingly, his termination did not occur as the result of his Whistleblower claim.

Conclusion

Employee filed a grievance before filing his appeal with OEA. Moreover, he was terminated during his probationary period. Employee’s termination did not occur as the result of a Whistleblower claim. Consequently, OEA cannot consider the merits of his appeal. As a result, Employee’s Petition for Review is denied.

²⁰ *[Employee’s] Petition for Review*, p. 115-131 (October 18, 2023). It is unclear where Employee filed the Whistleblower claim or when. However, given the date that the document was notarized, it had to been filed on March 8, 2023, or after.

²¹ *District of Columbia Public Schools’ Motion to Dismiss and Answer*, Agency Exhibit #2 (June 8, 2023).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

Clarence Labor, Jr., Chair

Peter Rosenstein

Dionna Maria Lewis

Arrington L. Dixon

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.