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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
CAROL FISHER)	OEA Matter No. J-0120-08
Employee)	
)	Date of Issuance: February 14, 2008
v.)	
)	Lois Hochhauser, Esq.
DEPARTMENT OF YOUTH REHABILITATION)	Administrative Judge
SERVICES)	
Agency)	
_____)	
Glenna E. Barner, Esq., Agency Representative		
John M. Walker, Union Representative		

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Employee filed a petition with the Office of Employee Appeals (OEA) on August 2, 2007, appealing Agency's decision to remove her from her position as Social Worker, effective July 3, 2007. At the time the petition was filed, Employee was in permanent career status.

This matter was assigned to me on October 30, 2007. On November 5, 2007, I issued an Order notifying Employee that she had not submitted all of the required information, including the final Agency notice. Employee responded in a timely manner. I then issued an Order on November 29, 2007, scheduling the prehearing conference for December 18, 2007.

At the prehearing conference, Employee was present and was represented by John Walker, President, Local 383. Glenna Barner, Esq. represented Agency at the prehearing conference. Andrea Comentale, Esq. was also present on behalf of Agency. Bert Fisher, Employee's spouse, was present as an observer. At the meeting, the parties discussed the impact of Employee having filed a grievance under the collective bargaining agreement between Agency and the exclusive bargaining representative. The parties agreed they would submit written arguments on that issue. I issued an Order on December 19, 2007 directing the parties to address that issue by January 9, 2008. An extension was granted to Agency.¹ The record closed on February 6, 2008.

¹ On January 22, 2008, Employee telephoned me, stating that she no longer wanted Mr. Walker to represent her. I told her that Agency was seeking an extension, and that Ms. Barner had been unable to reach Mr.

JURISDICTION

The jurisdiction of this Office was not established.

ISSUE

Should this petition for appeal be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Employee does not dispute that she filed a grievance regarding her removal pursuant to the terms of a collective bargaining agreement between her exclusive bargaining representative and Agency before she filed the appeal now before OEA. She argues, however, that when the grievance reached arbitration, Agency informed the Union that it was no longer honoring the agreement and would not arbitrate the matter. Employee noted that Agency's position had already been challenged by Union in an unfair labor practice complaint filed with the D.C. Public Employee Relations Board (PERB). The complaint has been heard and is currently awaiting the issuance of a decision by PERB. Employee argues that until PERB issues a decision on this issue, there is no binding agreement between Union and Agency, and that OEA therefore should hear this appeal. Agency contends that by grieving her termination pursuant to the terms of collective bargaining agreement first, Employee is barred from appealing the matter to OEA.

Employee has the burden of proof on issues of jurisdiction, pursuant to OEA Rule 629.2, 46 D.C. Reg. 9317 (1999). Employee must meet this burden by a "preponderance of the evidence" which is defined in OEA Rule 629.1, 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".

This Office's jurisdiction is conferred upon it by law. It is governed in this matter by D.C. Office Code (2001) Section 1-616.52 which states in pertinent part:

(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**

Walker to request his consent. She agreed to the extension requested by Agency. I issued an Order on that day granting the extension and directing Employee to submit written notification regarding her representation by February 6, 2008. In her submission dated February 6, she stated that Mr. Walker would remain her representative.

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).

Employee elected to grieve the matter through the collective bargaining agreement before filing the appeal with OEA. Her appeal rights to OEA were contained in the final Agency notice, and she does not contend she was unaware of her rights before this Office. Although Agency now refuses to proceed to arbitration, this does not confer jurisdiction on OEA. Recourse is with PERB, and the Union has pursued this recourse by filing the unfair labor practice complaint against Agency currently before PERB.

In sum, based on the arguments and evidence presented, and the applicable laws, rules and regulations, the Administrative Judge concludes that Employee has not met her burden of proof in this matter.

ORDER

It is hereby ORDERED that the petition for appeal is DISMISSED.

FOR THE OFFICE:

LOIS HOCHHAUSER, ESQ.
Administrative Judge