THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
HERBERT A. BOYD, JR.	)	OEA Matter No. J-0002-08
Employee	)	
	)	Date of Issuance: August 6, 2008
v.	)	
	)	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA PUBLIC SCHOOLS	)	Administrative Judge
Agency	)	
	)	

John F. Mercer, Esq., Employee Representative
James Sandman, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Employee filed a petition with the Office of Employee Appeals (OEA) on October 1, 2007, appealing Agency's decision to terminate him from his position as Principal, effective May 16, 2005.[1] At the time of the removal, Employee was in permanent educational status.

This matter was assigned to me on November 14, 2007. On that date, I issued an Order directing Employee to submit argument in support of his position on the issue of timeliness. In his response, Employee argued that he had elected to utilize the grievance procedure pursuant to the collective bargaining agreement between Agency and the Council of School Officers, Local #4, American Federation of School Administrators, AFL-CIO (CSO, herein), his collective bargaining representative and did not file his petition with OEA until he was notified that the CSO would not proceed to arbitration with his grievance. On February 7, 2008, I issued an Order directing Employee to present legal and/or factual argument regarding this Office's jurisdiction based on his election to pursue his remedy through the grievance process. After several extensions, the submission was filed on July 8, 2008. The parties were notified that the record would close at that time unless they were notified to the contrary. The record did close at that time.

[1] This is the date as stated on the final Agency notice issued on April 29, 2005.

JURISDICTION

The jurisdiction of this Office was not established.

ISSUE

Should this appeal be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

This appeal was filed well-beyond the time permitted by the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, which provides that an "appeal shall be filed [with this Office] within 30 days of the effective date of the appealed agency action". D.C. Official Code Section 1-606.03(a) (2001). The Court of Appeals for the District of Columbia has determined that the time limit for filing an appeal with an administrative adjudicatory agency is mandatory and jurisdictional in nature. *See, e.g., District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991) and *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162 (D.C. 1985). The Board has consistently maintained this position. *See, e.g., King v. Department of Corrections,* OEA Matter No. T-0031-01, *Opinion and Order on Petition for Review* (October 16, 2002), ____D.C. Reg. ____ ( ).

OEA Rule 604.2, 46 D.C. Reg. at 9299, requires that an appeal be filed "within thirty (30) days of the effective date of the appealed agency action". Employee argues that the "effective" date should be September 20, 2007 when he was notified by the CSO that it would take no further action with his appeal, rather than May 16, 2005, the date of his removal. In his December 14, 2007 submission, Employee stated that he elected to pursue the remedy afforded by the collective bargaining agreement. Indeed, CSO took the matter through several layers of the grievance process until August 2007 when Bernard Lucas, CSO President, notified Employee that the CSO was withdrawing its demand for arbitration. Employee received written confirmation of CSO's decision on September 20, 2007. He then filed this petition.

The Board has established an exception to OEA Rule 604.2. In cases where an agency fails to provide the employee with "adequate notice of its decision and the right to contest the decision through an appeal", this Board will accept a late filing of a petition for appeal. *McLeod v. District of Columbia Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003), ___D.C. Reg.____ ( ). *See also*, Section 1614.1(d) of the District Personnel Manual. Although Employee did not argue the lack of adequate notice or that he was in any way unaware of his right to appeal to OEA, this Administrative Judge in reviewing the final Agency notice found that the notice did not provide Employee with any information regarding appeal rights to OEA. The Administrative Judge therefore would not dismiss this matter if it was based on timeliness alone.

With regard to the issue of election of remedies, Employee states in his July 9, 2008 submission:

> Counsel for the Employee has neither found precedent from the OEA or the District of Columbia Court of Appeals establishing that the OEA has jurisdiction over matters similar or identical to the Employee's (where the Employee has opted to pursue his relief from a decision of termination by the Agency via the union grievance process). Therefore Counsel rests his argument on general principles of law.

Employee argues that Employee should be notified before making a choice of remedies "clearly and in writing that one method of relief is superior to the other". He contends that the Union should have made him aware that its remedy did not guarantee him "an opportunity to have a full review of the final decision to terminate". These arguments must fail. First, Employee has the absolute right to seek advice regarding election of remedies, but while Agency must notify Employee of his appeal rights, it is not obligated to and indeed should not discuss the merits of the various methods. Such would be placing it in a position of providing legal advice to someone who may soon be in an adversarial position. Second, this Office has no jurisdiction over the relationship between Employee and his bargaining representative and what obligations, if any, the CSO had to Employee in this instance. That challenge must be raised in another forum.

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 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).

This Administrative Judge spent a considerable amount of time in reaching a decision. While Agency's failure to include the proper notice of appeal rights may be an exception to the timeliness rule, this Board has not determined that lack of notice will automatically negate an election of remedies. Employee concedes he elected to grieve the matter through the collective bargaining agreement. The Union represented Employee until August 2007, when it decided not to proceed to arbitration on his behalf. Employee now seeks to initiate his appeal with OEA. He argues that he should be permitted to do so because the Union did not take his case to arbitration. Employee has never contended that he was unaware of his right to appeal to OEA at the time of his removal or at

the time he elected his remedy. Indeed, Employee has never argued that he was in any way prejudiced by Agency's failure to provide notice of his right to appeal to OEA. In his July 9 submission, Employee discusses the situation where an employee "is offered a choice of alternative remedies", supporting the view that he was aware of the alternative to appeal to OEA. He selects September 29 as the operative date, not because it was the date when he first became aware of his appeal rights to OEA, but because it was the date the Union notified him it would not proceed further on his behalf. Employee asks OEA to take jurisdiction at this time because he is dissatisfied with the remedy he elected several years earlier and not because he was unaware of his right to appeal to OEA.

Each case must be reviewed on its merits. After carefully reviewing Employee's arguments, the Administrative Judge finds Employee never argued he was unaware of his right to appeal to OEA or pursue his contractual remedy, that he chose to pursue the contractual remedy, that the Union represented him throughout the grievance process but ultimately determined not to proceed to arbitrate his appeal; and that at that point, dissatisfied that the CSO would not complete the arbitration process, Employee sought to file his petition for appeal with OEA.

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999), states that the employee filing the petition for appeal has the burden of proof on all jurisdictional issues. According to OEA Rule 629.1, *id* , the burden must be met 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". Where the final Agency notice was deficient and where this failure resulted in an employee pursuing relief under a negotiated procedure because he was unaware of an alternative right to appeal an adverse action with OEA, this Administrative Judge could find good cause to permit filing with OEA even after the contractual remedy is exhausted. But those facts are not present in this matter. Employee did not argue that he was unaware of his right to pursue a remedy with OEA when he chose to pursue his relief with the Union. Employee elected to pursue his contractual remedy. This is not a timeliness issue. Employee did not allege or imply that he was unaware of his right to file with OEA when he opted to pursue his contractual remedy. Rather, he argues that he should have been notified of the risks and benefits of the alternatives, particularly the possibility that the CSO would not pursue his grievance to arbitration. Employee did not meet his burden of proof with regard to his election of remedies, and therefore, this petition must be dismissed. To do otherwise would undermine the purpose of D.C. Office Code (2001) Section 1-616.52.

ORDER

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

FOR THE OFFICE:

LOIS HOCHHAUSER, ESQ.
Administrative Judge