THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
STEVENSON WACHIRA,	)	
Employee	)	OEA Matter No. J-0007-13
	)	
v.	)	Date of Issuance: January 24, 2013
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Senior Administrative Judge

Stevenson Wachira, Employee *Pro-Se*
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On October 5, 2012, Stevenson Wachira (hereinafter "Employee") filed a petition for appeal with the Office of Employee Appeals (hereinafter "OEA" or the "Office") contesting the District of Columbia Public Schools (hereinafter "DCPS" or the "Agency") action of removing him from service. The effective date of his removal from service was August 16, 2012. After reviewing the Employee's petition for appeal, I determined that there existed an issue with respect to whether the OEA may exercise jurisdiction over this matter. Accordingly, on November 19, 2012, I issued an Order to Employee requiring him to address whether the OEA may exercise jurisdiction over his matter. Employee has since submitted several documents in response to my Order. After considering the sum and substance of Employee's arguments as presented, I have determined that no further proceedings were warranted in this matter. The record is now closed.

JURISDICTION

As will be explained below, the jurisdiction of this Office has not been established.

ISSUE

Whether this Office has jurisdiction over this matter.

BURDEN OF PROOF

OEA Rule 628 *et al*, 59 DCR 2129 (March 16, 2012) states:

> 628.1 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 the 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.
>
> 628.2 The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDING OF FACTS, ANALYSIS, AND CONCLUSION

The Agency, by notice dated August 16, 2012, (hereinafter "Removal letter") addressed to the Employee and signed by Kaya Henderson, DCPS Chancellor, effectuated the Employee's removal from service. According to the Removal letter, the effective date of Employee's removal was August 12, 2012. The Removal Letter goes on to state the following in pertinent part:

> This letter serves as official notice that you will be separated from service with [DCPS] effective August 16, 2012…
>
> **Upon your termination from [DCPS], you may elect to file a grievance in accordance with Article VI, Grievance and Arbitration, of the WTU Agreement. Or, if you are a permanent employee of [DCPS], you may elect to file an appeal with the [OEA]. You may not, however, do both. If you file and appeal or grievance, it must be in writing, clearly stating your reasons for appealing or grieving this action.**
>
> If you elect to file a grievance, it must be filed with your Union within fourteen (14) business days of the effective date of this termination.
>
> **If you file an appeal with OEA, you must do so within thirty (30) calendar days of the effective date of your termination. A copy of the OEA Rules and the appeal form are enclosed.**
> **Emphasis added.**

Timeliness

Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA") modified certain sections of the Comprehensive Merit Personnel Act ("CMPA")

pertaining to this Office. Of specific relevance to this matter is § 101(d) of OPRAA, which amended § 1-606.3(a) of the Code (§ 603(a) of the CMPA) in pertinent part as follows: "Any appeal [to this Office] shall be filed within 30 days of the effective date of the appealed agency action."

"The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 753, 756 (1975). "A statute that is clear and unambiguous on its face is not open to construction or interpretation other than through its express language." *Caminetti v. United States*, 242 U.S. 470 (1916); *McLord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980); *Banks v. D.C. Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992), _ D.C. Reg. __ ( ). Further, "[t]he time limits for filing with administrative adjudicatory agencies, as with the courts, are mandatory and jurisdictional matters." *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991).

As is abundantly evident from the documents of record, the Employee filed his petition for appeal with the OEA on October 5, 2012. The Employee's Removal letter states that the effective date of his from service was August 16, 2012. Furthermore, according to the Employee's Removal letter, the Employee was made aware of his right to appeal Agency's adverse action with this Office as well as the proper time frame in which to do so. Employee in his letter dated January 9, 2013, admits several relevant facts as follows:

> While it is true that I filed my Petition for Appeal on October 5, 2012, I filed the Petition with OEA as a last result and only because [DCPS] failed or ignored to respond to my grievance letter dated September 6, 2012. The grievance letter and attached supporting documentations were hand delivered to DCPS, handed and signed for by Ms. Danielle Reich, the manager of labor relation who was designated to hear my grievance.

Employee readily admits that he submitted his petition for appeal October 5, 2012, which is well past the 30 day deadline for filing a petition for appeal with the OEA. As was stated previously, OPRAA "clearly and unambiguously" removed appeals filed more than 30 days after the effective date of the action being appealed from the jurisdiction of this Office. "Further, the 30-day filing deadline is statutory and cannot be waived." *King v. Department of Human Services*, OEA Matter No. J-0187-99 (November 30, 1999), __ D.C. Reg. __ ( ). I find that the Employee has not established that this Office has jurisdiction over this matter because of his failure to timely file his petition for appeal with the OEA.

Election of Venue

In his letter Dated January 9, 2013, Employee also admitted that he filed a grievance in this matter on September 6, 2012, prior to his filing his petition for appeal with the OEA on October 5, 2012. Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the CMPA, sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") reads in pertinent part as follows:

(a) An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . ., an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . ., or a reduction in force [RIF]. . . .

Of note, D.C. Official Code § 1-616.52, provides as follows:

(a) An official reprimand or a suspension of less than 10 days may be contested as a grievance pursuant to § 1-616.53 except that the grievance must be filed within 10 days of receipt of the final decision on the reprimand or suspension.

(b) An appeal from a removal, a reduction in grade, or suspension of 10 days or more may be made to the Office of Employee Appeals. When, upon appeal, the action or decision by an agency is found to be unwarranted by the Office of Employee Appeals, the corrective or remedial action directed by the Office of Employee Appeals shall be taken in accordance with the provisions of subchapter VI of this chapter within 30 days of the OEA decision.

(c) A grievance pursuant to subsection (a) of this section or an appeal pursuant to subsection (b) of this section shall not serve to delay the effective date of a decision by the agency.

(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 for employees in a bargaining unit represented by a labor organization. If an employee does not pay dues or a service fee to the labor organization, he or she shall pay all reasonable costs to the labor organization incurred in representing such employee.

(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.
Emphasis Added.

Based on the preceding, a District government employee, who is otherwise covered by the protections afforded to most District government employees under D.C. Official Code § 1-606.03, may elect to have an Agency's action reviewed under the auspices of the OEA. However, some District government employees, like Employee herein, have other protections afforded to them pursuant to various collective bargaining agreements entered into by and between an employees' union and a District government agency.

In the instant matter, as referenced in the Removal letter, initially, Employee had concurrent avenues available for reviewing the Agency's adverse action – file a petition with the OEA or file a grievance through the CBA. Based on Employee's admission as outlined in his letter dated January 9, 2013, I find that Employee has exercised his option for review via the grievance procedure outlined in the CBA. According to D.C. Official Code § 1-616.52 (e), an aggrieved employee cannot simultaneously review a matter before the OEA and through a negotiated grievance procedure. Also, D.C. Official Code § 1-616.52 (f), further provides that once an avenue of review, either through the OEA or through a negotiated grievance procedure, is first selected, then the possibility of review via the other route is closed. I find that the Employee initially opted to contest his removal under the auspices of the Collective Bargaining Agreement as noted in the Removal letter. Consequently, I further find that this fact presents another reason that the OEA lacks jurisdiction over the instant matter. Accordingly, I conclude that I must dismiss this matter for lack of jurisdiction.

ORDER

Based on the foregoing, it is hereby ORDERED that this matter be DISMISSED for lack of jurisdiction. [1]

FOR THE OFFICE:

_____
ERIC T. ROBINSON, Esq.
Senior Administrative Judge

[1] Since this decision is predicated on the Office's lack of jurisdiction, I am unable to address the factual merits, if any, of the Employee's appeal.