THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
STEPHEN WHITFIELD,	)	
Employee	)	OEA Matter No. 1601-0016-12
	)	
v.	)	Date of Issuance: January 9, 2012
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Senior Administrative Judge

Stephen Whitfield, Employee *Pro-Se*
Sara White, Esq., Agency Representative

INTIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On November 3, 2011, Stephen Whitfield ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the District of Columbia Public Schools ("DCPS" or "the Agency") adverse action of removing him from service. I was assigned this matter on or about December 21, 2011. After reviewing the Employee's petition for appeal, I determined that there existed a question as to whether the OEA may exercise jurisdiction over the instant appeal. Consequently, I issued an order on December 22, 2011, requiring Employee to address said issue in a written brief. According to this order, Employee was required to submit his response on or before January 5, 2012. To date, the OEA has not received Employee's response. After carefully reviewing the documents of record, I have determined that no further proceedings are warranted. The record is closed.

ISSUE

Whether this Office may exercise jurisdiction over this matter.

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states that:

> 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 629.2, *id*., states that "the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing."

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

According to a letter addressed to the Employee dated September 1, 2011, ("Termination Letter"), Employee was informed that the effective date of his termination was September 2, 2011. The Termination Letter provided in relevant part that:

> You may elect to file an appeal to this termination in **one** of the following ways:
>
> 1. You may elect to file a grievance pursuant to Article 6 of the Collective Bargaining Agreement by and between the District of Columbia Board of Education and the Washington Teachers' Union within fourteen (14) days after receipt of this notice…
>
>   Or
>
> 2. You may elect to file an appeal with the [OEA]… That appeal must be filed within thirty (30) calendar days of the effective date of your termination.

Election of Venue

On August 31, 2011, Nathan Saunders, President of the Washington Teachers' Union, sent a letter initiating the Step 2 grievance process on behalf of Employee. This letter states in pertinent part as follow:

> The Washington Teachers' Union hereby invokes a Step 2 grievance in accordance with Article 6 of the grievance and arbitration procedure as outlined in the Collective Bargaining Agreement between the Washington Teachers' Union and the District of Columbia Public Schools. This grievance is filed on behalf of Mr. Stephen Whitfield… This grievance would also apply to any resulting termination.

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 Termination 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. I find that Employee, through his Union, 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, through his Union, initially opted to contest his removal under the auspices of the Collective Bargaining Agreement as noted in the Termination Letter. Consequently, I further find that the OEA lacks jurisdiction over the instant matter.

Timeliness of Filing Petition for Appeal

As was mentioned previously, the Employee was removed from service with an effective date of September 2, 2011. However, he filed his petition for appeal on November 3, 2011. This is well past the 30 day filing deadline that shall be discussed *infra*.

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); *White v. D.C. Fire Department*, OEA Matter No. 1601-0149-91, *Opinion and Order on Petition for Review* (September 2, 1994), _ D.C. Reg. __ ( ).

As was stated previously, OPRAA "clearly and unambiguously" removed appeals filed more than 30 calendar 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 Employee was duly warned of his option to personally appeal to the OEA in the aforesaid Termination Letter. Further, I find that he opted to allow the Union to press a claim on his behalf. Employee had every right to exercise his option to pursue this matter in another forum. However, because he failed to file a petition for appeal in the instant matter with the OEA within the 30 day filing deadline, I find that he is precluded from pursuing said appeal through the OEA. I further find that this represent another reason why the OEA may not exercise jurisdiction over this matter.

Based on the foregoing, I conclude that I must dismiss this matter for lack of jurisdiction[1].

ORDER

It is hereby ORDERED that this matter be DISMISSED for lack of jurisdiction.

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.