

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. 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:)	
)	
CHARLES BROWN,)	
Employee)	
)	OEA Matter No.: 1601-0058-07
v.)	
)	Date of Issuance: November 23, 2009
DISTRICT OF COLUMBIA)	
DEPARTMENT OF HUMAN SERVICES,)	
Agency)	
_____)	

OPINION AND ORDER

ON

PETITION FOR REVIEW

Charles Brown (“Employee”) was a Social Service Representative with the Department of Human Services (“Agency”). Agency sustained charges against Employee for: 1) Acts of Fraud in Obtaining Public Assistance; 2) Food Stamp Act Violations; and 3) False Representations. The events from which the charges stemmed occurred between 2004 and 2006. During this time, Agency alleged that Employee conspired with two other people to illegally process food stamp benefits in the name of a

man who was in prison.¹ Agency also alleged that Employee fraudulently set up a case file for a fictitious customer and repeatedly authorized the receipt of expedited food stamp benefits for the public assistance recipient.²

On August 16, 2006, Agency issued Employee an Advanced Written Notice of Proposed Removal. Agency amended Employee's termination notice on October 6, 2006 to include the charge of "any on duty or employment related act or omission that the employee knew or should reasonably have known is a violation of the law."³ On November 22, 2006, Agency served Employee with a letter notifying him of its final decision to terminate employment. The letter stated that Employee's removal was effective November 27, 2006.⁴

Employee, through his union representative, Stephen White, filed a step 4 grievance against Agency on December 18, 2006⁵. The grievance was filed pursuant to Article 7 Section 3 of the Master Agreement between the American Federation of State, County, and Municipal Employee's, District Council 20, AFL-CIO and the Government of the District of Columbia ("CBA"). Employee's union representative argued that Agency violated the CBA by failing to conduct the investigation in a timely manner. Agency rejected Employee's grievance on February 2, 2007, stating that it would not reconsider their decision to terminate his employment. The notice stated that Employee

¹ Advanced Written Notice of Proposed Removal (October 6, 2006).

² *Id.*

³ Agency Exhibit 3.

⁴ Agency Exhibit 4.

⁵ The Employee's Collective Bargaining Agreement includes a 5 step grievance process. Step 4 of the process occurs when an unsolved grievance is presented by the employee and/or the Union to the Office of the Director. The Office of the Director must respond in writing within fifteen days after the receipt of the grievance. If the grievance remains unresolved at this point, the Union **may** request arbitration (emphasis added). *Employee's Petition for Appeal*, Exhibit 6 (November 23, 2007); See *Agency Brief, Exhibit 6*.

could choose to invoke arbitration through the Office of Labor Relations.⁶ Employee subsequently requested arbitration, but on February 22, 2007, Employee's union informed him that it would not seek arbitration with Agency.⁷

Employee then filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on March 8, 2007. Employee argued that Agency failed to produce any evidence to prove that he participated in public assistance and food stamp fraud. Employee admitted in the petition that he was covered by the Union Collective Bargaining Agreement and argued that he should be afforded the right to participate in arbitration with Agency. Lastly, Employee contended that by removing him more than three months after the initial advance notice Agency violated Article 7, Section 10 of their CBA which requires the deciding official to issue a written decision within forty-five days from the date of receipt of the proposed action.

In response to the petition, Agency alleged that Employee had already chosen the negotiated grievance process with his union in lieu of appealing directly to this Office. Employee did not deny that he chose to pursue the grievance process, but argued that he relied on the representation of his union that he could still appeal to this Office after the request for arbitration was denied.⁸

In an Initial Decision issued on November 19, 2007, the Administrative Judge dismissed Employee's Petition for Appeal for lack of jurisdiction. The AJ held that Employee was precluded by D.C. Official Code § 1-616-.52(e) and by the terms of the CBA from appealing the final Agency decision to this Office since he previously chose

⁶ *Agency Brief*, Exhibit 7.

⁷ *Agency Brief*, Exhibit 9.

⁸ *Initial Decision* at p. 5 (November 19, 2007).

the negotiation/arbitration process through his union.⁹ In addition, the AJ held that the failure of Agency to render a final decision on Employee's adverse action within 45 days after it was proposed was a harmless procedural error. The CBA between Employee and Agency contained no remedy for a violation of the 45 day rule.

Employee filed a Petition for Review on November 23, 2007. Employee asks us to reverse the Initial Decision on the grounds that: 1) the AJ erred in making a determination that Agency's alleged violation of the 45 day rule was harmless error; and 2) OEA has jurisdiction to hear this case. Employee believes that since his union declined to invoke arbitration, he should be afforded the opportunity to seek review through this Office.

An employee has the burden of proof as to issues of jurisdiction.¹⁰ D.C. Official Code § 1-616.52(e) allows an aggrieved employee to seek review through their negotiated union agreement or appeal directly to this Office, but not both. Once an employee has exercised their option, they are limited to that choice. Any system of grievance resolution or review of adverse actions negotiated between the District and a labor organization takes precedence over the rules of this Office.¹¹

Section 7 of Article 8 of the collective bargaining agreement states in relevant part, "[e]mployees may grieve actions through the negotiated grievance procedure, or appeal to the Office of Employee Appeals (OEA) in accordance with OEA regulations but not both. Once the employee has selected the review procedure that choice shall be the *exclusive method of review*." (emphasis added)¹²

⁹ *Id.*

¹⁰ See OEA Rule 629.2, 46 D.C. Reg. 9317 (1999)

¹¹ D.C. Official Code § 1-616.52(f) (2001).

¹² *Petition for Review*, Exhibit 1 (November 23, 2007).

In this case, the CBA does not expressly preserve OEA's jurisdiction when the union does not pursue arbitration. Employee elected to pursue the grievance process through his union instead of seeking review with OEA. Employee's union representative filed a step 4 grievance with Agency. This election binds Employee to pursue his contractual remedy through the union. Moreover, Employee did not allege or imply that he was unaware of his right to file with OEA when he opted to pursue the negotiated grievance process. Even though Employee raises other issues in his Petition for Review, he has failed to meet his jurisdictional burden of proof with regard to his election of remedies and is therefore precluded from filing an appeal with this Office.

Although it is regretful that Employee's union mistakenly informed him that he could seek review with OEA after Employee was denied arbitration, this Office lacks jurisdiction to address the merits of this case. For the reasons stated above, this Board must deny Employee's Petition for Review and uphold the initial decision.

ORDER

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

FOR THE BOARD:

Sherri Beatty-Arthur, Chair

Barbara D. Morgan

Richard F. Johns

Hilary Cairns

Clarence Labor, Jr.

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after the formal notice of the decision or order sought to be reviewed.