THE DISTRICT OF COLUMBIA

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
EMPLOYEE	OEA Matter No. 1601-0006-23
	Date of Issuance: April 3, 2023
v.	
	Senior Administrative Judge
D.C. PUBLIC SCHOOLS	JOSEPH E. LIM, ESQ.
Agency	

Nicole Dillard, Esq., Agency Representative
Employee *pro se*

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Employee filed a Petition for Appeal with the Office of Employee Appeals (OEA) on October 10, 2022, appealing D.C. Public Schools ("Agency" or "DCPS")'s decision to terminate her from her position as Special Education Coordinator, effective June 13, 2022.[1] At the time of the removal, Employee was in permanent educational status. In response to OEA's October 21, 2022, request, Agency filed its Answer to Employee's Appeal on November 17, 2022. Agency also filed a Motion to Dismiss for Lack of Jurisdiction, contending that Employee had earlier filed a grievance through her union.

This matter was assigned to the Undersigned on December 2, 2022. On December 13, 2022, I issued an Order directing Employee to submit a written brief in support of her position on the issue of jurisdiction raised by Agency in its Motion to Dismiss. Employee's response was due on or before by December 22, 2022. When Employee failed to respond, I issued an Order for Good Cause Statement. In that March 10, 2023, Order, I reiterated the instruction for Employee to respond to Agency's motion. Employee submitted a response on March 24, 2023. In her response, Employee explained that she had been trying to secure legal representation and argued that OEA should exercise jurisdiction over her appeal. After reviewing the documents of record, I have determined that no further proceedings are warranted. The record is now closed.

JURISDICTION

[1] June 1, 2022, Notice of Termination. While Agency had proposed a Reduction-in-Force, it was not effected in Employee's case as her Standard Form 50 (DCPS Motion to Dismiss, Tab 1) indicate that she was terminated for cause.

The jurisdiction of this Office was not established.

BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021) states:

> The burden of proof for 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 631.2 id. States:

> For appeals filed under §604.1, 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.

ISSUE

Should this appeal be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

In its Motion to Dismiss, Agency argued that Employee's appeal was untimely. It points out that 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). OEA Rule 604.2, 6B DCMR Ch. 600, requires that an appeal be filed "within thirty (30) days of the effective date of the appealed agency action". In this matter, Employee filed her appeal four (4) months after the effective date of her termination. 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 jurisdictional and not mandatory in nature. *See, e.g*., *Sium v. Office of the State Superintendent of Education*, 218 A.3d 228 (D.C. 2019). Given the circumstances, I find that the timing of Employee's filing of the Petition cannot be grounds for dismissal in this matter. That said, this matter can be decided on Agency's second ground for its Motion to Dismiss.

In its Motion to Dismiss, Agency also argued that Employee's appeal was filed in contravention of the Counsel of School Officers ("CSO" or "Union")'s Collective Bargaining Agreement ("CBA"). Employee does not dispute that she filed her grievance with her Union in accordance with Article VII, Grievance and Arbitration of the CSO Agreement on June 1, 2022.[2] In her March 24, 2023, submission, Employee stated that she elected to pursue the remedy afforded by the collective bargaining agreement.

[2] DCPS Motion to Dismiss, Tab 3. Step 2 Grievance-Termination Re: [Employee], Special Education Coordinator, Johnson MS by Council of School Officers.

Regarding the issue of election of remedies, Employee states in her March 24, 2023, submission: "Please be advised that my appeal to the Office of Employees Appeal was entered after my termination date of June 2022 and therefore does not violate any jurisdiction standard. This process was only used after I had exhausted my option with my local union, within the guidelines of the CSO (Council of School Officers) contract." Thus, I find that Employee admits that she filed her appeal with OEA *after* exhausting her union grievance option.

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).

Employee concedes she elected to grieve the matter through the collective bargaining agreement after she was terminated. The Union represented Employee until Employee exhausted this option. Employee now seeks to initiate her appeal with OEA. She argues that she should be permitted to do so because she filed her appeal after her termination and after she had taken her grievance to her union. Employee has never contended that she was unaware of her right to appeal to OEA at the time of her removal or at the time she elected her remedy. Employee asks OEA to take jurisdiction at this time because she is dissatisfied with the result she received from her grievance.

OEA Rule 631.2, 6B DCMR Ch. 600 (2021), states that the employee filing the petition for appeal has the burden of proof as to issues of jurisdiction. According to OEA Rule 631.1, *id* , the burden of proof for material issues of fact shall be by a preponderance of the evidence. For the reasons previously explained, I find that Employee did not meet her burden of proof with regard to jurisdiction, 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 lack of jurisdiction.

s/Joseph Lim
Joseph Lim, Esq.
Senior Administrative Judge