THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
THERESA MARSHALL	)	
Employee	)	OEA Matter No. 1601-0108-08
	)	
v.	)	Date of Issuance: December 17, 2008
	)	
D.C. DEPT. OF INSURANCE	)	
SECURITIES, AND BANKING	)	
Agency	)	ROHULAMIN QUANDER, Esq.
	)	Senior Administrative Judge

Theresa Marshall, Employee *Pro-Se*
Arnold R. Finlayson, Esq., Agency Representative

INTIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

By letter dated April 24, 2008, (the "Removal Notice") the District of Columbia Department of Insurance, Securities, and Banking ("the Agency") issued its final notice removing Theresa Marshall ("the Employee") from employment service, effective April 30, 2008. On July 7, 2008, the Employee filed a Petition for Appeal with the Office of Employee Appeals (hereinafter "OEA" or "the Office") contesting her removal. Agency was notified of Employee's petition on July 21, 2008. On August 20, 2008, Agency filed an *Answer*, plus a *Motion for Summary Disposition*, which was supported by 10 exhibits.

This matter was assigned to me on October 6, 2008. Because there was a question as to whether this Office may exercise jurisdiction over the Employee's belated appeal, on October 16, 2008, I issued an Order, directing the Employee to submit a reply to the Agency's Motion, addressing the issues raised of whether the Office had jurisdiction to consider the matter further. Employee filed her response on October 31, 2008, with a supplemental filing on November 3, 2008. After carefully reviewing the documents of record, I have determined that no further proceedings are 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 629.1, 46 D.C. Reg. 9317 (1999) states:

> 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 CONCLUSION

According to the Removal Notice, the Employee was removed from employment service for two separate elements of cause. The first cause for removal was her allegedly making false statements to support her claim for disability compensation as a result of an alleged on-the-job injury. The second cause for her removal was based upon Agency's charge that Employee was excessively absent without official leave ("AWOL") from her position as a Banking Licensing Specialist in the Department of Insurance, Securities, and Banking. Agency asserted that either charge, if sustained, constituted sufficient "cause" for removal, under § 1603 of the District of Columbia personnel regulations, in order to promote the efficiency and integrity of government operations.

The Removal Notice letter, under the heading "Appeal Rights," stated the following:

> An employee who elects to challenge a final decision of the deciding official in an adverse personnel action resulting in the removal/termination from a position in the government of the District of Columbia has the right to grieve through the negotiated grievance procedure set forth in the Master Agreement Between the American Federation of State, County and Municipal Employees ("AFSCME"), District Council 20, AFL-CIO and

> the Government of the District of Columbia (hereinafter "Union Contract"), or alternatively, to file an appeal with the Office of Employee Appeals ("OEA"), **but not both**.

(this AJ's emphasis)

After explaining the parameters of how to proceed, should the affected employee adopt the first option, i.e., via the Union Contract process, the same Removal Notice letter likewise explained the details of how to proceed with noting an appeal via the OEA process. The letter further stated:

> An appeal to OEA must be filed without thirty (30) days of receipt of the written notice of the final decision. OEA is located at 717 14th Street, NW, Third Floor, Washington, DC 20005. Enclosed are an OEA appeal form and a copy of the OEA regulations. For additional information on filing an appeal with the OEA, you may contact OEA at (202) 727-0004.

Timeliness of Appeal

The effective date of the Employee's removal was April 30, 2008. She elected to pursue a multi-step grievance, consistent with the provisions of her Union Contract. However, by letter dated June 27, 2008, AFSCME, through George T. Johnson, Executive Director, District Council 20, advised Employee that the union would not continue with her case by pursuing arbitration on her behalf, the effect of which terminated union assistance in her appeal. Johnson's letter, then advised the Employee that, in light of the above decision by the union, she was now free to file an appeal to this Office. She did note such an appeal with this Office on July 7, 2008, noting on Page 4, § E of the appeal form, that she initially filed a grievance elsewhere to contest her termination. However, the action of noting an appeal at OEA was well beyond the 30-day filing deadline afforded to affected employee's by *D.C. Official Code* (the *Code*) § 1-606.03. (2001 ed.)

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 § 1-606.03(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. __ ( ).[1]

Based on the foregoing, I find that the Employee has not established that this Office has jurisdiction over this matter. Because of the Employee's failure to timely file her petition for appeal with the OEA, I conclude that, based solely upon the issue of non timeliness of filing, I must dismiss this matter for lack of jurisdiction.

Union Contract/CBA verses OEA Appeal Option

Further, and supplemental to the issue of timeliness, the Employee admitted in her appeal petition to having filed a grievance through her union on May 16, 2008, pursuant to her union's negotiated collective bargaining agreement (the "CBA") prior to her filing her petition for appeal. Title 1, Chapter 6, Subchapter VI of the *Code* (2001), a portion of the CMPA, sets forth the law governing the jurisdiction of this Office. The *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]. . . .

Further, of note, the *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

[1] The one exception would be in those situations where Agency neglected to properly advise the affected employee of his/her appeal rights at the time of the adverse action or reduction in force.

> 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.
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> (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.
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> (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.
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> **(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.**

Bold emphasis added by the AJ.

Based on the preceding, a District government employee, who is otherwise covered by the protections afforded to most District government employees under the *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 the Employee herein, have other protection afforded to them pursuant to various CBA's entered into by and between an employees' union and a District agency.

In the instant matter, as clearly and simplistically referenced in the Employee's Removal Notice, she had concurrent avenues available for challenging the Agency's adverse action – file a petition with the OEA or file a grievance through the negotiated

grievance procedure, but not both. The Employee had to choose the avenue in which to contest her removal. An aggrieved employee cannot simultaneously review a matter before the OEA and through a negotiated grievance procedure. Also, the *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. Therefore, a letter from a union official, directing the affected employee that he or she can now pursue the OEA option, since the union grievance route was unsuccessful, was erroneous, and cannot expand the statutorily defined jurisdiction of this Office.

I find that the Employee initially opted to contest her removal under the auspices of the CBA entered into by and between the District of Columbia Government and AFSCME District Local 20. Consequently, I further find that this represents another reason why the OEA lacks jurisdiction over the instant matter

ORDER

Based on the foregoing, it is hereby,

ORDERED that Agency's Motion for Summary Disposition is GRANTED; and it is

FURTHER ORDERED that this matter be DISMISSED.

FOR THE OFFICE: / s /

ROHULAMIN QUANDER, Esq.
Senior Administrative Judge