THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE,	)	
Employee	)	OEA Matter No. 1601-0044-23
	)	
v.	)	Date of Issuance: September 13, 2023
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	ERIC T. ROBINSON, ESQ.
	)	SENIOR ADMINISTRATIVE JUDGE

Employee, *Pro-Se*
Lynette Collins, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On May 31, 2023, 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") action of removing him from service. Employee's last position of record with DCPS was Teacher, Special Education, Grade 15 Step 6. The effective date of Employee's removal from service was May 1, 2023.[1] Of note, Employee admitted that he was first hired by DCPS on December 5, 2022.[2] By letter dated June 1, 2023, the OEA, through its Executive Director, tasked the Agency with responding to Employee's Petition for Appeal by July 1, 2023. DCPS timely responded and in its Motion to Dismiss and Answer, Agency asserts, *inter alia*, that OEA lacks the authority to exercise jurisdiction over this matter due to Employee being in a probationary status at the time of his removal and that Employee, through the Washington Teachers' Union ("Union"), filed a grievance contesting his termination prior to filing his Petition for Appeal. Taken separately or collectively, the Agency asserts that the OEA cannot exercise jurisdiction over this matter. This matter was assigned to the Undersigned on June 12, 2023. On that same date, the Undersigned issued an Order requiring Employee to respond to Agency's Motion to Dismiss. The parties have submitted multiple responses in excess of what was initially required. After reviewing

[1] DCPS Motion to Dismiss and Answer at Exhibit 4 (June 8, 2023).
[2] Petition for Appeal p. 1 (May 31, 2023).

the documents of record, the Undersigned has determined that no further proceedings are warranted. The record is now closed.

JURISDICTION

As will be explained below, the OEA lacks jurisdiction over the instant matter.

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.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

The following statement of facts, analysis, and conclusions are based on the documents of record as submitted by the parties. Based on a review of the Petition for Appeal, a question arose as to whether this Office has jurisdiction over this matter.

Probationary Employee

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Protections Act (hereinafter "CMPA"), sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") states in pertinent part that:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed Agency action.

The above referenced career/education service rights conferred by the CMPA may be exercised by aggrieved employees. The District Personnel Manual ("DPM") § 814.3, provides in relevant part that "a termination during a probationary period is not appealable or grievable. Thus, according to the preceding sections of the DPM and the CMPA, Career Service employees who are serving in their probationary period are precluded from appealing a removal action to this Office until their probationary period is finished. As was noted previously, Employee has the burden of proof regarding the jurisdiction of this Office. In his Petition for Appeal, Employee admits that he had worked for Agency for less than one year prior to his termination. The Board of the OEA has previously held that an employee's admission is sufficient to meet Agency's burden of proof.[3] I find that when Employee was removed from service, he was still within his one-year probationary period. Because Employee was in a probationary status when he was removed from service, I conclude that he is not allowed to appeal his removal to this Office.

Election of Remedies

D.C. Official Code § 1-616.52 et seq. provides, in relevant part, 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**

[3] *See Employee v. Agency*, OEA Matter No 1601-0047-84, 34 D.C. Reg. 804, 806 (1987).

> **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).**

DCPS, in its Motion to Dismiss and Answer, asserts that Employee filed a grievance through his Union prior to filing his Petition for Appeal with the OEA. Agency further asserts that once an avenue is chosen, Employee's election precludes redress through the other avenue. It is uncontroverted that on May 19, 2023, Employee, through his Union, filed a grievance contesting his removal from service. Subsequently, on May 31, 2023, Employee filed his Petition for Appeal with the OEA. Agency contends, and I agree, that D.C. Official Code § 1-616.52 (f) plainly provides that whichever avenue of redress is first chosen, is the sole venue through which an employee may pursue redress. Taking into consideration D.C. Official Code §1-616. 52 (e) and (f), I find that Employee's decision, through his Union, to first grieve this cause of action through the CBA prevents him from subsequently filing with the OEA. I further find that this presents an additional reason why the OEA cannot exercise jurisdiction over this matter.

Based on the preceding statutes, case law, and regulations, it is plainly evident that the OEA lacks jurisdictional authority over the instant Petition for Appeal.[4] I further find that Employee's other ancillary arguments are best characterized as grievances and are outside of the OEA's jurisdiction to adjudicate.[5]

ORDER

Based on the foregoing, it is hereby ORDERED that the above-captioned Petition for Appeal be DISMISSED for lack of jurisdiction.

FOR THE OFFICE: /s/ *Eric T. Robinson*
ERIC T. ROBINSON, Esq.
Senior Administrative Judge

[4] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin,* 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater,* 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").
[5] Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.