

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:)	
)	OEA Matter No.: 2401-0049-14
DARNELLENA BURNETT,)	
Employee)	
)	Date of Issuance: December 14, 2015
v.)	
)	
DISTRICT OF COLUMBIA)	
HOUSING AUTHORITY,)	
Agency)	Sommer J. Murphy, Esq.
_____)	Administrative Judge
Darnellena Burnett, Employee <i>Pro Se</i>		
Nicole N. Grey, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On February 3, 2014, Darnellena Burnett (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the District of Columbia Housing Authorities’ (“Agency” or “DCHA”) act of separating her from service through a Reduction-in-Force (“RIF”). Prior to being terminated, Employee worked as a DS-13/07 Special Assistant to the Executive Director in the Office of the Executive Director.¹ The effective date of the RIF was January 4, 2014.

I was assigned this matter in March of 2014. On March 24, 2014, I issued an Order scheduling a Prehearing Conference to be held on May 21, 2014, for the purpose of assessing the parties’ arguments.² On March 27, 2014, Agency filed its Answer to the Petition for Appeal, which included a motion to dismiss for lack of jurisdiction. Specifically, Agency argued that OEA lacks jurisdiction over Employee’s appeal because she opted to exercise her appeal rights with DCHA prior to filing an appeal with this Office.³ On April 4, 2014, the Undersigned issued

¹ Employee was detailed to the Office of Fair Hearings at the time she was terminated.

² Gerald L. Gillard, Esq., Employee’s previous attorney, filed a Notice of Withdrawal of Employee’s Representative with this Office on May 21, 2014.

³ Agency Answer and Motion for Summary Judgment (March 27, 2014).

an Order on Jurisdiction, pursuant to OEA Rule 629.2,⁴ requiring Employee to submit a written brief addressing the jurisdictional issue. Employee submitted a response to the Order on Jurisdiction on April 17, 2014. The response included a Cross Motion to Stay the Proceedings Before OEA.⁵

JURISDICTION

Jurisdiction in the matter has not been established.

ISSUE

Should Employee's appeal be dismissed?

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, amended certain sections of the CMPA. Amended D.C. Code §1-606.3 (a), which is also, enumerated in OEA's rules and regulations states the following:

604.1 Except as otherwise provided in the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code §§ 1-601.01, *et seq.* (2006 Repl. & 2011 Supp.)) or § 604.2 below, any District of Columbia government employee may appeal a final agency decision affecting:

- (a) A performance rating which results in removal of the employee;
- (b) An adverse action for cause which results in removal;
- (c) A reduction in grade;
- (d) A suspension for ten (10) days or more;
- (e) A reduction-in-force; or
- (f) A placement on enforced leave for ten (10) days or more.⁶

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) 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 is "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." Under OEA Rule 628.2, 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.

⁴ 59 DCR 2129 (March 16, 2012).

⁵ Employee's Response to OEA's Order, Employee's Response to DCHA's Hearing Officer's Order, Cross Motion to Stay (OEA) , and Motion for Default Judgment (DCHA) (April 17, 2014).

⁶ 59 DCR 2129 (March 16, 2012).

The District of Columbia Housing Authority is an independent agency, which was created pursuant to the D.C. Housing Authority Act of 1999.⁷ DCHA operates the public housing program in the District and is responsible for providing shelter for low and moderate income persons and families. In Fiscal Year 2013, Agency conducted a RIF due to financial shortfalls and its inability to maintain workforce levels during the next fiscal year.⁸

Employee began working as a Special Assistant to the Executive Director for DCHA in January of 2001. On December 4, 2013, Agency issued Employee written notification that her position was being abolished pursuant to a RIF, effective January 4, 2014.⁹ The RIF notice provided the following information regarding Employee's appeal rights:

- A. An employee who is affected by a RIF may file an administrative appeal contesting the procedures of this policy with the Director of Human Resources. Allegations of discrimination shall be filed with the District of Columbia Office of Human Rights.
- B. If an employee elects to pursue an administrative appeal of their separation, the employee must request a hearing, in writing, within fifteen (15) calendar days after the RIF Notice Date identified in the RIF notification letter. Appeals will be considered in accordance with the Appeal Procedure. A written request for a hearing must be submitted to: Ms. Paulette M. Campbell, Director of Human Resources....¹⁰

On December 27, 2014, Employee, who was not a member of a union at the time she was terminated, filed an amended appeal with DCHA, requesting that Agency conduct an administrative review of her separation from service. On February 18, 2014, Employee submitted a Second Amended Request for a Hearing to DCHA. Agency and Employee submitted Prehearing statements to DCHA Hearing Officer, Roholamin Quander, and a Prehearing Conference was held on April 23, 2014.¹¹ Employee also filed a Petition for Appeal with this Office on March 26, 2014.

On May 18, 2014, Employee filed an Amended Objection to Agency's Motion for Summary Disposition for Failure to State a Claim, arguing that she was exempt from exhausting DCHA's internal appeals process before filing an appeal with OEA. In the alternative, Employee requested that the Undersigned grant her a stay pending the outcome of her appeal before DCHA. Employee's primary arguments before this Officer are that:

⁷ D.C. Law 13-105, D.C. Official Code § 6-203 (2001).

⁸ Agency Answer to Petition for Appeal and Motion for Summary Judgment at 1 (April 1, 2014).

⁹ Petition for Appeal (February 3, 2014).

¹⁰ *Id.*

¹¹ Hearing Officer Roholamin Quander, Esq. was assigned to adjudicate Employee's administrative appeal before DCHA. Attorney Quander was previously employed by this Office as an Administrative Judge.

1. OEA has jurisdiction over this instant matter
2. Agency's Motion for Summary Disposition should be denied;
3. Agency's action of separating her from service under the RIF should be reverse and that Employee is entitled to be restored to her previous position of record, including being compensated for lost wages and benefits lost as a result of her termination.

As a threshold matter, the Undersigned must first determine whether this Office has jurisdiction over the instant appeal and whether Employee has failed to exhaust her administrative remedies by first filing a grievance with DCHA. Employee argues that she did not want to forfeit her right to prosecute and appeal before this Office because she did not receive a response from DCHA after requesting that Agency conduct an administrative review of her grievances on two occasions.¹² In response, Agency argues that Employee's decision to file a Petition for Appeal with OEA prior to receiving a decision from DCHA's internal review renders her appeal premature because she is still currently engaged in administrative proceedings consistent with Agency's RIF Policy and Procedures and Appeal Rights for non-bargaining unit employees.¹³

In *White v. D.C.*, the Court of Appeals examined whether an aggrieved employee failed to first initiate a grievance with the Office of the Inspector General ("OIG") prior to invoking the jurisdiction of OEA based on allegations of fraudulent misrepresentation.¹⁴ The employee in *White* filed an appeal with this Office prior to receiving a final agency decision from OIG's internal appeals process. The Court held that the employee in *White* failed to prove that the agency issued a final decision, thus OEA lacked jurisdiction over the matter.¹⁵ Moreover, in *Hunter v. D.C. Water and Sewer Authority*, this Office held that, pursuant to D.C. Official Code § 1-606.03, OEA may only review a RIF if it has been finalized.¹⁶ As a prerequisite to finalizing a RIF, an agency's internal administrative remedies must be exhausted prior to the employee appealing to this Office. "If the Agency has not made a final decision, an appeal to OEA is usually premature since it is likely that the employee has not completed the Agency's own review procedures."¹⁷

In this case, Employee was provided an opportunity to file an administrative grievance after receiving notice of DCHA's intent to terminate her employment through a RIF. Employee elected to exercise her right to such administrative review and filed an appeal of Agency's December 27, 2014 RIF notice. As of the date of this Initial Decision, Employee has failed to exhaust her administrative remedies through DCHA's internal review process, as there has been

¹² Employee Brief at 2.

¹³ Agency Response to Employee's Brief and Motion for Summary Disposition for Failure to State a Claim at 4 (May 14, 2014).

¹⁴ 852 A2d 922 (D.C. App. 2004).

¹⁵ *Id.*

¹⁶ OEA Matter No. 2401-0036-05; OEA Matter No. 1601-0046-05 (November 9, 2005).

¹⁷ *Bufford v. D.C. Public Schools*, 611 A.2d 519 (D.C. 1992).

no final decision submitted to this Office. The absence of a final Agency action decision regarding Employee's appeal of the RIF precludes the undersigned Administrative Judge from addressing the substantive merits, if any, of Employee's arguments. Accordingly, I find that Employee has not met the jurisdictional burden of proof as required under OEA Rule 628.1. Based on the foregoing, Employee's motion to stay is denied and her Petition for Appeal must be dismissed for lack of jurisdiction.

ORDER

It is hereby **ORDERED** that this matter be **DISMISSED**.

FOR THE OFFICE:

Sommer J. Murphy, Esq.
Administrative Judge