THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ROBERT MAYFIELD,	)	OEA Matter No. J-0105-08
Employee	)	
	)	Date of Issuance: April 5, 2010
	)	
	)	
D.C. DEPARTMENT OF HEALTH,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Robert Mayfield ("Employee") worked as a Public Affairs Specialist with the D.C. Department of Health ("Agency"). Employee received a termination notice on May 30, 2008. The notice stated that his term appointment was not to exceed the date of June 6, 2008, therefore, he would be terminated on that date. He was placed on paid administrative leave effective May 30, 2008 through June 6, 2008.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on July 2, 2008. The petition provided that he was not a term employee as Agency suggested in its termination notice. Instead, he contended that he was converted

to a Career Service employee on October 26, 2007.[1] Therefore, Agency did not have cause to terminate him. Accordingly, Employee requested that he be reinstated to his position as a Career Service employee.[2]

On September 4, 2008, the Administrative Judge ("AJ") issued an Initial Decision. He found that because Employee did not provide a signed Notice of Personnel Action, then he did not establish that he was a Career Service employee over which OEA has jurisdiction. The AJ reasoned that because Employee failed to file a Request for Personnel Action and because the Notice of Personnel Action form submitted was not signed, then Employee was never converted to Career Service status. The AJ cited to several statutes and regulations which provide that OEA does not have jurisdiction over term employees. Moreover, the AJ found that because Employee chose to file a grievance with Agency, then he could not seek redress with OEA.[3]

On September 24, 2008, Employee filed a Petition for Review of the Initial Decision. He argued that the Request for Personnel Action and the signed Notice of Personnel Action were in Agency's possession and that he only had possession of miscellaneous personnel documents. Employee also admitted that he had a case pending before the Public Employee Relations Board. Additionally, he provided that Agency admitted, during the proceedings before the Public Employee Relations Board, that he was converted to Career Service and then converted back to term status. Finally,

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[1] Employee attached a Notice of Personnel Action form to his Petition for Appeal. The form provided that the nature of the personnel action was "Conv to Career Appt." It listed an effective date of October 14, 2007, and the remarks section stated that Employee received a promotion due to a classification desk audit. The personnel action form does not bear a signature.
[2] *Petition for Appeal*, p. 5 (July 2, 2008).
[3] *Initial Decision*, p. 2-4 (September 4, 2008).

Employee argued that in accordance with his collective bargaining agreement, violations of classifications could be appealed to OEA. Therefore, he requested that his Petition for Review be granted.[4]

Agency filed an Opposition to Employee's Petition for Review on October 28, 2008. It asserted that Employee did not demonstrate that he was converted from a term employee to a Career Service employee. Agency argued that in October of 2007, it processed a position upgrade from a DS-11 to a DS-12 under Employee's term appointment. However, while processing the upgrade, Employee's position was inadvertently changed from term to Career Service. Agency did not become aware of the error until April of 2008. At that point, it claimed that Employee was notified of the error and informed that he was changed back to a term status.[5]

Agency also argued that Employee was precluded from filing a classification appeal with OEA because he filed a grievance with the D.C. Department of Health. It contended that a grievance was filed on June 13, 2008, approximately 3 weeks prior to Employee filing an appeal with OEA. Further, Agency stated that in accordance with OEA Rule 604.3, OEA only had jurisdiction over classification appeals that were filed before October 21, 1998. Therefore, it requested that Employee's Petition for Review be denied.[6]

On December 31, 2008, Employee filed a Motion to Supplement his Petition for Review. He provided that the AJ dismissed his Petition for Appeal because he failed to

[4] *Request for Reconsideration of Initial Decision,* p. 1-3 (September 24, 2008).
[5] *Agency Opposition to Employee's Petition for Review,* p. 2 (October 28, 2008).
[6] *Id.,* p. 5-6.

establish jurisdiction and did not file a personnel form demonstrating that he was converted to Career Service status. Accordingly, Employee attached a signed copy of a personnel form that listed his competitive level and pay plan as "CS", an abbreviation for the Career Service designation. Additionally, the box labeled "career service" is checked in the position status field on the form. It was dated May 3, 2007, and was signed by Employee's immediate supervisor and the Interim Bureau Chief.[7]

There are two issues on appeal before this Board. The first is whether Employee was a Career Service employee or a term employee when he was terminated. The second is whether Employee elected to file his appeal with OEA or Agency in accordance with his collective bargaining agreement.

In accordance with OEA Rule § 629.2 "the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing."[8] D.C. Personnel Regulations, Chapter 16, Part I, § 1600 provides the protections afforded to Career Service employees, but the section specifically states that an employee serving a term appointment is excluded from coverage.[9] Therefore, Employee must prove that he was a Career Service employee and not a term employee for OEA to have jurisdiction to consider his case.

Employee started his appeal pro se but secured counsel when he filed his Petition for Review. In his Petition for Appeal, he provided a copy of a Notification of Personnel

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[7] *Motion to Supplement Request for Review* (December 31, 2008).
[8] OEA Rule 629.1 provides that preponderance of the evidence is the standard by which the burden of proof is met. The rule defines preponderance of the evidence as "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."
[9] D.C. Personnel Regulations, Chapter 16, Part I, § 1600.3(b).

Action form from Agency. The form is not signed, but it clearly states that the nature of the action was to convert Employee to Career Service status.[10] After obtaining counsel, Employee provided a signed copy of a personnel form which showed his position status as Career Service. This personnel form also bears the signatures of two of his supervisors, and it listed an effective date of May 3, 2007.[11]

Agency admitted that a personnel action was taken in 2007 that accidentally converted Employee to Career Service status. It also stated that it did not notice its error in processing the Career service appointment until April of 2008.[12] As proof that it informed Employee of its error, Agency cited a filing by Employee to the Public Employee's Relations Board which claimed that Agency provided a notice to Employee dated April 25, 2008. According to Agency, the notice stated that the Career Service appointment was made in error and that Employee was converted back to term status.[13]

Based on the documents in the record, this Board believes that Employee proved that he was a Career Service employee as of May 3, 2007. Although Agency claimed that it informed Employee of its mistake, it offered no evidence of the letter on which it relies that shows the conversion from Career Service back to his term appointment status. Because there is no evidence in the record to show that the conversion back to his term status ever took place, we are left with only the proof of Employee's Career Service appointment. We believe that a reasonable mind would accept that it is more probably

[10] *Petition for Appeal,* Exhibit #2 (July 2, 2008).
[11] *Motion to Supplement Request for Review* (December 31, 2008).
[12] *Agency Opposition to Employee's Petition for Review,* p. 2 (October 28, 2008). According to the documents in the record, Agency noticed its error nearly one year after Employee was converted to Career Service and only one month before his removal.
[13] *Agency's Opposition to Employee's Petition for Review,* p. 5 (October 28, 2008).

true than not that Employee was still a Career Service employee when he was terminated. Thus, Employee did properly establish OEA's jurisdiction in this matter. Accordingly, this Board would have remanded this matter back to the AJ to determine if Agency had proof that the conversion back to a term appointment actually occurred before Employee was removed. However, a remand would be premature before a determination was made as to whether Employee elected to file his appeal before OEA or Agency.

There was a collective bargaining agreement between Agency and Employee that addressed where and how appeals should filed. Employee admitted in his Petition for Appeal that he appealed his position classification to Agency.[14] Consequently, we must determine which appeal route Employee elected to use first regarding his position classification. This is of particular importance in this case because if he chose to use the negotiated grievance process, then the need for Agency to show that Employee was converted back to a term employee before he was terminated is nullified because OEA would still lack jurisdiction to consider this matter.

In accordance with D.C. Personnel Regulations, Chapter 16, Part I, § 1601.3, even if an employee is in a Career Service status, they could not choose to file a grievance with an agency **and** an appeal with OEA. They must choose one or the other. The regulation provides that:

> If an employee is authorized to choose between the negotiated grievance process set forth in a collective bargaining agreement and the grievance or appellate process provided in these rules, the employee may elect, at his or her discretion, to do one (1) of the following:
>
> (a) Grieve through the negotiated grievance procedure; or

[14] *Petition for Appeal,* p. 4 (July 2, 2008).

> (b) Appeal to the Office of Employee Appeals or file a disciplinary grievance, each as provided in these rules.

Section 1601.4 goes on to provide that:

> An employee shall be deemed to have elected his or her remedy pursuant to § 1601.3 when he or she files a disciplinary grievance or an appeal under the provisions of this chapter or files a grievance in writing in accordance with the provisions of the negotiated grievance procedure applicable to the parties, *whichever event occurs first* (Emphasis added). This section shall not be construed to toll any deadlines for filing.

Similarly, as the AJ stated in his Initial Decision, the D.C. Official Code provides that matters that fall within OEA's jurisdiction could be raised either before OEA or a negotiated grievance procedure. D.C. Official Code § 1-616.52 (e) and (f) provide that:

> (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.

Therefore, because Employee provided in his Petition for Appeal that a grievance was filed with the Department of Health on June 13, 2008, he cannot also seek a remedy from OEA. His Petition for Appeal was filed three weeks later on July 2, 2008, therefore, he elected to use the grievance procedure with Agency instead of OEA because that appeal was filed first.

Moreover, D.C. Official Code § 1-606.03 provides the types of issues that OEA

can consider on appeal. D.C. Official Code § 1-606.03(a) provides that:

> 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.

Agency correctly provided in its Opposition to Employee's Petition for Review that classification appeals do not fall under the types of matters that OEA can decide on appeal. Per OEA Rule 604.3, OEA lacks jurisdiction to consider classification appeals that were filed after October 21, 1998. This case was filed ten years after that date. Accordingly, we must deny Employee's Petition for Review for the above-mentioned reasons.

ORDER

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

FOR THE BOARD:

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Sherri Beatty-Arthur, Chair

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Barbara D. Morgan

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Richard F. Johns

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Hilary Cairns

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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 formal notice of the decision or order sought to be reviewed.