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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Michael Williams)	OEA Matter No. 1601-0042-07
Employee)	
)	Date of Issuance: October 10, 2007
v.)	
)	Sheryl Sears, Esq.
)	Administrative Judge
D.C. Public Schools)	
Agency)	
_____)	

Michael Williams, Employee, *Pro Se*
Michael D. Levy, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND FINDINGS OF FACT

Employee was a 4th Grade Classroom Teacher (Grade ET-15) at Walker-Jones Elementary School. On December 15, 2006, Tony J. Demasi, Director, Department of Human Resources, issued a letter of termination to Employee stating as follows:

From November 17, 2006, through December 6, 2006, you were absent without leave (AWOL) from Walker-Jones Elementary School. Your absences from work were all unauthorized.

In a memorandum dated November 17, 2006, your supervisor, Janette Johns-Gibson, directed you to report for duty by November 28, 2006. You failed to report for duty as directed.

Because of your continued incidents of AWOL, this letter serves as official notice that you will be separated from service effectively immediately.

You have the right to elect to appeal this separation notice in one of the following ways:

1. You may elect to file an appeal with the D.C. Office of Employee Appeals (OEA) located at 717 14th Street, N.W., 3rd Floor, Washington, D.C. 20005. That appeal must be filed within thirty (30) calendar days of the effective date of your separation. A copy of the OEA Rules and the appeal form is attached to this letter. In addition, this information is available at <http://oea.dc.gov/oea/site/sefault.asp>; or,

2. You may elect to file a grievance pursuant to Article VI of the Collective Bargaining Agreement between the Washington Teachers' Union Local #6 of the American Federa[tion] of Teachers/AFL-CIO & the District of Columbia Public Schools within ten (10) school days after receipt of this notice. File your grievance with your union representative and provide a copy to Abbey G. Hairston, Esq., General Counsel, DCPD, 825 North Capitol Street, N.E., Washington, DC, 20002. (Emphasis added).

Employee filed an appeal with the Office of Employee Appeals (“the Office” or “OEA”) on January 16, 2007, seeking reinstatement to his position and the restoration of lost pay and benefits. On the appeal form, Employee responded “Yes,” to the question, “Have you filed an appeal, grievance, or complaint with your agency concerning this matter?” He stated, “My union (WTU [Washington Teachers Union]) filed on my behalf as of January 9, 2007.”

JURISDICTION

As will be explained in the “Analysis and Conclusion” section, the jurisdiction of this Office has not been established.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

BURDEN OF PROOF

OEA Rule 629.2, 46 D.C. Reg. 9297 (1999) states that “[t]he employee shall have the burden of proof as to issues of jurisdiction . . .”

ANALYSIS AND CONCLUSIONS

Agency notified Employee of his right to challenge the separation action by filing an appeal with this Office or a grievance with the union. The D.C. Official Code § 1-606.03 provides for appeals to this Office:

(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.

D.C. Official Code §1-616.52 (2007) provides for an employee to use the union grievance process in the alternative.

(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.

(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 filed a grievance in writing in accordance with the provision of the negotiated grievance procedure applicable to the parties, whichever event occurs first. (Emphasis added).

In accordance with these provisions, an employee who is a member of a collective bargaining agreement through which he or she has access to a grievance procedure, may pursue that process or file an appeal with this Office but not both. In the instant matter,

the Union filed a grievance on Employee's behalf on January 4, 2007. Later, on January 16, 2007, Employee filed a petition for appeal. Having first elected to challenge Agency's separation action by filing a grievance, Employee is precluded from pursuing an appeal before OEA. This Office does not have jurisdiction over this appeal and it must be dismissed.

ORDER

It is hereby ORDERED that this petition for appeal is dismissed for lack of jurisdiction.

FOR THE OFFICE:

SHERYL SEARS, ESQ.