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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ERWIN DIGGS)	
Employee)	
)	OEA Matter No.: 1601-0041-06
v.)	
)	Date of Issuance: November 13, 2008
DISTRICT OF COLUMBIA PUBLIC)	
SCHOOLS, DEPARTMENT OF)	
TRANSPORTATION)	
Agency)	
_____)	

OPINION AND ORDER
ON
MOTION FOR INTERLOCUTORY APPEAL NO. 2

Erwin Diggs (“Employee”) was a bus driver with the District of Columbia Public Schools, Department of Transportation (“Agency”). Agency removed him from this position effective March 8, 2006 based on the charges of negligent behavior stemming from an alleged speeding incident and theft. In anticipation of being terminated, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on March 7, 2006. Agency filed its response on May 9, 2006.

This case has not come before us in the usual posture wherein one of the party's has appealed to us by filing a Petition for Review of the Initial Decision. In fact the Initial Decision has not yet been issued in this appeal. Instead Agency has filed a Motion for Interlocutory Appeal. In the motion Agency has asked us to decide the issue of whether the Administrative Judge must dismiss this appeal for lack of jurisdiction.

Agency's Motion to Dismiss the Petition for Appeal was filed on December 4, 2007, just three days prior to the date the evidentiary hearing was to have convened. Agency relies on this Office's decision in *Latosha Minter v. D.C. Public Schools (DOT)*, OEA Matter No. J-0056-07, (Oct. 1, 2007), __D.C. Reg.__ () as the basis for its argument that this appeal must be dismissed. Agency is correct in stating that *Minter* involves the same set of circumstances as the case at bar. Minter and Employee both worked for Agency's Division of Transportation, both were removed from their respective positions, and both were members of the union. Furthermore the same collective bargaining agreement ("CBA") was in effect for Minter and Employee at the time of their removals. This CBA set forth a grievance process for the union members to follow when they had been subjected to a disciplinary or adverse action.

At some point after being terminated, both Minter and Employee filed a Petition for Appeal with this Office. The following statutes were also in effect at that time: D.C. Official Code §§ 1-606.02(b), 1-616.52(d), and 1-616.52(e). D.C. Official Code § 1-606.02(b) provides the following:

Any performance rating, grievance, adverse action or reduction-in-force review, which has been included within a collective bargaining agreement under the provisions of subchapter XVII of this chapter, shall not be subject to the provisions of this subchapter.

D.C. Official Code §§ 1-616.52(d) and (e) provide the following:

(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 the aggrieved employee, be raised either pursuant to § 1-606.03, or the negotiated grievance procedure, but not both.

Even though the facts, the CBA, and the statutes are the same in both the *Minter* appeal and the case at bar, we disagree with the outcome of *Minter* and will not apply its ruling to this appeal. The question before the Administrative Judge in *Minter*, and the question before us now, is whether the CBA provided the sole avenue of appeal for these employees or did they still have the option to pursue their cases through the statutorily created appeal provisions of the code. If the CBA provides an exclusive avenue of appeal, then the provisions of D.C. Official Code §§ 1-606.02(b) and 1-616.52(d) apply and thereby prohibit this Office from taking jurisdiction over such appeals. If however the CBA does not provide an exclusive avenue of appeal, then D.C. Official Code § 1-616.52(e) applies thereby giving an employee the option of pursuing his or her appeal through the CBA or through this Office but not both.

The Administrative Judge in *Minter* held that the CBA “provide[d] an exclusive avenue of appeal outside of this Office’s jurisdiction . . . [t]herefore . . . Employee was prevented by the terms of the Agreement from appealing the final Agency decisions to

this Office.”¹ As we just stated, we disagree with this ruling. There is no language within the CBA, and the Administrative Judge in *Minter* did not point to any language, that would lead one to conclude that it provides an *exclusive* avenue of appeal. Admittedly the grievance process set forth within the CBA is very thorough and detailed. Therefore, it seems to us that had the union and the District intended for the CBA to be an exclusive avenue of appeal, they would have clearly stated that within the agreement. Because the CBA does not provide an exclusive avenue of appeal, Employee had the right, under D.C. Official Code § 1-616.62(e), to appeal Agency’s action to this Office. Accordingly, this Office has jurisdiction over Employee’s appeal and the Administrative Judge may not dismiss it on this basis. We therefore deny Agency’s Motion for Interlocutory Appeal.

¹ *Latosha Minter v. D.C. Public Schools (DOT)*, OEA Matter No. J-0056-07 (October 1, 2007).

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Motion for Interlocutory Appeal is **DENIED**.

FOR THE BOARD:

Sherri Beatty-Arthur, Chair

Barbara D. Morgan

Richard F. Johns