Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. 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:	)	
	)	
EMPLOYEE,	)	
Employee	)	OEA Matter No.1601-0043-20
	)	
v.	)	Date of Issuance: January 25, 2022
	)	
D.C. FIRE AND EMERGENCY	)	
MEDICAL SERVICES	)	
DEPARTMENT	)	
Agency	)	ERIC T. ROBINSON, ESQ.
	)	SENIOR ADMINISTRATIVE JUDGE
	)	

Employee *Pro-Se*
Conner Finch, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL HISTORY

Employee filed a Petition for Appeal on April 9, 2020, contesting the District of Columbia Fire and Emergency Medical Services Department's ("FEMS" or the "Agency") action of imposing a $5000 fine as part of his Conditional Retirement. On March 6, 2020, FEMS imposed the fine due to it instituting a disciplinary investigation and Employee opting to retire from service before the investigation was completed. The Firefighter Retirement While Under Disciplinary Investigation Act of 2014[1]("Conditional Retirement Act") allowed the Agency to continue with its investigation and ultimately impose a fine. During this process, Employee was placed in Conditional Retirement status. As a practical consideration, prior to the implementation of this statute, members could avoid disciplinary review and sanction by retiring before the Department finished its investigatory process. In the instant matter, Agency's investigation concluded that Employee was found guilty and a 108-duty hour suspension would have been imposed had Employee not opted to retire. However, given his Conditional Retirement status, the penalty that

[1] D.C. Official Code §§ 5-1051 through 5-1057.

Employee had to endure was the aforementioned $5000 fine. Of note, on April 3, 2020, Employee's Union, the International Association of Firefighters, Local No. 36, through its representative Dabney S. Hudson, filed a grievance regarding the aforementioned fine. Further, by letter dated May 1, 2020, the Union informed FEMS that it was "dissatisfied with the Department's decision in this matter…" and was escalating its grievance to step 4[2] as provided in its Collective Bargaining Agreement.

On June 16, 2020, the Office of Employee Appeals ("OEA" or the "Office") sent a notice to FEMS requesting that it submit an Answer to Employee's Petition for Appeal by July 16, 2020. Agency asserted that it timely filed its Answer on July 16, 2020 by placing a hard copy in the OEA's mailbox.[3] This matter was assigned to the Undersigned on December 17, 2020. On December 22, 2020, the Undersigned issued an Order Convening a Prehearing/Status Conference that was set to occur January 26, 2021. The meeting was held as scheduled. During it, an issue regarding whether OEA may exercise jurisdiction over this matter was brought to my attention. Further conferences were held in this matter. Consequently, on July 23, 2021, Agency submitted a Brief on Jurisdiction asserting that OEA cannot exercise jurisdiction over this matter. Employee provided a brief response. After reviewing the documents of record, I have determined that no further proceedings are warranted. The record is now closed.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to 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 628.2 *id.* states:

> 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.

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[2] The grievance process was agreed upon and delineated in the Collective Bargaining Agreement between IAFF Local 36 and the District of Columbia Fire and EMS Department.

[3] During the relevant time frame for filing its Answer, the District Government (including the OEA) was operating at a limited capacity due to emergency measures instituted because of the Coronavirus Covid-19 pandemic.

ISSUE

Whether this matter should be dismissed for lack of jurisdiction.

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.

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 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).**

FEMS, in its Brief on Jurisdiction, asserts that Employee had two options to contest the imposition of the fine as part of his Conditional Retirement. Either file a grievance through his CBA or file a Petition for Appeal with the OEA. Agency further asserts that once an avenue is chosen, Employee's election precludes redress through the other avenue. On April 3, 2020, Employee, through his Union, filed a grievance contesting the fine imposed pursuant to his Conditional Retirement. Subsequently, on April 9, 2020, Employee filed his Petition for Appeal with the OEA. Of note, on July 3, 2021, Employee noted that the Union subsequently withdrew his grievance, ostensibly so that he could seek redress before the OEA. However, 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.[4] It is also clear, to do otherwise would brazenly contravene this statue and allow potential litigants to forum shop, waiting till the last permissible moment to make a determination on which (if any) venue may provide a favorable outcome. Moreover, this would work against Agency's ability to efficiently defend one cause of action simultaneously in multiple forums.

Taking into consideration D.C. Official Code §1-616. 52 (e) and (f), I find that Employee's decision, through his Union, to grieve this cause of action through the CBA prevents him from subsequently filing with the OEA. I further find that given the instant circumstances, Employee's decision to withdraw his CBA grievance is of absolutely no moment when considering whether OEA can exercise jurisdiction in this matter.[5]

Based on the preceding statutes, case law, and regulations, it is plainly evident that the OEA lacks jurisdictional authority over a Conditional Retirement appeal where the employee's first election of remedy was to utilize the Negotiated Grievance Procedure agreed upon by his Union and Agency management. Since Employee first grieved this matter through his CBA, I find that I cannot adjudicate his appeal and it therefore must be dismissed for lack of jurisdiction.[6] I further find that Employee's other ancillary arguments are best characterized as grievances and are outside of the OEA's jurisdiction to adjudicate.[7]

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[4] Agency's Brief on Jurisdiction pp. 2-4. (July 23, 2021).

[5] For practical concerns, I take note, that Employee's attempt to withdraw his appeal came over a year after his OEA Petition for Appeal was filed.

[6] 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").

[7] Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.

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:

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ERIC T. ROBINSON, Esq.
Senior Administrative Judge