THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 1601-0206-12
MARIAN TAYLOR,	)	
Employee	)	
	)	Date of Issuance: June 26, 2014
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	Sommer J. Murphy, Esq.
	)	Administrative Judge

Marian Taylor, Employee, *Pro Se*
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 15, 2012, Marian Taylor ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the District of Columbia Public Schools' ("Agency" or "DCPS") final decision to remove her from her position as a Special Education Teacher in the Incarcerated Youth Program. Employee was removed because she received a rating of "Ineffective" under Agency's IMPACT program.[1] Employee's termination was effective on August 10, 2012.

I was assigned this matter in February of 2014. On February 18, 2014, I issued an Order convening a prehearing conference for the purpose of assessing the parties' arguments. During the conference, Employee indicated that she had previously filed an appeal of her termination with the Washington Teachers' Union. On May 15, 2014, I issued an Order directing Employee to submit a written brief addressing whether OEA has jurisdiction over her appeal.[2] Employee submitted a response to the Order. After reviewing the record, I determined that there were no material issues of fact at issue; therefore, the record is now closed.

[1] IMPACT is the effectiveness assessment system used by the D.C. Public School System to rate the performance of school-based personnel.
[2] Agency was given the option to submit a response to Employee's brief, but did not.

JURISDICTION

Jurisdiction has not been established.

ISSUE

Whether OEA has jurisdiction over this matter.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) provides that 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." According to OEA Rule 628.2 *id.*, 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. 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) states:

> "An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee…an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more…or a reduction in force…."

Thus, §101(d) restricted this Office's jurisdiction to employee appeals from the following personnel actions only: a performance rating that results in removal; a final agency decision affecting an adverse action for cause that results in removal, a reduction in grade, a suspension of 10 days or more, or a reduction-in-force.[3]

D.C. Official Code § 1-616.52 (2001) states in pertinent part 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.

[3] OEA's Rules of Procedure were amended effective March 16, 2012 to include placements of enforced leave for ten (10) days or more.

> (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* (emphasis added).
>
> (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.

District Personnel Manual, Chapter 16, Section 1601 provides that:

> 1601.3 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
>
> (b) Appeal to the Office of Employee Appeals or file a disciplinary grievance, each as provided in these rules.
>
> 1601.4 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. This section shall not be construed to toll any deadlines for filing.

In this case, Employee, a member of the Washington Teachers' Union ("WTU"), indicated on her Petition for Appeal that she had filed an appeal of her termination with her union prior to filing an appeal with OEA.[4] Employee further stated that a decision had not been issued by the WTU at the time she filed an appeal with this Office. In response to the Undersigned's May 15, 2014 Order on Jurisdiction, Employee reiterated that she was rated as Infective and subsequently terminated in retaliation for being a Whistle-Blower. However, Employee did not directly address the issue of jurisdiction, and did not contest that she had filed a grievance with the WTU prior to filing an appeal with OEA.

[4] Petition for Appeal (August 15, 2012).

Under D.C. Code § 1-616.52, employees are given an option of whether to file their complaints with OEA or to pursue a formal grievance with their union. However, once an employee has elected a path to remediation, and in this instance, by filing a grievance with the WTU, he or she is specifically barred from also filing a Petition for Appeal with this Office. Employee, when notified of the two available appeal options in the July 27, 2012 Notice of Ineffective IMPACT Rating and Termination, elected to invoke the provisions of the WTU's Collective Bargaining Agreement, in lieu of pursing her appeal through OEA. Accordingly, I find that Employee is precluded from pursuing her appeal before this Office and the Undersigned is precluded from addressing the merits, if any, of Employee's substantive arguments.

ORDER

It is hereby **ORDERED** that Employee's petition for appeal is **DISMISSED** based on lack of jurisdiction.

FOR THE OFFICE:

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Sommer J. Murphy, Esq.
ADMINISTRATIVE JUDGE