THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
PATRICIA VOLCY,	)	
Employee	)	OEA Matter No. 1601-0111-14
	)	
v.	)	Date of Issuance: February 24, 2015
	)	
OFFICE OF THE STATE SUPERINTENDENT	)	
OF EDUCATION,	)	MONICA DOHNJI, Esq.
Agency	)	Administrative Judge
	)	

Patricia Volcy, Employee, *Pro se*
Hillary Hoffman-Peak, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 15, 2014, Patricia Volcy ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") contesting the Office of the State Superintendent of Education's ("Agency") decision to terminate her effective December 17, 2007. On September 17, 2014, Agency filed a Motion to Dismiss Employee's appeal for lack of jurisdiction.

Following a failed mediation attempt, this matter was assigned to the undersigned Administrative Judge on November 7, 2014. Thereafter, On November 21, 2014, I issued an Order requiring Employee to attend a Status/Prehearing Conference on January 12, 2015. Both parties were present for the scheduled Status/Prehearing Conference. Thereafter, a Prehearing Conference was scheduled for March 9, 2015. On January 29, 2015, Agency filed a Supplemental Motion to Dismiss Employee's Petition for Appeal for lack of jurisdiction. On February 9, 2015, Employee submitted a reply to Agency's January 29, 2015, Motion. After considering the parties' arguments as presented in their submissions to this Office, I decided that an Evidentiary Hearing was not required. The record is now closed.

JURISDICTION

The jurisdiction of this Office, pursuant to *D.C. Official Code, § 1-606.03 (2001),* has not been established.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

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.

ANALYSIS AND CONCLUSION

The threshold issue in this matter is one of jurisdiction. This Office's jurisdiction is conferred upon it by law, and was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Official Code §1-601-01, *et seq.* (2001). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which took effect on October 21, 1998. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions. According to 6-B of the District of Columbia Municipal Regulation ("DCMR") § 604.1[1], this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting:

(a) A performance rating resulting in removal;
(b) An adverse action for cause that results in removal, reduction in grade, or ***suspension for 10 days or more***; or
(c) A reduction-in-force.

[1] *See also,* Chapter 6, §604.1 of the District Personnel Manual ("DPM") and OEA Rules.

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), states that "[t]he employee shall have the burden of proof as to issues of jurisdiction..." Pursuant to this rule, the burden of proof is by a preponderance of the evidence which is defined as "[t]hat 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." This Office has no authority to review issues beyond its jurisdiction.[2] Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.[3]

Here, Employee was terminated effective December 17, 2007. Thereafter, on April 2, 2008, Employee filed a Petition for Appeal with OEA.[4] This matter was assigned to retired Senior Administrative Judge ("AJ") Quander. On May 29, 2008, Senior AJ Quander issued an Initial Decision dismissing Employee's Petition for Appeal in this matter. Senior AJ Quander noted in the Initial Decision that "…on April 17, 2008, Employee filed a letter with the Office, indicating that she wished to dismiss her appeal to the Office. She elected to pursue her claim through her union."[5]

In its January 29, 2015, Motion to Dismiss, Agency cited to the May 29, 2008 Initial Decision noting that, Employee elected to withdraw her appeal in 2008, and her request was granted and the matter dismissed. As such, she is not entitled to come back again on the same matter now that it was dismissed by OEA with prejudice. Employee does not deny that she indeed filed, and withdrew her Petition for Appeal with this Office in 2008. She explains that she had hoped that Agency would work things out with her union and that she "did not even want to go pass the union because the Union promises [sic] to help me. But they mislead me and never took any actions on my behalf until I had to go to the OAE [sic]."[6]

A review of the case file for OEA Matter J-0064-15 does in fact show that Employee submitted a letter on April 17, 2008, notifying this Office of her intention to withdraw her Petition for Appeal. Moreover, Employee does not dispute the fact that she requested that the Petition for Appeal be dismissed in 2008. Because both the 2008 Petition for Appeal and the current Petition for Appeal stem from the same cause of action, her December 2007 termination, I find that this matter became final in 2008, and therefore, OEA lacks jurisdiction over the current appeal. By filing the current appeal with this Office, it appears Employee is attempting to get a second bite at the apple. Employee had one chance to appeal her 2007 termination from Agency, and she did so when she filed her Petition for Appeal in 2008 with this Office, and subsequently with her union. Because things did not work out as Employee expected with the union, Employee cannot now come back to this Office, expecting this Office to set aside the May 29, 2008, Initial Decision and reconsider this matter. Therefore, I find that this Office no longer has jurisdiction over this matter and Employee's Petition for Appeal must be dismissed.

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[2] *See Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).
[3] *See Brown v. District of Columbia Public Schools*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (January 22, 1993); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).
[4] Patricia Volcy v. DCPS, OEA Matter No. J-0064-08 (May 29, 2008).
[5] *Id*. at May 29, 2008, Initial Decision.
[6] *Id*. at Employee's April 17, 2008, letter.

Assuming *arguendo* that Employee did not file a Petition for Appeal with this Office in 2008, and that the current appeal was her only appeal in this Office, the fact that she decided to file a grievance with her union in 2008 prior to filing her current appeal with this Office takes away this Office's jurisdiction over her appeal as well. D.C. Official Code (2001) §1-616.52 reads in pertinent part as follows:

> (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 [providing appeal rights to OEA] 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 Section 1-606.03, or the negotiated grievance procedure, **but not both**. (Emphasis added).
>
> (f) An employee shall be deemed to have exercised their option *(sic)* pursuant to subsection (e) of this section to raise a matter either under the applicable statutory procedures or under the negotiated grievance in writing in accordance with the provision of the negotiated grievance procedure applicable to the parties, **whichever occurs first** (emphasis added).

In the instant matter, Employee acknowledges that she was a member of a union and she decided to file her appeal with the union in 2008 in hopes that the union would help her, but it failed to do so, thus, the reason she is now filing with OEA. Pursuant to the above referenced code, Employee had the option to appeal her termination with either OEA or through her Union, **but not both**. (Emphasis added). Employee elected to appeal her termination by filing a grievance with her Union, several years before filing the current Petition for Appeal with OEA. By doing so, Employee waived her rights to be heard by this Office. Based on the foregoing reasons, I conclude that this Office does not have jurisdiction over Employee's appeal.

ORDER

It is hereby **ORDERED** that the Prehearing Conference scheduled for March 9, 2015, is **CANCELED**; Agency's Motion to Dismiss is **GRANTED**; and it is

FURTHER ORDERED, that Employee's Petition for Appeal is **DISMISSED**.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.
Administrative Judge