THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: J-0064-19
LARRY JACKSON, Employee	
	Date of Issuance: November 25, 2019
v.	
	ARIEN P. CANNON, ESQ.
DISTRICT OF COLUMBIA PUBLIC SCHOOLS, Agency	Administrative Judge

Larry Jackson, Employee, *Pro se*
Lynette A. Collins, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Larry Jackson ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on July 12, 2019, challenging the District of Columbia Public Schools' ("Agency" or "DCPS") decision to reduce his rate of pay. Agency filed a Motion to Dismiss on July 24, 2019. To appropriately address the jurisdiction issue, a status conference was held on September 27, 2019. Subsequent to the status conference, Agency submitted an Amended Motion to Dismiss Employee's Petition for Appeal on October 2, 2019. It was determined that an evidentiary hearing is not warranted. The record is now closed.

ISSUE

Whether this Office may exercise jurisdiction over Employee's appeal.

JURISDICTION

As explained below, this Office has jurisdiction in this matter pursuant to D.C. Official Code ("D.C. Code") § 1-606.03.

ANALYSIS AND CONCLUSIONS OF LAW

Agency's Motion to Dismiss and Amended Motion to Dismiss both cite to the fact that Employee's appeal was filed beyond the thirty (30) day time frame set forth in D.C. Code § 1-606.03 and OEA Rule 604.2[1], as a basis for dismissal. In Agency's initial Motion to Dismiss, it further relies upon D.C. Code § 1-616.52—the provision that limits an employee's ability to file a grievance through the Collective Bargaining Agreement process *and* with this Office, but not both, as a basis for dismissal. Both reasons provided as a basis for dismissal for lack of jurisdiction are discussed in turn below.

A summation of events leading up to this appeal is as follows: During the 2016-2017 school year, Employee was employed with DCPS as a Custodian (RW 7).[2] On June 23, 2017, DCPS issued Employee a Notice of Developing IMPACT rating and Termination.[3] This notice indicated that Employee's termination would be effective on July 29, 2017. Pursuant to a grievance filed by Employee regarding his IMPACT termination, DCPS issued a letter dated September 7, 2017, agreeing to settle the grievance and reinstate Employee retroactively, effective August 7, 2017.[4] Employee was reinstated to his position of Custodian.[5] The settlement terms of the agreement provided that Employee will suffer *no loss in pay or benefits* as a result of his reinstatement. This letter containing the settlement terms indicates that Employee was returned to the *status quo ante* retroactive to August 7, 2017.

Thirty-day (30) timeframe

D.C. Code § 1-606.03 (2001) provides that "[a]ny appeal [to this Office] shall be filed within 30 days of the effective date of the appealed agency action." Furthermore, pursuant to OEA Rule 604.2, "[a]n appeal filed pursuant to Rule 604.1 must be filed within thirty (30) days of the effective date of the appealed agency action." This Office has consistently held that the only exception to this mandatory timing requirement arises when an agency fails to provide the employee "adequate notice of its decision and the right to contest the decision through an appeal."[6] Specifically, the OEA Board has held that an agency "cannot benefit from [an

[1] 59 DCR 2129 (Mach 16 ,2012).
[2] In Employee's Petition for Appeal, he maintains that in 1997 he was promoted from Custodian to Gardner, and in 2009 his position was reversed back to Custodian without written notice. The paystubs attached with Employee's Petition for Appeal also indicate that his job title is Custodian. Despite Agency's contention in its initial Motion to Dismiss, filed on July 24, 2019, that Employee's position was a Gardner, the undersigned will rely on the position titled provided on Employee's paystubs for the 2017-2018 school year that he was a Custodian for the 2017-2018 school year.
[3] *See* Employee's Petition for Appeal, Attachments (July 12, 2019). IMPACT policy states that an employee who receives a final IMPACT rating of "Developing" for three consecutive years is subject to separation. Employee received a "Developing" rating for the 2014-2015, 2015-2016, and 2016-2017 school years.
[4] *See* Employee's Petition for Appeal, Attachments (July 12, 2019).
[5] It can be deduced that Employee was reinstated as a Custodian for the 2017-2018 school year from the paystubs provided along with his Petition for Appeal.
[6] *See McLeod, v. D.C. Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003); *Rebello v. D.C. Public Schools*, Opinion and Order on Petition for Review, OEA Matter No. 2401-0202-05 (June 27, 2008); *Mosley v. District of Columbia Public Schools*, OEA Matter No. J-0014-16, Opinion and Order on Petition for Review (June 6, 2017).

employee's] seemingly untimely filed Petition for Appeal [with OEA] because it failed to adhere to the [thirty (30) day timeframe set forth in the D.C. Code and OEA rules]."[7]

After being reinstated pursuant to the settlement agreement pertaining to Employee's 2016-2017 IMPACT termination, DCPS issued a letter to Employee on February 26, 2018, effectively reducing his pay grade.[8] This letter states, in pertinent part:

> It has recently come to our attention that your current pay grade does not match your current role at Wilson High School. The school has confirmed that you currently serve as an RW-3 custodian (grade 3). However, your current compensation is grade 7, step 10, which is not related to any current DCPS positions.
>
> To address the error, we will be correcting your pay rate to grade 3, step 10 ($21.07 per hour), effective March 4, 2018. This corrected pay rate will be reflected on your March 30, 2018 paycheck and all subsequent paychecks moving forward…

This letter was issued unsigned and effectively constituted an adverse action in the form of a reduction in grade. When Agency reinstated Employee on August 17, 2017, it ostensibly returned him to the rate of pay he was earning prior to his removal pursuant to his 2016-2017 IMPACT rating. The reinstatement was at the rate of pay: grade 7, step 10, according to the letter issued on September 7, 2017, which indicated that Employee would be reinstated retroactive to August 17, 2017 and suffer no loss in pay or benefits.[9] For nearly seven (7) months—August 17, 2017 through March 4, 2018—DCPS continued to pay Employee at a grade 7, step 10. Suddenly, DCPS believed that there was a purported error in setting Employee's rate of pay at a grade 7, step 10 and reduced his pay to a grade 3, step 10, because the higher rate of pay was "not related to any current DCPS positions."[10] I find Agency's decision to reduce Employee's pay grade constitutes an adverse action pursuant to D.C. Code § 1-616.52; thus, Employee should have been afforded appeal rights.

The February 26, 2018 letter, which effectively reduced Employee's pay grade, did not include any appeal rights nor the appropriate notice of his right to elect between challenging Agency's actions with OEA or through the negotiated grievance process. D.C. Code § 1-606.04, DPM §§ 1614.3(e) and 1623.5, and OEA Rule 605.1, all require an agency to provide an employee subject to an adverse action the appropriate appeal rights when challenging an agency's adverse action. Because Agency failed to adequately advise Employee of his appeal rights, it cannot benefit from Employee's seemingly untimely Petition for Appeal with OEA within the thirty (30) day time frame set forth in D.C. Code § 1-606.03 and OEA Rule 604. Accordingly, Agency's Motion to Dismiss for Lack of Jurisdiction based on an untimely Petition for Appeal is denied.

---

[7] *See Margaret Rebello v. District of Columbia Public Schools*, OEA Matter No. 2401-0202-04, Opinion and Order on Petition for Review (June 27, 2008).
[8] *See* Employee's Petition for Appeal, Attachments (July 12, 2019).
[9] *See Id.*, Paycheck stubs.
[10] *See Id.*, September 26, 2018 Letter.

Challenging Agency's Action through OEA and the negotiated grievance process

Agency's argument that Employee is precluded from filing an appeal with OEA must also fail. D.C. Code § 1-616.52 states, in relevant part:

> **(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 [OEA procedures], 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.

D.C. Code § 1-616.52 limits an employee's ability to seek redress through either the negotiated grievance process *or* with OEA—but not both. However, the Municipal Regulations, specifically, 6-B DCMR § 1623, sets forth the information that should accompany a final agency decision. Title 6-B DCMR § 1623.5 states, in pertinent part that: "[i]n addition to the information specified in § 1623.4[,] each final agency decision shall be accompanied by … [a] notice of the employee's right to elect between the remedies specified in § 1625…."[11]

Again, Agency's February 26, 2018 letter to Employee, informing him that his pay rate was being reduced, does not provide any appeal rights or the notice of his right to elect between challenging Agency's actions with OEA or through the negotiated grievance process. As provided above, this Office has consistently held that an agency may not benefit from its failure to provide "adequate notice of its decision and the right to contest this decision through an appeal."[12] Here, Agency failed to properly inform Employee of his right to elect between filing with OEA or through the negotiated grievance process. Pursuant to the narrow exception carved out by OEA's Board, Agency may not benefit from its failure to adequately provide Employee with his appeal rights; thus, Employee is not precluded from filing his appeal with OEA, despite having also filed a grievance with his union disputing his reduction in pay. Accordingly, Agency's Motion to Dismiss for Lack of Jurisdiction on these grounds must also be denied.

As held above, this Office may exercise jurisdiction over Employee's appeal. Because Agency's February 26, 2018 letter has been determined to be an adverse action, Agency was

[11] Title 6-B DCMR § 1623.5(c), Adopted February 5, 2016, Amended May 12, 2017.
[12] *See McLeod, v. D.C. Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003); *Rebello v. D.C. Public Schools*, Opinion and Order on Petition for Review, OEA Matter No. 2401-0202-05 (June 27, 2008);

required to have cause to take such action. Agency does not provide any cause of Employee's reduction in pay, which was through no fault of his own and must be reversed.

ORDER

Accordingly, it is hereby **ORDERED** that:

1. Agency's reduction in pay of Employee's pay grade is **REVERSED**;

2. Agency shall correct Employee's rate of pay to be consistent with and reflect a grade 7, step 10;

3. Agency shall immediately reimburse Employee all back-pay and benefits lost as a result of his reduction in grade; and

4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

_____

Arien P. Cannon, Esq.
Administrative Judge