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. 1601-0060-20
	)	
v.	)	Date of Issuance: January 25, 2022
	)	
DEPARTMENT OF CORRECTIONS,	)	
Agency	)	ERIC T. ROBINSON, ESQ.
	)	SENIOR ADMINISTRATIVE JUDGE

J. Michael Hannon, Esq., Employee Representative
Rahsaan Dickerson, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL HISTORY

Prior to her removal, Employee was a Sergeant with the Department of Corrections and she was the Executive Secretary for the Fraternal Order of Police Lodge No. 1. Employee filed a Civil Action in the District of Columbia Superior Court on September 3, 2020.[1] In this Civil Action she alleges that the Department of Corrections committed prohibited personnel practices, including improperly removing her from service.[2] The basis of her Civil Action was that the protections afforded through the Whistleblower Protection Act should prohibit her removal.[3] Afterwards, on September 17, 2020, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting the Department of Corrections ("DOC" or the "Agency") action of removing her from service. The Civil Action and the Petition for Appeal cite identical facts and circumstances in support of Employee's claims. On February 4, 2021, OEA

[1] *Jannease Johnson v. District of Columbia, et al*., 2020 CA 003889 B. According to Employee, the case was removed by the District of Columbia to the U.S. District Court for the District of Columbia on October 14, 2020. Thereafter, a Second Amended Complaint was filed in the U.S. District Court for the District of Columbia.

[2] *See,* Employee's Memorandum of Points and Authorities in Support of OEA Jurisdiction of Her Claims p. 1 (December 3, 2021).

[3] D.C. Official Code § 1-615.56 *et al*.

sent a letter to DOC asking it to submit its Answer to Employee's Petition for Appeal by March 6, 2021. On March 4, 2021, DOC submitted its Answer. After an unsuccessful foray into settlement talks, under the auspices of the OEA's Mediation Department, this matter was assigned to the Undersigned on March 7, 2021. Thereafter, multiple Conferences were held in this matter. Initially, the Undersigned was under the impression that this matter would require an Evidentiary Hearing to resolve the issues brought forth through the Petition for Appeal. However, during a Status Conference held on October 27, 2021, Employee's counsel *first* revealed to the OEA that Employee had filed the aforementioned Civil Action with the District of Columbia Superior Court ("Sup Ct."). Further revelations noted that the exact same facts and circumstance that gave rise to the Petition for Appeal gave rise to the Civil Action. What is more ominous is that the Sup Ct. Complaint was filed before the Petition for Appeal. This newly revealed set of circumstances implicated the ability of the OEA to exercise jurisdiction over this matter. Accordingly, I issued an Order requiring the parties to address OEA's jurisdiction over this matter. The parties responded by timely submitting their respective briefs. After reviewing the documents of record, the Undersigned has 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.

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. Agency, in its Reply to Employee's

Brief on Jurisdiction provides in pertinent part as follows:

> The Whistleblower Protection Act ("WPA"), which Employee's claims are based on, explicitly allows employees who allege that they were the victim of a prohibited personnel action under the WPA to pursue the full panoply of administrative and judicial remedies available under the WPA. However, this right is not without limitation; Employee's choice of first filing a complaint at DCSC that is based on the same facts and defenses here precludes this Tribunal's review of Employee's appeal.
>
> Although Employee cites to several cases in support of her argument that OEA *and* either DCSC or USDC possess jurisdiction over her claim under the WPA, Employee's brief misses the mark entirely; Employee's brief is devoid of any reference to the first resource that should be considered when analyzing the issue of claim splitting in the context of the WPA: the act itself. Employee's conspicuous omission of any reference to the WPA is not surprising based on the plain language of the statute, which is dispositive of the questions that were posed to the parties in the Tribunal's November 23, 2021 Order.
>
> The WPA reads, in pertinent part:
>
> > (a) The institution of a civil action pursuant to § 1-615.54 shall preclude an employee from pursuing **any** administrative remedy for the same cause of action from the Office of Employee Appeals or from an arbitrator pursuant to a negotiated grievance and arbitration procedure or an employment contract.
> >
> > (b) An employee may bring a civil action pursuant to § 1-615.54 if the aggrieved employee has had a final determination on the same cause of action from the Office of Employee Appeals or from an arbitrator pursuant to a negotiated grievance and arbitration procedure or an employment contract.
> >
> > (c) Except as provided in subsections (a) and (b) of this section, nothing in this subchapter shall diminish the rights and remedies of an employee pursuant to any other federal or District law.
> >
> > D.C. Code § 1-615.56 (emphasis added).[4]

Employee responds that while the facts and circumstances that belie both actions are similar, the matters should proceed apace since she is not actively promoting the WPA in her

[4] Agency's Reply to Employee's Brief on Jurisdiction pp 1 – 3 (December 20, 2021).

Petition for Appeal but rather is basing it on factual arguments congruent with a CMPA[5] appeal.[6] I find Employee's explanation disingenuous. I take note of the following:

- Employee, through counsel, was aware that she had filed a Civil Action citing the WPA several days prior to filing her Petition for Appeal. This fact should have been shared contemporaneously with the filing of her Petition for Appeal.

- At all relevant times, Employee has been represented by more than competent counsel that has a firm familiarity with representing clients before the OEA.

- Employee did not divulge that there was a companion case being adjudicated first through the Sup Ct. and later the District Court for the District of Columbia until several months had elapsed while this matter progressed erroneously through OEA adjudication.

- As of the date that this Initial Decision was issued, the OEA has not been notified that her companion case has been withdrawn or decided. Rather, at last update, her District Court matter was proceeding towards a Scheduling Conference.

I agree with DOC's argument that given the instant circumstances, the WPA precludes the filing of multiple cases across different tribunals. D.C. Official Code § 1-615.56 9 (a) is abundantly clear in noting that a matter first filed under the WPA cannot be subsequently adjudicated by the OEA. The plain language of CMPA and OEA Rules compels the dismissal of this appeal for lack of jurisdiction. The starting point in every case involving construction of a statute is the language itself.[7] A statute that is clear and unambiguous on its face is not open to construction or interpretation other than through its express language.[8] Employee's erstwhile explanation that she is basing her appeal on the CMPA is of no moment. The WPA is exceedingly clear in that once a WPA civil action is filed, those facts and circumstances cannot be subsequently used as

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[5] The D.C. Comprehensive Merit Personnel Act (CMPA), D.C. Official Code § 1-601.01 et seq. (2001), established this Office, which has only that jurisdiction conferred upon it by law. The types of actions that employees of the District of Columbia government may appeal to this Office are stated in D.C. Official Code § 1-606.03. Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") states in pertinent part that:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.

[6] Employee's Reply in Support of OEA Jurisdiction of Her Claims pp 1-2 (December 28, 2021).

[7] *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 753, 756 (1975).

[8] *Banks v. D.C. Public Schools*; OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992); *Caminetti v. United States*, 242 U.S. 470 (1916); *McLord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980).

the basis for a Petition for Appeal before the OEA. Given the instant facts, Employee's sole means of pursuing redress now lie with her WPA claim with the District Court. Promoting judicial efficiency and comity explain why the WPA has a prohibition against multiple cases. Accordingly, as I noted above, I find that Employee filed her Petition for Appeal ***after*** she first filed her Complaint under the WPA. Given this, I further find that D.C. Official Code § 1-615.56 (a), obviates OEA's ability to adjudicate the instant matter. [9]

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: */s/ Eric T. Robinson*
ERIC T. ROBINSON, Esq.
Senior Administrative Judge

[9] 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").