THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
CARLA RICHARDSON,	)	
Employee	)	OEA Matter No. 1601-0054-11
	)	
v.	)	Date of Issuance: August 12, 2011
	)	
D.C. DEPARTMENT OF MENTAL HEALTH,	)	
	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge

Carla Richardson, Employee *Pro-Se*[1]
Ross Buchholz, Esq., Agency Representative.

INTIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On December 29, 2010, Carla Richardson ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the District of Columbia Department of Mental Health ("DMH" or "the Agency") adverse action of removing her from service. I was assigned this matter on or about April 14, 2011. At the time of her removal, Employee was a member of the American Federation of State, County, and Municipal Employees Local 2095 ("the Union"). After reviewing the Employee's petition for appeal, I determined that there existed a question as to whether the OEA may exercise jurisdiction over the instant appeal. Consequently, I issued an order on June 10, 2011, requiring both the Agency and Employee to address said issue in a written brief. Both parties have since complied with said order. After carefully reviewing the documents of record, I have determined that no further proceedings are warranted. The record is closed.

[1] Initially, Employee was represented by Monalie E. Bledsoe, Esquire. However, on August 8, 2011, Ms. Bledsoe informed the undersigned, via letter, that she wanted to note her withdrawal in this matter.

ISSUE

Whether this Office may exercise jurisdiction over this matter.

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states 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.

OEA Rule 629.2, *id*., states that "the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing."

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

According to a letter addressed to Employee dated November 30, 2010, ("Termination Letter"), Employee was informed that the effective date of her termination was that same date. The Termination Letter further provided in relevant part that "[Employee has] the right to file an appeal with the [OEA] or to file a grievance under the negotiated grievance procedure outlined in the Collective Bargaining Agreement ("CBA") between the American Federation of State, County, and Municipal Employees Local 2095 and the [DMH]."

On or about December 1, 2010, Employee's Union Representative, utilizing the protections afforded to Employee through the CBA, filed a Step III grievance of the final decision to remove her from service. *See* Agency's Brief Regarding Jurisdiction at 1. As was noted above, on December 29, 2010, Employee filed her petition for appeal with the Office of Employee Appeals.

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the CMPA, sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") reads in pertinent part as follows:

> (a) An employee may appeal [to this Office] 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 [RIF]. . . .
>
> Of note, D.C. Official Code § 1-616.52, provides 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.

Based on the preceding, a District government employee, who is otherwise covered by the protections afforded to most District government employees under D.C. Official Code § 1-606.03, may elect to have an Agency's action reviewed under the auspices of the OEA. However, some District government employees, like Employee herein, have other protections afforded to them pursuant to various collective bargaining agreements entered into by and between an employees' union and a District government agency.

In the instant matter, as referenced in the Termination Letter, initially, Employee had concurrent avenues available for reviewing the Agency's adverse action – file a petition with the OEA or file a grievance through the CBA. Of note in this matter, Employee argues that the Union filed the grievance on her behalf without her prior knowledge or ability to confer with union and/or legal counsel with respect to her available option of having her removal reviewed by the OEA. However, the Agency correctly notes that according to the CBA entered into by and between the DMH and the Union, either the Union or the affected employee can file a grievance of removal through the CBA. *See* CBA Article 19 §§ 2 and 4. Regrettably, I find that Employee, through her Union, has exercised her option for review via the grievance procedure outlined in the CBA. According to D.C. Official Code § 1-616.52 (e), an aggrieved employee cannot simultaneously review a matter before the OEA and through a negotiated grievance procedure. Also, D.C. Official Code § 1-616.52 (f), further provides that once an avenue of review, either through the OEA or through a negotiated grievance procedure, is first selected, then the possibility of review via the other route is closed. I find that the Employee, through her Union, initially opted to contest her removal under the auspices of the Collective Bargaining Agreement as noted in the Termination letter. Consequently, I further find that the OEA lacks jurisdiction over the instant matter[2].

ORDER

Based on the foregoing, it is hereby ORDERED that this matter be DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

Eric T. Robinson, Esq.
Administrative Judge

[2] Since this decision is predicated on the Office's lack of jurisdiction, I am unable to address the factual merits, if any, of the Employee's appeal.