THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Damond Smith	)	Matter No. J-0063-09
Employee	)	
	)	Date of Issuance:
v.	)	July 16, 2009
	)	
Office of the Chief Financial Officer	)	Senior Administrative Judge
Agency	)	Joseph E. Lim, Esq.
	)	

Clarene P. Martin, Esq., Agency Representative
Damond Smith, Employee *pro se*

INITIAL DECISION ON REMAND

INTRODUCTION AND STATEMENT OF FACTS

On December 17, 2008, Employee filed a petition for appeal with this Office from Agency's final decision terminating him from his position as management program analyst effective October 6, 2008, for having a misdemeanor conviction. The matter was assigned to the undersigned judge on June 15, 2009. I ordered both parties to submit legal briefs on the issue of jurisdiction. The record closed afterwards.

JURISDICTION

The jurisdiction of this Office was not established.

ISSUE

Should this petition for appeal be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

On October 2, 2008, Agency sent a letter of termination to Employee to his last known address and to Employee's union. The union also sent a copy of the termination letter to Employee on October 20, 2008.

Employee does not dispute that on October 27, 2009, he filed a grievance regarding his removal pursuant to the terms of a collective bargaining agreement (CBA) between his exclusive bargaining representative and Agency before he filed the appeal now before OEA. After his

grievance was denied, Employee's union, the AFSCME, District Council 20, declined to take the grievance to arbitration.

Employee argues that Agency had sent the termination letter to his former address and thus it was not until November 11, 2008, that he received the notice. However, Employee admits that he learned of his termination earlier on October 20, 2008, and that he was made aware of a pending adverse action as early as September 2, 2008.

Employee has the burden of proof on issues of jurisdiction, pursuant to OEA Rule 629.2, 46 D.C. Reg. 9317 (1999). Employee must meet this burden by a "preponderance of the evidence" which is defined in OEA Rule 629.1, as 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".

This Office's jurisdiction is conferred upon it by law. It is governed in this matter by D.C. Office Code (2001) Section 1-616.52 which states in pertinent 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 [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 addition, Article 7, Section 13, of the CBA between Employee's union and Agency states, "Except as provided in section 14 of the Article, employees may grieve actions through the negotiated grievance procedure, or appeal to the Office of Employee Appeals (OEA) in accordance with OEA regulations but not both. Once the employee has selected the review procedure, that choice shall be the exclusive method of review."

Employee elected to grieve the matter through the collective bargaining agreement before filing the appeal with OEA. He does not contend he was unaware of his appeal rights before this Office. Although his union now refuses to proceed with his grievance, this does not confer jurisdiction on OEA.

In addition, the Comprehensive Merit Personnel Act (CMPA), D.C. Law 2-139, D.C. Official Code § 1-601.01 *et seq.* (2001), was amended to include a time limit for filing a petition for appeal in this Office. The relevant section reads as follows: "Any appeal shall be filed within 30 days of the effective date of the appealed agency action." D.C. Official Code § 1-606.03(a) (2001). The Office's Rules and Regulations have been amended to reflect this change. *See* OEA Rules 604.1 and 604.2, 46 D.C. Reg. 9299 (1999).

The District of Columbia Court of Appeals has held that the time limit for filing an appeal with an administrative adjudicatory agency such as this Office is mandatory and jurisdictional in nature. *See, e.g., District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991); *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162, 1164 (D.C. 1985). Following these cases, this Office's Board has held that that the statutory 30-day time limit for filing an appeal in this Office is mandatory and jurisdictional in nature. *See King v. Department of Corrections*, OEA Matter No. T-0031-01, *Opinion and Order on Petition for Review* (October 16, 2002), __ D.C. Reg. ____ ( ). Further, in *McLeod v. D.C. Public Schools,* OEA Matter No. J-0024-00 (May 5, 2003), __ D.C. Reg. ____ ( ), it was held that the only situation in which an agency may not "benefit from the [30-day] jurisdictional bar" is when the agency fails to give the employee "adequate notice of its decision and the right to contest the decision through an appeal." *McLeod*, slip op. at 8. (citations omitted).

Here, Employee filed his appeal on December 17, 2008, more than 30 days after he received a second copy of the termination letter. Thus, his appeal is untimely and can be dismissed on that ground.

In sum, based on the arguments and evidence presented, and the applicable laws, rules and regulations, the Administrative Judge concludes that Employee has not met his burden of proof in this matter.

ORDER

It is hereby ORDERED that the petition for appeal is DISMISSED.

FOR THE OFFICE: Joseph E. Lim, Esq.
Senior Administrative Judge