THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
CAROLYN REYNOLDS,	)	
Employee	)	OEA Matter No. 1601-0133-11
	)	
v.	)	
	)	Date of Issuance: May 10, 2016
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Carolyn Reynolds ("Employee") worked as an Administrative Assistant with D.C. Public Schools ("Agency"). Agency issued a final notice of removal to Employee on July 15, 2011. Her removal was effective on July 29, 2011. The notice provided that Employee was being removed from her position because she received a "Minimally Effective" rating under IMPACT, Agency's performance evaluation system, for both the 2009-2010 and 2010-2011 school years.[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on July 18, 2011. She argued that her evaluation was not accurate given her data and documented evidence. Moreover, she contended that she was informed by the Principal, Mr. Linder, that her evaluation rating was "Effective," not "Minimally Effective." Therefore, she requested that she

[1] *Petition for Review*, p. 6 (July 18, 2011).

be provided the rating she deserved.[2]

On August 31, 2011, Agency filed its response to Employee's Petition for Appeal. It explained each section of Employee's IMPACT evaluation and argued that it correctly evaluated her. Agency asserted that Employee was removed because she received ratings of "Minimally Effective." It denied that Employee was told that she would receive an "Effective" rating. Therefore, Agency requested an evidentiary hearing.[3]

Prior to conducting an evidentiary hearing, OEA Administrative Judge ("AJ") Quander ordered the parties to submit Pre-hearing Statements regarding Employee's IMPACT evaluations.[4] Agency made the same arguments it presented in its Answer to Employee's Petition for Appeal.[5] Employee argued that prior to her termination, she sustained a workplace injury for which she requested a reasonable accommodation. She claimed that she was removed from her position as a result of her injury. Moreover, she alleged that Agency never provided to her, or her union, any documentation stating that if she received two consecutive "Minimally Effective" ratings, then she would be terminated. Employee also contended that Agency lacked any documentary evidence that she signed to prove that she was aware of the IMPACT removal terms. Finally, Employee asserted that Agency failed to provide feedback and development plans before removing her from her position. Therefore, she requested that she be reinstated with back pay and benefits.[6]

On December 12, 2012, AJ Quander issued an Order Scheduling Evidentiary Hearing. In the order, he stated that Employee raised several issues which could only be resolved through an evidentiary hearing. Those issues were whether Agency's decision to remove her was based on

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[2] *Id.*, 2-5.
[3] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal*, p. 1-4 (August 31, 2011).
[4] *Order Rescheduling the Convening of Pre-hearing Conference* (November 20, 2012).
[5] *District of Columbia Public Schools' Pre-hearing Statement* (November 13, 2012).
[6] *Employee's Motion to Appeal Unlawful Impact Evaluation Termination*, p. 1-6 (December 5, 2012).

substantial evidence; whether Agency committed harmful error by failing to follow its standards prior to terminating Employee; whether Agency adhered to the applicable laws, agreements, and regulations when terminating Employee; and whether Agency provided Employee with reasonable accommodations in her work load, working conditions, and schedule after she sustained her workplace injury. Accordingly, an evidentiary hearing was scheduled for January 28, 2013, to address these issues.[7]

After rescheduling the hearing date, the evidentiary hearing was held on March 15, 2013. However, due to lengthy testimonies, the hearing did not conclude on March 15th. Employee was able to cross examine two of Agency's witnesses, but she was unable to offer any testimony or present any of her witnesses. As a result, AJ Quander scheduled a continuation of the hearing for July 1, 2013. However, on the hearing date, Employee explained that she retained counsel to represent her in the matter moving forward. Her attorney provided that he was retained the week before and was not ready to proceed with the hearing. Consequently, he requested that the hearing be rescheduled for three weeks later. Before leaving, the parties tentatively set the rescheduled hearing date for August 27, 2013.[8]

The August 27th hearing never occurred. Furthermore, a new AJ was assigned to this matter after Judge Quander left the employ of OEA. Administrative Judge Lim was assigned the case on January 27, 2014. He held a Status Conference on March 10, 2014. On March 11, 2014, AJ Lim issued a Post-Status Conference Order which provided that both parties were finalizing their witness lists and engaging in settlement talks. As a result, he ordered the parties to submit status reports on their settlement negotiations.[9]

From March until August 2014, the parties provided periodic settlement status reports.

[7] *Order Convening Evidentiary Hearing and Directing Completion of Discovery,* p. 2 (December 12, 2012).
[8] *OEA Hearing Transcript,* p. 337-347 (July 1, 2013).
[9] *Post Conference Order* (March 11, 2014).

However, on August 19, 2014, AJ Lim issued an order requesting briefs on whether the case should be dismissed because Employee received worker's compensation benefits since her termination.[10]

Employee submitted her brief. In it, she specifically requested that the AJ allow her to present evidence regarding her IMPACT evaluation. Employee also asked that a hearing be rescheduled to allow her the opportunity to present evidence that Agency lacked cause to remove her through IMPACT.[11]

The AJ issued his Initial Decision on October 1, 2014. He held that Agency had just cause to remove Employee because it adhered to the evaluation process. Additionally, the AJ found that Employee did not prove that the Principal's comments in her evaluation were untrue, and she failed to provide any evidence that directly contradicted the Principal's factual findings. As for Employee's argument that she should have been allowed to present her proof at a hearing, the AJ ruled that a hearing is only warranted if she offered evidence that directly contradicted the statements provided by the Principal.[12]

Employee filed a Petition for Review with the OEA Board on November 12, 2014. She asserts that Judge Lim dismissed her appeal without permitting her the opportunity to demonstrate that her evaluation was a pre-text to her termination. She also argues that Agency engaged in disparate treatment through its failure to provide her with a reasonable accommodation for her injury. Employee provides that she was not allowed to present her defense during the evidentiary hearing, in accordance with the law. Accordingly, she requests

[10] *Order Requesting Briefs* (August 19, 2014).
[11] *Memorandum in Support of the Office of Employee Appeals' Jurisdiction to Consider Appeal,* p. 3-4 (September 24, 2014).
[12] *Initial Decision,* p. 5-7 (October 1, 2014).

that the matter be remanded and rescheduled for a hearing.[13]

In accordance with OEA Rule 633.1 "any party to the proceeding may serve and file a petition for review of an initial decision with the Board within thirty-five (35) calendar days of issuance of the initial decision." Furthermore, D.C. Official Code § 1-606.03(c) provides that ". . . the initial decision . . . shall become final 35 days after issuance, unless a party files a petition for review of the initial decision with the Office within the 35-day filing period." The D.C. Court of Appeals held in *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991), that "the time limits for filing appeals with administrative adjudicative agencies, as with courts, are mandatory and jurisdictional matters."[14] Therefore, OEA has consistently held that the filing requirement for Petitions for Review is mandatory in nature.[15]

In the current case, the Initial Decision was issued on October 1, 2014. Employee did not file her Petition for Review until November 12, 2014. This is past the thirty-five day deadline. Because the statute is mandatory, this Board does not have the authority to waive the requirement.[16] Accordingly, Employee's Petition for Review is denied.

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[13] *Claimant Carolyn Reynolds' Petition for Review of Senior Administrative Judge's October 1, 2014 Decision,* p. 2, 4-7 (November 12, 2014).

[14] Also see *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991) (citing *Woodley Park Community Association v. District of Columbia Board of Zoning Adjustment*, 490 A.2d 628, 635 (D.C.1985); *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162, 1164 (D.C.1985); *Gosch v. District of Columbia Department of Employment Services*, 484 A.2d 956, 958 (D.C.1984); and *Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917, 923 (D.C.1980)).

[15] *Alfred Gurley v. D.C. Public Schools,* OEA Matter No. 1601-0008-05, *Opinion and Order on Petition for Review* (April 14, 2008), *James Davis v. Department of Human Services*, OEA Matter No. 1601-0091-02, *Opinion and Order on Petition for Review* (October 18, 2006); *Damond Smith v. Office of the Chief Financial Officer,* OEA Matter No. J-0063-09, *Opinion and Order on Petition for Review* (December 6, 2010); and *Jason Codling v. Office of the Chief Technology Officer,* OEA Matter No. J-0151-09, *Opinion and Order on Petition for Review* (December 6, 2010).

[16] While this Board agrees with AJ Lim's reasoning in this matter, we would be remiss not to address Employee's inability to present her defense during the evidentiary hearing. AJ Quander obviously thought that a hearing was warranted as evidenced in the issues he laid out prior to the hearing. Thus, ordinarily, AJ Lim should have allowed Employee to present her position, as Agency was allowed to do, during the hearing. AJ Lim was reassigned the case after Judge Quander left the Office. At the point of reassignment, it was his case to move forward procedurally as

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

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Sheree L. Price, Interim Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

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he saw fit. However, in an effort to tie up any procedural loose ends left after Judge Quander's departure, AJ Lim should have conducted the second day of hearing – even if it ultimately would not have altered his ruling.

It is important to note that AJ Lim did not rely on any information provided in the hearing to render his decision. Therefore, his decision does not on its face appear to be biased or prejudicial. AJ Lim correctly relied on the Court's holding in *Onuche David Shaibu v. D.C. Public Schools*, 2012 CA 003606 P(MPA)(D.C. Super. Ct. January 29, 2013) which provided that if an employee offers evidence that directly contradicts any of the factual basis for the CLDF, then OEA must conduct a hearing to address the material fact in question. Employee offered no evidence to directly contradict any of the comments on either her 2009-2010 or 2010-2011 evaluations. Therefore, an evidentiary hearing was not warranted. Moreover, because her Petition for Review was untimely, this Board cannot address the merits of Employee's removal action.