

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 ¹)	
)	OEA Matter No. J-0054-22
)	
v.)	
)	Date of Issuance: April 13, 2023
)	
OFFICE OF THE ATTORNEY GENERAL,)	
Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Case Management Specialist for the Office of Attorney General (“Agency”). On May 13, 2022, Agency issued Employee a notice placing her on a sixty-day Performance Improvement Plan (“PIP”). According to the notice, Employee was placed on a PIP because of deficient performance in communication, customer service, and goal attainment. Agency provided that Employee displayed a lack of civility and was disrespectful to colleagues, management, and other Agency officials.²

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on May 23, 2022. In her appeal, she asserted that she was placed on a PIP and reluctantly transferred

¹ Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

² *Petition for Appeal*, p. 7-8 (May 23, 2022).

to a division with which she had no knowledge or expertise. She asserted that the PIP was retaliatory because she engaged in protected activities with her union; filed a complaint on bullying; used approved Covid-19 leave; and exposed unethical work practices. As a result, Employee argued that she was denied the right to respond or grieve a corrective action. Accordingly, she asked that OEA reverse her reassignment and the PIP.³

On June 22, 2022, Agency filed a Motion to Dismiss. It argued that OEA lacked jurisdiction over transfers or PIPs. Agency asserted that Employee underwent a lateral transfer which did not impact her title, grade, position description, salary or benefits. Additionally, Agency argued that there was no final agency decision providing a basis for Employee's appeal to OEA, as required by D.C. Official Code § 1-606.03(a) and OEA Rule 604.1. It explained that Employee's transfer and PIP were not disciplinary actions. Moreover, it contended that Employee submitted a step 4 grievance challenging her transfer and PIP. Accordingly, it requested that this matter be dismissed for lack of jurisdiction.⁴

Prior to issuing an Initial Decision, the OEA Administrative Judge ("AJ") ordered both parties to submit briefs on jurisdiction. Employee's brief was due by July 24, 2022, and Agency's brief was due by August 8, 2022.⁵ Agency timely filed its brief.⁶ However, Employee failed to provide a timely submission. Consequently, the AJ issued an Order for Good Cause Statement, which Employee was required to respond by October 10, 2022.⁷ On October 7, 2022, Employee responded and provided that she was experiencing health problems and did not intentionally miss the deadline.⁸ The AJ ruled that Employee established good cause and then, again, ordered that

³ *Id.*, p. 2 and 12.

⁴ *OAG's Motion to Dismiss*, p. 1-5 (June 22, 2022).

⁵ *Order* (July 12, 2022).

⁶ *OAG's Reply Brief* (August 8, 2022).

⁷ *Order for Good Cause Statement* (October 3, 2022).

⁸ *Good Cause Statement* (October 7, 2022).

the parties brief the jurisdictional issue. Employee's deadline was November 10, 2022, and Agency's was November 18, 2022.⁹ However, on November 17, 2022, Employee filed a motion to voluntarily withdraw her appeal because she agreed that OEA lacked jurisdiction.¹⁰

The AJ issued an Initial Decision on December 2, 2022. He determined that because Employee voluntarily withdrew her appeal, the matter was dismissed. As a result, the AJ dismissed the matter with prejudice.¹¹

On December 6, 2022, Employee filed a Motion for Reconsideration. She explains that she voluntarily withdrew her petition because she was under stress and duress. Employee provides that she suffered from depression and anxiety, which was the result of work-place trauma and the side effects of chemotherapy. She also contends that Agency created a hostile work environment. Therefore, she requests that her petition be reconsidered.¹²

Agency filed its response on March 13, 2023. It asserts that despite multiple OEA orders instructing her to address the issue of jurisdiction, Employee failed to do so and instead filed a Motion to Withdraw her appeal. Agency also contends that Employee failed to state a legal basis for her Petition for Review and failed to prove duress. It, again, argues that OEA lacks jurisdiction over Employee's appeal. Therefore, Agency requests that Employee's Petition for Review be denied.¹³

Jurisdiction

In accordance with D.C. Code § 1-606.03(a), "an employee may appeal *a final agency decision* affecting a performance rating which results in *removal* of the employee . . . , *an adverse*

⁹ *Order* (October 28, 2022).

¹⁰ *Employee's Withdrawal* (November 17, 2022).

¹¹ *Initial Decision* (December 2, 2022).

¹² *Request for Review/Reconsideration* (December 6, 2022).

¹³ *OAG's Opposition to Employee's Request for Review/Reconsideration* (March 13, 2023).

action for cause that results in removal, reduction in force . . . , reduction in grade, placement on enforced leave, or suspension for 10 days or more . . . to the Office upon the record and pursuant to other rules and regulations which the Office may issue (emphasis added).” Similarly, OEA Rule 604.1 provides that “. . . any District of Columbia government employee may appeal a final agency decision affecting: a performance rating which results in removal of the employee; an adverse action for cause which results in removal; a reduction in grade; a suspension for ten (10) days or more; a reduction-in-force; or a placement on enforced leave for ten (10) days or more. Employee’s transfer and PIP do not fall under any of the categories over which OEA has jurisdiction. Moreover, Employee failed to file a final agency decision with her appeal. Accordingly, the AJ correctly ordered briefs on jurisdiction in this matter.

Pursuant to OEA Rule 628.2, the employee shall have the burden of proof as to issues of jurisdiction. The AJ issued an order on July 12, 2022, requiring Employee to submit a brief on jurisdiction by July 27, 2022.¹⁴ Employee failed to comply. The AJ, again, ordered Employee to submit a brief on jurisdiction by November 10, 2022.¹⁵ Employee missed the deadline again. However, on November 17, 2022, she submitted a filing providing that she agreed that OEA lacked jurisdiction. Employee clearly conceded in this filing that OEA lacked jurisdiction in her case, an argument with which this Board agrees.

Failure to Prosecute

OEA Rule 621.3 outlines the process for parties who fail to prosecute their appeals. The section provides the following:

If a party fails to take reasonable steps to prosecute or defend an appeal, the Administrative Judge, in the exercise of sound discretion, may dismiss the action or rule for the appellant. Failure of a party to prosecute or defend an appeal includes, but is not limited to, a failure to:

¹⁴ *Order* (July 12, 2022).

¹⁵ *Order* (October 28, 2022).

- a. Appear at a scheduled proceeding after receiving notice;
- b. Submit required documents after being provided with a deadline for such submission; or
- c. Inform this Office of a change of address which results in correspondence being returned.

Moreover, the AJ in *Employee v. Department of Human Services*, OEA Matter No. 1601-0030-21 (July 21, 2022), reasoned that “. . . this Office has long maintained that a petition for appeal may be dismissed with prejudice when an employee fails to prosecute the appeal. . . . Employee failed to respond to two orders . . . both had specific deadlines[,] and both contained warnings that failures to comply could result in . . . dismissal of the petition.”¹⁶

In this case, Employee failed to submit required documents after being provided with a deadline for such submission. On July 12, 2022 and October 28, 2022, the AJ issued orders requesting that Employee submit a brief on jurisdiction. In both orders, he instructed the parties that dismissal was a sanction for failing to prosecute the appeal. Thus, in accordance with OEA Rule 621.3 and the holding in *Employee v. Department of Human Services*, it was within the AJ’s authority to dismiss Employee’s appeal.

Voluntary Withdrawal

In her November 17, 2022, filing, Employee provided that “I [Employee] *voluntarily* withdraw my petition for appeal . . . as I agree that OEA lacks jurisdiction in the matter (emphasis added).” This directly contradicts Employee’s subsequent claim that she withdrew her appeal under duress. Consistent with OEA’s historical ruling on these matters, the AJ properly dismissed Employee’s petition as the result of her voluntary withdrawal.¹⁷

¹⁶ The Office has also dismissed appeals for failure to submit required documents in *Employee v. Office of the Attorney General of the District of Columbia*, OEA Matter No. J-0059-17 (September 8, 2017); *Employee v. Metropolitan Police Department*, OEA Matter No. J-0034-16 (May 31, 2016); *Employee v. D.C. Public Schools*, OEA Matter No. 2401-0244-09 (December 13, 2010); *Employee v. Office of Public Education Facilities Modernization*, OEA Matter No. 2401-0219-09 (November 1, 2010);

¹⁷ *Employee v. D.C. Department of Forensic Sciences*, OEA Matter No. 1601-0081-22 (February 23, 2023); *Employee v. Office of the Attorney General for the District of Columbia*, OEA Matter No. 1601-0016-23 (February 16, 2023);

Conclusion

According to OEA Rule 633.3(c), the Board may grant a Petition for Review when the AJ's findings are not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.¹⁸ After a review of the record, this Board believes that the AJ's ruling was based on substantial evidence. Employee failed to establish OEA's jurisdiction over her appeal. She also failed to provide a final Agency decision. Finally, she voluntarily withdrew her Petition for Appeal. Accordingly, this Board must deny Employee's Petition for Review.

Employee v. D.C. Department of Parks and Recreation, OEA Matter No. 1601-0078-22 (November 16, 2022); Employee v. District of Columbia Department of Public Works, OEA Matter No. 1601-0012-21 (July 1, 2022); Employee v. Metropolitan Police Department, OEA Matter No. 1601-0042-21 (April 18, 2022); Employee v. Office of the Chief Technology Officer, OEA Matter No. 1601-0043-21 (January 11, 2022); and Employee v. D.C. Public Schools, OEA Matter No. 1601-0028-21 (November 12, 2021).

¹⁸*Black's Law Dictionary*, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

ORDER

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

FOR THE BOARD:

Clarence Labor, Jr., Chair

Jelani Freeman

Peter Rosenstein

Dionna Maria Lewis

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.