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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
LINDA WILLIAMS)	
Employee)	OEA Matter No. J-0072-13
)	
v.)	Date of Issuance: June 19, 2013
)	
OFFICE OF THE STATE)	Lois Hochhauser, Esq.
SUPERINTENDENT OF)	Administrative Judge
EDUCATION)	
Agency)	
_____)	
Johnnie Johnson, Esq., Employee Representative		
Hillary Hoffman-Peak, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On April 9, 2013, Linda Williams, Employee herein, filed a petition with the Office of Employee Appeals (OEA) appealing the decision of the Office of the State Superintendent of Education (OSSE), Agency herein, to terminate her employment. The effective date of the termination, according to the petition, was December 14, 2012. I was assigned the matter on May 3, 2013.

On May 14, 2013, I issued an Order notifying Employee that it appeared that her petition was untimely. I informed her that she had the burden of proof on this jurisdictional issue, and directed her to submit legal and/or factual argument in support of her position by May 28, 2013. I advised the parties that unless they were notified to the contrary, the record would close in this matter would close on May 28, 2013. Employee filed a timely response on May 22, 2013. The record closed on May 28, 2013.¹

¹ Agency filed a Motion to Dismiss on May 15, 2013. However, since it was filed after the May 14 Order was issued, and since the Certificate of Service on the Motion was not dated and therefore the Administrative Judge did not know when or if it was sent to Employee, rather than delay resolution of this matter, the Administrative Judge did not consider the Motion or its contents in reaching her decision .

JURISDICTION

The jurisdiction of this Office was not established.

ISSUE

Should this petition be dismissed?

FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS

The jurisdiction of this appeal is at issue because Employee did not file her petition for appeal in a timely manner. Timeliness is a jurisdictional issue. Pursuant to OEA Rule 628, 59 DCR 2129 (March 16, 2012), cited in pertinent part below, Employee has the burden of proof on this issue:

628.1 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 the 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.

628.2 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.

OEA Rule 604.2, *id*, requires that appeals be filed within 30 days of the effective date of the appealed action. The effective date in the final Agency notice submitted by Employee with her appeal was December 14, 2012. The final Agency notice included information regarding appeals filed with this Office, including the 30 day requirement of filing the appeal. In her response, Employee stated that she was “misled by the wording of Chief Operating Officer RaeShawn Crosson-Settles’s letter, which did not appear to be a final decision based on the words ‘[u]nless the proposed action is reversed or amended by administrative review, the effective date of your termination will be Friday, December 14, 2013.’” Employee stated that when she “did not receive the anticipated final letter” from Chief Operating Officer RaeShawn Crosson-Settles, she “realized that she needed to file her appeal” with this Office, and did so.

Employee appears to be referring to the proposed notice of removal in her response rather than the final Agency notice. The final Agency notice was signed by Ryan Solchenberger, OSSE Director of Student Transportation and not by Chief Operating Officer RaeShawn Crosson-Settles, the OSSE official referred to by Employee in her response. Although Employee did not refer to the final Agency notice in her response, she attached the final Agency notice to her petition, thus supporting the view that she did receive it. The final Agency notice states that its purpose is to “inform [Employee] of [her] removal.” The letter refers to the earlier issued proposed notice. It also provides Employee with information, including the 30 day filing

The Motion is rendered moot by this Decision and is therefore dismissed.

requirement, for filing a petition for appeal with this Office. Although the final notice did not state the effective date of her termination, that omission constitutes a *de minimis* error in this matter. There are several reasons, based on Employee's own submissions and arguments, that the Administrative Judge finds that Employee was aware that the effective date of her removal was December 14, 2012. First, Employee attached the final Agency notice, and in her petition she listed the effective date of her termination as December 14, 2012. Second, in her submission, Employee quotes from the proposed notice, which she states, notified her that "[u]nless the proposed adverse action is reversed or amended...the effective date of your termination will be Friday, December 14, 2012." Thus the proposed notice stated the effective day. Finally, Employee attached several documents to her petition which support the conclusion that she was aware of the effective date of her removal well before she filed her petition with this Office.

The Administrative Judge did not ask the parties to present argument on whether this Office lacked jurisdiction based on the fact that Employee had grieved the removal through her Union prior to filing a petition with this Office, because the timeliness issue needed to be resolved first. However, in her petition, Employee stated that she filed a grievance with the Union regarding her removal on December 22, 2012. She attached a copy of the Step 2 Grievance filed on her behalf by AFSCME, Local 1959 on December 22, 2012. She also attached a letter from Brenda Zwack, Esq., to AFSCME, District Council 20's Executive Director, responding to his request for a recommendation as to whether the Union should pursue arbitration regarding Employee's grievance. In her letter of March 1, 2013, Ms. Zwack refers to the file she reviewed, which included the December 14, 2012 notice of removal, the December 22, 2012 grievance and OSSE's January 25, 2013 response. These documents, submitted by Employee, support the conclusion that Employee was aware of her removal before December 22, 2012, since her grievance was filed on that date.

For these reasons, the Administrative Judge finds that Employee was aware that the effective date of her termination was December 14, 2012, and that even if she was confused because the final Agency notice did not state the effective date and even if she did not refer back to the December 14, 2012 date in the proposed notice, she was certainly aware of the effective date by December 22, 2012 when the Union filed the grievance on her behalf.

Based on this analysis, the Administrative Judge concludes that Employee did not meet her burden of proof that her untimely filing of this petition should be excused. She further concludes that Employee failed to meet her burden of proof on the jurisdictional issue of timeliness. Finally, the Administrative Judge concludes that this petition for appeal should be dismissed for lack of jurisdiction.²

ORDER

² The Administrative Judge did not consider the issue of the grievance and its impact on this Office's jurisdiction, in reaching her decision in this matter, since the parties were not asked to brief the issue. However, the documents related to the grievance referenced in this Initial Decision were submitted by Employee with her petition and the dates contained in the documents were considered only with regard to the timeliness issue. However, the Administrative Judge notes that even if the timeliness issue had been resolved in Employee's favor, based solely on the documents submitted by Employee, it is likely that the appeal would have been dismissed pursuant to D.C. Official Code § 1-616.52.

It is hereby: ORDERED: This petition for appeal is dismissed.

FOR THE OFFICE:

LOIS HOCHHAUSER, Esq.
Administrative Judge