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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
BRENDA BLACK)	OEA Matter No. J-0180-11
Employee)	
)	Date of Issuance: February 13, 2012
v.)	
)	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA OFFICE OF THE)	Administrative Judge
STATE SUPERINTENDENT OF EDUCATION)	
Agency)	
_____)	
Brenda Black, Employee, <i>pro se</i>)	
W. Iris Barber, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Brenda Black, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on August 22, 2011, appealing the final decision of the District of Columbia Office of the State Superintendent of Education, Agency herein, to remove her from her position as Bus Attendant, effective May 31, 2011.

The matter was assigned to me on December 5, 2011. In the Order issued on that date, I noted that in its final notice issued on May 16, 2011, Agency had failed to fully comply with OEA Rule 605.1 regarding Employee's right to file an appeal with this Office. I further noted that Employee had failed to file her petition for appeal in a timely manner pursuant to OEA Rule 604.2. I directed Agency to provide documentation of its compliance with OEA Rule 605.1 or if no such documentation existed, to submit legal and/or factual argument why its notice should be considered legally sufficient. Agency's submission was due on December 20, 2011. I directed Employee to submit legal and/or factual argument on why her petition should be accepted by this Office despite its untimely filing as well as to respond to Agency's submission, by January 6, 2012. Finally, I notified the parties, that unless they were advised to the contrary, the record in the matter would close on January 6, 2012. Agency filed a timely response. Employee did not file

a response and did not contact the undersigned to request an extension. The record closed at on January 6, 2012.

JURISDICTION

The jurisdiction of this Office was not established.

ISSUE

Should this petition be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

OEA Rule 622.3, 46 D.C. Reg. at 9313 (1999) states:

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:

- (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.

In this matter, Employee failed to respond to the December 5, 2011 Order, which was sent to her by first class mail, postage prepaid, at the address she listed in her petition for appeal as her home address. The Order was not returned to OEA, and is presumed to have been received by Employee. Employee did not contact me to request an extension of time to file her response. OEA Rule 622.3(b), cited above, provides that the failure to prosecute an appeal includes the failure to submit required documents after being provided with a deadline for such submission. The Order imposed a deadline of January 6, 2012. I therefore conclude that by failing submit a required response, after being provided with a deadline for such submission, Employee failed to prosecute her appeal. I further conclude that the appeal should be dismissed for this reason.

There is an additional issue presented for resolution. OEA Rule 604.2 provides that “an appeal filed pursuant to Rule 604.1 must be filed within thirty (30) days of the effective date of the appealed agency action.” Although Employee’s petition should have been filed within 30 days of her May 31, 2011 effective date of termination, it was not filed until August 22, 2011, in excess of 60 days from the effective date of her removal. Both this Office and the D.C. Court of Appeals have consistently held that time limits for filing appeals are mandatory in nature. *See, e.g., Alfred Gurley v. D.C. Public Schools*, OEA Matter No. 1601-0008-05, *Opinion and Order on Petition for Review* (April 14, 2008), ___ D.C. Reg. ___ () citing *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991); 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), ___ D.C. Reg. ___ (). The only exception to the mandatory nature of the timeliness rule that this Office has

established is that it will excuse a late filing if an agency fails to provide an employee with “adequate notice of its decision and the right to contest the decision through an appeal”. *McLeod v. District of Columbia Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003), _____ D.C. Reg. _____ (). D.C. Official Code § 1-606.04(e) states, in pertinent part, that “the personnel authority shall provide the employee with a written decision following the review . . . and shall advise each employee of his or her right to appeal to the Office as provided in this subchapter.” OEA Rule 605.1 states the specific information regarding appeal rights to OEA that an agency must include in its final decision:

[W]hen an agency issues a final decision to an employee on a matter appealable to the Office, the agency shall at the same time provide the employee with:

- (a) notice of the employee’s right to appeal to the Office;
- (b) a copy of the rules of the Office;
- (c) a copy of the appeal form of the Office;
- (d) notice of applicable rights to appeal under a negotiated review procedure; and
- (e) notice of the right to representation by a lawyer or other representative authorized by the rules.

Issues regarding the sufficiency of the final agency notice are generally raised when an employee fails to file a petition for appeal with this Office in a timely manner. In its final notice, Agency advised Employee of her right to appeal its action to this Office, but did not include copies of OEA’s rules or appeal form so that Employee would immediately be aware of the filing deadline. In its response to my Order, Agency did not contend that it fully complied with OEA Rule 605.1 or present any argument on that issue. However, OEA Rule 629.2, 46 D.C. Reg. 9317 (1999) places the burden of proof on all issues of jurisdiction on Employee. Timeliness is a jurisdictional issue. 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”. If Employee had responded to the Order and contended that she filed her petition late because Agency failed to fully advise her of her appeal rights, then the untimely filing might well have been accepted. However, by failing to file a response, Employee failed to offer any reason for her late filing. I conclude that she failed to meet her burden of proof on the issue of jurisdiction, which provides an additional basis upon which to dismiss this petition

ORDER

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

FOR THE OFFICE:

LOIS HOCHHAUSER, ESQ.
Administrative Judge