

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:)	
)	
TENECIA MOSLEY,)	
Employee)	
)	OEA Matter No.: J-0014-16
v.)	
)	Date of Issuance: June 6, 2017
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
Agency)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Tenecia Mosley (“Employee”) worked as a Program Coordinator at Roosevelt STAY High School with D.C. Public Schools (“Agency”). On May 15, 2015, Agency notified Employee that she was being separated from her position pursuant to a Reduction-in-Force (“RIF”). The effective date of the RIF was August 7, 2015.

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on December 4, 2015. In her appeal, Employee argued that the staff at Roosevelt was informed that the fiscal budget for the 2016 fiscal year was sufficient to support the current staffing levels. She also asserted that there was no good cause to support Agency’s decision to conduct a RIF. In addition, Employee stated that she never received RIF counseling and was unable to file a

Petition for Appeal in a timely manner because she was not “privity to particular information until after [the] time period had passed.”¹

Agency filed a Motion to Dismiss and Answer to Employee’s Petition for Appeal on December 18, 2015. It claimed that Employee failed to complete a two-year probationary period as required under the Collective Bargaining Agreement (“CBA”) between D.C. Public Schools and the Council of School Officers (“CSO”). It also argued that Employee’s appeal was filed in an untimely manner. Consequently, it requested that the matter be dismissed for lack of jurisdiction.²

The matter was subsequently assigned to an OEA Administrative Judge (“AJ”). On December 24, 2015, the AJ issued an order directing Employee to submit a written brief that addressed whether the instant appeal should be dismissed for lack of jurisdiction because it was filed in an untimely manner and because Employee was in a probationary status at the time of the RIF action. Employee was required to submit a brief on or before January 4, 2016. The AJ further provided in his order that sanctions may be imposed pursuant to OEA Rule 621.3 if Employee failed to submit a brief by the prescribed deadline.³

An Initial Decision was issued on February 24, 2016. The AJ held that Employee failed to meet her burden of proof in establishing jurisdiction before this Office. Specifically, he highlighted OEA Rule 604.2, 59 DCR 2129 (March 16, 2012), which requires that a Petition for Appeal be filed within thirty days after the effective date of the appealed agency action. However, the AJ concluded that Employee’s appeal was filed approximately four months after the effective date of Agency’s RIF action. In addition, the AJ provided that an appeal may be

¹ *Petition for Appeal* (December 4, 2015).

² *Agency Motion to Dismiss and Answer to Petition for Appeal* (December 18, 2015).

³ *Order to Employee* (December 24, 2015). Agency was given the option to respond to Employee’s brief on or before January 14, 2015.

dismissed in accordance with OEA Rule 621.3 when an employee fails to prosecute the appeal. According to the AJ, Employee failed to respond to his December 24, 2015 jurisdictional order. Consequently, Employee's Petition for Appeal was dismissed for lack of jurisdiction. Alternatively, the appeal was dismissed for failure to prosecute.⁴

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on March 3, 2016. She argues that the AJ erroneously concluded that she failed to respond to his December 24, 2015 order. According to Employee, a response was mailed to OEA by regular mail on January 19, 2016. Since the brief was not returned to her by the postal service, Employee asserts that it was presumed to be delivered to this Office in a timely manner. Attached to her Petition for Review is a copy of what Employee claims was her original response to the AJ's order. In the submission, Employee states that OEA has jurisdiction over her appeal pursuant to OEA Rule 604.1 because "any District of Columbia government employee may appeal a final agency decision affecting...a reduction in force." In addition, she notes that Agency's Motion to Dismiss and Answer to Employee's Petition for Appeal contains documents addressed to another employee, in addition to documents that she did not sign. As a result, Employee requests that this Board grant her Petition for Review.⁵

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:

- (a) New and material evidence is available that, despite due diligence, was not available when the record closed;

⁴ *Initial Decision* (February 24, 2016).

⁵ *Petition for Review* (March 3, 2016). Employee did not provided any arguments pertaining to her being in a probationary status at the time of her termination. Agency did not file a response to the Petition for Review.

- (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
- (c) The findings of the Administrative Judge are not based on substantial evidence; or
- (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

OEA Rule 622.3 provides that “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 an appeal includes, but is not limited to, “a failure to submit required documents after being provided with a deadline for such submission.”⁶

Here, Employee was warned that the failure to submit a Brief on Jurisdiction could result in sanctions as enumerated in OEA Rule 622.3. However, OEA’s policy has historically required that an Administrative Judge issue an Order for Statement of Good cause to employees who fail to respond to an order in a timely manner. This practice provides affected employees with an opportunity to provide a statement to justify and/or explain their failure to comply with the AJ’s order(s). Accordingly, the AJ in this case erred by failing to issue a Statement of Good Cause to Employee; thereby, affording her a chance to respond to the jurisdictional issues presented.

Although the AJ erred by failing to issue a Statement of Good Cause, this Board nonetheless finds that Employee was unable to establish OEA’s jurisdiction because her Petition for Appeal was not filed in a timely manner. D.C. Official Code § 1-606.03 (2001) provides that “Any appeal [to this Office] shall be filed within 30 days of the effective date of the appealed agency action.” Pursuant to OEA Rule 628.2, “[t]he employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing.” In addition to the above, OEA Rule

⁶ *Id.*

604.2 provides that “[a]n appeal filed pursuant to Rule 604.1 must be filed within thirty (30) days of the effective date of the appealed agency action. The date of filing shall be the date the Office time stamps on the document.”⁷ The D.C. Court of Appeals has held that the time limit for filing an appeal with an administrative adjudicatory agency such as OEA is mandatory and jurisdictional in nature.⁸ This Office has consistently held that the only exception to this mandatory and jurisdictional timing requirement arises when an agency fails to provide the employee “adequate notice of its decision and the right to contest this decision through an appeal.”⁹

In this case, Employee received official notification from Agency that her position was being abolished pursuant to a RIF effective August 7, 2015. However, she did not file a Petition for Appeal with this Office until December 4, 2015. This date is well beyond the thirty-day jurisdictional time limit as provided under OEA Rule 604.2. Moreover, Employee does not assert that Agency failed to give her the appropriate appeals rights to OEA. The record is clear that Agency provided the deadline for appealing the termination action to OEA in its RIF notice. Employee did not comply with the thirty-day time limit for filing a Petition for Appeal. Thus, the AJ’s determination that OEA lacks jurisdiction over Employee’s appeal is supported by substantial evidence.¹⁰ Accordingly, this Board may not address the merits, if any, of

⁷ OEA Rule 607.3.

⁸ See, e.g., *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991) and *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162 (D.C. 1985).

⁹ OEA Rule 605.1; See also *Rebello v. D.C. Public Schools*, OEA Matter No. 2401-0202-04, *Opinion and Order on Petition for Review* (June 27, 2008) (citing *McLeod v. D.C. Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003)) and *Jones v. D.C. Public Schools, Department of Transportation*, OEA Matter No. 1601-0077-09, *Opinion and Order on Petition for Review* (May 23, 2011).

¹⁰ Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

Employee's substantive claims. Based on the foregoing, Employee's Petition for Review must be denied.

ORDER

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

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams.

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.