

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:	)	
	)	
DAMETRIUS McKENNY,	)	OEA Matter No. 1601-0207-12
Employee	)	
	)	Date of Issuance: February 16, 2016
v.	)	
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Dametrious McKenny (“Employee”) worked as an Instructional Aide at D.C. Public Schools (“Agency”). On July 27, 2012, he received a notice from Agency that he would be terminated from his position because he received a “Minimally Effective” rating for two consecutive school years on his IMPACT evaluation. IMPACT is Agency’s performance assessment system.<sup>1</sup>

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on August 16, 2012. In his petition, he argued that he was surprised to be terminated because he felt his performance was within the IMPACT standards. He also explained that he had a great work ethic; had a great relationship with the students and staff; and was not provided an opportunity to

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<sup>1</sup> *Petition for Appeal*, p. 8-9 (August 16, 2012).

meet with any supervisors regarding his performance. Therefore, he requested that he be reinstated to his position.<sup>2</sup>

Agency responded to Employee's petition and contended that he received a rating of "Minimally Effective" for the 2010-2011 and 2011-2012 school years. It asserted that Employee was observed twice during each school year. Additionally, Agency provided that Employee had at least two opportunities to meet with his supervisor to discuss the strengths and weaknesses provided in his evaluation.<sup>3</sup>

On February 25, 2014, the OEA Administrative Judge ("AJ") issued an Order Convening a Status Conference. The conference was scheduled for March 25, 2014.<sup>4</sup> However, Employee's representative had a conflict and requested that the conference be rescheduled. Employee's representative provided that she tried to reach Agency's counsel several times for an alternate date. However, Agency was non-responsive. Accordingly, on March 24, 2014, the AJ issued an Order Rescheduling the Status Conference for April 15, 2014.<sup>5</sup>

Agency failed to appear at the April 15<sup>th</sup> Status Conference. Therefore, the AJ issued an Order Requesting a Good Cause Statement. Agency was given a deadline of April 25, 2014, to provide its statement.<sup>6</sup> According to the AJ, Agency failed to meet the deadline. Agency's counsel subsequently sent the AJ an email on April 29, 2014, stating that it would provide a statement the next day. However, counsel failed to meet this deadline as well. On May 1, 2014, Agency sent the AJ an emailed Statement of Good Cause.<sup>7</sup>

The AJ issued her Initial Decision on May 7, 2014. She provided that email submissions

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<sup>2</sup> *Id.* at 3.

<sup>3</sup> *District of Columbia Public Schools' Answer to Employee's Petition for Appeal*, p. 2-3 (September 20, 2012).

<sup>4</sup> *Order Convening Status Conference* (February 25, 2014).

<sup>5</sup> *Order Rescheduling Status Conference* (March 24, 2014).

<sup>6</sup> *Order for Statement of Good Cause* (April 15, 2014).

<sup>7</sup> *Initial Decision*, p. 1-2 (May 7, 2014).

are not a valid means of filing documents with the office; thus, Agency failed to provide a Good Cause Statement by the deadline. The AJ also held that Agency was warned that its failure to comply with her orders could lead to sanctions. Therefore, she ruled that Agency failed to defend its action against Employee. Accordingly, Agency's decision was reversed, and it was ordered to reinstate Employee with back pay and benefits.<sup>8</sup>

Agency filed a Petition for Review with the OEA Board on June 12, 2014. It provides that Agency's counsel could not have appeared for the April 15, 2014 conference because it was Passover, a religious holiday. Furthermore, its representative explains that due to a clerical error, it failed to calendar the April 15<sup>th</sup> conference. Additionally, counsel claims that she was ill and unable to provide her Good Cause Statement by the April 25, 2014 deadline set by the AJ. Moreover, Agency's counsel states that because she was out of the office, she missed the April 30, 2014 extension that she requested. Agency opines that it did not fail to defend its action against Employee and requests that the OEA Board remand this matter to the AJ to consider the case on its merits.<sup>9</sup>

Employee filed his response to Agency's Petition for Review and outlines in detail the efforts made to reach out to Agency to provide the AJ with a Status Conference date that worked for both parties. However, Agency's representative failed to return any phone calls or emails. Employee reasons that Agency failed to exercise reasonable diligence. Therefore, he requests that Agency's petition be denied.<sup>10</sup>

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 ". .

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<sup>8</sup> *Id.*, 3-4.

<sup>9</sup> *District of Columbia's Petition for Review* (June 12, 2014).

<sup>10</sup> *Employee Dametrius McKenny's Opposition to the Agency's Petition for Review* (September 9, 2014).

. 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.”<sup>11</sup> Therefore, OEA has consistently held that the filing requirement for Petitions for Review is mandatory in nature.<sup>12</sup>

In the current case, the Initial Decision was issued on May 7, 2014. Agency did not file its Petition for Review until June 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.

*Assuming arguendo* that this Board could consider the merits of Agency’s arguments, the petition would be denied because there is substantial evidence to support that Agency failed to comply with the AJ’s order to attend a scheduled conference and failed to respond to a Good Cause Order. On March 24, 2014, the AJ issued an Order Rescheduling Status Conference to April 15, 2014. In that order, she provided that “the AJ may impose sanctions, including dismissing the appeal or rule in favor of the appellant, if a party does not attend.”<sup>13</sup> Moreover, as the AJ accurately held, OEA Rule 621.3, provides the sanctions that she may take when a party

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<sup>11</sup>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)).

<sup>12</sup> *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); *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); and *Ronald Holman v. D.C. Public Schools*, OEA Matter No. 1601-0100-12, *Opinion and Order on Petition for Review* (March 3, 2015).

<sup>13</sup> *Order Rescheduling Status Conference* (March 24, 2014).

fails to prosecute or defend a matter. The rule 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* (Emphasis added). 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 the Office of a change of address which results in correspondence being returned.

Based on the aforementioned, it was within the AJ's discretion to rule in favor of Employee and overturn Agency's decision. Agency failed to comply with OEA Rule 621.3(a) when it failed to appear at the April 15, 2014 Status Conference. Additionally, Agency's representative failed to adhere to OEA Rule 621.3(b) when she failed to provide a Good Cause statement for her absence at the April 15, 2014 Status Conference. The AJ issued an Order Requesting Good Cause Statements on April 15, 2014. Agency's response was due on April 25, 2014. Agency did not submit the required document of good cause.

OEA has consistently held that a matter may be decided in favor of an employee when Agency fails to defend its action against an employee by not submitting documents or by not attending a proceeding.<sup>14</sup> Therefore, even if Agency's petition was timely filed, this Board would have upheld the AJ's decision that Agency failed to defend its action against Employee. Accordingly, Agency's Petition for Review is dismissed.

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<sup>14</sup> *Marlon Ray v. D.C. Public Schools, Division of Transportation*, OEA Matter No. J-0070-04, *Opinion and Order on Petition for Review* (May 15, 2007); *Sharon Young-Wester v. D.C. Public Schools*, OEA Matter No. J-0033-03, *Opinion and Order on Petition for Review* (September 19, 2006); *Francine H. James v. Office of Boards and Commissions (Board of Appeals and Review)*, OEA Matter No. 2401-0069-04, *Opinion and Order on Petition for Review* (July 31, 2007); and *Isabelita Aglipay v. Department of Mental Health*, OEA Matter No. 1601-0072-08, *Opinion and Order on Petition for Review* (July 30, 2010).

**ORDER**

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **DISMISSED**. Therefore, Agency's termination action is REVERSED. Accordingly, Agency shall reinstate Employee to his last position of record or a comparable position. Additionally, it must reimburse Employee all back-pay and benefits lost as a result of the termination action. Agency shall file with this Board within thirty (30) days from the date upon which this decision is final, documents evidencing compliance with the terms of this Order.

FOR THE BOARD:

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Sheree L. Price, Vice 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.