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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
LAUREN MANNING,)	
Employee)	OEA Matter No.: J-0043-18
)	
)	Date of Issuance: January 14, 2020
)	
D.C. PUBLIC SCHOOLS,)	
Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Lauren Manning (“Employee”) worked as a Bilingual Guidance Counselor for D.C. Public Schools (“Agency”). On February 23, 2018, Agency issued Employee a Final Notice of Termination based on charges of “intoxication while on duty” and “violation of the rules, regulations, or lawful orders of the Board of Education.” Specifically, Agency alleged that Employee violated its Mandatory Drug and Alcohol Testing Policy, which requires that employees occupying safety-sensitive positions submit to drug and alcohol testing upon reasonable suspicion of intoxication. According to Agency, on February 22, 2018, school administrators at Powell Elementary School confirmed their reasonable suspicion that Employee was intoxicated while on duty. The effective date of Employee’s termination was March 12, 2018.

The Office of Employee Appeals (“OEA”) received a copy of Employee’s Petition for Appeal on April 17, 2018. In her appeal, Employee argued that she was not intoxicated at any point while on duty on February 22, 2018. She contended that school administrators failed to conduct a formal or informal inquiry into her alleged status prior to requesting that staff from the Office of Labor Management and Employee Relations be dispatched to the school for alcohol testing. Employee explained that she did not submit to the testing because she felt pressured to disclose private, clinically-diagnosed medical conditions for which she had legally prescribed medications. As a result, Employee believed that her termination was unlawful and requested to be reinstated with back pay, benefits, compensatory damages for emotional distress, and attorney’s fees.¹

Agency filed its Answer to Employee’s Petition for Appeal on June 1, 2018. Included with its answer was a Motion to Dismiss for lack of jurisdiction. According to Agency, Employee’s termination became effective on March 12, 2018, but she did not file an appeal with OEA until April 17, 2018. Agency reasoned that Employee’s appeal violated OEA Rule 604.2 because it was filed more than thirty days after the effective date of her termination. Additionally, it contended that Employee’s termination was taken for cause and requested that OEA conduct an evidentiary hearing on the merits if jurisdiction was established.²

An OEA Administrative Judge (“AJ”) was assigned to the matter in May of 2018. On May 21, 2018, the AJ issued an order directing Employee to submit a brief addressing whether her appeal should be dismissed for lack of jurisdiction. The order instructed Employee to submit

¹ *Petition for Appeal* (April 17, 2018).

² *Agency Answer to Petition for Appeal and Motion to Dismiss* (June 1, 2018).

a response by June 4, 2018. Additionally, the AJ, citing to OEA Rule 621.3, stated that sanctions may be imposed if Employee failed to provide a brief on jurisdiction by the prescribed deadline.³

An Initial Decision was issued on July 3, 2018. The AJ held that in accordance with OEA rule 628.2, Employee had the burden of proof as to the issue of jurisdiction, including the timeliness of filing. He provided that OEA Rule 604.2 requires that appeals must be filed with OEA within thirty calendar days of the effective date of the appealed agency action. In addition, the AJ noted that under OEA Rule 607.3, the date of filing shall be the date the Office time stamps on the document.⁴ He explained that Agency provided Employee with the proper appeal rights to OEA, which included the requirement that an appeal must be filed within thirty days after the effective date of the termination action. Because the effective date of Employee's termination was March 12, 2018, and OEA did not receive Employee's Petition for Appeal until April 17, 2018, the AJ deemed her petition to be a violation of OEA Rule 604.2. To buttress his finding of lack of jurisdiction, the AJ reiterated that OEA Rule 621.3 may be invoked if a party fails to take reasonable steps to prosecute an appeal. Based on the record, he concluded that Employee violated the rule by failing to submit a response to the May 21, 2018 Order on Jurisdiction. As a result, the AJ held that Employee's failure to file a timely Petition for Appeal with OEA, in addition to her failure to respond to the May 21st order, served as grounds for dismissing the matter for lack of jurisdiction.⁵

Employee, through counsel, filed a Motion to Reinstate Appeal with the OEA Board on April 19, 2019. Counsel explains that a paralegal from the law offices of Zipin, Amster & Greenberg, LLC sent, by certified mail, a cover letter and two copies of Employee's Petition for Appeal to OEA on April 10, 2018. Counsel states that their law firm received a May 2, 2018

³ *Order on Jurisdiction* (May 21, 2018).

⁴ *Initial Decision* (July 3, 2018).

⁵ *Id.*

letter from OEA's Executive Director indicating that Employee's appeal was received. However, according to Employee's counsel, neither the firm nor Employee received any further correspondence from OEA regarding the prosecution of her appeal. Counsel argues that Employee, through no fault of her own, has been denied an opportunity to appeal her termination before OEA. Therefore, counsel requests that Employee's appeal be reinstated so that she may be permitted to prosecute her appeal on the merits.⁶

Discussion

Employee's filing before this Board is captioned as a "Motion to Reinstate Appeal." While nothing within OEA's rules grants this Board the authority to grant such a motion, we will nonetheless construe Employee's filing as a Petition for Review. This Board has previously relied on *Murphy v. A.A. Beiro Construction Co. et al.*, 679 A.2d 1039, 1044 (D.C. 1996), wherein the District of Columbia Court of Appeals held that "decisions on the merits of a case are preferred whenever possible, and where there is any doubt, it should be resolved in favor of trial."⁷

Regarding the timeliness requirement, D.C. Official Code § 1-606.03(a) states that "[a]ny appeal shall be filed within 30 days of the effective date of the appealed agency action." Likewise, OEA Rule 604.2 provides that "an appeal filed pursuant to Rule 604.1 must be filed within thirty (30) calendar days of the effective date of the appealed agency action." However, in *Department of Mental Health v. District of Columbia Office of Employee Appeals, et al.*, Case No. 2015 CA 7829 P(MPA)(D.C. Super. Ct. February 14, 2017), the District of Columbia

⁶ *Motion to Reinstate Appeal* (April 19, 2019).

⁷ See *Diane Gustus v. Office of Chief Financial Officer*, OEA Matter No. 1601-0025-08, *Opinion and Order on Petition for Review* (December 21, 2009); *Jerelyn Jones v. D.C. Public Schools*, OEA Matter No. 2401-0053-10, *Opinion and Order on Petition for Review* (April 30, 2013); *Cynthia Miller-Carrette v. D.C. Public Schools*, OEA Matter No. 1601-0173-11, *Opinion and Order on Petition for Review* (October 29, 2013); and *Carmen Faulkner v. D.C. Public Schools*, OEA Matter No. 1601-0135-15R16, *Opinion and Order on Petition for Review* (March 29, 2016).

Superior Court held that even if the it were to conclude that a filing deadline is jurisdictional, “...OEA [] retains the equitable authority to hear the matter even outside the filing period.”⁸ Additionally, OEA Rule 633.3 permits the Board to grant a Petition for Review when the findings of the AJ are not based on substantial evidence.⁹

In this case, on March 8, 2018, counsel for Employee mailed a letter to Donielle Powe, Director of Labor Management & Employee Relations for D.C. Public Schools, advising her that Zipin, Amster & Greenberg, LLC was retained as legal counsel.¹⁰ The letter requested that all further communication be directed to Philip B. Zipin, Esq.¹¹ On April 17, 2018, OEA received two copies of Employee’s Petition for Appeal form. Attached to the appeal was a letter from a paralegal at Zipin, Amster & Greenberg, LLC. The letter requested that OEA return a copy of the appeal form, date stamped, in a self-addressed envelope.¹² On May 2, 2018, OEA’s Executive Director issued a letter acknowledging receipt of Employee’s appeal and requested that Agency file an answer within thirty calendar days of service of the appeal. The letter was mailed to the addresses of record for Employee, Employee’s counsel, Agency’s counsel, and the Labor Management & Employee Relations division for D.C. Public Schools.¹³ Agency subsequently filed its Answer and Motion to Dismiss with OEA on June 1, 2018. However, the certificate of service did not name Employee’s counsel as a recipient of Agency’s answer. The AJ’s May 21,

⁸ See *Macleod v. Georgetown Univ. Med. Ctr.*, 736 A.2d 977 (D.C. 1999) (holding that “[i]n matters involving pleadings, service of process, and timeliness of filings, *pro se* litigants are not always held to the same standards as are applied to lawyers).

⁹ In *Baumgartner v. Police and Firemen’s Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), the D.C. Court of Appeals held 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

¹⁰ *Motion to Reinstate*, Exhibit 2.

¹¹ *Motion to Reinstate*, Exhibit 1.

¹² *Petition for Appeal*.

¹³ *Memorandum Requesting Agency’s Answer* (May 2, 2018). While the letter was mailed to Employee’s address that she provided in her Petition for Appeal, it was returned to OEA as “Return to Sender” on May 23, 2018. Employee did not provide OEA, in writing, with notice of a change of address.

2018 order requesting briefs on jurisdiction was not mailed to Employee's counsel. Additionally, the July 3, 2018 Initial Decision was not mailed to Employee's counsel.¹⁴

Based on a review of the record, we believe that a ruling premised on sanctions is not proper in this case. While this Board recognizes the AJ's authority to dismiss an appeal for failure to prosecute under OEA Rule 621.3, and for lack of jurisdiction under OEA Rule 604.2, we disagree with his ultimate finding that Employee failed to exercise the diligence expected of an appellant pursuing an appeal before this Office. With respect to the prosecution requirement, Employee retained legal counsel for the purpose of appealing Agency's termination action. Counsel for Employee notified Agency of its representation, in writing, and requested that all further communication regarding this matter be directed to Zipin, Amster & Greenberg, LLC.¹⁵ Agency's notice of termination informed Employee that she had the right to review any documents supporting the charges against her and to submit a written or in-person reply for administrative review. Employee's counsel submitted a formal reply, but Agency did not respond or acknowledge receipt of the letter.

Additionally, this Office was notified that Employee was represented by counsel, but the AJ failed to provide Zipin, Amster & Greenberg, LLC with a copy of the May 21, 2018 Order on Jurisdiction. Consequently, Employee was deprived of the opportunity to submit a response for the purposes of establishing jurisdiction before OEA. We find that the AJ's error was detrimental to Employee's pursuit of an appeal before this Office. As such, it was unreasonable for the AJ to dismiss Employee's appeal for failure to prosecute.

Through no fault of her own, Employee has been unable to contest her termination before OEA because her attorney was not properly served with Agency's answer or the AJ's Order on

¹⁴ The jurisdictional order was sent to Employee's address of record but was returned to OEA as undeliverable on June 1, 2018. The Initial Decision was also returned as undeliverable to Employee.

¹⁵ *Motion for Reinstatement*, Exhibit 2.

Jurisdiction. The record supports a finding that Employee was proactive in acquiring legal representation and counsel for Employee was diligent in communicating with both Agency and OEA regarding the prosecution of this matter. As a result, this Board is inclined to grant Employee's motion. Therefore, this matter is remanded to the AJ for further consideration.

ORDER

Accordingly, it is hereby ordered that Employee's Motion for Reinstatement is **GRANTED**. Therefore, the matter is **REMANDED** to the Administrative Judge for adjudication on its merits.

FOR THE BOARD:

Clarence Labor, Chair

Patricia Hobson Wilson

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.