

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**

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In the Matter of:	)	
	)	OEA Matter No.: 1601-0016-11
TERRI JENKINS,	)	
Employee	)	
	)	Date of Issuance: June 5, 2018
v.	)	
	)	
OFFICE OF THE STATE	)	
SUPERINTENDENT OF EDUCATION,	)	
Agency	)	
_____	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Terri Jenkins (“Employee”) worked as a Motor Vehicle Operator with the Office of the State Superintendent of Education (“Agency”). On August 27, 2010, Agency issued a Proposed Notice of Adverse Action, charging Employee with “conviction of a misdemeanor based on conduct relevant to an employee’s position, job duties, or job activities.” The removal action was also based on Employee’s violation of D.C. Official Code § 4-1501.5(c)(7), which provides that “[w]hen the Department of Human Resources (DCHR)...resolve[s] criminal background check information issues, the DCHR...shall make the final suitability determination whether: (d) a current employee shall be retained or employment shall be terminated.” According to Agency, a review of Employee’s criminal background check revealed that she was arrested by the D.C. Metropolitan Police Department on July 30, 2004, and was charged with two misdemeanor

counts of Threats to Do Bodily Harm. Agency issued its Notice of Final Decision on October 18, 2010. The effective date of Employee's termination was November 5, 2010.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on November 5, 2010. She argued that Agency was fully aware of her previous misdemeanor charges when it hired her. Therefore, Employee requested to be rehired. In the alternative, she asked to be reinstated to a different position.<sup>1</sup>

On November 19, 2011, Employee filed a Motion for Sanctions because Agency did not file an Answer within thirty days of service of the Petition for Appeal. Employee requested that Agency provide her with a copy of its response. Again, she asked that OEA reinstate her with back pay and benefits.<sup>2</sup>

An OEA Administrative Judge ("AJ") was assigned to this matter in July of 2012. On August 28, 2012, the AJ issued an Order Convening a Prehearing Conference on October 12, 2012. The Order stated that the purpose of the conference was to ascertain the factual disputes; to identify possible exhibits; and to set the date for an evidentiary hearing, if needed. The AJ further ordered the parties to submit prehearing statements no later than October 5, 2012. Additionally, he provided that pursuant to OEA Rule 621.3, sanctions may be imposed if either party or representative failed to appear at the conference.<sup>3</sup>

On October 12, 2012, the AJ issued an Order for Statement of Good Cause to Employee because she failed to submit a prehearing statement and failed to attend the October 12, 2012 prehearing conference. As a result, the AJ instructed Employee to provide a statement of cause for her failure to comply with the order no later than October 19, 2012. Again, she was warned

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<sup>1</sup> *Petition for Appeal* (November 5, 2010). On November 12, 2010, OEA informed Agency that Employee filed an appeal with this office; however, it did not file an Answer to the petition.

<sup>2</sup> *Employee's Motion for Sanctions* (November 19, 2011).

<sup>3</sup> *Order Convening a Prehearing Conference* (August 28, 2012).

that the failure to comply could result in the imposition of sanctions. Employee did not provide a response to the AJ's Order.<sup>4</sup>

An Initial Decision was issued on October 2, 2013. The issue presented was whether Employee's appeal should be dismissed for failure to prosecute. According to the AJ, despite prior warnings that the refusal to comply with orders from this Office could result in sanctions, including dismissal, Employee failed to attend the prehearing conference. Employee also failed to submit a statement of cause to the AJ to explain her absence. Thus, in accordance with OEA Rule 621.3, the AJ held that a Petition for Appeal may be dismissed when an employee fails to prosecute his or her appeal before this Office. With respect to this matter, the AJ determined that both the order for a prehearing conference and the cause order were both sent by first class mail to Employee at the address she provided on her appeal form. Because Employee failed to comply with the orders, the AJ concluded that sanctions were appropriate. Consequently, Employee's appeal was dismissed for failure to prosecute.<sup>5</sup>

On December 18, 2017, Employee filed a Motion to Re-Open the record. She explains that she was incarcerated until 2014, and did not receive either of the AJ's orders. Employee notes that she worked for Agency for two years without receiving a reprimand or a complaint. In addition, she states that Agency was aware of her previous conviction at all times. According to Employee, public policy favors adjudication on the merits, and she opines that Agency should not have terminated her for a minor conviction that was not related to her job duties. Thus, Employee requests that the Board re-open her appeal and allow the matter to be adjudicated on its merits.<sup>6</sup>

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<sup>4</sup> *Order for Statement of Good Cause* (October 12, 2012).

<sup>5</sup> *Initial Decision* (October 2, 2013).

<sup>6</sup> *Employee's Motion to Re-open Record* (December 18, 2017).

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;
- (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.

While Employee has titled her request as a Motion to Re-open, this Board will nonetheless characterize her submission as a Petition for Review. Employee does not cite any of the aforementioned arguments as a basis for granting her petition. However, under OEA Rule 633.1, “[a]ny 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.” In this case, the AJ issued his Initial Decision on October 2, 2013. Employee did not appeal the decision until December 18, 2017, more than four years beyond the jurisdictional time limit. Consequently, Employee’s Petition for Review is untimely.

Additionally, OEA has consistently held that incarceration does not toll the deadline for filing an appeal with our Office. The OEA Board held in *Emory Mavins v. Department of Transportation*, OEA Matter No. 1601-0202-09, *Opinion and Order on Petition for Review* (March 19, 2013) and *Hawkins v. Department of Public Works*, OEA Matter No. 1601-0054-06

(May 4, 2006)(citing *Employee v. Agency*, OEA Matter No. 1601-0009-88, 36 D.C. Reg. 7336 (1989)), that incarceration is not an excusable explanation for an employee's absence.

Lastly, as previously stated, OEA Rule 621.3 provides the sanctions that the AJ may impose when a party 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. 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

Employee failed to attend the prehearing conference as ordered by the AJ. Employee also failed to provide a response or statement of cause to explain her absence. In addition, her Petition for Review was not filed in a timely manner. Finally, incarceration is not a valid justification for Employee's failure to appear at a proceeding before OEA. Based on the foregoing, it was proper for the AJ to rule in favor of Agency and dismiss Employee's Petition for Appeal for failure to prosecute. Therefore, her Petition for Review (Motion to Re-open) must be dismissed.

**ORDER**

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DISMISSED**.

FOR THE BOARD:

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Sheree L. Price, Chair

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Vera M. Abbott

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Patricia Hobson Wilson

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Jelani Freeman

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.