

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
Yamika Warbington)	Matter No. J-0396-10
Employee)	
)	Date of Issuance:
v.)	December 22, 2011
)	
District of Columbia Public Schools)	Senior Administrative Judge
Agency)	Joseph E. Lim, Esq.
)	

Yamika Warbington, Employee *pro se*
Bobbie Hoye, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Employee filed a petition for appeal with the Office of Employee Appeals on September 2, 2010. She appealed Agency’s final decision dated July 23, 2010, to remove her from her position as Clerk/Non-Typing, effective July 30, 2010, as a result of a low IMPACT score.¹ At the time of the removal, Employee was in permanent status and in the Educational Service.

This matter was assigned to me on or about October 17, 2011. On October 25, 2011, I issued an Order directing Employee to submit legal and/or factual argument to support her position that this appeal should not be dismissed as untimely. To date, Employee never responded.

JURISDICTION

The jurisdiction of this Office was not established.

ISSUE

Should this matter be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124

¹ IMPACT is the effectiveness assessment system which Agency used for the 2009-2010 school year to rate the performance of school-based personnel.

which became effective on October 22, 1998, provides a statutory time limit for filing an appeal with this Office. The relevant section states that an “appeal shall be filed within 30 days of the effective date of the appealed agency action”. D.C. Official Code Section 1-606.03 (a) (2001). OEA’s Rules and Regulations have been amended to reflect this requirement. OEA Rule 604.2, 46 D.C. Reg. at 9299 reflects the requirement, stating that an appeal must be filed “within thirty (30) days of the effective date of the appealed agency action”. The manner in which this time limitation is calculated is provided in OEA Rule 603.1, 46 D.C. Reg. at 9298:

In the computation of time periods which involve calendar days, the first day counted shall be the next calendar day following the day the event occurs from which the time period begins to run. For calendar days, if the last day of the time period is a Saturday, Sunday, or legal holiday, the time period shall be extended to the end of the next business day.

The District of Columbia 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. *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). This Board has consistently held that the statutory 30 day time limit is mandatory and jurisdictional in nature. *See, e.g., King v. Department of Corrections*, OEA Matter No. T-0031-01, *Opinion and Order on Petition for Review* (October 16, 2002), ___D.C. Reg. ___ (). Employee filed her petition on September 2, 2010, 33 days after the effective date. It was not filed in a timely manner.

The only exception that this Board has established is that it will excuse a late filing if an agency has failed to provide the employee with “adequate notice of its decision and the right to contest the decision through an appeal”. *McLeod v. D.C. Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003), ___D.C. Reg. ___ (). In this matter, Employee does not claim that she was unaware of the filing deadline. Indeed, the July 23, 2010, notice from Agency Human Resources Director Youngblood to Employee notifying her that she would be separated from service with Agency, effective July 30, 2010, informs her that she has thirty (30) calendar days of the effective date of the termination to file an appeal.

Agency provided Employee with the appropriate notice of her appeal rights, a copy of OEA Rules, information regarding its website, and an appeal form. Having been afforded the appropriate notice, this petition does not fall within the exception discussed above.

Employee counters with a submission of her post office receipt indicating that she mailed her appeal on August 30, 2010. However, OEA Rule 608.3, 46 D.C. Reg. 9317 (1999) states that “The date of filing shall be determined by the date of receipt by the Office.” Her appeal form shows this Office’s date stamp of “September 2, 2010.”

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999) states that the employee filing the petition has the

“burden of proof as to issues of jurisdiction, including timeliness of filing”. According to OEA Rule 629.1, *id*, the burden must be met by a “preponderance of the evidence” which is defined as “[t]hat 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”. The time limit is mandatory and jurisdictional. The Administrative Judge concludes that Employee did not meet the burden of proof on this issue² and therefore she did not establish that this Office has jurisdiction of her appeal. The Administrative Judge concludes that the petition was untimely and should be dismissed for lack of jurisdiction.

ORDER

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

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge

² Employee has also failed to submit the required response to my order, thereby providing an alternative ground for dismissal. OEA Rule § 622.3, 46 D.C. Reg. 9313 (1999) 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 this Office of a change of address which results in correspondence being returned.”