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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
GEORGE VINCENT, II)	OEA Matter No. J-0032-12
Employee)	
)	Date of Issuance: March 20, 2012
v.)	
)	Lois Hochhauser, Esq.
D.C. DEPARTMENT OF PUBLIC WORKS)	Administrative Judge
Agency)	
)	

George Vincent, II, Employee, *pro se*
Andrea Comentale, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

George Vincent, II, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on November 16, 2011, appealing the final decision of the D.C. Department of Public Works, Agency herein, to remove him from his position as a Motor Vehicle Operator. The Notice of Final Decision was issued on September 9, 2010 and confirmed Agency's decision with regard to its summary removal of Employee on June 30, 2010.

Following assignment of the matter to me, I issued an Order advising Employee that his petition appeared to have been untimely filed.¹ I directed that he submit legal and/or factual arguments supporting his position that this Office had jurisdiction to hear his appeal despite the untimely filing, by no later than February 13, 2012. The Order notified him that employees have the burden of proof on all jurisdictional issues, including timeliness. The Order concluded that unless the parties were notified to the contrary, the record in this matter would close on that date. Employee filed a timely response to the Order. The record closed on February 13, 2012.

¹ Agency filed a timely response on December 19, 2011 raising substantive issues as well as challenging the timeliness of the appeal.

JURISDICTION

The jurisdiction of this Office was not established.

ISSUE

Should this petition be dismissed as untimely?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

OEA Rule 604.2 provides that “an appeal filed pursuant to Rule 604.1 must be filed within thirty (30) days of the effective date of the appealed agency action.” On June 30, 2010, Agency issued a Notice of Summary Removal, notifying Employee that he was being terminated from his position on that date “based on [his] second positive result when tested for the presence of controlled substances” which, it asserted constituted an “immediate hazard to the agency, other employees” as well as to Employee. In its notice, Agency provided Employee with the opportunity to challenge its decision.

On September 9, 2010, Agency issued its Notice of Final Decision, in which it confirmed its decision to remove Employee. William Howland, Jr., Agency Director, stated in the September 9, 2010 Notice, that he had considered the report of the hearing officer in reaching his decision. The Notice notified Employee of his right “to contest this action by filing a grievance in writing in accordance with the negotiated grievance procedure...”. It further stated that “[in] the alternative, you may appeal this final decision to the Office of Employee Appeals within 30 days of the effective date of your removal”. The document listed OEA’s address and telephone number.

The threshold issue in this matter is the date of the actual removal. Although the Notice of Summary Removal identifies June 30, 2010 as the removal date, Employee was provided with the opportunity to challenge Agency’s decision, and he did so. The Notice of Final Decision confirming Agency’s decision to remove Employee on June 30, 2010 was issued on September 9, 2010. Since Employee had the opportunity to challenge the June 30 notice, it cannot be considered a final decision although it listed the effective date of removal. The Administrative Judge concludes that September 9, 2010, the date of issuance of the Notice of Final Decision, is considered to be the effective date of the removal.

OEA Rule 604.2 provides that “an appeal filed pursuant to Rule 604.1 must be filed within thirty (30) days of the effective date of the appealed agency action.” Employee’s petition was required to be filed within 30 days from September 9, 2010, the effective date of the removal. However, it was not filed until November 16, 2011, more than a year after the effective date of the removal. Both this Office and the D.C. Court of Appeals have consistently held that time limits for filing appeals are mandatory in nature. *See, e.g., Alfred Gurley v. D.C. Public Schools*, OEA Matter No. 1601-0008-05, *Opinion and Order on Petition for Review* (April 14, 2008), ___ D.C. Reg. ___ (), citing *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991); and *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), ___ D.C. Reg. ____ ().

In its final notice, Agency notified Employee of his right to appeal its action through a negotiated grievance procedure and provided him with information to contact the Union. It stated that in the alternative, Employee could file an appeal with the “Office of Employee Appeals (OEA) within 30 calendar days of the effective date of [the] removal.” The notice provided Employee with both the telephone number and address of OEA for additional information on filing an appeal with this Office. Employee does not challenge Agency’s compliance with OEA Rule 605.1. He does not claim he did not receive the final notice in a timely manner or was unaware of his appeal rights with this Office. Rather, in his February 9, 2011, he explains his untimely filing by asserting first, that the Union failed to assist him in a timely manner; and that as a result of not being assisted by the Union, he attempted to obtain the necessary information regarding the processing of drug tests. He challenged the accuracy of the results of his drug tests. He stated he then contacted the Office of Labor Relations, and was advised of what he “needed to do and the channels in which they should be done.” Employee concludes his explanation of the late filing:

Around the time this appeal should have been submitted, there was an incident of a shooting at the Department of Public Works...At this time I was a person of interest because of my removal from the department. I went through a lot of heart ache because of this situation. During the time of the appeals process I had given the union all necessary documents needed to go forward. I was a paid member at the time. The day of the shooting, I was called and asked by my ex co-workers if I had done it. I did not know what they were talking about because I was on my way to court and had not heard the news. I was harassed by the Metropolitan Police Department. My wife was taken from her job and questioned for over six hours. I was questioned and had a polygraph to prove my innocence. My home was searched and my dogs were sent to the animal shelter. I was cleared as being a person of interest but I guess that did not matter to the union.

The only exception to the mandatory nature of the timeliness rule that this Office has established is that a late filing may be excused if an agency fails to provide an employee with “adequate notice of its decision and the right to contest the decision through an appeal”. *McLeod v. District of Columbia Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003), ___ D.C. Reg. ____ (). D.C. Official Code § 1-606.04(e) states, in pertinent part, that “the personnel authority shall provide the employee with a written decision following the review . . . and shall advise each employee of his or her right to appeal to the Office as provided in this subchapter.” Employee does not challenge Agency’s compliance with OEA Rule 605.1², and

² Although Agency’s notice did not appear to include a copy of the appeal form or OEA Rules, it clearly stated that the appeal must be filed within 30 days of the removal date and as Employee stated in the quoted paragraph, *infra*, certain actions took place “around the time of the appeal date”, making it apparent that he was aware of the filing deadline. Therefore although Agency may not have included copies of the form or OEA Rules as required, the Administrative Judge concludes that based on the facts of this matter, these defects were not fatal. Employee did not argue or present evidence that failure to provide the rules or the form in any way impacted on the extensive delay in filing this appeal.

from his statement, quoted above, appears to have been aware of when he was required to file his appeal with this Office. Rather, Employee explains that the Union's failure to respond to him in a timely manner required him to initiate his own investigation regarding the accuracy of the drug tests. He further notes that at some point during this process, he and his wife were "harassed" by the police because he was considered a person of interest in relation to a homicide at Agency. While this Administrative Judge may be sympathetic to Employee's frustration with obtaining Union representation and the stress that the actions taken by the police caused him and his family, these reasons do not justify his failure to file his appeal with OEA in a timely manner. Indeed, this appeal was filed more than a year from the effective date of September 10, 2010. The appeal did not require representation. Employee could have filed the petition on his own while pursuing his efforts to obtain assistance from the Union. Employee was not required to investigate the drug testing procedures prior to filing his appeal with this Office. While the police investigation may well have been stressful and time consuming, Employee does not allege and certainly did not establish, that it caused or justified the extensive delay in filing this appeal.³

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999) places the burden of proof on all issues of jurisdiction on Employee. Timeliness is a jurisdictional issue. Employee must meet this burden by a "preponderance of the evidence" which is defined in OEA Rule 629.1, as that "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". I conclude that Employee failed to meet his burden of proof on the issue of jurisdiction since he did not meet his burden of establishing that the petition was filed in a timely manner or that there is any sufficient basis for excusing the extensive late filing. I therefore further conclude that this petition for appeal should be dismissed.

ORDER

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

FOR THE OFFICE:

LOIS HOCHHAUSER, ESQ.
Administrative Judge

³ Employee does not contend, and did not present any evidence, that, for example, he was incarcerated during the entire period of time from September 10, 2010 until the date he filed his appeal.