THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DUANE SMITH	)	
Employee	)	OEA Matter No. J-0112-14
	)	
v.	)	Date of Issuance: December 19, 2014
	)	
DISTRICT OF COLUMBIA DEPARTMENT OF YOUTH REHABILITATION SERVICES	)	Lois Hochhauser, Esq. Administrative Judge
Agency	)	
	)	

Duane Smith, Employee *Pro-Se*
Sellano Simmons, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 15, 2014, Duane Smith, Employee, filed a petition with the Office of Employee Appeals (OEA) appealing the decision of the District of Columbia Department of Youth Rehabilitation Services, Agency, to remove him from his position of Youth Development Representative, effective January 31, 2012. The matter was assigned to this Administrative Judge on August 29, 2014.

On September 22, 2014, I issued an Order stating that it appeared that the petition had not been filed in a timely manner, as required by OEA Rule 604.2. I advised Employee that he had the burden of proof on issues of jurisdiction, including timeliness; and directed him to submit legal and/or factual arguments to support his position that the appeal was timely filed, by October 8, 2014. In his response, filed on October 8, 2014, Employee contended that he had filed his appeal in a "timely manner personally and then was requested to fax it over again by [OEA] personnel…because the top pages had to be in duplicate." He stated "this action was done [on] February 12, 2012." He identified Ms. Katrina Hill as the OEA employee with whom he had spoken and who had given him those instructions. Employee stated that he is "far from being illiterate and truly know if advised to fax, mail, hand carry, etc., I will do all the above." He stated that at the time the appeal was filed, he was represented by the O'Neal Law Firm "who

also contacted [OEA] and was told [his] files were archived and [he] would have to file all over again."

After reviewing Employee's response, I determined that I would give Employee another opportunity to provide the necessary information and documentation. Therefore, on October 28, 2014, I issued an Order directing Employee to respond to the following items "with specificity, and to provide the supporting documentation:"

> With regard to the petition for appeal that Employee contends he filed in 2012, he was directed to submit:
>
> (a) the date it was filed with OEA;
> (b) the manner in which it was filed, *i.e.*, in person, by mail, by fax;
> (c) if Employee contends it was filed in person, the name of the person who filed it;
> (d) if filed in person by someone other than Employee, a sworn statement from that person affirming that he or she filed the petition for appeal, the date filed, etc.;
> (e) verification of receipt by OEA by either a copy of the petition with OEA date-stamp, or a copy of receipt, if sent by certified mail or through a carrier such as USPS or FedEx or delivery service; and
> (f) copies of all fax confirmations and fax transmittals to and from OEA.

The Order also stated that since Employee was represented by the O'Neal Law Firm at the relevant time in 2012, he "must submit any document in the file maintained by that law firm related to the original filing as well as an affidavit from the attorney who represented him or staff member who had first-hand information regarding the filing of the petition." With regard to Employee's statement that he is "far from being illiterate" and would have complied with any filing request, I stated that he "should be assured that these issues do not reflect on his intelligence or education. Every employee who files a petition for appeal with this Office must do so in accordance with the Rules of this Office." I also stated that the notice of final decision included a petition for appeal, a copy of this Office's Rules and filing information. I noted that Employee had not submitted a certificate of service with his submission and again cautioned him that he was required to comply with all OEA Rules. I advised him that the name and address of the Agency representative had been included in the previous Order and was being included in the October 28, 2014 Order as a courtesy. Employee was told that his response had to be filed by 5:00 p.m. on November 14, 2014 and had to be signed before a Notary Public. Finally, the parties were advised that unless they were notified to the contrary, the record in this matter would close at 5:10 p.m. on November 14, 2014. The Order was sent by first class mail, postage prepaid, to the address listed by the Employee in his petition. It was not returned. Employee did not file a response. The record closed on November 14, 2014.

JURISDICTION

The jurisdiction of this Office was not established.

ISSUES

Did Employee meet the burden of proof on the issue of timeliness?

ANALYSIS AND CONCLUSIONS OF LAW

Pursuant to OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), employees have the burden of proof on all issues of jurisdiction, including the timeliness of filing the petition for appeal. This burden must be met by a "preponderance of the evidence" which is defined in OEA Rule 628.2 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."

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), 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).

According to DCMR §604.2, the petition for appeal with OEA must be filed "within 30 calendar days of the effective date of the appealed agency action." In this matter, the effective date was January 31, 2012. On its face, therefore, the petition was not timely filed. However, pursuant to D.C. Official Code § 1-606.04(e), 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). The final agency notice in this matter, provided Employee with information regarding OEA appeal procedures, and included copies of the OEA Rules and the petition for appeal, as well as contact information for this Office. Therefore, the late filing could not be excused for lack of adequate notice from Agency. Employee, however, was is seeking to file his petition beyond the permitted deadline, but rather contends he had filed it in a timely manner and was advised by OEA staff to fax additional pages. His explanation was insufficient to establish that the petition was timely filed and he was given another opportunity to meet that burden, but failed to do so.

The filing requirements are established by OEA Rules, a copy of which was provided to Employee with the final Agency decision. OEA Rule 608.5 requires an employee to file an original petition and two copies of that petition, as well as the other documents required by Rule 609. OEA Rule 608.4 requires that these documents be filed by "personal delivery" to OEA or by mail between 9:00 a.m. and 4:00 p.m., Monday through Friday. There is no provision for faxing petitions. Employee's representations were inconsistent with the practices and procedures of this Office. Even if Ms. Hill agreed with Employee's representations regarding their conversations, and she did not, OEA employees do not have the discretion to waive filing requirements. In addition, there was no file opened at the time the petition was allegedly filed, and nothing was archived. Employee was given the opportunity to submit a statement from his prior counsel and documentation to support his representation that he faxed documents to OEA, but failed to do so. However, given Employee's representations, he was given an opportunity to

submit documentation or further support for his position. If he had done so, the Administrative Judge might well have scheduled an evidentiary hearing on the issue.

Employee represented that "this action was done [on] February 12, 2012." The statement appears to refer to the filing of the petition, the alleged instructions from Ms. Hill and the subsequent faxing. I thought that since Employee remembered the specific date, he would have some record documenting the date of filing. But he did not provide any such record. If I had checked the 2012 calendar when I first was assigned this case, this matter could have been disposed of more expeditiously. However, I did check the 2012 calendar while preparing this Initial Decision. I found that in 2012, February 12 fell on a Sunday, and, consistent with OEA Rule 608.4, petitions for appeal are not accepted for filing on Sundays. Indeed, this Office is closed on Sundays, so the petition could not have been filed and the matter could not have been discussed with Ms. Hill on that date. For these reasons, the Administrative Judge concludes that Employee did not meet his burden of proof on the timeliness issue

There is an additional basis for dismissing this petition. OEA Rule 621.3, 59 DCR 2129 (March 16, 2012) 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." According to OEA Rule 621.3(b), failure of an employee to prosecute an appeal includes the failure to submit documents after being provided with a deadline for the submission. In this matter, an Order was issued on October 31, 2014, directing Employee to respond by November 14, 2014. The Order was mailed to the address listed by Employee in his petition by first class mail, postage prepaid. It was not returned to OEA, and is presumed to have been received by Employee in a timely manner. Employee did not submit a response or contact the undersigned to request an extension of time to respond. The Administrative Judge concludes that Employee's failure to respond to the Order constitutes a failure to prosecute his appeal and provides another basis to dismiss this matter. *See e.g., Williams v. D.C. Public Schools*, OEA Matter No. 2401-0244-09 (December 13, 2010); *Brady v. Office of Public Education Facilities Modernization*, OEA Matter No. 2401-0219-09 (November 1, 2010).

There are two independent bases upon which this petition for appeal can be dismissed. The Administrative Judge concludes therefore that this petition for appeal should be dismissed.

ORDER

It is hereby:

ORDERED: This petition for appeal is dismissed.

FOR THE OFFICE:

_____
Lois Hochhauser, Esq.
Administrative Judge