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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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In the Matter of:	)	
	)	
SHIRLEY LINDER MORGAN	)	OEA Matter No. 2401-0367-10
Employee	)	
	)	Date of Issuance: August 29, 2012
v.	)	
	)	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA PUBLIC SCHOOLS	)	Administrative Judge
Agency	)	

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Ms. Shirley-Linder-Morgan, Employee  
Bobbie Hoye, Esq., Agency Representative

**INITIAL DECISION**

INTRODUCTION AND STATEMENT OF FACTS

Shirley-Linder-Morgan, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on August 17, 2010, appealing the final decision of the District of Columbia Public Schools, Agency herein, to terminate her employment as a result of a reduction-in-force (RIF), effective August 24, 2009. In the final Agency notice, dated July 24, 2009, Agency provided Employee with several alternatives, including filing an appeal with this Office, filing a complaint in Superior Court or filing an appeal with the D.C. Office of Human Rights. The final notice advised Employee notified that her appeal with OEA had to be filed within thirty calendar days of the effective date of her removal. Employee stated she had filed a grievance with her Union on July 24, 2010. In its Answer, filed on September 23, 2010, Agency argued that the matter should be dismissed since Employee filed a grievance with her Union prior to filing her appeal with OEA.

The matter was assigned to me on July 20, 2012. On that date, I issued an Order, notifying Employee that the jurisdiction of this Office was at issue. I directed her to submit legal and/or factual arguments supporting her claim that this Office has jurisdiction of her appeal by August 14, 2012. I also informed her that employees have the burden of proof on the issue of jurisdiction. The parties were advised that the record would close on August 14, 2012, unless they were notified to the contrary. The Order was sent to Employee at the address she listed as her mailing address in her

petition by first class mail; postage prepaid, and was not returned by the U.S. Postal Service. Employee did not respond to the Order and did not otherwise contact this Office. The record closed on August 14, 2012.

### JURISDICTION

The jurisdiction of this Office was not established.

### ISSUE

Should this petition for appeal be dismissed?

### FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

On July 24, 2009, Agency issued its final decision terminating Employee, effective August 24, 2009. The final Agency notice stated that if Employee chose to file an appeal with this Office, she had 30 calendar days from the effective date of her separation to do so. The notice also provided Employee with OEA's website and Rules. 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 was required to file her appeal no later than 30 days from August 24, 2009. However, she did not file the petition for appeal with OEA until August 17, 2010, almost 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. \_\_\_\_ ( ). Consistent with 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), \_\_\_ D.C. Reg. \_\_\_\_ . The final agency notice in this matter, as noted above, provided Employee with information regarding OEA appeal procedures, including the 30 day time limit; as well as a copy of OEA's Rules and its website.

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". Employee failed to provide any argument or fact regarding the timeliness of her appeal or a reason why her appeal should be accepted beyond the

permissible time period for filing. I conclude that Employee failed to meet her burden of proof on the issue of timeliness and further conclude that this petition for appeal should be dismissed because it was untimely.

There is another basis to dismiss this petition. In accordance with OEA Rule 622.3, 46 D.C. Reg. 9313 (1999), this Office has long maintained that a petition for appeal may be dismissed with prejudice when an employee fails to prosecute the appeal. In this matter, Employee failed to respond to the July 20, 2012 Order which contained a deadline to respond of August 14, 2012. The Order was sent to Employee at the address listed as her home address in the petition for appeal, by first class mail, postage prepaid. It was not returned by the U.S. Postal Service and is deemed to have been received by Employee. Employee did not seek an extension or otherwise contact the undersigned. The failure to prosecute an appeal includes the failure to respond to an Order after being given a deadline for the submission. *See, e.g., Employee v. Agency*, OEA Matter No.1602-0078-83, 32 D.C. Reg. 1244 (1985). Employee failed to respond to an Order which contained a deadline for the submission. I conclude that Employee failed to prosecute her appeal, and that this matter should also be dismissed for that reason.

#### ORDER

It is hereby ORDERED that the petition for appeal is DISMISSED<sup>1</sup>

FOR THE OFFICE:

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LOIS HOCHHAUSER, ESQ.  
Administrative Judge

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<sup>1</sup> The issue of whether the petition should be dismissed because Employee filed a grievance prior to filing her petition with this Office is not addressed in this Initial Decision since there are two other grounds for dismissing this matter. The Administrative Judge also notes that although Agency argues that the petition should be dismissed for this reason, it did note present filing a grievance with her Union as one of the three alternatives for challenging its action in its final notice.