

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**

In the Matter of:	)	
	)	
Khaled Falah,	)	
Employee	)	OEA Matter No. 2401-0093-17
	)	
v.	)	
	)	Date of Issuance: September 4, 2018
District of Columbia Office of the Chief	)	
Technology Officer,	)	
Agency	)	
	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Khaled Falah (“Employee”) worked as a Program Manager with the D.C. Office of the Chief Technology Officer (“Agency”). On August 25, 2017, Agency issued a notice to Employee informing him that he was being separated from his position pursuant to a Reduction-in-Force (“RIF”). The effective date of the RIF was September 30, 2017.<sup>1</sup>

Employee contested the RIF action and filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on September 22, 2017. He claimed that he was a victim of constructive dismissal and that Agency discriminated against him based on his age. Therefore, Employee requested that he be reinstated.<sup>2</sup>

On November 1, 2017, Agency filed its Response to Employee’s Petition for Appeal. It

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<sup>1</sup> *Petition for Appeal*, p. 6-7 (September 22, 2017).

<sup>2</sup> *Id.* at 2.

denied Employee's discrimination and constructive dismissal allegations. Additionally, Agency argued that Employee failed to allege an actual violation of any provision of the Comprehensive Merit Personnel Act ("CMPA"). Moreover, Agency asserted that the RIF was implemented based on its operational needs. It requested additional time to obtain a copy of Employee's Official Personnel Folder ("OPF") and other relevant documents to submit to OEA for further review.<sup>3</sup>

The OEA Administrative Judge ("AJ") issued an Order Requesting Briefs from both parties on November 15, 2017. The AJ ordered the parties to address whether Agency adequately followed the proper statutes, regulations, and laws when conducting the RIF action. Additionally, Agency was ordered to submit a copy of the retention register; the Administrative Order authorizing the RIF; and a copy of Employee's Personnel Standard Form 50. In accordance with the order, Agency had until December 5, 2017, to file its brief, and Employee had until December 26, 2017. The order concluded by noting that if either party failed to take reasonable steps to prosecute or defend the appeal, the AJ may dismiss the action or rule for the appellant.<sup>4</sup>

On December 4, 2017, Agency filed a Motion for Continuance until December 19, 2017 to file its brief. Agency noted that OEA sent the Order Requesting Briefs to the wrong address for Agency. Counsel for Agency explained that she was contacted and informed of the order, two weeks after the order was issued, by the office to which OEA improperly mailed the order. Accordingly, Agency requested additional time in which to file its brief.<sup>5</sup>

On January 3, 2018, the AJ issued an Order for Statement of Good Cause for Agency's failure to submit its brief by the December 19, 2017 deadline. Agency was provided a new

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<sup>3</sup> *Agency Response to Petition*, p. 1-3 (November 1, 2017).

<sup>4</sup> *Order for Briefs* (November 15, 2017).

<sup>5</sup> *Agency Motion for Continuance* (December 4, 2017).

deadline of January 16, 2018, to file its brief. The Order provided that failure to establish good cause for Agency's failure to submit its response would result in the imposition of sanctions, including the dismissal of the matter.<sup>6</sup>

The AJ issued her Initial Decision on January 17, 2018. She stated that Agency failed to provide a written response to the orders that were required for a proper resolution of the matter on its merits. Additionally, she stated that Agency failed to adhere to its requested extension deadline of December 19, 2017. Furthermore, the AJ opined that the orders to Agency were not returned to OEA, and the certificates of service attached to the orders were mailed to the address of record. The AJ affirmed that OEA was not notified by Agency of a change of address. Consequently, she reversed Agency's action of separating Employee from service; ordered that Agency reinstate Employee to his last position of record; that Agency reimburse him all back-pay and benefits lost as a result of the RIF; and file documents evidencing compliance with the terms of the Order within thirty days.<sup>7</sup>

Upon realizing that the AJ issued her Initial Decision, Agency filed a Petition for Review with the OEA Board on February 2, 2018. It states that the AJ's decision to reverse Employee's separation from employment was harsh and unwarranted. Agency provides that Employee's position was abolished due to a budgetary shortfall and that its request to conduct a RIF and eliminate ten positions was approved. Agency also argues that the Initial Decision was flawed because it did not address all the material issues of law and fact raised in the appeal.<sup>8</sup>

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<sup>6</sup> *Order for Statement of Good Cause* (January 3, 2018).

<sup>7</sup> *Initial Decision*, p. 3 (January 17, 2018). Agency filed a Motion for Enlargement of Time in which to file its brief because its counsel did not receive the AJ's January 3, 2018 order until January 17, 2018. As it related to the missed December 19, 2017 briefing deadline, Agency's counsel provided that the reason she missed the deadline was because she had a death in the family. Agency's counsel provided a copy of an email which was sent to Employee and an OEA technology representative on December 19, 2017, which provided that she needed additional time to file her brief due to her uncle's death. Accordingly, Agency requested a deadline of January 24, 2018, in which to file its brief. *Agency Motion for Enlargement of Time* (January 18, 2018).

<sup>8</sup> *Agency Petition for Review*, p. 1-5 (February 2, 2018).

Moreover, Agency argues that it provided good cause by filing a timely motion for a continuance in December. However, before Agency could comply with the December 19, 2017 deadline, counsel's uncle passed away before the holidays. Agency explains that it was the third death in counsel's family for the year. It argues that it requested a reasonable amount of time to comply and requested acknowledgement from Employee for the extension, and Employee registered no objection. Moreover, Agency's counsel states that it was in the midst of a major transition because the former Chief Technology Officer ("CTO") stepped down from her post, which required her to update the Interim CTO on all Agency matters. Accordingly, it requests that the matter be remanded to render a decision on the merits.<sup>9</sup>

Employee filed his response to Agency's Petition for Review on March 9, 2018. He argues that according to OEA Rule 621.3, the AJ was correct in ordering his reinstatement with full back pay and benefits. Employee also states that Agency flagrantly disregarded two Orders from the AJ; thus, its petition should be denied. Additionally, Employee asserts that Agency failed to timely submit its brief by the due date imposed by the AJ or even its own self-determined deadline of December 19, 2017.<sup>10</sup>

The record reflects that Agency's counsel did a poor job in adhering to deadlines in this case; she failed to offer proof of the death in her family; and she improperly emailed a request for an extension to an OEA technology staff member instead of the AJ. As noted by Employee, the OEA Board has upheld the AJ's decisions to rule in favor of employees when an agency fails

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<sup>9</sup> *Id.*

<sup>10</sup> Furthermore, while sympathetic to Agency's counsel's death in the family, Employee notes that Agency's Petition for Review only suggests that her uncle died near the briefing deadline. Employee contends that personal difficulties on the part of Agency's counsel do not absolve Agency of its obligation to timely respond to orders from the AJ. Employee argues that Agency does not provide evidence that the AJ's Order did not timely arrive at Agency or that it was improperly addressed. Employee asserts that Agency does not state what input from its new Interim CTO was required to timely respond to the AJ's orders in the matter, or what Agency needed from the new CTO to make decisions with respect to this matter. Therefore, Employee requests that Agency's petition be denied. *Complainant's Response to Agency Petition for Review*, p. 3-8 (March 9, 2018).

to defend a matter. However, we would be remiss if we failed to note that OEA's Administrative Assistant may have attributed to some of the missed deadlines in this matter by mailing the Order Requesting Briefs and the Initial Decision to the wrong address for Agency.

The record is clear of Agency's address in this case. The OEA document requesting Agency's Answer to Employee's Petition for Appeal was mailed to Agency's correct address of record at 200 I Street, SE, 5<sup>th</sup> Floor, Washington, D.C. 20001. However, for some reason OEA's Administrative Assistant used the incorrect address of 441 4<sup>th</sup> Street, NW, Suite 330S, Washington, D.C. 20001 when she mailed the November 15, 2017 Order Requesting Briefs and the January 17, 2018 Initial Decision. In its December 4, 2017 filing, Agency notified the AJ that the incorrect address was used by OEA.<sup>11</sup> Although Agency was ultimately forwarded the order and Initial Decision, it does not negate the fact that OEA failed to adhere to its own Designation of Agency Representative form and mail all documents to the address provided by Agency.<sup>12</sup> But for these errors by OEA's Administrative Assistant, this Board would have upheld the AJ's ruling in favor of Employee. However, because of these errors, this Board cannot – in good faith – uphold the ruling.

This Board has historically relied on *Murphy v. A.A. Beiro Construction Co. et al.*, 679 A.2d 1039, 1044 (D.C. 1996), where the District of Columbia Court of Appeals held that “decisions on the merits of a case are preferred whenever possible, and where there is any doubt, it should be resolved in favor of trial.”<sup>13</sup> Given the errors committed by the OEA Administrative Assistant, we believe that a ruling premised on sanctions is not proper in this case. Therefore, in

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<sup>11</sup> *Agency Motion for Continuance* (December 4, 2017).

<sup>12</sup> *Agency's Response to Petition*, p. 4 (November 1, 2017).

<sup>13</sup> See *Diane Gustus v. Office of Chief Financial Officer*, OEA Matter No. 1601-0025-08, *Opinion and Order on Petition for Review* (December 21, 2009); *Jerelyn Jones v. D.C. Public Schools*, OEA Matter No. 2401-0053-10, *Opinion and Order on Petition for Review* (April 30, 2013); *Cynthia Miller-Carrette v. D.C. Public Schools*, OEA Matter No. 1601-0173-11, *Opinion and Order on Petition for Review* (October 29, 2013); and *Carmen Faulkner v. D.C. Public Schools*, OEA Matter No. 1601-0135-15R16, *Opinion and Order on Petition for Review* (March 29, 2016).

the interest of justice and fairness, we remand this matter to the Administrative Judge to consider the merits of Employee's appeal. We also implore Agency's counsel to retrieve her mail in a timely fashion and to meet the deadlines imposed by the AJ on remand so there is no further delay in rendering a decision in this case.

**ORDER**

Accordingly, it is hereby ordered that Agency's Petition for Review is **GRANTED**, and the matter is **REMANDED** to the Administrative Judge for further consideration.

**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.