

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: |) | |
| |) | OEA Matter No.: J-0060-23 |
| EMPLOYEE ¹ |) | |
| |) | Date of Issuance: April 24, 2025 |
| v. |) | |
| |) | |
| D.C. DEPARTMENT OF |) | |
| TRANSPORTATION, |) | |
| Agency |) | |

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Maintenance Mechanic with the Department of Transportation (“Agency”). On July 14, 2023, Agency notified Employee that he would be terminated pursuant to Chapter 2, Section 227, of the D.C. Municipal Regulations (“DCMR”). The notice provided that Employee was being terminated during his probationary period. The effective date of the adverse action was July 28, 2023.²

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on August 25, 2023. In his appeal, Employee argued that he was subject to acts of discrimination. He further asserted Agency provided him with inaccurate information regarding his employment

¹ Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

² *Agency’s Answer, Tab 3* (September 22, 2023).

status, as well as the termination action. Employee proffered that Agency hired him as a Mechanic, CS-4701; however, the job from which he was terminated was classified as a level WS-4749 position. As a result, he requested to be reinstated and asked for retribution against Agency for its discriminatory practices.³

On September 22, 2023, Agency filed an answer and a motion to dismiss for lack of jurisdiction. It explained that Employee's appeal was improper because he was terminated from his position as a Maintenance Mechanic during the required one-year probationary period for Career Service appointments, which was not appealable to this Office. Agency further expressed that Employee's claims of discrimination were reserved for the Office of Human Rights ("OAH"), not OEA. Therefore, Agency opined that the instant matter should be dismissed.⁴

An OEA Administrative Judge ("AJ") was assigned to this appeal in September of 2023. On September 25, 2023, the AJ issued an order citing OEA Rule 628.2, which directed that Employee submit a brief on jurisdiction. Agency was also provided with an opportunity to respond.⁵ However, Employee failed to submit a response, and the record was subsequently closed.

An Initial Decision was issued on October 30, 2023. The AJ held that in accordance with D.C. Code § 1-606.03 and District Personnel Manual ("DPM"), Section 227.4, separation from government service during an employee's probationary period is neither appealable nor grievable. Thus, he assessed that Employee was precluded from appealing his termination to OEA because this Office lacked jurisdiction over his appeal. As such, the AJ reasoned that Employee failed to satisfy his burden of proof in this matter. Moreover, the appeal was dismissed pursuant to OEA Rule 621.3 for failure to prosecute because Employee failed to provide a response to the AJ's

³ *Petition for Appeal* (August 25, 2023).

⁴ *Agency's Answer to Employee's Petition for Appeal* (September 22, 2023) and *Agency's Motion to Dismiss* (September 22, 2023).

⁵ *Order* (September 25, 2023).

September 25, 2023, order for briefs. The AJ reiterated that such a response was necessary to make an informed decision regarding OEA's ability to properly adjudicate the instant appeal. Consequently, Employee's Petition for Appeal was dismissed.⁶

Employee filed a Petition for Review with the OEA Board on September 10, 2024. His filing highlights the same arguments presented in his Petition for Appeal. Employee also maintains that he was not in probationary status at the time of the termination action; his official position classification was a Maintenance Mechanic, CS-4701-10, not WS-4749; Agency terminated Employee from a position he never held; and he was not required to serve a second probationary period. Thus, he reasons that the AJ erred and asks the Board to review the aforementioned discrepancies.⁷

Substantial Evidence

In accordance with OEA Rule 637.4, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:

- (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
- (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
- (c) The findings of the Administrative Judge are not based on substantial evidence; or
- (d) The initial decision did not address all material issues of law and fact properly raised in the appeal

Additionally, the D.C. Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987) found that if administrative findings are supported by

⁶ *Initial Decision* (October 30, 2023).

⁷ *Petition for Review* (September 10, 2024).

substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.⁸

Failure to Prosecute

The Initial Decision concluded that Employee failed to submit a response to the AJ's September 25, 2023, order for briefs on jurisdiction. OEA Rule 621.3 states the following as it relates to failure to prosecute:

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.

In this case, the AJ reasoned that Employee's response "was integral to making an informed decision regarding the OEA's ability to exercise jurisdiction over this matter" and that Employee failed to exercise the diligence expected of an appellant pursuing an appeal before this Office. However, in *In re Estate of Davis*, 915 A.2d 955, 962 (D.C. 2007) (quoting *Wilds v. Graham*, 560 A.2d 546, 547 (D.C.1989)), the D.C. Court of Appeals held that dismissal for failure to prosecute should be sparingly exercised. In *Murphy v. A.A. Beiro Construction Co. et al.*, 679 A.2d 1039,

⁸ Black's Law Dictionary, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

1044 (D.C. 1996), the D.C. 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.”⁹

While this Board recognizes the AJ’s authority to dismiss appeals for failure to prosecute, we believe that the better practice would have been to first issue Employee an order for statement of good cause, which is this Office’s standard practice.¹⁰ By issuing a show cause order, Employee would have been afforded the opportunity to provide a reason or proposed justification for missing the briefing deadline. Because the AJ failed to provide this procedural avenue, Employee was unable to expound upon or offer supporting evidence of his arguments related to establishing jurisdiction before OEA. As such, we cannot sufficiently determine if the AJ’s rulings were supported by substantial evidence based on the record in its current state.

Timeliness

Additionally, OEA Rule 637.3 provides that “[a]ny party to the proceeding may serve and file one (1) original and one (1) copy of a Petition for Review of an Initial Decision with the Board within thirty-five (35) calendar days of issuance of the Initial Decision.” Employee’s petition to the Board was filed approximately eleven months after the Initial Decision was issued, which is

⁹ *Employee v. D.C. Department of Forensic Sciences*, OEA Matter No. 1601-0015-21, *Opinion and Order on Petition for Review* (June 17, 2021); *Employee v. University of the District of Columbia*, OEA Matter No. 16010026-18, *Opinion and Order on Petition for Review* (May 19, 2020); *Employee v. Office of the Chief Technology Officer*, OEA Matter No. 2401-0094-17, *Opinion and Order on Petition for Review* (September 4, 2018); *Employee v. Office of the Chief Technology Officer*, OEA Matter No. 2401-0093-17, *Opinion and Order on Petition for Review* (September 4, 2018); *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0135-15R16, *Opinion and Order on Petition for Review* (March 29, 2016); *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0173-11, *Opinion and Order on Petition for Review* (October 29, 2013); and *Employee v. D.C. Public Schools*, OEA Matter No. 2401-0053-10, *Opinion and Order on Petition for Review* (April 30, 2013).

¹⁰ *Employee v. Office of the State Superintendent of Education*, OEA Matter No. 1601-0016-11 (October 2, 2013); *Employee v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0038-24 (February 14, 2025); *Employee v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0017-23R23; *Employee v. Office of the State Superintendent of Education*, OEA Matter No. J-0033-23 (April 29, 2024); *Employee v. Department of Corrections*, OEA Matter No. 1601-0025-23 (October 17, 2023); *Employee v. Department of Behavioral Health*, OEA Matter No. 1601-0009-22 (December 22, 2022); *Employee v. Department of Corrections*, OEA Matter No. 1601-0025-21 (January 7, 2022); *Employee v. Department of Public Works*, OEA Matter No. 1601-0088-19 (April 30, 2020); *Employee v. Department of Administrative Hearings*, OEA Matter No. 1601-0036-18 (May 15, 2019); and *Employee v. Department of Human Services*, OEA Matter No. 1601-0015-18 (August 24, 2018).

considered an untimely submission. However, this Board notes that while the certificate of service attached to the October 30, 2023, Initial Decision contains the same address Employee provided on his Petition for Appeal form, the address reflected on the mailing envelope from OEA's front office contains an incorrect address for Employee.¹¹ As a result, the decision was returned to the Office as "Not Deliverable" on November 21, 2023.¹² This error further deprived Employee of the ability to timely contest the findings of the Initial Decision by way of petition for review.¹³ Accordingly, in the interest of justice and fairness, this matter must be remanded to the AJ to afford Employee an opportunity to explain his failure to submit a brief, and if appropriate, to submit arguments related to his jurisdictional claims.

¹¹ The numerical address listed on the return envelope reads "9531" instead of "6531."

¹² *Returned Mail ("Not Deliverable/Unable to Forward")* (November 21, 2023). A copy of the Initial Decision was subsequently mailed to Employee's correct address of record.

¹³ Employee's September 10, 2024, filing to OEA was submitted on the OEA form typically reserved for submitting a Petition for Appeal. However, because an Initial Decision was previously issued in this matter, his current submission will be construed as a Petition for Review.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's petition is **GRANTED**. Therefore, this matter is **REMANDED** for further review consistent with this opinion.

FOR THE BOARD:

Dionna Maria Lewis, Chair

Arrington L. Dixon

Jeanne Moorehead

LaShon Adams

Pia Winston

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.