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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
EDWARD BANNISTER,)	
Employee)	
)	OEA Matter No.: J-0078-11
v.)	
)	Date of Issuance: June 20, 2011
D.C. DEPARTMENT OF INSURANCE,)	
SECURITIES AND BANKING,)	
Agency)	SOMMER J. MURPHY, Esq.
_____)	Administrative Judge

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On March 2, 2011, Edward Bannister (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or the “Office”) contesting the Department of Insurance, Securities and Banking’s (“Agency”) decision to terminate him. Agency’s notice informed Employee that he was being separated from service as a result of a Reduction-in-Force (“RIF”). Employee’s termination was effective on January 21, 2011.

This matter was assigned to me on or around April of 2011. I issued an Order on May 9, 2011, directing Employee to present legal and factual arguments to support his argument that this Office has jurisdiction over his appeal. Employee was advised that he had the burden of proof with regard to the issue of jurisdiction. Employee, through a union representative, submitted a response to the Order on May 20, 2011. Agency subsequently filed a response to Employee’s Brief on Jurisdiction on June 10, 2011. After reviewing the documents of record, I have determined that a hearing is not warranted in this case. The record is now closed.

JURISDICTION

As will be explained below the Jurisdiction of this Office has not been established.

ISSUE

Whether OEA has jurisdiction over this matter.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Employee worked as an insurance examiner with Agency at the time he was separated. As previously stated, Agency notified Employee on December 17, 2010 that his position was being abolished as the result of budgetary issues. The letter provided that Employee could elect to file an appeal with this Office within thirty (30) calendar days of the effective date of the RIF. The notice further instructed employee to refer to an enclosed copy of OEA's appeal form, which provided instructions on filing an appeal.

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999), states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean: "[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." Pursuant to OEA Rule 629.3, for appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, amended certain sections of the CMPA. Amended D.C. Code §1-606.3(a) states:

"An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee...an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more...or a reduction in force...."

Thus, §101(d) restricted this Office's jurisdiction to employee appeals from the following personnel actions only: a performance rating that results in removal; a final agency decision affecting an adverse action for cause that results in removal, a reduction in grade, a suspension of 10 days or more, or a reduction-in-force.

The District of Columbia Court of Appeals has held that the time limit for filing an appeal with an administrative adjudicatory agency such as this Office is mandatory and jurisdictional in nature.¹ Furthermore, in *McLeod v. D.C. Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003), __ D.C. Reg. ____ ()², it was held that the only situation in which an agency may

¹See, e.g., *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991); *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162, 1164 (D.C. 1985). Following these cases, this Office's Board has held that that the statutory 30-day time limit for filing an appeal in this Office is mandatory and jurisdictional in nature. See *King v. Department of Corrections*, OEA Matter No. T-0031-01, *Opinion and Order on Petition for Review* (October 16, 2002), __ D.C. Reg. ____ ().

² OEA Matter No. J-0024-00 (May 5, 2003), __ D.C. Reg. ____ ().

not “benefit from the [30-day] jurisdictional bar” is when the agency fails to give the employee “adequate notice of its decision and the right to contest the decision through an appeal.”

The effective date of the RIF was January 21, 2010; however, Employee did not file his appeal until March 2, 2011, more than thirty calendar days after the effective date of Agency’s action. Although the reasons Employee offers as justification for filing his appeal in an untimely manner are unfortunate, he unjustifiably failed to comply with the mandatory filing deadline.

Here, Employee has not asserted that he did not receive adequate notice pertaining to the ability to appeal to this Office and therefore the exception for a late filing does not apply. Although this appeal may be dismissed on jurisdictional grounds alone, there is no evidence in the record to indicate that Employee did not receive thirty days notice and one round of lateral competition as required by D.C. Official Code § 1-624.08 (d) and (e). Based on the foregoing reasons, I conclude that Employee has failed to meet his burden of proof by establishing that OEA has jurisdiction over this matter. Thus, Employee’s petition for appeal is dismissed.

ORDER

It is hereby ORDERED that this matter be DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

SOMMER J MURPHY, ESQ
ADMINISTRATIVE JUDGE