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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
AISHAH MILLS-PHERIGO,)	
Employee)	OEA Matter No. J-0018-17
)	
v.)	Date of Issuance: June 6, 2017
)	
D.C. DEPARTMENT OF HUMAN,)	
RESOURCES,)	
Agency)	
_____)	

OPINION AND ORDER ON
MOTION FOR INTERLOCUTORY APPEAL

Aishah Mills-Pherigo (“Employee”) worked as a Management Analyst with the D.C. Department of Human Resources (“Agency”). On November 8, 2016, Agency issued a final notice of removal. According to the notice, Employee was removed from her position for Failure to Meet the Requirements of a Performance Improvement Plan (“PIP”) and Neglect of Duty. The effective date of Employee’s removal was November 11, 2016.¹

On December 14, 2016, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”). She contended that Agency improperly placed her on a PIP. However, despite being improperly placed on the PIP, Employee asserted that she completed the terms of the PIP. She posited that the Hearing Officer presiding over her matter ruled that she

¹ *Petition for Appeal*, p. 7-9 (December 14, 2016).

provided sufficient evidence to support her claim that she completed the PIP terms. As for the Neglect of Duty charge, Employee explained that she followed the District Personnel Manual (“DPM”) regulations while performing her job duties. As a result, Employee requested that she be reinstated to her position with back pay.²

Agency filed its Response to Employee’s Petition for Appeal on January 18, 2017. It argued that the Hearing Officer determined that removal was warranted based on the Neglect of Duty charge. Agency went on to provide that although the Hearing Officer did not sustain the charge of Failure to Meet the PIP requirements, he did acknowledge that despite some improvement, Employee failed to technically complete the goals of the PIP. Additionally, Agency asserted that Employee’s Petition for Appeal was untimely filed with OEA. It claimed that Employee’s petition was filed thirty-three days after the effective date of her termination. Accordingly, Agency reasoned that OEA lacked jurisdiction over Employee’s appeal and requested that the matter be dismissed.³

Agency also filed a Motion to Dismiss Employee’s Appeal. It contended that Employee had thirty days to appeal her removal to OEA. According to Agency, Employee was required to file her appeal by December 11, 2016, but because that date fell on a Sunday, she had until December 12, 2016, in which to file. Agency argued that because Employee’s appeal was not filed with OEA until December 14, 2016, it was untimely. It opined that time limits for filing appeals with OEA are mandatory and jurisdictional in nature. Therefore, Agency requested that Employee’s petition be dismissed with prejudice.⁴

On February 2, 2017, the OEA Administrative Judge (“AJ”) ordered both parties to

² *Id.*, 5-6.

³ *Agency’s Answer to Employee’s Petition for Appeal*, p. 1-4 (January 18, 2017).

⁴ *District of Columbia Department of Human Resources’ Motion to Dismiss Employee’s Petition for Appeal*, p. 3-8 (January 18, 2017).

submit briefs on OEA's jurisdiction. Employee filed her brief on February 22, 2017. She provided that her Petition for Appeal was filed within the thirty-day deadline. Employee contended that she mailed her appeal from the United States Postal Service ("USPS") on December 9, 2016. She submitted a receipt from the USPS that she claimed provided that the appeal was scheduled to be delivered to OEA on December 10, 2016. Employee also submitted a tracking report which, in her opinion, showed that the appeal was delivered to the mailroom on December 12, 2016. Therefore, she argued that her appeal was received within the thirty-day deadline.⁵

In its Reply Brief, Agency argued that Employee failed to prove that her appeal was timely filed. Furthermore, it provided that Employee failed to cite to any regulations, statutes, provisions, or case law to support her argument. Agency also claimed that the receipts Employee provided offered no postmark date, recipient address, or content of what was mailed. As for the report that Employee's package was delivered to a mailroom, Agency contended that it is not clear that the mailroom was at OEA and does not provide proof of delivery. Moreover, Agency contended that in accordance with OEA Rule 607.3, the date of filing shall be the date the Office time stamps the document. Thus, it provided that Employee's petition was untimely filed and that her petition should be dismissed.⁶

The AJ found that Employee's appeal was timely filed and subsequently denied Agency's Motion to Dismiss and scheduled a Pre-hearing Conference.⁷ Agency disagreed with the AJ's ruling and filed a Motion for Certification of an Interlocutory Appeal to the OEA Board. Agency argues that the AJ failed to consider OEA's binding rule which provides that the time stamp on the document shall be the date of filing. It claims that the AJ's order on its Motion to

⁵ *Response to Order on Jurisdiction* (February 22, 2017).

⁶ *D.C. Department of Human Resource's Reply Brief* (March 14, 2017).

⁷ *Order Convening a Pre-hearing Conference* (March 20, 2017).

Dismiss focused on service instead of the appeal being untimely filed. Thus, it requests that the Board set aside the AJ's order and dismiss Employee's appeal with prejudice.⁸ On March 31, 2017, the AJ certified the matter to the Board to consider Agency's Motion on Interlocutory Appeal.⁹

Agency correctly cites that OEA Rule 607.3 provides that "the date of filing shall be the date the Office time stamps on the document." However, this matter involves facts that require a more detailed investigation to determine if Employee's petition was actually timely filed. The effective date of Employee's termination was November 11, 2016. In accordance with OEA Rule 604.2, her appeal should have been filed within thirty calendar days of the effective date of the appealed action. Thus, Employee's appeal was to be filed with OEA on December 11, 2016. As Agency provided, December 11, 2016, was a Sunday. Hence, in accordance with OEA Rule 603.1, the time period for Employee to file her appeal was extended until the end of the next business day. Therefore, Employee's filing deadline was extended to December 12, 2016.

Despite Agency's claims, Employee provided credible documentary evidence that her appeal should have been received and date stamped by OEA on December 12, 2016. Agency contends that Employee offered receipts which provided no postmark date, recipient address, or content of what was mailed. The record clearly provides otherwise. Fortunately for Employee, OEA keeps the actual envelopes in which mailed Petitions for Appeal are filed. The USPS envelope has a postmark date of December 9, 2016. The envelope, as well as the receipt submitted by Employee, provides that her appeal was to be delivered by December 10, 2016. This was a Saturday; therefore, the envelope would have reasonably gone out for delivery the

⁸ *D.C. Department of Human Resources' Motion for Certification of an Interlocutory Appeal to the OEA Board and Motion to Stay* (March 20, 2017).

⁹ *Order Regarding D.C. Department of Human Resources' Motion for Certification of an Interlocutory Appeal and Motion for Stay* (March 31, 2017).

next available business day, which was December 12, 2016. Furthermore, OEA's address is clearly noted on the envelope. As it relates to the content of the envelope, the tracking number on the USPS envelope matches the tracking number on the receipts provided by Employee.¹⁰ Therefore, Employee's receipts prove that her Petition for Appeal was contained in the envelope.¹¹

As for Agency's argument that Employee's appeal was untimely filed, Employee also provided documentary proof that her appeal was delivered to the mail room which processes OEA's mail. According to the USPS tracking log, Employee's appeal was delivered to the mail room at 11:09 a.m. on December 12, 2016, the deadline to receive her appeal.¹² To fully understand why the appeal was delivered in the mail room on December 12, 2016, but not time stamped with OEA until December 14, 2016, requires an understanding of how mail is processed within OEA's building. Unfortunately, OEA does not have mail delivered directly to its offices. The mail is received by the mail room for the building. OEA must then rely on employees, who are not employed by our agency, to sort the mail and have it delivered to each suite within the building. On more than one occasion, this process has proven detrimental to the accuracy of the filing date when appeals are mailed. Therefore, OEA has taken mailed appeals on a case-by-case basis to make a determination, in the interest of justice, that an appeal is timely filed. In *Murphy v. A.A. Beiro Construction Co. et al.*, 679 A.2d 1039, 1044 (D.C. 1996), the District of Columbia Court of Appeals held that "decisions on the merits of a case are preferred whenever possible. . . ."¹³ Moreover, in *Department of Mental Health v. District of Columbia*

¹⁰ The tracking number associated with Employee's appeal was 9505 5102 5767 6344 0558 03.

¹¹ *Petition for Appeal*, envelope attachment (December 14, 2016) and *Response to Order on Jurisdiction*, Attachment #3 (February 22, 2017).

¹² *Response to Order on Jurisdiction*, Attachment #4 (February 22, 2017).

¹³ The OEA Board also followed this holding in *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); and *Carmen*

Office of Employee Appeals, et al., Case No. 2015 CA 7829 P(MPA)(D.C. Super. Ct. February 14, 2017), the Superior Court of the District of Columbia recently held that even if the Court were to conclude that a filing deadline is jurisdictional, “. . . OEA [] retains the equitable authority to hear the matter even outside the filing period.” Therefore, Agency’s Motion on Interlocutory Appeal is denied, and this case is remanded to the AJ for consideration on its merits.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Interlocutory Appeal is **DENIED**, and this matter is **REMANDED** to the Administrative Judge.

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams

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.