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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
JOE JONES)	OEA Matter No. 1601-0001-10
Employee)	
)	Date of Issuance: November 1, 2011
v.)	
)	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA PUBLIC SCHOOLS)	Administrative Judge
DEPARTMENT OF TRANSPORTATION)	
Agency)	
_____)	

Joe Jones, Employee
Frank McDougald, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Joe Jones, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on October 1, 2009, appealing his removal from his position as Operations Assistant, effective October 7, 2009. At the time of Agency's decision, Employee was in permanent and career status.

This matter was assigned to me on or about June 15, 2011. I did not find a copy of the final agency notice in the official file. On June 23, 2011, I issued an Order directing Agency to submit the final notice, or if no notice was issued, any legal or factual argument to support its position that the September 21, 2009 notice was legally sufficient and provided Employee with written notice of his right to appeal to this Office. Agency submitted its response in a timely manner. Employee was given the opportunity to respond, but did not do so. The record closed on August 15, 2011.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

ISSUES

Did Agency provide Employee with the final agency decision? If not, what action, if any should be taken?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

This Office requires that an agency issue a final written decision in every disciplinary action where this Office has jurisdiction to hear the adverse action. This document must not only inform the employee of the final agency determination, but also provide the employee with appeal rights. D.C. Official Code § 1-606.04(e) states, in pertinent part, that “the personnel authority shall provide the employee with a written decision following the review . . . and shall advise each employee of his or her right to appeal to the Office as provided in this subchapter.” OEA Rule 605.1 requires certain information to be included in the final decision:

[W]hen an agency issues a final decision to an employee on a matter appealable to the Office, the agency shall at the same time provide the employee with:

- (a) notice of the employee’s right to appeal to the Office;
- (b) a copy of the rules of the Office;
- (c) a copy of the appeal form of the Office;
- (d) notice of applicable rights to appeal under a negotiated review procedure; and
- (e) notice of the right to representation by a lawyer or other representative authorized by the rules.

Issues regarding the sufficiency of the final agency notice are most often raised when an employee fails to file a petition for appeal with this Office in a timely manner. Such is not the case in this instance. Rather, in this matter, Agency did not issue a defective notice, it failed to issue any notice. As Agency noted in its submission responding to my Order, Agency issued a notice of proposed action which it stated would become the final agency action unless Employee heard to the contrary. The notice omitted any information regarding appeal rights. Neither the D.C. Code nor the OEA rules permit the Agency to combine the proposed notice with the final notice. Agency’s failure to issue a notice of final agency action setting forth its decision after the review process violates both D.C. Official Code § 1-606.04(e) and OEA Rule 605.1 which require agencies to provide employees with both substantive and procedural information regarding the final disciplinary decision. Although Employee filed his petition for appeal with OEA in a timely manner, his ability to do so does not excuse Agency from failing to provide appeal information. In addition, Employee does not know if Agency based its final decision on the same factors set forth in the proposed notice since Agency did not issue a final notice with that information. The language that requires an agency to provide a disciplined employee with a final agency notice which includes appeal rights, is mandatory and not precatory. Agency must comply with these requirements. In this case it did not do so, and did not offer any reason for its failure. It does not, and for the reasons stated above, cannot contend that its proposed notice was sufficient to serve as its final notice. In addition, it does not- and again, for the reasons notice above, cannot argue that its failure to issue a final agency notice was harmless. As noted above, although there is no timeline issue raised in this matter, the lack of a final agency notice deprives Employee with any information for the basis of Agency’s final decision which could well impact on Employee’s ability to prepare his case.

In sum, by failing to issue a final agency notice with the requisite appeal rights, Agency violated the mandatory language of both D.C. Official Code § 1-606.04(e) and OEA Rule 605.1. As a result, upon careful consideration, the Administrative Judge has determined that Agency's action of removing Employee must be reversed.

ORDER

It is hereby

ORDERED:

1. Agency's removal of Employee from his position is reversed.
2. Agency is directed to reinstate Employee, issue his any back pay to which he is entitled and restore any benefits he lost as a result of the removal, no later than 30 calendar days from the date of issuance of this Initial Decision.
3. Agency is directed to document its compliance no later than 45 calendar days from the date of issuance of this Initial Decision.

FOR THE OFFICE:

LOIS HOCHHAUSER, ESQ.
Administrative Judge