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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
WILLIE PORTER,)	OEA Matter No. 1601-0046-12
Employee)	
v.)	Date of Issuance: April 14, 2015
DEPARTMENT OF MENTAL HEALTH,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Willie Porter (“Employee”) was a Psychiatric Nurse with the Department of Mental Health (“Agency”). On July 28, 2011, Agency issued a Notice of Final Decision to Employee informing him that he would be removed from his position. Employee was charged with any knowing or material misrepresentation on an employment application.¹ The effective date of removal was August 5, 2011.²

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on December 29, 2011. He requested that OEA reinstate him with back-pay and attorney fees. Employee also requested that OEA expunge the adverse action from his record.³ In response to the Petition for Appeal, Agency argued that the appeal was untimely and requested that OEA

¹ The notice explained that Employee omitted from his D.C. employment application that he previously worked at Walter Reed Army Medical Center (“Walter Reed”) and was terminated for misconduct.

² *Petition for Appeal*, p. 7-10 (December 29, 2011).

³ *Id.* at 4.

dismiss the matter.⁴

After the matter was assigned to an OEA Administrative Judge (“AJ”), he scheduled a Pre-hearing Conference and subsequently issued a Post Pre-hearing Conference Order.⁵ The Post Pre-hearing Conference Order required the parties to submit briefs addressing whether Agency’s action was for cause and whether the penalty was appropriate. The AJ also issued an order denying Agency’s request to dismiss the matter. He explained that Employee’s Petition for Appeal was mailed via certified mail, but due to OEA’s relocation, receipt of the Petition for Appeal was delayed.⁶

Agency’s brief provided that its removal action was taken in accordance with Chapter 16, § 1603.3 of the District Personnel Manual (“DPM”). Additionally, it explained that pursuant to DPM Chapter 4, § 405.10, Employee was deemed unsuitable for the position because of misconduct in his prior employment.⁷ Agency provided that under the DPM Table of Penalties, removal was the appropriate penalty for misrepresentation. Therefore, it requested that OEA uphold its removal action.⁸

In Response to Agency’s brief, Employee claimed that Agency knew about his employment with Walter Reed prior to its offer of employment. In support of this assertion, Employee submitted to OEA an application dated October 5, 2010, which listed his employment with DeWitt Army Hospital. However, Employee asserted that he resigned from Walter Reed.⁹

⁴ Furthermore, Agency argued that Employee failed to present reasons why it should not have taken its adverse action. *Department of Mental Health’s Response to Petition for Appeal*, Tab 2 (February 6, 2012).

⁵ *Post Pre-hearing Conference Order* (October 8, 2013).

⁶ *Order Denying Motion to Dismiss* (October 8, 2013).

⁷ This section of the DPM provides that misconduct in prior employment is a basis for disqualifying an appointee. Agency contended that had it known about Employee’s termination from Walter Reed, it would not have hired him. It argued that Employee knowingly omitted this information from his employment application.

⁸ *Agency’s Brief*, p. 6-10 (October 30, 2013).

⁹ Employee explained that during his time at Walter Reed, he got into a car accident that caused a concussion. Due to Employee’s condition, his doctor instructed him not to return to work until further notice. Employee provided that thereafter, he submitted a letter of resignation. *Employee’s Response to Agency’s Brief* (November 25, 2013).

Agency submitted a Reply Brief to Employee's response. In it, Agency provided that Employee submitted an application on September 16, 2010, and it relied on that application. Moreover, Agency stated that there was no evidence to show that the October 2010 application was actually submitted. Lastly, Agency argued that sending a letter of resignation did not prove that Employee resigned from his position at Walter Reed.¹⁰

The AJ issued his Initial Decision on December 24, 2013. He found that Employee submitted an application on September 16, 2010, and then submitted another application on October 6, 2010.¹¹ The AJ provided that although Employee's October 2010 application indicated that he resigned from Walter Reed, his Standard Form 50 ("SF-50") indicated that he was terminated from his position for cause. Moreover, the AJ found that Employee did not offer any evidence to contradict the accuracy of the SF-50, nor did he prove that his resignation letter was received by Walter Reed. As a result, the AJ ruled that Agency's adverse action was taken for cause, and its penalty was appropriate. Accordingly, the action was upheld.¹²

Employee filed a Petition for Review with the OEA Board on February 4, 2014. He requests that the final decision by OEA be delayed until the Merit Systems Protection Board could provide new and material evidence from his personnel file to prove that he was unaware of Walter Reed's adverse action charges.¹³ In opposition to the Petition for Review, Agency asserts that the filing was untimely and should be dismissed for lack of jurisdiction. In the alternative, Agency submitted that the Petition for Review should be denied because the Initial Decision was

¹⁰ In response to Agency's Reply Brief, Employee stated, *inter alia*, that Agency told him to submit another application because there was no evidence showing that he submitted the September 16, 2010 application. Therefore, on October 6, 2010, he gave the application to Ms. Francise Dease. Employee explained that Walter Reed terminated him without his knowledge and that the termination was initiated while he was recovering from his concussion. He also stated that his resignation was due to family and personal reasons. Thus, Employee believed that Agency's case was based on accusations and not facts. *Employee's Reply Brief* (December 18, 2013).

¹¹ The AJ found that the October 2010 application was submitted under a different vacancy announcement number.

¹² *Initial Decision*, p. 4-6 (December 24, 2013).

¹³ *Petition for Review* (February 4, 2014).

supported by substantial evidence, and Employee did not provide a reason for the Board to grant his Petition for Review.¹⁴

Employee filed a Response to Agency's Opposition to the Petition for Review. He later filed an Amended Petition for Review. He reiterates that he did not knowingly omit information from his employment application.¹⁵ Additionally, Employee submits a settlement agreement with the Department of the Army, wherein the Department agreed to accept his voluntary resignation; create a SF-50 which indicated that his resignation was tendered; and remove all SF-50's referencing the Department's removal action from Employee's Official Personnel File. Employee argues that the settlement agreement proves that the allegations on his SF-50 were not factual. Thus, he requests that his Petition for Review be granted, and the Initial Decision be overturned. Employee also requests compensation for back-pay, raises and promotions, legal fees, and reimbursement for medical bills.¹⁶

Agency submitted a Motion to Strike Employee's September 9, 2014 submission. It argues that Employee's submission does not comply with OEA's rules. Agency reasons that Employee did not provide new and material evidence that was not available when the record closed.¹⁷ Agency states that the settlement agreement does not change the fact that Employee omitted information from his employment application.¹⁸

On January 8, 2015, Bradley E. Eayrs, Attorney for the Department of the Army, submitted a letter addressed to the OEA Administrative Judge. The letter provides that "the

¹⁴ *Agency's Response in Opposition to Employee's Petition for Review of Initial Decision*, p. 5-10 (June 27, 2014).

¹⁵ *Employee's Response to Agency's Opposition for Employee's Petition for Review of Initial Decision* (July 30, 2014).

¹⁶ *Amended Petition for Review* (September 9, 2014).

¹⁷ It asserts that the settlement agreement submitted by Employee was recently created and is not newly discovered evidence. Furthermore, Agency argues that the settlement agreement does not change the fact that when it made its decision to terminate Employee, all of the information it had was accurate.

¹⁸ *Agency's Motion to Strike Employee's Submission*, p. 2-4 (September 25, 2014). On October 15, 2014, Employee submitted an additional filing that argued that Agency did not verify the information on his SF-50. *Employee's Response in the Agency's Opposition to Employee's Petition for Review of Initial Decision* (October 15, 2014).

Department of the Army's personnel records does not show that a notice of decision to terminate Mr. Porter was ever provided to him." However, its records did "show that Mr. Porter submitted his resignation prior to 12 June 2006." The letter went on to provide that Employee's SF-50 forms would be updated to indicate that he resigned from his position and that "[a]ny documentation to indicate any action other than a voluntary resignation for the purposes of non-federal employment will be rescinded."¹⁹

Agency is correct that OEA has consistently held that the filing requirement for Petitions for Review is mandatory in nature. In accordance with OEA Rule 633.1 "any party to the proceeding may serve and file a petition for review of an initial decision with the Board within thirty-five (35) calendar days of issuance of the initial decision."²⁰ Furthermore, the D.C. Court of Appeals held in *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991) that "the time limits for filing appeals with administrative adjudicative agencies, as with courts, are mandatory and jurisdictional matters."²¹ However, in *Bagenstose v. District of Columbia Office of Employee Appeals*, 888 A.2d 1155, 1157 (D.C. 2005), the D.C. Court of Appeals also provided that a ruling on the merits of a case may occur without deciding the more complex jurisdictional question. Additionally, the court in *Stevens v. Quick*, 678 A.2d 28, 31 (D.C.1996) reasoned that "when the merits of a case are clearly against the party seeking to invoke the court's jurisdiction, the jurisdictional question is especially difficult and far-reaching, . . . we may rule on the merits

¹⁹ Letter from Bradley E. Eayrs to Administrative Judge (January 8, 2015).

²⁰ Similarly, D.C. Official Code § 1-606.03(c) provides that ". . . the initial decision . . . shall become final 35 days after issuance, unless a party files a petition for review of the initial decision with the Office within the 35-day filing period."

²¹ Also see *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991) (citing *Woodley Park Community Association v. District of Columbia Board of Zoning Adjustment*, 490 A.2d 628, 635 (D.C.1985); *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162, 1164 (D.C.1985); *Gosch v. District of Columbia Department of Employment Services*, 484 A.2d 956, 958 (D.C.1984); and *Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917, 923 (D.C.1980)).

without reaching the jurisdictional question.” Accordingly, this Board will make a decision on the evidence presented without deciding if Employee’s Petition for Review was untimely.

As it relates to the new evidence presented by Employee, the D.C. Court of Appeals held in *Hahn v. University of the District of Columbia*, 789 A.2d 1252 (D.C. 2002)(citing *Goodman v. District of Columbia Housing Commission*, 573 A.2d 1293 (D.C. 1990)) that “contentions not urged at the administrative level may not form the basis for overturning the decision on review.” However, it went on to provide that “the case law recognizes a narrow exception to this rule on a showing of exceptional circumstances . . . when the interests of justice so require.” Absent exceptional circumstances, as those presented in the current matter, this Board would not normally entertain a potentially untimely filing or new and material evidence presented after the closing of an OEA record.

However, Employee provided evidence to this Board that establishes that the SF-50 relied upon by Agency to remove him was inaccurate. The evidence supports Employee’s assertion from the beginning that he voluntarily resigned from his position and was not removed on the basis of any adverse action.²² Because Employee is a pro se litigant and given the compelling evidence presented by him, we will allow some flexibility and in the interest of justice, remand the matter to the AJ for consideration of the case on its merits.

²² Agency provided that its removal action was based on Employee’s “knowing or negligent misrepresentation on an employment application.” *Department of Mental Health’s Response to Petition for Appeal*, Tab #1 (February 6, 2012). Additionally, it claimed that Employee engaged in misconduct during prior employment and misrepresented this information on his employment application. *Agency’s Response in Opposition to Employee’s Petition for Review of Initial Decision*, p. 9 (June 27, 2014). However, Employee’s evidence seems to suggest that there was no misconduct or misrepresentation because he was not removed from his previous position, but instead, he voluntarily resigned.

ORDER

It is hereby **ORDERED** that Employee's Petition for Review is **GRANTED** and the Initial Decision is **REMANDED** to the Administrative Judge for consideration of the case on its merits.

FOR THE BOARD:

William Persina, Chair

Sheree L. Price, Vice Chair

Vera M. Abbott

A. Gilbert Douglass

Patricia Hobson Wilson

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.