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:	
KEVIN BALDWIN, Employee	OEA Matter No. 1601-0070-12
v.	Date of Issuance: September 13, 2016
DEPARTMENT OF YOUTH REHABILITATION SERVICES, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Kevin Baldwin ("Employee") worked as a Youth Development Representative with the Department of Youth Rehabilitation Services ("Agency"). Agency issued a notice of final decision terminating Employee for "any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty, incompetence, and misfeasance; any act which constitutes a criminal offense whether or not that act results in conviction: attempted second degree cruelty to children and simple assault; and any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: violation of DYRS Reporting Unusual Incidents Policy, violation of

DYRS Use of Force Policy, and violation of the DYRS and District Employee Conduct Policies." The effective date of Employee's termination was January 31, 2012. [1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on February 27, 2012. He argued that his termination was arbitrary and capricious. Moreover, Employee contended that Agency should have considered alternative forms of disciplinary action that were less severe than removal. Therefore, he requested to be reinstated.[2]

On March 29, 2012, Agency filed its response to Employee's Petition for Appeal. Agency asserted that Employee was removed from his position as the result of an investigation which found that he physically abused a youth by slamming him into a wall. It explained that this was a violation of its "Use of Force" policy. Agency further asserted that Employee provided illusive information in his incident report, as it was inconsistent with the video footage of that incident and his interview answers submitted to his superiors. According to Agency, Employee was subsequently arrested and charged with simple assault and second degree cruelty to children. It provided that based on the preponderance of evidence, including the video footage, it had cause to remove Employee from his position. Agency opined that removal was appropriate because it was within the range of penalties as outlined in the Table of Penalties in the District Personnel Regulations ("DPR") § 1619. Therefore, it requested that Employee's appeal be dismissed.[3]

On August 12, 2014, the OEA Administrative Judge ("AJ") conducted an evidentiary hearing. Both parties issued closing arguments. Employee asserted that Agency did not have cause to remove him. He claimed that he was defending himself and others after being physically threated by the youth. Additionally, he argued that Agency violated its policy and rules to

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[1] *Petition for Appeal,* p. 9 (February 27, 2012).
[2] *Id.* at 5.
[3] *The Department of Youth Rehabilitation Service's Response to the Appellant's Petition for Appeal*, p. 2-8 (March 29, 2012).

complete its investigation within thirty-five days. As a result, he requested that he be reimbursed with back pay and benefits.[4]

In its closing statement, Agency opined that it had cause to remove Employee for all three causes of action taken against him. It explained that removal was within the range of penalties for the first offense for both of neglect of duty and any act which constitutes a criminal offense, whether or not the act results in conviction. As for Employee's argument regarding the thirty-five day deadline, Agency provided that the timeline was set by the consent decree that resulted in the matter of *Jerry M.*[5] It provided that the thirty-five day deadline to complete investigations is a goal, but there are exceptions. It claimed that criminal investigations by the Metropolitan Police Department; investigations by Child and Family Services Agency; and uncooperative or untruthful witnesses are recognized exceptions to the deadline. Agency argued that both the Metropolitan Police Department and Child and Family Services Agency were involved in the current case. Therefore, there were justifications for the delay in completing the investigation against Employee.[6]

The AJ issued his Initial Decision on January 14, 2015. He found that while the youth acted in an aggressive manner, the excessive force used by Employee was unnecessary. Moreover, the AJ stated that Employee aggravated the circumstances. Hence, he posited that Employee failed to follow instructions and the safety rules taught to him regarding excessive force and precautions pertaining to the safety of youth. Additionally, he held that Employee was careless in his work performance and was, therefore, incompetent in applying Agency's Use of Force policy. Because Employee was charged with simple assault and attempted second degree cruelty to children, the AJ

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[4] *Closing Argument* (October 20, 2014).
[5] According to Agency, the *Jerry M.* case addressed deadlines for investigation and disciplinary action taken against Employees. *OEA Hearing Transcript,* Exhibit #14 (August 12, 2014).
[6] *Agency's Proposed Initial Decision,* p. 9-20 (October 17, 2014).

ruled that Agency proved that it had cause for the charge of any act which constitutes a criminal offense whether or not the act results in conviction. However, he found that Agency failed to prove the misfeasance charge. Because removal was within the range of penalties for neglect of duty and acts which constitute a criminal offense, the AJ upheld Agency's decision to terminate Employee.[7]

Prior to filing his Petition for Review, Employee filed four requests for extensions to file his Petition for Review. He explained that he needed additional time to secure an attorney to represent him on appeal. Employee filed a Petition for Review with the OEA Board on May 18, 2015. He makes many of the same arguments previously decided by the AJ. Employee asserts that Agency violated its thirty-five day deadline to complete investigations.[8] He provides that Agency's witness, Tony Newman, committed perjury when testifying about the deadline. He also claims that Agency violated his rights by placing him on enforced leave. Accordingly, Employee requests that the Board reverse his termination with back pay or remand the matter for further consideration.[9]

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." Furthermore, 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." 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

[7] *Initial Decision* p. 8-15 (January 14, 2015).
[8] He contends that OEA previously held that Agency violated the thirty-five day rule in *Michael Dunn v. Department of Youth Rehabilitation Services,* OEA Matter No. 1601-0047-10 (October 5, 2012).
[9] *Petition for Review,* p. 4-18 (May 18, 2015).

filing appeals with administrative adjudicative agencies, as with courts, are mandatory and jurisdictional matters."[10] Therefore, OEA has consistently held that the Petitions for Review filing requirement is mandatory in nature.[11]

In the current case, the Initial Decision was issued on January 14, 2015. Attached to the Initial Decision is a Notice of Appeal Rights which clearly provides that "a Petition for Review must be filed within thirty-five (35) calendar days . . . of the issuance date of the Initial Decision in this case." Accordingly, Employee was on notice of the mandatory filing requirement. However, he attempted to get an extension to file his petition late so that he could secure counsel to represent him on appeal.[12] However, as this Board has previously held in *Michael Dunn v. Department of Youth Rehabilitation Services,* OEA Matter No. 1601-0047-10, *Opinion and Order on Petition for Review* (April 15, 2014), we do not have the statutory or regulatory authority to rule on motions for extension. We reasoned that if we allowed parties to circumvent the filing requirements of Petitions for Review, then the requirements would be nullified.[13] Because the statute is mandatory, this Board does not have the authority to waive the

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[10] *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)).

[11] *Alfred Gurley v. D.C. Public Schools*, OEA Matter No. 1601-0008-05, *Opinion and Order on Petition for Review* (April 14, 2008), *James Davis v. Department of Human Services*, OEA Matter No. 1601-0091-02, *Opinion and Order on Petition for Review* (October 18, 2006); *Damond Smith v. Office of the Chief Financial Officer*, OEA Matter No. J-0063-09, *Opinion and Order on Petition for Review* (December 6, 2010); *Jason Codling v. Office of the Chief Technology Officer*, OEA Matter No. J-0151-09, *Opinion and Order on Petition for Review* (December 6, 2010); *Dametrius McKenny v. D.C. Public Schools*, OEA Matter No. 1601-0207-12, *Opinion and Order on Petition for Review* (February 16, 2016); *Carolyn Reynolds v. D.C. Public Schools*, OEA Matter No. 1601-0133-11, *Opinion and Order on Petition for Review* (May 10, 2016).

[12] This Board must note that it appears that Employee's Petition for Review was filed by him and not an attorney. Therefore, Employee did not even comply with his reasoning for requesting the extension.

[13] *Also see Leonard Cheeks v. Department of Public Works*, OEA Matter No. 1601-0119-09R12, *Opinion and Order on Remand* (July 24, 2014), where this Board held that neither party to the case, nor this Board has the authority to consent to or extend statutory deadlines.

requirement. Therefore, Employee's Petition for Review is denied.[14]

[14] *Assuming arguendo* that we could consider the merits of Employee's appeal, we would still deny his petition. The AJ relied on testimony provided by Tony Newman that the thirty-five day deadline is not mandatory and may be extended for a variety of reasons. Employee asserted that Mr. Newman perjured himself. As we have historically held, this Board will not question an AJ's credibility determinations. *Ernest H. Taylor v D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 2007); *Larry L. Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Paul D. Holmes v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009); *Derrick Jones v. Department of Transportation*, OEA Matter No. 1601-0192-09, *Opinion and Order on Petition for Review* (March 5, 2012); *C. Dion Henderson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 1601-0050-09, *Opinion and Order on Petition for Review* (July 16, 2012); and *Ronald Wilkins v. Metropolitan Police Department*, OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013). The Court in *Metropolitan Police Department v. Ronald Baker*, 564 A2d. 1155 (D.C. 1989), ruled that great deference to any witness credibility determinations are given to the administrative fact finder. The OEA Administrative Judge was the fact finder in this matter. The AJ found that Mr. Newman's testimony was credible and more persuasive than Employee's testimony. Thus, we will not second guess his credibility determinations.

Additionally, Employee's reliance on the ruling in *Dunn* is misguided. Mr. Newman clearly testified that there are exceptions to the thirty-five day deadline. They include if there are investigations by the Metropolitan Police Department and/or the Child and Family Services Agency. In *Dunn*, the only investigation conducted in the case was by Agency. *Dunn* is distinguishable from this case because in the current matter, there were investigations conducted by the Metropolitan Police Department and the Child and Family Services Agency. Thus, Employee's argument lacks merit.

As for Employee's enforced leave argument, the AJ correctly held that the enforced leave action is separate from the termination action. The current matter involves Employee's termination action. Therefore, neither the AJ, nor this Board, can address the merits of the enforced leave claim because it is not properly before us.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

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Sheree L. Price, Interim Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. 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.