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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
JOHNNY TUCKER)	OEA Matter No. J-0004-09
Employee)	
)	Date of Issuance: March 26, 2009
v.)	
)	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA PUBLIC SCHOOLS)	Administrative Judge
Agency)	
_____)	

Johnny Tucker, Employee
Bobbie Hoye, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Employee filed a petition with the Office of Employee Appeals (OEA) on October 16, 2008, appealing Agency's final decision to remove him from his position as a custodian, effective August 21, 2008.

This matter was assigned to me on or about January 9, 2009. In his petition, Employee contended that he did not receive the final decision until September 20, 2008, i.e., that it was sent to an address from which he had moved months earlier. Since the issue of timeliness had to be resolved before the matter could proceed, I issued an Order on January 13, 2009 directing the parties to submit written argument on the issue of timeliness by February 6, 2009 and to appear at OEA at 9:30 a.m. on February 23, 2009 to present oral argument. In the Order, I notified the parties that failure to comply with the Order in a timely manner would result in the dismissal of the petition. Written arguments were filed by the parties, although Employee's response was not filed until February 12, 2009. Employee did not appear for oral argument on February 23rd and did not contact me or anyone at OEA to request a continuance. Agency representative was present and was dismissed after approximately 50 minutes.

On February 23, 2009, I issued an Order directing Employee to show cause, in writing, why the matter should not be dismissed for his failure to prosecute his appeal by failing to attend the February 23rd proceeding. Employee was directed to submit his response by no later than 4:00 p.m.

on March 6, 2009. He did not do so and did not contact me. In that Order, the parties were notified that unless they were advised to the contrary, the record in this matter would close on March 6, 2009. The record closed at 4:15 p.m. on March 6, 2009.

JURISDICTION

The jurisdiction of this Office was not established.

ISSUE

Should this petition be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

In accordance with OEA Rule 622.3, 46 D.C. Reg. 9313 (1999), this Office has long maintained that a petition for appeal may be dismissed with prejudice when an employee fails to prosecute his or her appeal. In this matter, Employee failed to attend a scheduled proceeding pursuant to the January 13th Order, and failed to file a written submission in response the February 23rd Order. *See, e.g., Employee v. Agency*, OEA Matter No.1602-0078-83, 32 D.C. Reg. 1244 (1985). Employee was notified in both Orders that his failure to comply with these Orders could result in the dismissal of his appeal. Employee did not appear at the proceeding on February 23, 2009 and did not respond to the Order issued on that day directing him to show cause why the matter should not be dismissed for failure to prosecute. He did not contact the Office or me to request an extension or seek a continuance.¹ Therefore, I conclude that Employee failed to prosecute his appeal, and that the petition should be dismissed for that reason.

There is another basis for dismissing the appeal. It is undisputed that Employee filed his petition beyond the 30 days permitted by D.C. Official Code §1-606.03 (a) (2001) and this Office's Rules. OEA RULE 604.2, 46 D.C. REG. AT 9299 REQUIRES THAT AN APPEAL BE FILED "WITHIN THIRTY (30) DAYS OF THE EFFECTIVE DATE OF THE APPEALED AGENCY ACTION".

BOTH THE DISTRICT OF COLUMBIA COURT OF APPEALS AND THIS BOARD HAVE CONSISTENTLY CONCLUDED THAT THE STATUTORY 30 DAY TIME LIMIT IS MANDATORY AND JURISDICTIONAL IN NATURE. *SEE, E.G., KING V. DEPARTMENT OF CORRECTIONS*, OEA MATTER NO. T-0031-01, *OPINION AND ORDER ON PETITION FOR REVIEW* (OCTOBER 16, 2002), _____ D.C. REG. _____ (), *DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD V. DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT*, 593 A.2D 641 (D.C. 1991) AND *THOMAS V. DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES*, 490 A.2D 1162

¹ I am not including the fact that Employee's submission in response to the January 13th Order was filed six day past the deadline. This late filing would have been discussed at the February 23rd proceeding to determine if it would have been included in the record, but would not be a basis for dismissing the petition.

(D.C. 1985).

Pursuant to OEA Rule 629.2, 46 D.C. Reg. 9317 (1999), the employee who files the appeal has the “burden of proof as to issues of jurisdiction, including timeliness of filing”. According to OEA Rule 629.1, *id*, the burden must be met by a “preponderance of the evidence” which is defined as “[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”.

There are rare circumstances in which OEA will excuse a late filing. *See, e.g., MCLEOD V. D.C. PUBLIC SCHOOLS*, OEA MATTER NO. J-0024-00 (MAY 5, 2003), ____ D.C. REG. ____ (____). HOWEVER, THE BURDEN OF PROOF IS ON EMPLOYEE IN ALL ISSUES RELATING TO TIMELINESS, INCLUDING THE ISSUE OF WHETHER A LATE FILING SHOULD BE EXCUSED. THERE WAS INSUFFICIENT INFORMATION IN THE DOCUMENTS SUBMITTED FOR THE ADMINISTRATIVE JUDGE TO MAKE A DETERMINATION ON THE TIMELINESS ISSUE. FOR THAT REASON, SHE SCHEDULED ORAL ARGUMENT ON FEBRUARY 23, 2009. EMPLOYEE'S FAILURE TO ATTEND AND PRESENT ORAL ARGUMENT ON THAT DAY MEANT THAT HE DID NOT MEET HIS BURDEN OF PROOF ON THE ISSUE OF TIMELINESS. THE ADMINISTRATIVE JUDGE THEREFORE CONCLUDES THE APPEAL MAY BE DISMISSED AS UNTIMELY AS WELL AS FOR FAILURE TO PROSECUTE.

ORDER

It is hereby ORDERED that the petition for appeal is DISMISSED.

FOR THE OFFICE:

LOIS HOCHHAUSER, ESQ.
Administrative Judge