

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. 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:)	
)	
BRYAN JOHNSON,)	OEA Matter No. J-0276-10
Employee)	
)	Date of Issuance: August 22, 2011
)	
)	
OFFICE OF THE CHIEF MEDICAL)	
EXAMINER,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Bryan Johnson (“Employee”) worked as an autopsy assistant with the Office of the Chief Medical Examiner (“Agency”). On July 9, 2009, Agency issued a final notice of summary removal of Employee from his position. According to Agency, Employee committed an on-duty and employment-related act that he knew or should have reasonably known violated the law; an on-duty and employment-related act that interfered with the efficiency and integrity of government operations, to include malfeasance; and an act which constitutes a criminal offense

whether or not the act resulted in a conviction.¹

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on February 22, 2010. He argued that although his appeal was clearly filed after the deadline, it should be considered because Agency’s summary decision did not inform him of his appeal rights to OEA and because his previous attorney wrongly instructed him not to respond to Agency’s decision to remove him. Subsequently, Employee requested that he be reinstated to his position and receive back pay, benefits, and attorney’s fees.²

On March 30, 2010, Agency filed a Motion to Dismiss Employee’s case on the basis of lack of jurisdiction. It stated that Employee was advised of his right to appeal to OEA; he was provided documents consistent with filing an appeal with the office; and he was informed that he could, alternatively, file a grievance through his union. Agency contended that despite the notice and documents it provided, Employee chose to ignore the information and failed to file a timely appeal. Agency asserted that it was Employee’s legal strategy to forego all administrative remedies in favor of suing the District government in court. As a consequence of his untimely filing, Agency requested that the matter be dismissed.³

On April 1, 2010, the OEA Administrative Judge issued his Initial Decision. He found that the deadline to file an appeal with OEA is mandatory in nature and cannot be waived. He held that Agency provided Employee with the proper appeal rights notification and that

¹ Employee was arrested and charged with simple assault and possession of a knife after he had a verbal altercation and subsequently attacked a co-worker with a knife. *Agency’s Motion to Dismiss for Lack of Jurisdiction*, Exhibits #4 and 5 (March 30, 2010).

² *Petition for Appeal*, p. 3, 5 (February 22, 2010).

³ It should be noted that Agency provided that it considered the *Douglas Factors* before removing Employee. It counseled Employee and changed his detail to help assist with many workplace issues. However, when Employee became violent with the staff and made threats, Agency felt that it had no choice but to remove Employee because he was endangering the lives of other employees with his escalating workplace violence and ultimately threatened the integrity of government operations. *Agency’s Motion to Dismiss for Lack of Jurisdiction*, p. 1-3, 5-6 (March 30, 2010).

Employee conceded that he received the information. Accordingly, the AJ dismissed the appeal.⁴

Employee disagreed with the AJ's Initial Decision and filed a Petition for Review on May 7, 2010. He chose to focus on the fact that Agency filed its response to his Petition for Appeal late. Employee contends that Agency's answer was due on March 29, 2010. However, it was not filed until March 30th. He also provided that Agency did not timely file its response with him because he received his copy on April 2nd, the day after the AJ issued his Initial Decision. Thus, because he was not afforded an opportunity to respond to Agency's Motion to Dismiss, Employee requested that the Board reverse the Initial Decision.⁵

D.C. Official Code § 1-606.03 provides that

“An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more (pursuant to subchapter XXIV of this chapter), or a reduction-in-force (pursuant to subchapter XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.”

Moreover, OEA Rule 604.2 provides that “an appeal filed pursuant to Rule 604.1 must be filed within thirty (30) days of the effective date of the appealed agency action.” Therefore, Employee's appeal should have been filed within 30 days of July 9, 2009, his effective date of termination. However, it was not filed until February 22, 2010, which was seven and one-half months after the effective date.

⁴ *Initial Decision* (April 1, 2010).

⁵ *Employee's Petition for Review*, p. 1-3 (May 7, 2010).

Employee concedes in his Petition for Appeal that it was filed untimely because he relied on incorrect information allegedly given by his representative. If true, it is unfortunate that Employee decided to follow his attorney's advice. However, OEA and the D.C. Court of Appeals have consistently held that time limits for filing appeals are mandatory in nature.⁶ In accordance with OEA Rule 629.2, Employee has the burden of proving issues of jurisdiction including the timeliness of his filing. Because Employee failed to prove that his petition was timely filed with OEA, we must dismiss his case.

Assuming that Employee's Petition for Appeal was timely filed, he argued that the AJ should have entered a default judgment against Agency because its response was filed one day past the deadline. As Employee presented, OEA Rule 608.2 provides that "the office shall promptly send a copy of the petition for appeal to the agency, and the agency shall file an answer within thirty (30) calendar days of service of the petition for appeal." Additionally, OEA Rule 610.3 states that "failure by the agency to file an answer within the time limit set forth in Rule 608.2 shall constitute a default, and the Administrative Judge *may*, without further notice, render an appropriate decision" [Emphasis added]. Thus according to OEA Rule 610.3, the AJ was within his discretion to render a decision he considered appropriate. The AJ decided to issue a decision on the lack of OEA's jurisdiction despite Agency's untimely filing.

Despite Agency's filing a day late, Employee failed to establish OEA's jurisdiction to

⁶ *Alfred Gurley v. D.C. Public Schools*, OEA Matter No. 1601-0008-05, *Opinion and Order on Petition for Review* (April 14, 2008) citing *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991) and *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162, 1164 (D.C. 1985); *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); and *Annie Keitt v. D.C. Public Schools, Department of Transportation*, OEA Matter No. J-0082-09, *Opinion and Order on Petition for Review* (January 26, 2011).

consider this matter on its merits. Essentially, Employee is requesting the Board to reverse the AJ's decision which would require it to ignore his severely untimely filing of his Petition for Appeal because Agency filed its response one day late. This argument is contradictory on its face, and this Board does not consider it a legitimate basis to overturn precedent that appeals be filed within thirty days after the effective date of Agency's final notice. Accordingly, Employee's Petition for Review is dismissed.

ORDER

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

FOR THE BOARD:

Clarence Labor, Chair

Barbara D. Morgan

Richard F. Johns

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.