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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

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| _____ |) | |
| In the Matter of: |) | |
| |) | |
| JUSTIN SCALES, |) | |
| Employee |) | OEA Matter No. 1601-0016-15 |
| |) | |
| v. |) | |
| |) | Date of Issuance: June 21, 2016 |
| D.C. FIRE AND EMERGENCY |) | |
| MEDICAL SERVICES, |) | |
| Agency |) | |
| _____ |) | |

OPINION AND ORDER
ON
PETITION FOR REVIEW

Justin Scales (“Employee”) worked as a Firefighter/EMT with D.C. Fire and Emergency Medical Services (“Agency”). Agency terminated Employee from his position for failing to adhere to the D.C. Fire and EMS Order Book, Article XI, Part II, Section 1.1/b. This section requires all firefighters who wish to be placed on sick leave to report to the Police and Fire Clinic (“PFC”) between 7:00 and 8:30 a.m. Additionally, Employee was charged with unauthorized absences of ten days or more, a violation of D.C. Fire and EMS Order Book Article VII, Section 2(f)(1). Specifically, Agency asserted that Employee failed to report for duty for eleven consecutive tours of duty. The effective date of Employee’s removal was October 11, 2014.¹

On November 14, 2014, Employee filed a Petition for Appeal with the Office of

¹ *Agency’s Motion to Dismiss*, p. 11-24 (November 24, 2014).

Employee Appeals (“OEA”). He argued that he followed the procedure to report sick leave, but he was denied entry to the PFC. Employee contended that he was only absent without leave (“AWOL”) for two tours of duty. Therefore, he filed an appeal with OEA to ensure fairness.²

Agency filed a Motion to Dismiss Employee’s appeal because it was untimely filed. Agency stated that in accordance with D.C. Official Code § 1-606.03(a) and D.C. Municipal Regulation (“DCMR”) § 604.2, Employee’s appeal should have been filed by November 10, 2014. However, the appeal was not filed until November 14, 2014. Therefore, Agency requested that Employee’s appeal be dismissed.³

On December 5, 2014, the OEA Administrative Judge (“AJ”) asked the parties to file briefs on whether Employee’s appeal should be dismissed due to his untimely filing. In Employee’s brief, he explained that he learned of his termination on October 12, 2014. However, he did not receive official notice of the termination action until October 15, 2014. Therefore, he believed his appeal was filed in a timely manner.⁴

Agency posited that by Employee’s own admission, he was aware of his termination and received notice on October 15, 2014. Thus according to Agency, Employee was fully aware that his effective date of termination was October 11, 2014, and he had thirty days from that date to file an appeal with OEA. However, Employee elected to wait until beyond the thirty-day period to file his appeal. Consequently, it argued that OEA lacks jurisdiction to consider the merits of his case. Therefore, Agency, again, requested that the appeal be dismissed.⁵

The AJ issued her Initial Decision on January 20, 2015. She held that the time limit for filing an appeal with an administrative adjudicatory agency is mandatory and jurisdictional in

² *Petition for Appeal*, p. 2 (November 14, 2014).

³ *Agency’s Motion to Dismiss*, p. 2-3 (November 24, 2014).

⁴ *Employee’s Brief* (December 19, 2014).

⁵ *Agency’s Response to Employee’s Brief on Jurisdiction*, p. 3-4 (January 7, 2015).

nature. The AJ ruled that Agency gave Employee proper notice of his termination and appeal rights to OEA. However, he did not file his petition until more than thirty days after the jurisdictional deadline. Accordingly, the AJ reasoned that OEA lacked jurisdiction to consider the merits of Employee's appeal and dismissed the case.⁶

On February 25, 2015, Employee filed a Petition for Review with the OEA Board. He states that “. . . the effective date of my termination was October 11, 2014. The Agency's final decision stated I had the right to appeal my termination to the [O]ffice of [E]mployee [A]ppeals within 30 days of the effective date of termination. This is not up for dispute.” However, he claims that Agency failed to provide him with adequate notice of its final decision. Employee asserts that Agency should have provided his notice of removal within three days in accordance with District Personnel Regulation (“DPR”) § 1614.4. He explains that he was informed that he was terminated on October 12, 2014, when he reported to duty, but he did not receive a copy of Agency's final decision until October 15, 2014. Therefore, he requests that the Board reverse the Initial Decision.⁷

Agency filed its response to Employee's Petition for Review on March 18, 2015. It argues that similarly to his untimely filed Petition for Appeal, Employee's Petition for Review was also untimely filed. Agency opines that in accordance with D.C. Official Code § 1-606.03(c), the AJ's Initial Decision became final on February 24, 2015. Therefore, Employee's petition was untimely. Agency contends that the Board does not have the authority to waive the filing requirement. Hence, it requests that Employee's Petition for Review be dismissed.⁸

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

⁶ *Initial Decision*, p. 2-3 (January 20, 2015).

⁷ *Petition for Review* (February 25, 2015).

⁸ *Agency's Response to Employee's Petition for Review* (March 18, 2015).

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 filing appeals with administrative adjudicative agencies, as with courts, are mandatory and jurisdictional matters.”⁹ Therefore, OEA has consistently held that the filing requirement for Petitions for Review is mandatory in nature.¹⁰

In the current case, the Initial Decision was issued on January 20, 2015. Employee did not file his Petition for Review until February 25, 2015. As Agency presented, this is past the thirty-five day deadline. Because the statute is mandatory, this Board does not have the authority to waive the requirement.

Assuming that we could consider the merits of Employee’s claim, Employee’s petition would still have been denied because his Petition for Appeal was not filed within a timely manner. As the AJ provided, D.C. Official Code § 1-606.03(a) states that “. . . [a]ny appeal shall be filed within 30 days of the effective date of the appealed agency action.” Furthermore, Employee states in his Petition for Review that it is undisputed that the effective date of his

⁹ 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)).

¹⁰ *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); *Dametrious 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).

termination was October 11, 2014, and he had thirty days to appeal his case to OEA. Therefore, he was aware of the appeal procedure and chose not to adhere to the deadline. As a result, Employee's Petition for Review is dismissed.

ORDER

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

FOR THE BOARD:

Sheree L. Price, Interim Chair

Vera M. Abbott

A. Gilbert Douglass

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.