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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)

PAUL DAME,)
Employee)

OEA Matter No. 1601-0043-03

Date of Issuance: February 27, 2007

D.C. DEPARTMENT OF CORRECTIONS,)
Agency)

OPINION AND ORDER
ON
PETITION FOR REVIEW

Paul Dame (“Employee”) worked as a Computer Specialist at the Department of Corrections (“Agency”) for twenty-three years before being terminated. On September 2, 1999, Employee entered a guilty plea to an Internet Child Abuse felony charge in Anne Arundel County. Agency then provided Employee with a notice of Summary Removal on November 4, 1999. The notice provided that he was being summarily removed from his position within Agency for “other conduct during and outside of duty hours which would effect adversely the [E]mployee’s or the [A]gency’s ability to perform effectively.”¹

¹ Employee’s Response to Letter from OEA Administrative Assistant, p. 5-6 (November 6, 2003).

It was not until March 21, 2003, that Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”). He alleged in his petition that he never received Agency’s final decision. As a result, he was unaware of his appeal rights until he met with an attorney on February 21, 2003.²

The Administrative Assistant from OEA issued a notice to Employee requesting a copy of Agency’s final decision to establish this Office’s jurisdiction in his case. The notice gave Employee until October 24, 2003, to provide the decision. The notice went on to state that if Employee did not provide a copy of the decision, then his appeal may be dismissed for lack of jurisdiction.³

On October 16, 2003, Employee provided a copy of his Personnel Form 1 and a letter stating that he never received a copy of Agency’s final decision. The letter went on to note that Agency should be required to produce this document. Employee also attached a copy of Agency’s Summary Notice of Termination.⁴

The Administrative Judge (“AJ”) issued an Initial Decision on November 4, 2003. The AJ dismissed the case because Employee failed to respond to the letter from the Administrative Assistant requesting a copy of Agency’s final decision.⁵ Employee then filed a Petition for Review with OEA arguing that he did provide a response to the Administrative Assistant’s request. He provided a copy of his response and the returned receipt signed by a staff member at OEA.⁶

On January 14, 2004, OEA’s Board issued an Opinion and Order. It provided that

² *Petition for Appeal*, p. 4 (March 21, 2003).

³ *Letter from OEA Administrative Assistant*, p. 1-2 (October 14, 2003).

⁴ *Employee’s Response to Letter from OEA Administrative Assistant* (November 6, 2003).

⁵ *Initial Decision*, p. 2 (November 4, 2003).

⁶ *Employee’s Petition for Review* (November 10, 2003).

Employee filed a timely statement in response to the Administrative Assistant's request. It was later determined that the letter was not placed in the file before the AJ rendered his decision. Therefore, because of Employee's timely submission, the case was remanded to the AJ for further consideration.⁷

The AJ then convened a Pre-hearing Conference. Shortly after the conference, Agency submitted a Motion to Dismiss Employee's Petition for Appeal on the grounds that it was filed untimely. Agency alleged that it issued a final notice of decision to Employee on January 6, 2000. According to Agency, the notice was mailed to Employee on January 12, 2000.⁸ Therefore, he had until February 14, 2000, to file a Petition for Appeal. However, his appeal was not filed until over three years later on March 21, 2003. Therefore, Agency believed that his appeal should be dismissed because he did not file it within the requisite thirty-day time frame.⁹

On October 13, 2004, Employee filed a response to Agency's Motion to Dismiss. He argued that his arrest in no way impeded his abilities to perform his job duties. He again asserted that he did not receive a copy of Agency's final decision, nor did they make him aware of his true appeal rights. Employee provided that his appeals rights did not begin until Agency informed him of such rights.¹⁰ He also stated that he exercised due diligence when he called Agency to inquire if the notice of its final decision was mailed to him.¹¹

The AJ then issued an Addendum Decision on Remand. He found that due to

⁷ *Opinion and Order*, p. 1-2 (January 14, 2004).

⁸ Agency provided that it attempted to serve its final decision on Employee, but the notice was returned to sender unclaimed.

⁹ *Agency's Motion to Dismiss Employee's Petition for Appeal on the Grounds of Untimely Filing* (January 22, 2004).

¹⁰ *Employee's Opposition to Agency's Motion*, p. 8 (October 13, 2004).

¹¹ When Employee returned for a trip, he found notices in his post office box that a letter was returned to sender because he did not pick it up. He called Agency to determine if it was a copy of its final decision. The Agency representative could not tell Employee definitively, but he said that if the letter was returned it would have come back to that particular office. *Employee's Opposition to Agency's Motion*, p. 3-4 (October 13, 2004).

Employee's untimely filing of his Petition for Appeal, OEA lacked jurisdiction to adjudicate this matter. The AJ provided that Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, outlined the statutory time limit of thirty days to file an appeal with OEA. Additionally, he noted that the D.C. Court of Appeals held that the time limit is mandatory and jurisdictional in nature. The AJ found that Employee simply failed to prove that this Office had jurisdiction over his case. He also held that Employee improperly placed the blame on everyone else for his failure to comply with the mandatory filing. Consequently, Employee's Petition for Appeal was dismissed.¹²

Employee disagreed with the AJ's decision and filed another Petition for Review with the OEA Board on November 18, 2004.¹³ Employee raised the same arguments as previously outlined. Agency responded on December 4, 2004, with the same arguments that it previously asserted. Agency also presented some arguments on the merits of the case that were not raised before the AJ.¹⁴

According to OEA Rule 629.2, "the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." To establish this Office's jurisdiction, it is essential for an employee to possess a copy of agency's final decision. Without this decision, the adverse action against employee is still pending and awaiting agency's final review for purposes of OEA adjudicating the matter. The importance of the final decision is outlined in the OEA Rule 604.1. This rule specifically provides that a final agency decision is required for this Office

¹² *Addendum Decision on Remand*, p. 5-8 (October 14, 2004).

¹³ *Employee's Petition for Review* (November 18, 2004).

¹⁴ *Agency's Opposition to Employee's Petition for Review* (December 3, 2004).

to consider the appeal.¹⁵ Therefore, it is critical that agencies deliver a copy of its final decision to employees.

The statutory time requirement for an employee to appeal an agency's decision is outlined in both the OEA Rules and the D.C. Official Code. According to OEA Rule 604.2 and D.C. Official Code §1-606.03(a), an appeal shall be filed within thirty days of the effective date of the appealed agency action. The regulations do not offer any exceptions to this particular rule. However, the D.C. Court of Appeals and OEA have consistently held that an agency cannot benefit from the jurisdictional bar when it fails to give an employee adequate notice of its decision and afford them the right to appeal the decision.¹⁶

An agency's final decision not only outlines the penalty imposed on the employee, but it also offers notice of an employee's appeal rights. D.C. Official Code § 1-606.04(e) provides that "the personnel authority shall provide the employee with a written decision following the review . . . and shall advise each employee of his or her right to appeal to the Office as provided in this subchapter." Furthermore, OEA Rule 605.1 provides the required elements that an agency should include in its final decision. The regulation provides that:

¹⁵ The regulation provides that:

"effective October 21, 1998, . . . any District of Columbia government employee may appeal a *[final]* agency decision affecting:

- (a) a performance rating which results in removal or the employee;
- (b) an adverse action for cause that results in removal, reduction in grade, or suspension for ten (10) days or more; or
- (c) a reduction-in-force"

¹⁶ *Bailey v. District of Columbia Department of Employment Services*, 499 A.2d 1223 (D.C. 1985); *Plouffe v. District of Columbia Department of Employment Services*, 497 A.2d 464 (D.C. 1985); *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162 (D.C. 1985); *Hammond v. District of Columbia Department of Human Services*, OEA Matter No. 1601-0080-88, Opinion and Order on Petition for Review (May 22, 1998) ___ D.C. Reg. ___ ().

“when an agency issues a final decision to an employee on a matter appealable to the Office, the agency shall at the same time provide the employee with:

- (a) notice of the employee’s right to appeal to the Office;
- (b) a copy of the rules of the Office;
- (c) a copy of the appeal form of the Office;
- (d) notice of applicable rights to appeal under a negotiated review procedure; and
- (e) notice of the right to representation by a lawyer or other representative authorized by the rules.”

Hence, the responsibility lies squarely on the shoulders of the agency to provide such notice. There are no rules or regulations that place the burden of obtaining a copy of the final agency decision on the employee. Therefore, a prerequisite to an employee proving jurisdiction is the agency’s obligation to provide him with its final decision and the requirements for appealing its decision.

In this case, despite its failed attempt, Agency never provided Employee with a copy of its final decision. When Employee received a copy of the postal receipts in his box, he called an Agency representative to determine if a copy of the final decision was returned to it. Employee did not have an obligation to do this. As it was determined in *McLoed v. D.C. Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003), an agency may not benefit from the thirty-day jurisdictional bar when it failed to provide an employee with a copy of its final decision. In this case, it would not have been unreasonable for Agency to have attempted delivery of its final decision again once it realized that the notice was returned.

Furthermore, it has been held that when determining whether an employee’s untimely filing should be excused, one should consider if he promptly filed an appeal upon learning of his

right to do so.¹⁷ Employee filed his Petition for Appeal within thirty days of learning of his right to appeal and after receipt of his Personnel Form 1.¹⁸ Based on the aforementioned, Employee's Petition for Appeal was timely filed. Therefore, we grant his Petition for Review and remand the matter to the Administrative Judge to consider the issues on its merits and determine if Agency properly removed Employee from his position.

¹⁷ *Shiflett v. U.S. Postal Service*, 839 F.2d 669 (1988); *Gordy v. Merit Systems Protection Board*, 736 F.2d 1505 (1984); *Krizman v. U.S. Postal Service*, 66 M.S.P.R. 233 (1995).

¹⁸ There is nothing in the record that indicates that Employee ever received a copy of Agency's final decision prior to filing his Petition for Appeal.

ORDER

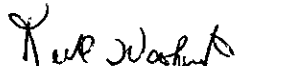
Accordingly, it is hereby **ORDERED** that Employee's Petition for
Review is **GRANTED**.

FOR THE BOARD:

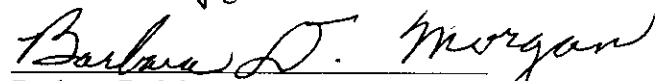


Brian Lederer, Chair

Horace Kreitzman



Keith E. Washington



Barbara D. Morgan

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.