

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:)	
)	
JAMES DAVIS)	OEA Matter No. 1601-0091-02
Employee)	
)	Date of Issuance: October 18, 2006
v.)	
)	
DEPARTMENT OF HUMAN SERVICES)	
Agency)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

James Davis (“Employee”) worked as a Youth Corrections Officer with the Department of Human Services (“Agency”) at Oak Hill Youth Center. On April 18, 2002, Employee received a letter from Agency informing him that he was terminated from his position within the Youth Services Administration (“YSA”) effective on April 30, 2002. The notice provided that Employee was terminated on the basis of negligence and malfeasance in the performance of his duties.

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on May 30, 2002, alleging that he was wrongfully terminated.¹ On November

¹ *Petition for Appeal*, p.3 (May 30, 2002).

5, 2003, Agency filed a response to Employee's Petition for Appeal. The response provided that Employee failed to protect a child ("KL") who was housed at the Oak Hill facility. It went on to provide that five youth were permitted to enter KL's room and inflict severe bodily injuries. Agency contended that Employee failed to accurately document in his report the events that occurred before, during, and after the altercation. Hence, it requested that OEA uphold its decision to terminate Employee.²

The Administrative Judge ("AJ") held three hearings on this matter where she heard from several witnesses presented by both parties.³ On August 25, 2004, the AJ issued an Initial Decision. She provided that Agency had the burden of proving by preponderance of the evidence that Employee committed the adverse action charges filed against him. The AJ held that Agency failed to meet its burden due in part to its inability to provide any eyewitnesses to corroborate its allegations.⁴

Consequently, the AJ relied heavily on witness credibility. She determined that after reviewing all of the evidence, it was possible to rule in favor of Agency and Employee. Relying on *Rule v. Bennett*, 219 A.2d 491 (D.C. 1966), the AJ found that if two conclusions can be inferred from the evidence produced at a hearing, she must conclude that neither can be proven, and the judgment must go against the party that has the burden of proof in the matter. Additionally, the AJ held that Employee's failure to complete his report of the incident was a *de minimus* violation of Agency's policy.

² *Agency's Response*, p. 1-4 (November 5, 2003).

³ The first hearing occurred on March 2, 2004. The next was held on April 9, 2004, and the last was May 4, 2004.

⁴ Agency provided a video tape to support its action against Employee, but the AJ found the video of little value because it did not clearly show the incident unfold.

Therefore, she ordered that Employee be reinstated to his position and reimbursed for pay and benefits lost as a result of his removal.

On September 30, 2004, Agency filed a Petition for Review with OEA. It provided that the AJ's determination was based on an erroneous interpretation of the D.C. Office of Personnel Regulation, and her decision was not based on substantial evidence. On October 22, 2004, Employee filed a response to Agency's Petition for Review. The response provided that Agency's Petition for Review was untimely filed and should, therefore, be dismissed.

Agency filed its Petition for Review on September 30, 2004. According to D.C. Official Code § 1-606.03(c) and OEA Rule 633.1, an Initial Decision becomes final thirty-five (35) calendar days after issuance. Therefore, a party wishing to file a Petition for Review must do so before the Initial Decision becomes final (OEA Rule 633.2).⁵ Furthermore, the District of Columbia Court of Appeals has held that the time limit for filing an appeal with an administrative adjudicatory agency, such as OEA, is mandatory and jurisdictional in nature.⁶ As a result of Agency's late filing, the OEA Board will not consider its Petition for Review. Accordingly, Agency's Petition for Review is **DENIED.**

⁵ Agency filed its Petition thirty-six (36) days after the Initial Decision was issued.

⁶ *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).

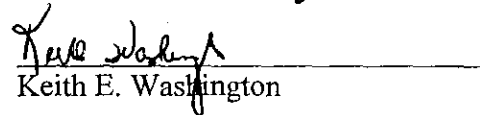
ORDER

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

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.