THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
SHERRES BAKER	OEA Matter No. 1601-0024-08
Employee	
	Date of Issuance: April 23, 2008
v.	
	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA PUBLIC SCHOOLS	Administrative Judge
Agency	

Stewart D. Fried, Esq., Employee Representative
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Employee filed a petition for appeal with the Office of Employee Appeals (OEA) on December 14, 2007, appealing Agency's final decision to remove her from her position as Call Center Manager, effective June 1, 2005. At the time of the adverse action, Employee was in permanent career status.

This matter was assigned to me on January 25, 2008. The prehearing conference took place on February 29, 2008. Mr. Fried was present. Ms. White was not present, but presented good cause for her absence. The parties represented that they were in settlement negotiations and they concurred on the facts, conclusions and remedies in this matter. They parties further agreed that an evidentiary hearing was not necessary. The record closed on April 23, 2008.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

ISSUES

Should this matter be dismissed as untimely? Did Agency meet its burden of proof in this matter?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

The parties concur on the pertinent facts in this matter. On or about January 10, 2006, Agency issued a Form 1 terminating Employee, effective June 1, 2005. Employee was not provided with a notice of removal or with information regarding her appeal rights to OEA at that time. Subsequently, she submitted a letter of resignation in February 2006, after which DCPS generated another Form 1. DCPS concedes that it did not adhere to the appropriate procedures in removing Employee from her position and that the letter of resignation submitted by Employee was invalid since DCPS had improperly removed her from her position prior to that time.

The first issue that must be addressed is one of timeliness. This appeal was filed well-beyond the time permitted by the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, which provides that an "appeal shall be filed [with this Office] within 30 days of the effective date of the appealed agency action". D.C. Official Code Section 1-606.03(a) (2001). The District of Columbia Court of Appeals has held that the time limit for filing an appeal with an administrative adjudicatory agency is mandatory and jurisdictional in nature. *See, e.g., 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 (D.C. 1985). This Board has consistently maintained that posture. *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.____ ( ).

This Office can only proceed with an appeal if it has jurisdiction. OEA Rule 604.2, 46 D.C. Reg. at 9299 states that an appeal must be filed "within thirty (30) days of the effective date of the appealed agency action". The only exception that this Board has established is that a late filing will be excused if an agency fails to provide the employee with "adequate notice of its decision and the right to contest the decision through an appeal". *McLeod v. District of Columbia Public Schools,* OEA Matter No. J-0024-00 (May 5, 2003), ____D.C. Reg. _____ ( ). The adequacy of the notice must be decided on a case-by-case basis. However, guidance is provided by Section 1614.1(d) of the District Personnel Manual which states:

> When the final decision results in an adverse action, the right to appeal to the Office of Employee Appeals as provided in Section 1619; and the notice shall have attached to it a copy of the OEA appeal form...

The parties agree that no Notice of Final Decision was issued when Agency issued the Form 1 on January 10, 2006. Therefore it is undisputed that Employee was not provided with any information regarding her appeal rights to OEA. The Administrative Judge concludes that Agency cannot establish its compliance with the notice requirements, and therefore Employee will be excused for the late filing of her petition.

With regard to the facts of the case, Agency is required to prove its case by a preponderance of evidence". OEA Rule 629.3, 46 D.C. Reg. 9317 (1999). "Preponderance" is defined as "that degree of relevant evidence which the reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue". OEA Rule 629.1, 46 D.C. Reg. 9317 (1999). Agency did not present any evidence to support its decision to remove Employee from her position. It has, in fact, agreed with Employee, that it acted improperly by terminating her in the matter that it did, and further, it has agreed that her letter of resignation, under the circumstances, is invalid. The Administrative Judge concludes that Agency did not meet its burden of proof and that its actions should be reversed. [1]

ORDER

It is hereby

ORDERED:

1. Agency's decision is to remove Employee from her position is reversed.

2. Agency is directed to reinstate Employee, issue her the back pay to which she is entitled and restore any benefits she lost as a result of the removal no later than thirty (30) calendar days from the date of issuance of this Decision. Employee's reinstatement shall be without a break in her employment service or status and all documents related to her removal, including any letters of resignation submitted by Employee, shall be removed from her official personnel file.

3. Agency is directed to document its compliance no later than forty (40) calendar days from the date of issuance of this Decision.

FOR THE OFFICE: _____
LOIS HOCHHAUSER, ESQ.
Administrative Judge

[1] In view of the outcome of this matter, Employee's Motion for Summary Disposition is hereby dismissed as moot.