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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
LORETTA PROCTOR)	OEA Matter No. 1601-0275-09
Employee)	
v.)	Date of Issuance: May 16, 2011
)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS)	Lois Hochhauser, Esq.
Agency)	Administrative Judge
)	
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Ms. Loretta Proctor, Employee, <i>Pro Se</i> ¹		
Bobbie Hoye, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Loretta Proctor, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on September 15, 2009, appealing the decision of the District of Columbia Public Schools, Agency herein, to terminate her employment, effective August 15, 2009. At the time of separation, Employee was a permanent employee in the educational service.

This matter was assigned to me on March 7, 2011. On that date, I issued an Order scheduling a prehearing conference for March 30, 2011. At the prehearing conference, Agency maintained, as argued in its Answer to Employee's Petition for Appeal, that the matter should be dismissed as untimely. The parties presented oral argument on that issue. A hearing date was tentatively scheduled, and the parties were advised that the Administrative Judge would review the timeliness issue in advance of the hearing date, and that if she determined that the petition was untimely filed, the matter would be dismissed. The record in this matter is hereby closed.

¹ In her petition for appeal, Employee listed a representative and that individual was served with the notice of the prehearing conference. However, at the prehearing conference, Employee stated that she did not have a representative and was proceeding *pro se*.

JURISDICTION

The jurisdiction of this Office was not established.

ISSUE

Did Employee meet her burden of proof on the issue of jurisdiction?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999) states that the employee filing an appeal with this Office has the “burden of proof as to issues of jurisdiction.” The time limit for filing an appeal is jurisdictional and thus Employee carries the burden of proof on this issue. *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.____(). The District of Columbia Court of Appeals held that the time limit for filing an appeal with an administrative adjudicatory agency such as OEA is mandatory and jurisdictional. *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).

The Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124 provides a statutory time limit for filing an appeal with this Office. An “appeal shall be filed within 30 days of the effective date of the appealed agency action.” D.C. Official Code §1-606.03 (a) (2001). OEA Rule 604.2, 46 D.C. Reg. at 9299 contains this requirement, stating that an appeal must be filed “within thirty (30) days of the effective date of the appealed agency action.” The manner in which this time limitation is calculated is provided in OEA Rule 603.1, 46 D.C. Reg. at 9298:

In the computation of time periods which involve calendar days, the first day counted shall be the next calendar day following the day the event occurs from which the time period begins to run. For calendar days, if the last day of the time period is a Saturday, Sunday, or legal holiday, the time period shall be extended to the end of the next business day.

According to the final Agency notice, the effective date of removal was August 15, 2009. Employee filed her petition with OEA on September 15, 2009. Using the calculations required by OEA Rule 603.1, cited above, the last day permitted for filing the petition for appeal was September 14, 2009. There are rare instances when the Board has excused a late filing. For example, the Board has accepted jurisdiction of an untimely petition for appeal where the agency failed to provide an employee with “adequate notice of its decision and the right to contest the decision through an appeal”. *McLeod v. D.C. Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003), ___D.C.

Reg. _____ (). However this matter does not fall within any exception. The final Agency notice provided Employee with the pertinent information about the deadline for filing a petition with OEA.

The calculation of the filing requirement begins the day after the effective date of the adverse action, even if it is on a weekend; and end on the 30th day, unless it is a weekend. Employee erred in calculating the deadline for filing, and although the delay is *de minimis*, when a requirement is mandatory and jurisdictional it is not judged by that standard. An untimely petition must be dismissed, whether it is untimely by one day or one year. Employee did not offer any argument or information as to why the petition was timely or why the appeal should proceed despite the lack of timely filing.

Timeliness is a jurisdictional issue for which Employee carries the burden of proof. According to OEA Rule 629.1, this burden must be met by a “preponderance of the evidence” which is defined as the “degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.” Employee failed to meet her burden of proof. Therefore, this appeal should be dismissed.

ORDER

It is hereby ORDERED that the petition for appeal is DISMISSED.

FOR THE OFFICE:

LOIS HOCHHAUSER, ESQ.
Administrative Judge