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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

| | | |
|--|---|---------------------------------|
| _____ |) | |
| In the Matter of: |) | |
| |) | |
| CASSANDRA COSBY |) | OEA Matter No. 1601-0301-10 |
| Employee |) | |
| |) | Date of Issuance: July 13, 2010 |
| v. |) | |
| |) | Lois Hochhauser, Esq. |
| D.C. DEPARTMENT OF CONSUMER AND |) | Administrative Judge |
| REGULATORY AFFAIRS |) | |
| Agency |) | |
| _____ |) | |
| Stephen White, Esq., Employee Representative | | |
| Charles Thomas, Esq., Agency Representative | | |

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Cassandra Cosby, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on April 29, 2010, appealing the decision of the D.C. Department of Consumer and Regulatory Affairs, Agency herein, to terminate her employment for cause, effective, March 19, 2010. At the time of separation, Employee was a permanent employee with career status.

This matter was assigned to me on June 11, 2010. On June 14, 2010, I issued an Order notifying Employee that the jurisdiction of this Office was at issue because her petition had not been filed in a timely manner. I directed that she present legal and/or factual arguments on this issue by June 30, 2010. She was notified that if she failed to respond in a timely manner, the petition could be dismissed without further notice. The parties were also advised that unless they were notified to the contrary, the record in this matter would close on June 30, 2010. Employee did not respond, and the record was closed on June 30, 2010.

JURISDICTION

The jurisdiction of this Office was not established.

ISSUE

Did Employee meet her burden of proof on the issue of jurisdiction? Should this petition be dismissed?

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”. 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.

The time limit for filing an appeal is mandatory and jurisdictional and thus Employee carries the burden of proof on this issue. 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”.

This Board has consistently concluded that the statutory 30 day time limit is mandatory and jurisdictional in nature. *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 has upheld the Board’s position, stating 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).

According to the final Agency notice, the effective date of removal was March 19, 2010. However, Employee filed her petition with OEA on April 29, 2010, well beyond the 30 day time limit. There are rare instances when the Board has excused a late filing. For example, the Board may accept jurisdiction if an agency fails 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. ____ (). In this matter, the final Agency notice provided Employee with the pertinent information about filing a petition with OEA, including the 30 day time period.

In sum, 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. She failed to meet her

burden of proof on this issue of jurisdiction. Therefore, this appeal should be dismissed.

There is another basis for dismissing the appeal. Pursuant to OEA Rule 622.3, 46 D.C. Reg. 9313 (1999), this Office has long maintained that a petition for appeal may be dismissed with prejudice when an employee fails to prosecute his or her appeal. The Rule provides that failure to prosecute includes failure to “[s]ubmit required documents after being provided with a deadline for such submission.” *See, e.g., Employee v. Agency*, OEA Matter No.1602-0078-83, 32 D.C. Reg. 1244 (1985). Employee failed to respond to the June 14, 2010 Order, despite being notified that the appeal would be dismissed if she did not respond to the Order. Employee’s failure to prosecute her appeal provides another basis for dismissing this petition for appeal.

ORDER

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

FOR THE OFFICE:

LOIS HOCHHAUSER, ESQ.
Administrative Judge