

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Administrative Assistant 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:)	
)	
KEVIN L. DENNIS)	
Employee)	
)	OEA Matter No. 2401-0177-95P03
)	
v.)	Date of Issuance: September 17, 2003
)	
D.C. GENERAL HOSPITAL)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee, a Health Systems Administrator, was involuntarily separated from his position as the result of a reduction-in-force effective May 3, 1995. Employee filed a timely appeal of that action after which this Office's Administrative Assistant requested that Agency respond to the appeal. Agency failed to respond to that request. Thereafter, the appeal was assigned to an Administrative Judge. On February 19, 1997, the Administrative Judge ordered

Agency to file a response to Employee's Petition for Appeal. In the order, the Administrative Judge cautioned Agency that failure to respond could result in sanctions. Agency's response was due by March 14, 1997. Again, Agency failed to comply with the order. Therefore, by order dated June 30, 1997, the Administrative Judge closed the record and informed Agency that they would not be allowed to make any submissions to the record.

An Initial Decision was issued March 27, 1998. In it the Administrative Judge found that not only had Agency failed to respond to Employee's petition for appeal and to the February 19, 1997 Order, but that Agency had also failed to respond to Employee's discovery requests. Concluding that Agency had failed to prosecute this appeal, the Administrative Judge construed "Agency's inaction as an indication that Agency [did] not contest Employee's allegations." *Initial Decision* at 3. Thus, the Administrative Judge reversed Agency's action and ordered Agency to restore to Employee all pay and benefits lost as a result of its action and, further, to file with this Office within 30 days documentation indicating that Agency had complied with the order. Agency did not file a Petition for Review. Thus, according to OEA Rule 633.1, 46 D.C. Reg. 9319, the Initial Decision became final on May 1, 1998.

Employee subsequently filed a Petition for Enforcement on August 24, 2000. On February 20, 2001 the Administrative Judge ordered Agency to respond to Employee's motion for compliance. Agency responded on April 9, 2001.¹ In its response Agency argued that

¹ Even though the Administrative Judge accepted Agency's response, we note that according to OEA Rule 636.3, an "agency shall have fifteen (15) business days to respond to [an] employee's motion [for enforcement]."

nearly three months after Employee was separated from District service, Employee accepted term appointments with another District agency and subsequently, a permanent appointment with Agency. Therefore, according to Agency, Employee “waived the benefits he was accorded in the [Initial Decision].” *Agency’s Response to Order for Agency’s Response to Employee’s Motion for Compliance* at 1.

Thereafter, on June 6, 2001, the Administrative Judge issued an Addendum Decision on Compliance. Addressing Agency’s arguments made in its response to the petition for enforcement, the Administrative Judge stated the following:

The mere fact that an employee obtains other employment [regardless of whether such employment is with the District Government or private industry] is only an indication that the employee needs to earn a living. Obtaining employment after being separated from service due to a reduction-in-force does not constitute a waiver of relief. Nor does the fact that an employee is promoted, while waiting for the agency to comply with an Initial Decision, constitute a waiver.

Addendum Decision on Compliance at 6.

Further, the Administrative Judge went on to state that “[t]his is not an instance where the Agency prepared the necessary documents, computed Employee’s back pay and benefits, and contacted Employee to inform him that he was to be reinstated to a specific position. If Agency had taken [these] steps and Employee had declined to be reinstated to a specific position, the result would be quite different.” *Id.* at 7-8. Thus finding that Agency had neither complied with the final decision within the 30-day time period nor that Agency had taken any

steps to comply up to the date that the Addendum Decision on Compliance was issued, the Administrative Judge ordered that this matter be certified to the General Counsel for compliance and enforcement. Agency has since filed a Petition for Review of this decision.

We believe Agency's Petition for Review, filed pursuant to a matter that has now been certified to this Office's General Counsel, is not properly before the Board and must be denied. According to D.C. Code § 1-606.01(g)(4)(B), the General Counsel shall have the authority to "[a]ssist in the enforcement of orders pursuant to § 1-606.09." D.C. Code § 1-606.09 provides that "[i]f the Office determines that the [agency] has not complied with an order within 30 calendar days of service of the order, the Office shall certify the matter to the General Counsel. . .for enforcement." Consistent with these provisions is this Office's rule regarding compliance and enforcement. OEA Rule 636.2 allows an employee to file a motion to enforce a final decision if the agency has failed to comply with the final decision within 30 days from the date the decision became final. Pursuant to OEA Rule 636.8, if the Administrative Judge determines that the agency has not complied with the final decision, "the Administrative Judge shall certify the matter to the General Counsel. . .[who] shall order the agency to comply with the Office's final decision. . . ." If the agency still fails to comply with the order, OEA Rule 636.9 permits the General Counsel to take further action to secure compliance "including forwarding the matter to the Office of the Mayor or other responsible official for direct enforcement."

Petitions for Review are permitted to be filed when a party wishes to appeal an Initial Decision to the Board. According to OEA Rule 634.1 such appeal must be taken "within thirty-five (35) calendar days of issuance of the initial decision." If a Petition for Review is not filed with the Board, D.C. Code § 1-606.03(c) provides that the Initial Decision shall become final 35 calendar days after issuance. *See also OEA Rule 633.1.* In this matter the Initial Decision was issued on March 27, 1998. Agency did not file a Petition for Review. Consequently, by operation of law, the Initial Decision became a final decision on May 1, 1998. As has been stated previously, Employee subsequently filed a Petition for Enforcement. In the Addendum Decision on Compliance the Administrative Judge ordered that this matter be certified to the General Counsel for enforcement.² Based on the foregoing provisions we believe the General Counsel must now issue an order directing Agency to comply with the final decision, or alternatively, directing Agency to submit documentation indicating that it has complied with this Office's final decision. As such, we deny Agency's Petition for Review.

² If, in the Addendum Decision on Compliance, the Administrative Judge had not certified this matter to the General Counsel, a different outcome may have resulted.

ORDER

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

FOR THE BOARD:

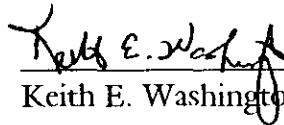


Erias A. Hyman, Chair

Horace Kreitzman



Brian Lederer



Keith E. Washington

The initial decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance 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.