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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
DWAYNE REDMOND,)	OEA Matter No. 1601-0203-12
Employee)	
)	Date of Issuance: July 24, 2014
DEPARTMENT OF GENERAL)	
SERVICES,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Dwayne Redmond (“Employee”) worked as a Protective Services Officer with the Department of General Services (“Agency”). On July 18, 2012, Agency issued a final decision suspending Employee for ten business days. Employee was charged with any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations. He was specifically suspended for neglect of duty, insubordination, misfeasance (providing inaccurate and misleading information), and unreasonable failure to assist a fellow government employee in carrying out assigned duties.¹

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on August 15, 2012. He argued that Agency wrongfully suspended him. Therefore, he requested

¹ *Petition for Appeal*, p. 5-7 (August 15, 2012).

that he be awarded back pay; that his record be cleared; and that attorney's fees be awarded.²

Agency filed its answer to Employee's petition on September 19, 2012. It asserted that it followed the District Personnel Manual when suspending Employee. Moreover, it submitted that it followed the factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). Accordingly, Agency requested that Employee's appeal be dismissed.³

On February 5, 2014, the OEA Administrative Judge issued her Initial Decision. She dismissed the appeal as the result of Employee's failure to appear at a scheduled status conference, and his failure to respond to her Good Cause order.⁴ In accordance with OEA Rule 621, the AJ held that Employee failed to prosecute his appeal. Hence, his case was dismissed.⁵

Employee filed a Motion to Reinstate Petition for Appeal. He argues that attached to his Petition for Appeal was a signed Designation of Representation form. The document provided Employee's representative's contact information and address. However, the AJ never served his attorney with any of the orders. The orders mistakenly list that Employee was unrepresented. Employee provides that OEA cannot dismiss his appeal without properly providing notice and an opportunity to be heard. He relies on D.C. Official Code § 2-509(a).⁶ Consequently, Employee requests that the Initial Decision be rescinded and remanded.⁷

On June 20, 2014, Agency filed its response. It alleges that Employee's counsel failed to state a legitimate claim for failing to appear at a scheduled Pre-hearing Conference. Agency

² *Id.* at 2.

³ *Agency's Answer*, p. 3-4 (September 19, 2012).

⁴ Orders for both the status conference and statement of good cause were returned to sender as undeliverable and unable to forward.

⁵ *Initial Decision* (February 5, 2014).

⁶ This section provides the following:

In any contested case, all parties thereto shall be given reasonable notice of the afforded hearing by the Mayor or the agency, as the case may be. The notice shall state the time, place, and issues involved, but if, by reason of the nature of the proceeding, the Mayor or the agency determines that the issues cannot be fully stated in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable, and opportunity shall be afforded all parties to present evidence and argument with respect thereto . . .

⁷ *Motion to Reinstate Petition for Appeal* (June 9, 2014).

contends that Employee's counsel's failure to receive notice of the Pre-hearing is insufficient grounds for good cause because he never properly entered his appearance in the case and despite receiving the notice, Employee failed to appear. It relies on OEA 608.2 as evidence that Employee's counsel's lack of signature on the Designation of Representation form justifies why the petition should be denied.⁸

Contested Case

Employee relied on D.C. Official Code § 2-509(a) in his assertion to why the AJ should not have dismissed his appeal without providing notice and an opportunity to be heard. As previously provided, this particular section of the Code discusses the requirements for contested cases. A contested case is defined in D.C. Code § 2-502(8)(B) to specifically exclude those proceedings which involve the selection or tenure of an employee of the District government.⁹

The D.C. Court of Appeals held in *Wells v. District of Columbia Board of Education, et al.*, 386 A.2d 703 (D.C. 1978), that the legislative history indicates that Congress intended D.C. Code § 2-502(8)(B) to encompass virtually all personnel decisions. The court provided that contested cases excluded personnel matters like the selection and tenure of officers or employees of the District.¹⁰ It reasoned that the exclusion applies whenever a proceeding involves personnel decisions such as whether a person should be hired, dismissed, or transferred.¹¹ Therefore, Employee's appeal would not be deemed a contested matter in accordance with this section of the Code. However, this Board does agree with other arguments presented by Employee regarding the AJ's failure to serve Employee's counsel with orders.

⁸ Agency's Memorandum in Opposition to Motion to Reinstate Petition for Appeal (June 20, 2014).

⁹ *Matala v. Washington*, 276 A.2d 126, 127 (D.C. 1971); *Kegley v. District of Columbia, et al.*, 440 A.2d 1013, 1018 (D.C. 1982); and *Wells v. District of Columbia Board of Education, et al.*, 386 A.2d 703 (D.C. 1978).

¹⁰ *Id.* at 705.

¹¹ *Id.* at 706, citing *Johnson v. Board of Appeals & Review*, 282 A.2d 566 (D.C.1971).

Designation of Representation Form

The Designation of Employee Representative form was drafted by OEA. The form specifically states the following:

when you designate a representative, you give this Office your permission to disclose all information concerning your appeal to your representative.
Once you identify your representative, this Office will only communicate with your representative regarding your appeal¹²

A review of the record clearly shows a Designation of Employee Representative form dated August 15, 2012. The document is signed by Employee and lists Matthew LeFande as his attorney. Contrary to Agency's claims that the form should have been signed by Employee's counsel, there is no field designated for counsel's signature on the form. Thus, Employee's counsel cannot be held to a requirement that is not evidenced on the OEA-issued form.¹³

Moreover, Agency cites to OEA Rule 608 to support its claim that counsel's signature is required. OEA Rules 608.1 and 608.2 provide the following:

- 608.1 A petition for appeal may be filed on the form the Office approved.
- 608.2 A petition for appeal made without use of the form of the Office shall be in writing and contain the following information:
- (a) The name of the employee and the name of the agency which took the action;
 - (b) The type and the effective date of the action taken by the agency;
 - (c) The name, address, and telephone number(s) of the employee's representative, if any;
 - (d) The employee's address and telephone number(s);
 - (e) A copy of the agency's notice of final decision;
 - (f) A statement as to whether the employee or anyone acting on his or her behalf has filed an appeal under any negotiated review procedure pursuant to a collective bargaining agreement, or has filed a complaint with any other agency regarding this matter;
 - (g) The identity of the collective bargaining unit (if any) of which the employee is a member; and

¹² *Petition for Appeal*, p. 11 (August 15, 2012).

¹³ The mediator's requirement that Employee's counsel sign the Designation form cannot be supported because there is no designation for counselor's signature on the form. Therefore, the mediator's request was misplaced.

(h) The signature of the employee and his or her representative, if any.

In the current case, Employee chose to use the Petition for Appeal form provided by OEA, as outlined in OEA Rule 608.1. Similar to the Designation of Representative form, the Petition for Appeal document provided by OEA only requires that the Employee sign the document. There is no signature requirement for Employee's counsel.

Agency's citation to OEA Rule 608.2 is inapplicable in this case. That rule clearly provides that the requirements, including a signature of the employee and their representative, only applies to those petitions filed without use of the form provided by OEA. There is a clear distinction in the OEA Rules for petitions filed using the form provided by OEA and those where an employee chooses not to use the standard form. Employee, nor his counsel, can be required to adhere to requirements not provided on OEA-issued forms. Therefore, in the interest of justice, we are compelled to remand this matter to the Administrative Judge for her to consider this matter on its merits.

ORDER

Accordingly, it is hereby ORDERED that Employee's Petition for Review is **GRANTED**, and this matter is **REMANDED** to the Administrative Judge for further findings.

FOR THE BOARD:

William Persina, Chair

Sheree L. Price, Vice Chair

Vera M. Abbott

A. Gilbert Douglass

Patricia Hobson Wilson

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.