

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	
Daunte Hill	)	Matter No. J-0291-10
Employee	)	
	)	Date of Issuance:
v.	)	October 1, 2010
	)	
Department of Public Works	)	Senior Administrative Judge
Agency	)	Joseph E. Lim, Esq.
_____		
Pamela Washington, Esq., Agency Representative		
Angela Pringle, Employee Representative		

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL HISTORY

On April 5, 2010, Employee, a Sanitation Worker, TG-5/5 in the Career Service, filed a petition for appeal from Agency's action summarily removing him from his position effective February 26, 2010. This appeal was assigned to me on May 11, 2010.

After Agency asserted in its reply that this appeal should be dismissed for lack of jurisdiction, I ordered Employee to meet his burden of proof that this Office has jurisdiction over his appeal. To date, Employee never responded. Because this matter could be decided based on the documents of record, no additional proceedings were held. The record is closed.

JURISDICTION

Due to Employee's untimely filing, the Office lacks jurisdiction over this matter.

ISSUE

Whether this matter must be dismissed for lack of jurisdiction as a result of Employee's untimely filing.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The following facts are not subject to genuine dispute:

1. Employee, a Sanitation Worker since November 17, 2003, has had several suspensions for unexcused absences without

official leave (AWOL). In June 2009, Employee had been AWOL for several days again.

2. On December 3, 2009, while Agency was finalizing a proposal to suspend Employee for AWOL, the sanitation supervisor observed Employee sleeping on the job. Together with the deputy administrator, they ordered Employee to go home, but he refused.

3. While the deputy administrator was talking with the administrator, Employee came up and began using profanity and threatening violence towards the deputy administrator. Employee's union representative arrived and together with others, finally calmed Employee down and took him away.

4. On December 9, 2009, Agency served Employee with a 30-day Advance Written Notice of Proposal to Remove on the charge of Any on-Duty or Employment-Related Act or Omission that the Employee Knew or Should Reasonably Have Known is a Violation of Law: Engaging in activities that have criminal penalties – threatening physical violence.

5. Employee and his union representatives met with a hearing officer who was conducting the administrative review of the proposed action. The hearing officer recommended sustaining the proposed removal.

6. On February 24, 2010, Agency sent Employee a Notice of Final Decision informing him that his termination would be effective February 26, 2010.

7. The notice advised Employee that she could elect to file an appeal with the Office of Employee Appeals within thirty calendar days or elect to file a grievance pursuant to the Collective Bargaining Agreement between the American Federation of State, County and Municipal Employees Local #2091 and the Agency.

8. This final decision advised Employee of her appeal rights to this Office and listed the Office's address and telephone number. Attached to the decision was a copy of the Office's Petition for Appeal Form.

9. It was not until April 5, 2010, 38 days after the effective date of his termination and 40 days after he received his notice of

the separation, that Employee filed the instant petition for appeal with the Office.

Prior to October 21, 1998, the Comprehensive Merit Personnel Act (CMPA), D.C. Law 2-139, D.C. Official Code § 1-601.01 *et seq.* (2001), did not contain a time limit for filing a petition for appeal in this Office. Rather, the Office's Rules and Regulations in effect at that time required a petition for appeal to be filed within 15 business days of the effective date of the action being appealed. *See* OEA Rule 608.2, 39 D.C. Reg. 7408 (1992). Because the filing requirement was not mandated by statute, the Office's Rules specifically permitted an Administrative Judge to waive the requirement for good cause shown. *See* OEA Rule 602.3, 39 D.C. Reg. at 7405.

However, effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, amended certain sections of the CMPA. Among these amendments was the addition of a statutory time limit for filing an appeal in this Office. The relevant section reads as follows: "Any 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). The Office's Rules and Regulations have been amended to reflect this change. *See* OEA Rules 604.1 and 604.2, 46 D.C. Reg. 9299 (1999).

The District of Columbia Court of Appeals has held that the time limit for filing an appeal with an administrative adjudicatory agency such as this Office 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, 643 (D.C. 1991); *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162, 1164 (D.C. 1985). Following these cases, this Office's Board has held that that the statutory 30-day time limit for filing an appeal in this Office is mandatory and jurisdictional in nature. *See King v. Department of Corrections*, OEA Matter No. T-0031-01, *Opinion and Order on Petition for Review* (October 16, 2002), \_\_ D.C. Reg. \_\_\_\_ ( ). Further, in *McLeod v. D.C. Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003), \_\_ D.C. Reg. \_\_\_\_ ( ), it was held that the only situation in which an agency may not "benefit from the [30-day] jurisdictional bar" is when the agency fails to give the employee "adequate notice of its decision and the right to contest the decision through an appeal." *McLeod*, slip op. at 8. (citations omitted).

OEA Rule 629.2, 46 D.C. Reg. at 9317, reads as follows: "The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." According to OEA Rule 629.1, *id.*, a party's burden of proof is by a "preponderance of the evidence", which is defined as "[t]hat 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."

In his appeal, Employee failed to state the basis of his appeal. Before I can address the merits of his appeal, the jurisdictional issue must first be tackled. Although he was given the chance, Employee also failed to explain why he did not file his appeal promptly, once he received his notice of termination.

It is clear that Employee unjustifiably failed to comply with the mandatory filing deadline. The 30-day filing deadline is mandatory, and to date this Office has recognized only one exception to that jurisdictional bar – when the agency fails to give the employee “adequate notice of its decision and the right to contest the decision through an appeal.” *McLeod, supra*. Here, Agency clearly gave Employee such notice in its final decision. Employee did not exercise due diligence in timely filing his petition for appeal and has failed to present an argument sufficient for me to broaden the scope of the exception to the mandatory filing deadline articulated in *McLeod*.

There is another ground for dismissing Employee’s appeal. OEA Rule § 622.3, 46 D.C. Reg. 9313 (1999) provides as follows, "If a party fails to take reasonable steps to prosecute or defend an appeal, the Administrative Judge, in the exercise of sound discretion, may dismiss the action or rule for the appellant. Failure of a party to prosecute or defend an appeal includes, but is not limited to, a failure to:

- (a) Appear at a scheduled proceeding after receiving notice;
- (b) Submit required documents after being provided with a deadline for such submission; or
- (c) Inform this Office of a change of address which results in correspondence being returned.

This Office has consistently held that failure to follow directives from this Office constitutes a failure to prosecute. See, e.g. *Employee v. Agency*, OEA Matter No. 1602-0078-83, 32 D.C. Reg. 1244 (1985) and *Rollins v. District of Columbia Pub. Sch.*, OEA Matter No. J-0086-92, *Opinion and Order on Petition for Review* (Dec. 3, 1990), \_\_ D.C. Reg. \_\_ ( ).

The employee was warned in each order that failure to comply could result in sanctions including dismissal. The employee never complied. Employee’s behavior constitutes a failure to prosecute his appeal and that is sound cause for dismissal.

Therefore, I conclude that Employee has failed to meet his burden of establishing this Office’s jurisdiction over his appeal. Thus, Employee’s petition for appeal is dismissed.

ORDER

It is hereby ORDERED that this matter is DISMISSED.

FOR THE OFFICE:

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JOSEPH E. LIM, Esq.  
Senior Administrative Judge