THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
TIMOTHY MORRIS Employee	
v.	OEA Matter No.: 2401-0080-03P04
	Date of Issuance: March 15, 2006
DEPARTMENT OF MENTAL HEALTH Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Timothy Morris ("Employee") was a Plumber with the Department of Mental Health ("Agency") when they separated him from government service pursuant to a reduction-in-force ("RIF"). On March 21, 2003, Employee filed with the Office of Employee Appeals ("OEA") a Petition for Appeal from Agency's actions. Because Employee did not attach to his appeal form a copy of the final agency decision from which he was appealing, by letter dated November 19, 2003, OEA's Administrative Assistant notified Employee that a question existed as to whether the Office had jurisdiction over

his appeal. Employee was given until December 1, 2003 to submit a copy of the final agency decision. By Initial Decision dated December 19, 2003, the Administrative Judge dismissed Employee's appeal for failure to prosecute believing that he had not submitted the requested document.

On January 23, 2004 Employee filed a Petition for Review in which he stated that he had submitted a copy of the final agency decision before the Administrative Judge issued the December 19, 2003 Initial Decision. Based on this claim, we issued an Opinion and Order on Petition for Review on February 10, 2004 in which we remanded this appeal to the Administrative Judge for further proceedings.

On February 17, 2004 the Administrative Judge issued an Order directing the parties to submit a prehearing statement and to attend a March 17, 2004 prehearing conference. When Agency failed to appear for the conference, the Administrative Judge issued an Order that required Agency to show cause for its failure to defend the appeal. Realizing that Agency had not submitted a Designation of Representative form, any documents pertaining to the RIF, or a prehearing statement, by Initial Decision dated April 14, 2004 the Administrative Judge reversed Agency's action on the basis that it had failed to defend the appeal. As a result, Agency was ordered to restore to Employee all pay and benefits of which he had been deprived due to the RIF.

Sometime after this decision was handed down, Employee informed Agency that he was entitled to the restoration of the pay and benefits he had lost as a result of the RIF which had now been reversed. To compel Agency to comply with the April 14, 2004 order, Employee filed a Motion to Enforce Final Decision dated December 15, 2004. Before the Administrative Judge could render a decision regarding Employee's compliance

motion, Agency filed what it called a Motion to Set Aside Default Judgment dated January 4, 2005. The motion challenged the April 14, 2004 Initial Decision. Employee responded on January 10, 2005 with an Opposition to Agency's Motion to Set Aside Default Judgment. Thereafter, on January 27, 2005 the Administrative Judge issued an Addendum Decision on Compliance in which he certified this matter to the Office's General Counsel for enforcement.

In an effort to unravel this tangled web of proceedings, we begin by reiterating this Office's policy with respect to filings that challenge an initial decision. OEA Rule 634.1 provides that "[a]ny party to the proceeding may serve and file a petition for review of an initial decision with the Board within thirty-five (35) calendar days of issuance of the initial decision." Therefore, the Office construes as a petition for review any filing that challenges an initial decision even if it is directed to the administrative judge and not the Board. Agency's January 4, 2005 filing challenged the April 14, 2004 Initial Decision. It is clear that the Administrative Judge recognized that this filing amounted to a Petition for Review for in the January 27, 2005 decision, he stated that Agency's motion was an appeal to the Board.[1] Nonetheless, the Administrative Judge took it upon himself to determine that Agency's filing was untimely and essentially need not be considered by the Board. The Administrative Judge erred by not allowing us to first render a decision on the Petition for Review before he issued the Addendum Decision on Compliance. Therefore, we find that the January 27, 2005 order certifying this matter to the General Counsel for compliance is premature and we herein vacate that decision.

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[1] *Addendum Decision on Compliance* at 3.

We recognize that Agency's January 4, 2005 Petition for Review was filed well beyond the thirty-five day period allotted for such filing. However, Agency claims that it did not receive from this Office the notice informing Agency that Employee had appealed the RIF action. Accordingly, Agency states that it had no knowledge that Employee had an appeal pending before this Office. Moreover, Agency claims that it did not receive the Administrative Judge's Order scheduling the prehearing conference nor did it receive a copy of the April 14, 2004 Initial Decision from which it is now appealing. According to Agency it became aware of the decision when Employee informed Agency that a default judgment had been entered against it. Agency does not state, however, when Employee made it aware of this fact.

The record established in this appeal is not complete. It is devoid of any clear indication as to when, if at all, this Office notified Agency of the fact that Employee had appealed the RIF. Furthermore the record is devoid of any documentation upon which we could reasonably rely to charge Agency with having received the order scheduling the prehearing conference, the show cause order, or the subsequent April 14, 2004 Initial Decision. Therefore, we are not able to say with certainty that Agency was on notice of Employee's appeal and thereafter received this Office's orders or decision pertaining to the appeal. Additionally, if we are unable to impute this knowledge to Agency, we must also excuse the lateness of the Petition for Review. As a result, we feel compelled to grant Agency's Petition for Review and reverse the April 14, 2004 Initial Decision.

We believe this decision is consistent with the District of Columbia Court of Appeals' decision in *Thomas v. D.C. Dep't of Employment Services*, 490 A.2d 1162 (D.C. 1985). In that case the Court was confronted with a claimant who contested having

received a notice that purported to alert the claimant of the time period within which he had to appeal a decision issued by the government. The decision denied benefits to the claimant. The government's contention was that the claimant's appeal was time barred and that its decision should be upheld. Upon a review of the record, the Court found that the record was devoid of any proof that would indicate when the notice was mailed or when the decision from which the claimant was appealing was mailed. Thus the Court rejected the government's arguments, reversed the decision from which the claimant was appealing, and remanded the case to the government for further proceedings. We believe our decision in the instant matter is consistent with *Thomas*.

ORDER

Accordingly, it is hereby **ORDERED** that the April 14, 2004 Initial Decision is **REVERSED**, the January 27, 2005 Addendum Decision on Compliance is **VACATED**, Agency's Petition for Review is **GRANTED**, and this appeal is **REMANDED** for further proceedings consistent with this decision.

FOR THE BOARD:

Brian Lederer, Chair

Horace Kreitzman

Jeffrey T. Stewart

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 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.