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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
GREGORY A. WILLIAMS	)	OEA Matter No. 1601-0120-05
Employee	)	
	)	Date of Issuance: October 20, 2005
v.	)	
	)	Daryl J. Hollis, Esq.
	)	Senior Administrative Judge
D.C. PUBLIC SCHOOLS	)	
Agency	)	

Gregory Williams, *Pro se*
Harriet Segar, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

On August 19, 2005, Employee, the Deputy Director for Operations and Maintenance in Agency's Office of Facilities Management, filed a petition for appeal from Agency's decision removing him for: "Grave misconduct in office" and "Violation of the rules, regulations, or lawful orders of the Board of Education or any directive of the Superintendent of Schools, issued pursuant to the rules of the Board of Education." This matter was assigned to me on September 29, 2005.

It is undisputed that Agency's "Notice of Termination", dated May 27, 2005, was hand-delivered to Employee on that day. In pertinent part, the notice reads as follows:

Pursuant to the District of Columbia Municipal Regulations (DCMR), Chapter 14, Adverse Actions, this is to notify you that you will be terminated from your position . . . *effective June 14, 2005.* Pursuant to the DCMR, Section 1403.2, a "notice of dismissal . . . shall be received by the employee not less than ten (10) days prior to the effective date of the adverse action." Accordingly, you will be placed on administrative leave until *the effective date of your termination, June 14, 2005*. . . .

[The notice then sets forth the causes and specifications for Employee's removal].

Your termination *will be effective as stated above* unless upon consideration of all relevant facts, the action is to be modified; at which time you will be so notified in writing. If you do not receive such communication, *this will serve as your final notice of termination.*

You have the right to file a grievance concerning this action in accordance with the DCMR or you may file an appeal with the Office of Employee Appeals (OEA), <u>but not both</u>. If you file an appeal or grievance, it must be in writing and clearly state your reasons for appealing or grieving this action.

If you elect to file an appeal under Chapter 14 of the DCMR, it must be filed within ten (10) days after receipt of a response to your written answer to the notice of termination; you may file an appeal to the Superintendent and request a hearing. Alternatively, you have the right to file an appeal to the Superintendent and request a hearing within ten (10) days after receipt of the notice of termination if you do not choose to file a written report (sic) to the notice of termination. Within twenty-four (24) hours after receipt of the notice of termination, you have the right to review any documents supportive of the charges. Within fourteen (14) days after receipt of the notice of termination, you have the right to file a written answer to the notice of termination. [The notice then sets forth the pertinent contact information if Employee chose

> to utilize the processes under Chapter 14 of the DCMR and contained a copy of Title 5 of DCMR Chapter 14 ("Adverse Action")].
>
> If you elect to file an appeal under the administrative procedures with the Office of Employee Appeals (OEA), *it must be filed within thirty (30) days of the effective date of the agency action.* Your election to appeal this action with OEA shall be in writing, with a copy to the Employer, and shall be irrevocable. A copy of the OEA petition for appeal form is enclosed for your convenience.

(italicized emphasis added).

Agency submitted its Answer to Employee's petition for appeal on September 23, 2005. Contained therein was a motion to dismiss the case for untimely filing that reads as follows:

> The Agency by motion requests that the instant matter be dismissed. The Employee was required to file an appeal to OEA within thirty (30) days of the effective date of his termination. The effective date of his termination was June 14, 2005. The Employee was required to file by July 14, 2005. Instead, the Employee filed an appeal at OEA on August 19, 2005, more than a month after the effective date of his termination. In addition, it was clearly stated in the notice of termination that if Employee elects to file at OEA, the appeal must be filed within thirty (30) days of the effective date of the agency action.

Agency's Answer to petition for appeal at 2.

By my Order dated September 29, 2005, Employee was required to submit to me his response to Agency's motion to dismiss by the close of business on October 13, 2005. In the Order, I set forth Agency's motion and then wrote as follows:

> D.C. Official Code § 1-606.03(a) (2001) requires that all appeals to this Office be filed within 30 days of the effective date of the action being appealed. *See also* OEA Rule 604.2,

> D.C. Reg. 9299 (1999). This time limit is mandatory, meaning that it cannot be waived. To date, this Office has recognized only one exception to the mandatory nature of the timeliness rule, and that exception is not germane to your case.
>
> According to the information contained in your petition for appeal, the salient facts are these: 1) By Notice of Termination hand-delivered to you on May 27, 2005, Agency advised you that you would be removed from your position effective June 14, 2005. You were placed on administrative leave with pay at the time the notice was delivered, and it appears that you never returned to duty; 2) On page 2, the notice also stated that "Your termination will be effective as stated above [*i.e.*, on June 14, 2005] unless upon consideration of all relevant facts, the action is to be modified; at which time you will be so notified in writing. If you do not receive such communication, this will serve as your final notice of termination"; 3) On page 2, you were advised that you had the right to file an appeal with this Office; 4) On page 3, the notice stated: "If you elect to file an appeal . . . with the Office of Employee Appeals (OEA), it must be filed within thirty (30) days of the effective date of the agency action." The notice provided you with our address and a copy of a petition for appeal form; 5) Although the record contains a number of additional documents, there is no "notification in writing" from Agency "modifying" the June 14, 2005 removal action; and thus it appears that that date was the effective date of your removal; and 6) You filed your petition for appeal with this Office on August 19, 2005, 36 days beyond the statutory 30-day filing deadline.

September 29, 2005 Order to Employee at 2.

On October 11, 2005, Employee responded to my Order. That response reads in part as follows:

> In accordance with the instructions of my Notice of Termination (May 27, 2005), the last paragraph states that "If you elect to file an appeal under the administrative procedures with the Office of Employee Appeals (OEA), it must be filed

> within thirty (30) days of the effective date of the action." The instructions did not specify "effective date of action" to be "effective date of termination." Therefore, it was my interpretation that the "effective date of action" was the date of the agency's response to my "written answer to the notice of termination (June 10, 2005)." The agency's response to my written answer to the notice of termination was as follows (in total): "Your request to resign in lieu of termination from DCPS has been received and reviewed; however, the request to allow you to resign has been denied." (July 18, 2005). I received this final action via certified mail on August 2, 2005. Therefore, it was my understanding that my thirty (30) day appeal filing period would end on September 2, 2005. I filed my appeal on August 19, 2005, therefore it should not be considered "untimely."
>
> Furthermore, the next to last paragraph of my Notice of Termination states: "If you elect to file an appeal under Chapter 14 of the DCMR, it must be filed within ten (10) days after receipt of a response to your written answer to the notice of termination; you may file an appeal to the Superintendent and request a hearing." This clearly states the appeal period, to the Superintendent, starts with response to the employee's written answer. So again, my interpretation (based on the next to the last paragraph, and the last paragraph, of Notice of Termination) was that the appeal period, to OEA, started with "agency (final) action" responding to employee's written answer.

Because this case could be decided on the basis of the above documents of record, no proceedings were conducted. 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.

ANALYSIS AND CONCLUSIONS

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 filing deadline 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." As will now be discussed, Employee has failed to meet his burden of proof as to the issue of jurisdiction.

The May 27, 2005 notice was captioned "Notice of Termination", a clear indication that its contents were not intended to be a mere proposal to remove employee from his position. Further, in several places the notice plainly stated that Employee would be removed effective June 14, 2005. The only caveat to the finality of the June 14th date was the statement that "[y]our termination will be effective as stated above ***unless upon consideration of all relevant facts, the action is to be modified; at which time you will be so notified in writing.***" (emphasis added). However, the notice then immediately stated: "***If you do not receive such communication, this will serve as your final notice of termination.***" (emphasis added).

The May 27, 2005 Notice of Termination advised Employee that he had two avenues of appeal: 1) a grievance filed in accordance with the applicable provisions of the DCMR; or 2) an appeal to this Office. However, the notice emphasized that he could not utilize both avenues of appeal, but must choose one of them. The notice then went on to describe, in two separate and distinct paragraphs, the procedures for filing an appeal either under Chapter 14 of the DCMR[1] or to this Office. The separate and distinct nature of these paragraphs is clearly evidenced by their opening sentences: 1) "If you elect to file an appeal under Chapter 14 of the DCMR. . . ."; and 2) "If you elect to file an appeal under the administrative procedures with the Office of Employee Appeals (OEA). . . ."

Finally, the May 27, 2005 notice plainly stated that if Employee chose to file an appeal of his removal with this Office, he was required to do so "within thirty (30) days of the effective date of the agency action."

The essence of Employee's October 11, 2005 response to my September 29, 2005 Order is that he was under the impression that his appeal rights under Chapter 14 of the

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[1] The paragraph setting forth an employee's appeal rights under Chapter 14 of the DCMR is in no way a model of clarity; but is more accurately described as a model of obfuscation. While I am certainly not saying that this paragraph was so written as to deliberately deceive employees, Agency would be well advised to restructure this paragraph to more clearly delineate an employee's appeal rights under Chapter 14. One suggestion would be to set forth each pertinent section of Chapter 14 and then explain its meaning.

DCMR were related to or interconnected with his appeal rights to this Office. As a result, he argues that the 30-day window for him to file an appeal here did not open until he received Agency's response to his "written answer to the notice of termination", which he states occurred on August 2, 2005. Thus, he avers that he was not required to file an appeal with this Office until September 2, 2005, and since his appeal was filed on August 19, 2005, it was timely.

As I have stated above, the Notice of Termination clearly set forth two distinct and separate avenues of appeal, one through Chapter 14 of the DCMR, and the other to this Office. Specifically, the process of filing "a written answer to the notice of termination" is found solely within the paragraph pertaining to appeal rights under Chapter 14 of the DCMR, and has nothing to do with appeal rights to this Office. Therefore, I conclude that Employee's argument that his appeal rights under Chapter 14 and to this Office were interconnected is unreasonable and untenable, as is his conclusion that his appeal, filed here on August 19, 2005, was timely.[2]

As set forth earlier, 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.* Notwithstanding the imperfections in the May 27, 2005 Notice of Termination addressed in n.1, *supra*, the document adequately advised Employee that he would be removed effective June 14, 2005 (unless he was notified in writing that the action would be "modified", which did not occur), and distinctly told him that his appeal rights to this Office must be exercised within 30 days of the effective date of his removal, ***i.e.***, no later than July 14, 2005. Nonetheless, Employee filed his appeal 36 days after the filing window closed.

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[2] Employee also stated that he believed the phrase "the effective date of the action" as set forth in the Notice of Termination's paragraph pertaining to appeal rights to this Office, did not mean the same as "the effective date of the termination." Consequently, according to Employee: "it was my interpretation that the 'effective date of action' was the date of the agency's response to my 'written answer to the notice of termination.'"

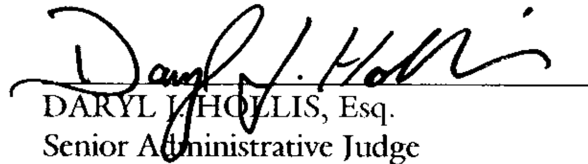
The May 27, 2005 notice was a notice of ***termination***, and did not mention any other type of adverse action. Therefore, the only reasonable interpretation of "the effective date of the action" is that the phrase is synonymous with "the effective date of the termination [*i.e.*, June 14, 2005]." The synonymous nature of the terms "termination" and "action" is also shown by the fact that they were used interchangeably in another part of the Notice of Termination, *viz*, "If you do not receive such communication, this will serve as your final notice of ***termination***. You have the right to file a grievance concerning this ***action***. . . . [An appeal or a grievance] must be in writing and clearly state your reasons for appealing or grieving this ***action***." Notice of Termination at 2. (emphasis added). I conclude that Employee's interpretation of the terms is not one that a "reasonable person" would make, especially at Employee's level within the agency.

Employee's appeal was untimely filed. Further, "[he] has failed to present an argument sufficient for me to broaden the scope of the exception to the mandatory filing deadline articulated in *McLeod*." *Dame v. Department of Corrections*, OEA Matter No. 1601-0043-03R04 (October 14, 2004), __ D.C. Reg. ____ ( ). Therefore, I conclude that Employee has failed to meet his burden of establishing this Office's jurisdiction over his appeal. Thus, Agency's motion to dismiss is hereby granted and Employee's petition for appeal is dismissed.

ORDER

It is hereby ORDERED that this matter is DISMISSED.

FOR THE OFFICE:



DARYL J. HOLLIS, Esq.
Senior Administrative Judge