Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager 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:	)	
	)	OEA Matter No.: J-0065-14
DEREK GADSDEN,	)	
Employee	)	
	)	Date of Issuance: April 28, 2014
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF GENERAL SERVICES,	)	
Agency	)	Sommer J. Murphy, Esq.
	)	Administrative Judge

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On March 18, 2014, Derek Gadsden ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the District of Columbia Department of General Services' ("Agency" or "DGS") action of terminating his employment. Specifically, Employee was charged with the following: "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include: unauthorized absence and absence without official leave." The effective date of Employee's termination was January 27, 2014.

I was assigned this matter in March of 2014. On April 2, 2014, I issued an Order directing the parties to submit briefs, together with copies of cited statutes, regulations, and/or cases, addressing whether this matter should be dismissed for lack of jurisdiction because Employee filed an untimely appeal with OEA. Both parties submitted responses the Order. The record is now closed.

JURISDICTION

Jurisdiction has not been established in this matter.

ISSUE

Whether Employee's appeal should be dismissed for lack of jurisdiction.

Employee's Position

Employee contends that his appeal was filed in an untimely manner because he was incarcerated at the time Agency issued its final notice of termination. Employee asserts that the notice should have been mailed to him at the Department of Corrections instead of his address of record because Agency knew that he was incarcerated at the time. Moreover, Employee characterizes Agency's actions as arbitrary, capricious, and ill advised.

Agency's Position

Agency argues that Employee's Petition for Appeal was filed in an untimely manner, thus OEA lack jurisdiction to address the merits of his appeal. According to Agency, Employee's incarceration did not toll the statutory requirement that his appeal be filed within thirty (30) days of the effective date of termination. In addition, Agency submits that it provided Employee with adequate notice of his termination.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, amended certain sections of the CMPA. Amended D.C. Code §1-606.3(a) states:

> "An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee…an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more…or a reduction in force…."

Thus, §101(d) restricted this Office's jurisdiction to employee appeals from the following personnel actions only: a performance rating that results in removal; a final agency decision affecting an adverse action for cause that results in removal, a reduction in grade, a suspension of 10 days or more, or a reduction-in-force.

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That 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.

OEA Rule 628.2 *Id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

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.[1] In *McLeod v. D.C. Public Schools*, this Office 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."[2]

In this case, Agency issued Employee a Notice of Final Decision on Proposed Removal on January 23, 2014, with an effective termination date of January 27, 2013.[3] The notice was sent via certified mail to Employee's address of record, in accordance with Chapter 16, Section 1608.7, of the District Personnel Manual ("DPM").[4] The notice further stated the following:

> "You are hereby advised of your right to file a grievance concerning this final decision in accordance with Article 30, Grievance Procedure, of the Collective Bargaining Agreement for AFGE 2741, or you may file an appeal with the Office of Employee Appeals (OEA) within **thirty (30) days** of this **final decision**; however, you may not file both a grievance **and** an OEA appeal....Enclosed is an OEA appeal form and instructions." (no emphasis added).

Agency has moved for the dismissal of this matter because Employee did not file a Petition for Appeal with OEA until March 18, 2014, more than thirty (30) days beyond the effective date of Employee's termination. Employee's primary argument is that the jurisdictional mandate for filing an appeal with this Office should have been tolled because he was incarcerated at the time Agency issued its Notice of Final Decision on Proposed Removal. However, Employee offers no statutes or case law, or regulations as authority to support his position that the time period for filing an appeal with OEA is tolled when an employee is incarcerated. It should be noted that this Office has previously held that an employee's incarceration cannot serve as basis for an excused absence.[5] Accordingly, Agency was only required to send the final notice of termination Employee's last known address of record, and not the D.C. Department of Corrections.[6] There is also no evidence in the record to support a finding that Employee's notice of termination was deficient in any manner. Based on the foregoing, I

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[1] *See Annie Keitt v. D.C. Public Schools, Division of Transportation*, OEA Matter No. J-0082-09, Opinion and Order on Petition for Review (January 26, 2011); King v. Department of Human Services, OEA Matter No. J-0187-99 (November 30, 1999).

[2] OEA Matter No. J-0024-00 (May 5, 2003).

[3] The Undersigned takes judicial notice that Employee's notice of termination lists an incorrect year of 2013; however, the correct year of termination is 2014.

[4] Agency Brief, Tab 5 (April 21, 2014).

[5] *Hawkins v. Department of Public Works*, OEA Matter No. 1601-0054-06; *Employee v. Agency*, OEA Matter No. 1601-0009-88, 36 D.C. Reg. 7336 (1989).

[6] *See* DPM § 1608.7

find that Employee filed an untimely Petition for Appeal with this Office, and has failed to meet his burden of proof as required by OEA Rule 628.1 *supra*, thus OEA lacks jurisdiction over this appeal. Consequently, the Undersigned is unable to address the factual merits, if any, of this matter.

ORDER

It is hereby **ORDERED** that Employee's Petition for Appeal is **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

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SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE