THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Lelonie Curry-Mills	)	OEA Matter No. 1601-0047-15
Employee	)	
	)	Date of Issuance: March 30, 2016
v.	)	
	)	Joseph E. Lim, Esq.
Dept. of Youth Rehabilitation Services	)	Senior Administrative Judge
Agency	)	

Robert Hornstein, Esq., Employee Representative
Sonia Weil, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On February 27, 2015, Lelonie Curry-Mills ("Employee"), a Correctional Officer in the Career Service, filed a Petition for Appeal from Department of Youth Rehabilitation Services' ("DYRS" or "Agency") action removing her from her position effective January 10, 2014, due to malfeasance and gun related criminal offenses. This appeal was assigned to me on June 11, 2015.

After three postponements requested by the parties, I held a prehearing conference on October 23, 2015. Because there appeared to be a jurisdictional issue, I ordered the parties to submit a legal brief on the issue. Both parties submitted their briefs and responses by March 18, 2016. 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]

1. DYRS is the District of Columbia's cabinet level juvenile justice agency tasked with the responsibility of providing security, supervision, and rehabilitation services for youth committed to its care and custody.

2. Youth Development Representatives ("YDRs"), formerly known as Correctional Officers, are among the most essential staff at the Agency. YDRs are responsible for the "rehabilitation, direct supervision, and active positive engagement, and safety and security of youth" in the Agency's secure facilities.[2]

3. Employee worked as a YDR with Agency since October 3, 2005.

4. Agency maintains personnel folders for every employee. Each personnel folder contains contact information provided by an employee upon his or her entrance of duty; all updates to this information, including address changes, are provided by the employee voluntarily.

5. Contact information for all Agency employees is also located in PeopleSoft, an electronic automated system that houses personnel information for the District of Columbia's 30,000 plus employees. District employees' address information is located in PeopleSoft.

6. On or around September 12, 2011, Employee was arrested and charged with an Assault with a Dangerous Weapon. Employee was placed into Pretrial Services Agency's (PSAs) High Intensity Supervision Program and ordered to abide by an electronically monitored curfew, abide by the stay away order, and submit to regular drug testing on a weekly basis.[3]

7. As a result, Employee was placed on non-contact status on September 22, 2011, and directed to report to New Beginnings, a different facility from where she was originally assigned.

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[1] Unless referenced from an exhibit, these facts are derived from the parties' Joint Stipulated Statement of Material Jurisdiction-related Facts.

[2] *See* Agency Exhibit 1.

[3] *See* Agency Exhibit 3.

8. On September 23, 2011, Employee reported to New Beginnings and received a written notice proposing her placement on enforced leave.[4] The notice pointed to Employee's arrest, her felony charge, and a relationship between the felony charge and her position as grounds for the proposed enforced leave.

9. The mailing address on the notice was 1218 Southern Avenue #103, Washington, DC 20032. This was Employee's correct mailing address as of September 23, 2011.

10. On September 30, 2011, Employee submitted a written response denying her criminal charges to the written notice.[5] She wrote: "I am not guilty of the charges that stand before me . . . . My life should not be destroyed due to a crime that I have not been proven to have committed."

11. On October 19, 2011, Employee received a final written decision that she would be placed on enforced leave immediately.[6] Thus, Employee ceased coming to work.

12. Throughout her employment with DYRS, Employee updated her address information in PeopleSoft when she changed addresses.

13. On February 7, 2012, Employee changed her address in PeopleSoft from 1218 Southern Avenue #103, Washington, DC 20032 to 1234 Southern Avenue, SE, Number 304, Washington, DC 20032.

14. When an employee makes an address change in the PeopleSoft System, the system does not send notification to the employee's agency. Employee did not separately inform DYRS of the address change made in PeopleSoft.

15. On or around August 29, 2012, Employee was indicted on felony charges for (1) assault with a dangerous weapon,[7] (2) Possession of a firearm during the time of violence,[8] (3) Carrying a pistol without a license outside the home/business,[9] and (4) threatening to kidnap or injure a person.[10]

16. Employee's February 7, 2012 change of address to 1234 Southern Avenue, SE, Number 304, Washington, DC 20032 in PeopleSoft was available to DYRS in November and December of 2013.

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[4] *See* Agency Exhibit 4.

[5] *See* Agency Exhibit 5.

[6] *See* Agency Exhibit 6.

[7] D.C. Official Code § 22-402.

[8] *Id.* at § 22-4504(b)

[9] *Id.* at § 22-4504(a)1.

[10] *Id.* at § 22-1810.

17. Employee received hours-and-earnings statements issued by the Office of Pay and Retirement Services from February 24, 2012 through at least January 2014, at 1234 Southern Avenue, SE, Number 304, Washington, DC 20032.

18. On November 4, 2013, the Agency issued a 15-day advanced written notice of proposal to remove Employee.[11] Employee's proposed removal was based on the following causes: 1) An on-duty or employment-related act or omission that interfered with the efficiency and integrity of government operations: malfeasance;[12] 2) An act which constitutes a criminal offense whether or not the act results in convictions; and 3) An on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious: violation of the District's Employee Conduct policy as outlined in the District Personnel Manual ("DPM") and violation of the Youth Services Administration "YSA") policy 13-004- Employee Conduct policy, in effect in September 2011 and superseded by DYRS Policy #DYRS-010 on September 4, 2012.

19. Agency could have, but did not, use the PeopleSoft System to determine Employee's current address in 2013.

20. This notice was mailed by Federal Express. The address on the notice — 3422 22nd St., SE, Washington, DC 20020 — was incorrect, and the notice was returned to DYRS undelivered.

21. On November 18, 2013, the Agency mailed a second copy of the Advance Written Notice of Proposed Removal to Employee.[13] The address on this notice — 1443 Southern Ave., Apt. 101, Oxon Hill, MD 20745 — was incorrect, and the notice was returned to DYRS undelivered.

22. On December 11, 2013, the Hearing Officer assigned to review the case found that there was sufficient cause to warrant the removal of Employee from her position.[14] The Hearing Officer issued a report recommending that DYRS uphold Employee's proposed removal. The report noted that the November 4, 2013 Advance Written Notice was returned undelivered and "multiple attempts were made to deliver the Notice to Employee's addresses on record with the DYRS Office of Human Resources; however, the correspondence was returned undelivered."

23. On December 24, 2013, DYRS sent Employee a Final Written Notice of Proposed Removal removing her effective January 10, 2014, and mailed it to Employee.[15] DYRS noted Employee's failure to respond to the Advance Written Notice. The address on the Final Written Notice — 1443 Southern Ave., Apt. 101, Oxon Hill, MD 20745 — was incorrect, and the notice was returned to DYRS undelivered.

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[11] *See* Agency Exhibit 7.
[12] D.C. Mun. Regs. Tit. 6b §1603.3 (f)(7).
[13] *See* Agency Exhibit 8.
[14] *See* Agency Exhibit 9.
[15] *See* Agency Exhibit 10.

24. The notice advised Employee that she could elect to file an appeal with the Office of Employee Appeals within thirty calendar days of the final decision or elect to file a grievance pursuant to the Negotiated Grievance Procedure of the collective bargaining agreement between Agency and Employee's union.

25. The December 24, 2013 Final Written Notice included a section about appealing to the Office of Employee Appeals ("OEA"). Labeled "Right to Appeal," it stated: "[Y]ou are entitled to appeal this removal action to the Office of Employee Appeals (OEA) within thirty (30) days of this final decision." The section also provided OEA's address, OEA's telephone number, and the instruction to call OEA for any questions about the OEA appeal process. Enclosed with the Final Written Notice were an OEA appeal form and a copy of the OEA regulations.

26. Agency used Employee's last known address based on their personnel records. Based on Agency's records, Employee never directly notified Agency of any change in mailing address or reached out to Agency after being placed on enforced leave since October 2011.[16]

27. It is "not necessarily uncommon" for DYRS Human Resources staff to pull up employee address information from the PeopleSoft system. Agency could have checked Employee's contact information by looking in PeopleSoft and it would only take a DYRS Human Resources staff person a couple of minutes to retrieve an employee's address information from the PeopleSoft System.

28. Sometimes, the address information in PeopleSoft is inaccurate while the address information in an employee's personnel folder is accurate.

29. On February 27, 2014, a jury acquitted Employee on all felony counts, finding that she had acted lawfully in defense of her children.

30. On March 6, 2014, Employee appeared at the Agency, in person, more than 2 years since she last reported to work. Employee was informed by Agency's Management Liaison Specialist Ms. Ohler that she had been removed from her position.

31. Ohler also told Employee that the removal notices sent to the addresses DYRS had for her. When Employee informed Ms. Ohler that she did not receive any of the removal notices, Ohler stated that the notices were indeed returned undelivered.

32. Ms. Ohler then handed over the documents and Employee signed for and received copies of her Advanced Notice of Removal, Supporting Documents for Removal, Hearing Officer Report, and Final Notice of Removal. Ohler opined that while she believed Employee's time to appeal had

[16] Agency's Answer to Employee's Petition for Appeal, p. 5.

lapsed, she advised Employee to reach out to OEA. Employee was not told that she had 30 more days to appeal from her receipt of the notices.[17]

33. Together with Employee's December 24, 2013, Final Written Notice of Proposed Removal were the OEA appeal forms and a copy of the OEA regulations. The notice also advised Employee to contact the OEA at (202) 727-0004 if she needed additional information on filing an appeal.

34. It was not until February 27, 2015, more than a year after the effective date of her termination, and more than eleven months after she signed for her notice of the separation, that Employee filed the instant Petition for Appeal with the Office.

Positions of the Parties

Employee argues that Agency never sent her a constitutionally adequate notice of her discharge, thereby depriving her of the opportunity to contest her removal prior to it becoming final or to file an appeal within 30 days of the final decision to terminate her employment. She also points out that an Agency employee, Cathy Ohler, told the Employee that her time to appeal had lapsed.

Agency argues that it relied on the last address that Employee provided to it directly. Agency also points out that even after Employee did receive her notices personally and was advised to seek out OEA for information regarding her appeal rights, Employee had negligently failed to do so.

Analysis and Conclusion

OEA Rule 628.2, 59 D.C. Reg. 2129, reads as follows: "The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." According to OEA Rule 628.1, *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."

The Due Process Clause of the Fourteenth Amendment requires that a state agency explain, in terms comprehensible to the client, exactly what the agency proposes to do and explain the agency's reasons for its action in enough detail that the client can assess the correctness of the agency's decision, make an informed decision as to whether to appeal, and be prepared for the issues to be addressed at the hearing. *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). The due process clause prohibits unintelligible, confusing, or misleading notices, or any notices which do not meaningfully inform clients of their hearing rights. *Mayhew v. Cohen*, 604 F.Supp. 850 (E.D.Pa.1984).

[17] *See* Agency Exhibit 11.

In this instance, the notice on Employee's December 24, 2013, Final Written Notice of Proposed Removal informs Employee what the cause of action was and referred to the charges and specifications as stated in its November 4, 2013, Advanced Written Notice of Proposed Removal. The Advance Notice runs five pages and lays out in detail Agency's charges.

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, 59 D.C. Reg. 2129 (2012).

The District Personnel Regulations §§ 1614 and 1618 provide the following:

1614 FINAL DECISION NOTICE: GENERAL DISCIPLINE

1614.1 The employee shall be given a notice of final decision in writing, dated and signed by the deciding official, informing him or her of all of the following:

(a) Which of the reasons in the notice of proposed corrective or adverse action have been sustained and which have not been sustained, or which of the reasons have been dismissed with or without prejudice;

(b) Whether the penalty proposed in the notice is sustained, reduced, or dismissed with or without prejudice;

(c) When the final decision results in a corrective action, the employee's right to grieve the decision as provided in § 1617;

(d) When the final decision results in an adverse action, the right to appeal to the Office of Employee Appeals as provided in § 1618. The notice shall have attached to it a copy of the OEA appeal form; and

(e) The effective date of the action.

1618 APPEALS TO THE OFFICE OF EMPLOYEE APPEALS

1618.1 Unless otherwise authorized or required as provided in §§ 1601.2 through 1601.5, an employee shall be entitled to appeal the following final agency actions to the Office of Employee Appeals (OEA):

(a) Any final decision regarding an adverse action; or

(b) Any final decision placing an employee on enforced leave that lasts ten (10) days or more.

1618.2 Any enforced leave lasting less than ten (10) days may be grieved as specified in § 1635.

1618.3 Any appeal of an action described in § 1618.1 shall be in accordance with the regulations issued by the OEA, and shall be filed within thirty (30) days of the effective date of the appealed agency action.

1618.4 The filing of an appeal to the OEA shall not serve to stay or delay the effective date of the final decision.

1618.5 When upon appeal, the action taken by an agency is reversed by the OEA, the remedial action directed by the OEA shall be taken within thirty (30) days of the final decision of the Office, unless the decision is reopened or reviewed in accordance with the regulations of the OEA.

Specifically, Section 1614.1 (d) provides that the employee shall be given a notice of the right to appeal to the Office of Employee Appeals as provided in § 1618. Section 1618.3 states that any appeal of an action shall be filed with OEA within thirty (30) days of the effective date of the appealed agency action.

Pursuant to D.C. Mun. Regs. tit. 6-B, § 1614.6 (2011), "[i]f the employee is not in a duty status when the adverse action is taken, the notice of final decision must be sent to the employee's last known address by courier, or by certified or registered mail, return receipt requested, before the time the action becomes effective."

The Supreme Court held in *Jones v. Flowers*, 547 U.S. 220, 227-29 (2006), that when a governmental agency learns *prior* to taking adverse action that a notice has failed, the governmental agency is obligated as a matter of due process to do something more before depriving a person of a constitutionally protected property interest. In *Jones*, the government's notice of tax sale to the defendant was returned unclaimed, and apart from publishing notice in a newspaper prior proceeding with the sale, the state did not take any further steps. The Court held that without ever posting notice at an address to which notice was sent or taking other

measures reasonably available to alert taxpayer of sale, the state's efforts were insufficient to satisfy taxpayer's Fourteenth Amendment due process rights.

Employee's December 24, 2013, Final Written Notice of Proposed Removal's Right to Appeal section states:

> In accordance with section 1618 of Chapter 16 of the regulations, you are entitled to appeal this removal action to the Office of Employee Appeals (OEA) within thirty (30) days of this final decision. The OEA is located at 1100 4th St., SW, Suite 620E, Washington, DC 20024. Enclosed are the OEA appeal forms and a copy of the OEA regulations. If you need additional information on filing an appeal, please contact the OEA at (202) 727-0004.

In this instance, I find that Agency failed to exercise due diligence in checking all its sources, such as Peoplesoft, of Employee's latest address. Therefore, Agency cannot benefit from not providing Employee with the 30-day deadline. Thus, I conclude that Employee's deadline for filing an appeal was not within thirty (30) days of January 10, 2014, the effective date of her removal; but within thirty (30) days of the date she received actual notice. In this case, Employee received actual notice on March 6, 2014, the date that she signed for the notices.

However, it is also true that once so notified, Employee failed to either consult with her own counsel or reach out to this Office to ascertain whether or not she could still file an appeal. Although Agency's Ms. Ohler opined that her time for appeal had expired, Employee concedes that Ohler did advise her to reach out to this Office. I find that Employee failed to do so. Although given the chance to do so, Employee never explained her delay when she filled her appeal almost a year after receiving actual notice. Neither did Employee claim there were ever any circumstances, exceptional or otherwise, beyond her control that stood in her way and caused her to file so late.

Instead, Employee attempts to shift the blame entirely on Agency by arguing that the notice she actually received was still not constitutionally adequate as the notice stated an appeal time that had already expired and was therefore misleading and ambiguous. Employee is not arguing that the wording of the notices is unclear, misleading, or confusing. Employee is simply stating that the notice does not inform her of what her rights are in the instance that her receipt of the notice(s) is tardy.

In other words, while the notice that she actually received would have been deemed adequate in of itself, Employee insists that the only constitutionally adequate notice is one that would cover any and all circumstances, such as when the date she actually received the notice is also the date when her time for appeal has already expired.

Employee cites several cases in her brief. However, none of them corresponds to the facts present here; where an appellant received actual notice yet fails to act for about eleven months before filing an appeal. Consequently, they are of no assistance here.

Employee then claims that the 30-day appeal time set forth in D.C. Code 1-606.3 and 6-B D.C.M.R. § 604.2 is not jurisdictional, but instead constitutes a claim-processing timing provision. Employee further asserts that because the 30-day deadline to file an appeal in this case is not jurisdictional, equitable tolling is applicable. *Mathis v. District of Columbia Housing Authority*, 124 A.3d 1089, 1103 (D.C. 2015).

The District of Columbia Court of Appeals has applied the doctrine of equitable tolling to relieve a litigant from the operation of a limitations period or other filing deadline, and courts applying the doctrine recognize that failure to give required notice is a basis to apply equitable tolling. *See Staropoli v. Donahue,* 786 F. Supp. 2d 384, 392 (D.D.C. 2011).

The application of equitable tolling in any given case is fact specific and requires a balancing of fairness that accounts for the interests of both parties. *Mathis,* 124 A.3d at 1104. Further, the doctrine turns on whether there was unexplained or undue delay and whether tolling would work an injustice to the other party. *Id.* Importantly, there must be a showing of prejudice. *Staropoli v. Donahue,* 786 F. Supp. 2d 384, 392 (D.D.C. 2011).

The conclusion that the statute of limitations was not triggered does not mean, however, that the Employee then has an unlimited time period in which to appeal, as she seems to contend. The D.C. Circuit has explained that the plaintiff must still act with reasonable diligence to preserve her rights or her claim may be defeated by the defense of laches. *See Wilson,* 79 F.3d at 163 n. 4 ("[E]ven where the notice is defective, [Title VII] complainants still must file suit within a reasonable time or may be defeated by a laches defense."); *Williams,* 663 F.2d at 188 ("When an agency or department has taken final action but has failed to issue a proper notice, we determine that an employee can bring an action in district court within a reasonable time. Of course, when the agency neglects to issue proper notice the right to sue would not continue forever because of the defense of laches."). *Staropoli v. Donahue, id.* The equitable defense of laches applies where there is (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. *See Menominee Indian Tribe of Wisconsin v. United States,* 614 F.3d 519, 531 (D.C.Cir.2010).

Employee asserts that the failure to file a timely appeal in this case is wholly attributable to the failure of Agency to provide a valid and constitutionally adequate notice of Employee's right to appeal and that there is not one claim of prejudice made by Agency because it would not be burdened by having to defend the merits of its decision to terminate her.

However, if a time for filing a claim is jurisdictional, then it is not subject to equitable tolling. Jurisdictional rules must contain language that "cabins a court's power." *United States v. Kwai Fun Wong,* 135 S.Ct. 1625, 1632 (2015). So although a statute need not contain "magic words," "traditional tools of statutory construction must plainly show that [the legislative body] imbued a procedural bar with jurisdictional consequences." *See id.*

The purpose of the CMPA and the plain meaning of its text indicate that the 30-day time bar carries jurisdictional consequences. The D.C. Council adopted the CMPA to "establish impartial and comprehensive administrative or negotiated procedures for resolving employee grievances." D.C. Code § 1-601.02(a)(5). The CMPA authorizes OEA to "hear and adjudicate appeals received . . . from employees." D.C. Code § 1-606.02(a)(2). But the CMPA cabins OEA's power in two ways. First, it permits OEA to decide an appeal only if the appeal falls within any of six distinct categories of personnel actions, including any "adverse action for cause that results in removal." D.C. Code §1-606.03(a). Second, the CMPA permits OEA to decide such an appeal only if it is "filed within 30 days of the effective date of the appealed agency action." *Id.* Additionally, the CMPA expressly requires OEA to determine whether jurisdiction exists before hearing an appeal on the merits: within 45 business days of receiving an appeal, OEA must "determine whether, in accordance with [the CMPA] and the [OEA's] own rules, [it] has jurisdiction." D.C. Code §1-606.03(c).

The statutory context of the CMPA confirms that the 30-day time bar is jurisdictional because the D.C. Council placed both the jurisdictional grant to OEA and the deadline for appealing to OEA within the same subsection. *See* D.C. Code §1-606.03(a). Reading the 30-day time bar as nonjurisdictional disregards this structural unity. *Cf. Kwai Fun Wong,* 135 S.Ct. at 1633. ("Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional.").

The OEA Rules[18] also reflect the jurisdictional consequences of the 30-day time bar. The Rules make clear that "[t]he jurisdiction of the [OEA] is set forth in Rule 604." 6-B DCMR § 600.1. The section containing Rule 604 is labeled "Jurisdiction." 6-B DCMR § 604. Within that section are two rules. *Id.* The first, Rule 604.1, recites the same six categories of appealable personnel actions contained in Section 1-606.03(a) of the D.C. Code. *Compare* 6-B DCMR § 604.1, *with* D.C. Code §1-606.03(a). The second, Rule 604.2, imposes the same filing deadline set forth in Section 1-606.03(a) of the D.C. Code: any appeal "must be filed within thirty (30) calendar days of the effective date of the appealed agency action." *Compare* 6-B DCMR § 604.2, *with* D.C. Code §1-606.03(a). So the OEA, like the D.C. Council, placed the jurisdictional grant and the filing deadline within the same section of its Rules. *See* 6-B DCMR §§ 604.1, 604.2. That is why the text and structure of the CMPA and the OEA Rules establish that the 30-day time bar is jurisdictional and precludes equitable tolling.

Even if, for the sake of argument, that the 30-day time bar were non-jurisdictional and hence subject to equitable tolling, Employee's equitable tolling argument fails under the test for equitable tolling as set forth by the United States Supreme Court in *Menominee Indian Tribe of Wisconsin v. United States,* 136 S.Ct. 750 (2016).

Under *Menominee,* a litigant is not entitled to equitable tolling unless she establishes two requirements: "(1) that [she] has been pursuing her rights diligently, and (2) that some extraordinary circumstance stood in her way and prevented timely filing." *Id.* at 755. (internal quotation marks and citations omitted). The diligence requirement "covers those affairs within the litigant's control." *Id.* at 756. The extraordinary circumstance requirement "covers matters

[18] 59 D.C. Register 2129 (March 16, 2012).

outside [a litigant's] control" and "is met only where the circumstances that caused a litigant's delay are both extraordinary *and* beyond its control." *Id.* (emphasis in the original). Both requirements are distinct elements, "not merely factors of indeterminate or commensurable weight." *Id.* So a litigant cannot receive the benefit of equitable tolling unless she carries the burden of establishing both requirements. *Id.*

Here, the documentary evidence shows that Employee did not carry that burden. First, she cannot establish the requisite diligence. She does not dispute that she received the final decision notice and all other required documents on March 6, 2014. The final decision notice contained OEA's telephone number, OEA's physical address, instructions for filing an OEA appeal, and the explicit instruction to telephone OEA for answers to any questions about the appeal process. During the 30-day period following March 6, 2014, Employee could have written to OEA, telephoned OEA, or gone to OEA herself to file her appeal or , at the very least, seek advice on how to file her appeal. These were all reasonable steps to take under the circumstances—and they were all within Employee's control. But she did nothing for 358 days. And she has not provided any valid justification for her inaction. I therefore find that Employee did not prove that she diligently pursued her right to appeal. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418-19 (2005) (holding that petitioner's lack of diligence precluded equitable tolling because petitioner delayed bringing two claims for ten years and one claim for five years "without valid justification").

Second, Employee cannot establish that some extraordinary circumstance outside her control prevented her from filing a timely appeal. Employee attributes her excessive delay to the following circumstances beyond her control: the fact that she received actual notice of her removal and right to appeal on March 6, 2014; the information about dates in the final decision notice; and the advice Cathy Ohler gave her after handing her the documents. Under *Menominee,* however, none of those circumstances is extraordinary. Even if the final decision notice raised questions about the timeline for filing an appeal (owing to the dates stated in it), it also advised Employee to telephone OEA if she had questions about the appeal process. Ohler, in an attempt to be helpful, echoed this advice. So at a minimum, Employee understood that she could go to OEA to file an appeal but was uncertain about the outcome of doing so. As a matter of law, her circumstances are not extraordinary. *See Menominee,* 136 S.Ct. at 757 (noting that "it is uncommon" and thus not extraordinary "for a litigant to be confronted with an . . . uncertain outcome based on an uncertain legal landscape") (internal citations and quotation marks omitted). That is why Employee cannot satisfy the extraordinary circumstance standard. *See id.* at 756-757 (holding that petitioner's failure to offer proof of extraordinary circumstances beyond its control precluded the benefit of equitable tolling). Thus, Employee cannot prove she is entitled to equitable tolling beyond the 30-day period following March 6, 2014.

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.[19] 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.[20]

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." *Ronald McLeod v. D.C. Public Schools*, OEA Matter No. J-0024-00, *Opinion and Order on Petition for Review* (October 18, 2006).

Here, Agency clearly gave Employee such notice in its final decision and in providing a copy of the rules of this Office. Employee has not presented a case whereby Agency is required to inform Employee in writing regarding her options in all conceivable scenarios.

Employee did not exercise due diligence in timely filing her 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*.

Therefore, I conclude that Employee has failed to meet her burden of establishing this Office's jurisdiction over her appeal. Thus, I cannot address her other arguments and Employee's petition for appeal is dismissed.[21]

ORDER

It is hereby ORDERED that this matter is DISMISSED.

FOR THE OFFICE: JOSEPH E. LIM, Esq.
Senior Administrative Judge

[19] *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).

[20] *See King v. Department of Corrections*, OEA Matter No. T-0031-01, *Opinion and Order on Petition for Review* (October 16, 2002).

[21] Even if Employee could surmount the hurdle of jurisdiction and this decision goes to the merits of her appeal, I note that one of the Agency's charges against her was "An act which constitutes a criminal offense whether or not the act results in convictions." It is undisputed that Employee had indeed been charged with a criminal offense even as it eventually resulted in an acquittal. Thus, under the D.C. DPM, as long as Agency had a good faith reason for its adverse action, then there is still cause to sustain Employee's removal. In *District of Columbia Metro. District of Columbia Metropolitan Police Dep't v. Broadus*, 560 A.2d 501 (D.C.1989), the District of Columbia Court of Appeals held that "the fact of an indictment ... constitutes sufficient evidence to establish cause under D.C.Code § 1-617.1(d)(16) (1981) to support an adverse action by the police department against one of its officers."