Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. 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:	
DEREK GADSDEN, Employee	OEA Matter No. J-0065-14
v.	Date of Issuance: February 16, 2016
DEPARTMENT OF GENERAL SERVICES, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Derek Gadsden ("Employee") was a Maintenance Worker with the Department of General Services ("Agency"). On January 23, 2014, Agency issued a Notice of Final Decision to Employee. The notice provided that he was being removed from his position for "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 leave."[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on March 18, 2014. He argued that the notice was sent to the wrong location and should have been sent to the Department of Corrections. He provided that he informed his supervisor that he was being arrested. However, he was terminated even though other previously arrested employees

[1] *Petition for Appeal*, p. 6-8 (March 18, 2014).

were allowed to keep their jobs.[2]

Agency filed its answer to Employee's Petition for Appeal on April 21, 2014. It argued that Employee was terminated from his position because he failed to call or show up to work for twenty-six consecutive days from November 21, 2013 through December 30, 2013.[3] Agency asserted that it sent notices to Employee's last known address, but it never received a response until Employee filed his Petition for Appeal with OEA. It explained that in accordance with the District Personnel Manual ("DPM"), removal was within the range of penalties for AWOL. Agency opined that incarceration is not a basis for an excused absence. Therefore, it requested that its decision be affirmed.[4]

The OEA Administrative Judge ("AJ") asked both parties to file briefs on jurisdiction for this matter because it appeared that Employee's Petition for Appeal was untimely. Employee asserted that Agency sent notices to his home even though it knew he was incarcerated. He claimed that he was unable to file his appeal within a timely manner because he was unaware of the removal action. Employee provided that Agency should have mailed his notices to the Department of Corrections.[5]

Agency provided that Employee's appeal was filed past the thirty-day deadline, and as a result, his case should be dismissed. Moreover, it contended that Employee's incarceration did not toll the filing deadline for his Petition for Appeal. Agency submitted that there is no case law or laws which grant OEA the authority to toll a deadline due to an employee's incarceration. Finally, it argued that Employee cannot claim that there was a lack of notice when he failed to

---

[2] *Id.*, 2 and 5.
[3] Agency explained that it called Employee's home telephone number multiple times and was informed by his wife that he was sick or had a toothache. Agency told his wife that if Employee failed to call his supervisor directly, then his absences would be deemed absence without leave ("AWOL"). Despite this information, Agency claimed that Employee never contacted his supervisor or Human Resources.
[4] *Agency's Answer,* p. 1-7 (April 21, 2014).
[5] *Legal Brief of Derek Gadsden* (April 11, 2014).

inform it of his "new[,] temporary address." Thus, Agency claimed that OEA lacked jurisdiction to consider Employee's case.[6]

On April 28, 2014, the AJ issued her Initial Decision. She held that the thirty-day deadline to file appeals is mandatory in nature. Additionally, she found that Agency was only required to send Employee's notice to his last address of record and not the Department of Corrections. Finally, she concluded that there was no proof offered that incarceration tolls a filing deadline. Therefore, Employee's appeal was dismissed for lack of jurisdiction.[7]

Employee filed a Petition for Review with the OEA Board on May 9, 2014. He argues that his wife acted as his agent when she told Agency that he would not be reporting to work because he had a toothache. He also claims that he was "under the Family Medical Act." Moreover, it is Employee's position that the regulations which Agency relied upon are abstract and not feasible. Therefore, he requested that he be reinstated.[8]

Untimely Appeal

The AJ in this matter decided that OEA lacked jurisdiction to consider the merits of Employee's claims because his appeal was not filed by the thirty-day deadline. OEA's statutory authority to address appeals is found in D.C. Official Code §1-606.03(a). This statute provides that:

> An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIIII-A of this chapter), an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more (pursuant to subchapter XXIV of this chapter),

[6] *Agency Brief on Jurisdiction*, p. 1-7 (April 23, 2014).
[7] *Initial Decision* (April 28, 2014).
[8] *Petition for Review* (May 9, 2014). Employee filed an addendum to his petition and argued that Agency was aware of his whereabouts because he was arrested at work. *Addendum to Petition for Review* (July 8, 2014). Additionally, he filed another supplemental document on September 10, 2014. This document was a decision for the Office of Administrative Hearings regarding an unemployment claim that he appealed. *Final Order from Office of Administrative Hearings* (September 10, 2014).

> or a reduction-in-force (pursuant to subchapter XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.

Moreover, OEA Rule 604.2 provides that "an appeal . . . must be filed within thirty (30) calendar days of the effective date of the appealed agency action." As the AJ provided, Agency issued Employee's notice of termination on January 23, 2014. The effective date of the action was January 27, 2014. Therefore, in accordance with the D.C. Official Code and OEA Rule 604.2, Employee had until February 26, 2014, to file his appeal with OEA. He did not file his Petition for Appeal until March 18, 2014. This is well past the thirty-day deadline.

Furthermore, the D.C. Court of Appeals held in *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991) that "the time limits for filing appeals with administrative adjudicative agencies, as with courts, are mandatory and jurisdictional matters."[9] In accordance with OEA Rule 628.2, Employee has the burden of proving issues of jurisdiction including the timeliness of his filing. Because Employee failed to prove that his petition was timely filed with OEA, the AJ was within her authority to dismiss the case on this basis.

However, Employee seems to present two contradicting arguments that, in his position, justifies the untimely filing. The first is that he did not receive proper notice of the termination action. Employee contends that because he was incarcerated, Agency should have sent the removal notice to the Department of Corrections. The second argument is that Agency should

[9] *See also District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991) (citing *Woodley Park Community Association v. District of Columbia Board of Zoning Adjustment*, 490 A.2d 628, 635 (D.C.1985); *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162, 1164 (D.C.1985); *Gosch v. District of Columbia Department of Employment Services*, 484 A.2d 956, 958 (D.C.1984); and *Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917, 923 (D.C.1980)).

not have removed him from his position because he was on Family Medical Leave, and his wife acted as his agent to inform it of his need to take leave.

Employee explains that the removal notice should have been sent to the Department of Corrections so he could have responded within a timely manner.[10] If Employee was absent from work because he was incarcerated, then his arguments regarding an illness as justification would simply be untruthful. *Assuming arguendo*, even if he was not ill, he still would have been incarcerated and unable to leave the Department of Corrections to report to duty. Moreover, Employee failed to raise any arguments regarding the Family Medical Leave Act before the Administrative Judge. This Board has historically ruled that in accordance with OEA Rule 633.4, "any . . . legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board."[11] Therefore, we will not address Employee's arguments regarding medical leave.[12]

---

[10] *Legal Brief of Derek Gadsden* (April 11, 2014) and *Addendum to Petition for Review* (July 8, 2014).

[11] *Ilbay Ozbay v. Department of Transportation,* OEA Matter No. 1601-0073-09R11, *Opinion and Order on Petition for Review* (October 28, 2014); *Sharon Jeffries v. D.C. Retirement Board,* OEA Matter No. 2401-0073-11, Opinion and Order on Petition for Review (July 24, 2014); *Latonya Lewis v. D.C. Public Schools,* OEA Matter No. 1601-0046-08, Opinion and Order on Petition for Review (April 15, 2014); *Markia Jackson v. D.C. Public Schools,* OEA Matter No. 2401-0138-10, Opinion and Order on Petition for Review (August 2, 2013); *Darlene Redding v. Department of Public Works*, OEA Matter No. 1601-0112-08R11, Opinion and Order on Petition for Review (April 30, 2013); *Dominick Stewart v. D.C. Public Schools*, OEA Matter No. 2401-0214-09, Opinion and Order on Petition for Review (June 4, 2012); *Calvin Braithwaite v. D.C. Public Schools*, OEA Matter No. 2401-0159-04, Opinion and Order on Petition for Review (September 3, 2008); *Collins Thompson v. D.C. Fire and EMS*, OEA Matter No. 1601-0219-04, Opinion and Order on Petition for Review (November 13, 2008); and *Beverly Gurara v. Department of Transportation*, OEA Matter No. 1601-0080-09, Opinion and Order on Petition for Review (December 12, 2011).

[12] This Board will note that if Employee was indeed claiming a medical condition under DCFMLA, he was required to provide notice to Agency. DCMR §§1614.1 and 1614.2 provide the following as it relates to notice. Those sections state that:

> If an employee has, or reasonably should have, at least thirty (30) days' notice of the need for family or medical leave, the employee shall notify the employer of his or her intention to take family or medical leave at least thirty (30) days before the employee wishes the leave to begin. When the need for family or medical leave is known at least thirty (30) days in advance and an employee fails to give timely notice to the employer with no reasonable excuse, the employer may delay FMLA coverage until thirty (30) days after the date the employee provides notice.
>
> If an employee could not reasonably have foreseen the need for family or medical leave at least thirty (30) days in advance, the employee shall notify the employer of the need for leave as soon

As the AJ provided, OEA has consistently held that incarceration does not toll the deadline for filing an appeal with our Office. The OEA Board held in *Emory Mavins v. Department of Transportation*, OEA Matter No. 1601-0202-09, *Opinion and Order on Petition for Review* (March 19, 2013) and *Hawkins v. Department of Public Works*, OEA Matter No. 1601-0054-06 (May 4, 2006)(citing *Employee v. Agency*, OEA Matter No. 1601-0009-88, 36 D.C. Reg. 7336 (1989)) that incarceration is not an excusable explanation for an employee's absence. Similarly, the AJ in *Young v. Department of Transportation*, OEA Matter No. 1601-0074-09 (May 20, 2010) ruled that "it is unfathomable that incarceration provides adequate justification for unauthorized absences for work for a period of ten (10) consecutive days." This Board will adhere to the historical rulings of this office and find that incarceration is not an excusable absence for an unauthorized absence and absence without leave. Therefore, Employee's Petition for Review could be denied on these grounds, as well.

Conclusion

Employee failed to file his Petition for Appeal within a timely manner. As a result, OEA lacks jurisdiction to consider his case. Additionally, incarceration is not justification or an excuse for the AWOL charge. The AJ's determination was based on substantial evidence. Therefore, Employee's Petition for Review is denied.

---

as practicable prior to the date on which the employee wishes the leave to begin.

According to the record, Employee failed to provide such notice to Agency. Therefore, even if we could have considered the merits of this claim, Employee would not have prevailed.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

_____
Sheree L. Price, Vice Chair

_____
Vera M. Abbott

_____
A. Gilbert Douglass

_____
Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.