

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
ERNESTINE COPELAND)	
Employee)	OEA Matter No. J-0390-10
)	
v.)	Date of Issuance: February 22, 2011
)	
DISTRICT OF COLUMBIA)	Rohulamin Quander, Esq.
DEPARTMENT OF CORRECTIONS)	Senior Administrative Judge
Agency)	
)	
Ernestine Copeland, Employee, <i>pro se</i>		
Mitchell J. Franks, Esq., Agency representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 27, 2010, Ernestine Copeland (the “Employee”), *pro se*, a former Correctional Officer (DS-007-08) with the D.C. Department of Corrections (the “Agency”), filed an appeal with the D.C. Office of Employee Appeals (the “Office” or “OEA”), seeking a reversal of Agency’s action terminating her employment, effective May 26, 2007.¹ The underlying basis for Employee’s termination was Agency’s efforts to comply with the provisions of Title 18, U.S.C., § 922 (g)(1) and § 922 (g)(9), the legal provisions which address, restrict, and prohibit persons who have been convicted of certain crimes from future access to firearms.

Agency filed an Answer to the appeal on September 29, 2010, asserting, first, that the Office lacked jurisdiction to consider an appeal filed outside of the statutorily mandated 30-day period. Further, Agency also alleged that Employee was incompetent under the law, since her former position as a Correctional Officer mandated that she carry a firearm during the course of her employment, which requirement was prohibited by the U.S. Code. The record reflects that in 1990 Employee pled guilty to a charge of child abuse. Agency incorporated a Motion to Dismiss for lack of jurisdiction into its Answer. This matter was assigned to this administrative judge (the “AJ”) on January 10, 2011. I convened a Status Conference on February 10, 2011. Upon consideration of the total record, including the statements of the parties, both of whom participated in the Status

¹ A second termination letter, also dated May 22, 2007, was issued, the nature of which is explained herein.

Conference, I have determined that there are no material issues of fact that need to be decided. I closed the record at that time.

ISSUE

Whether this Office has jurisdiction in this matter

JURISDICTION

The jurisdiction of this Office was not established.

FINDINGS OF FACT

The following facts are undisputed:

1. On or about October 13, 1987, Employee was hired as a Correctional Officer by the Agency.
2. On February 5, 1990, Employee pled guilty to “Cruelty to Children,” a misdemeanor violation of a D.C. criminal statute (D.C. Code Title 22, § 901). *Agency Exhibits #8 & #16.*
3. On February 3, 1998, Agency’s Position Description for the Correctional Officer position was updated, to include a requirement that the “Incumbent must be able to possess and use a firearm depending upon facility post assignment.” Subsequent updates also mandated that the incumbent must pass and maintain a firearm proficiency status. *Agency Exhibits. #15 & #12.*
4. On March 22, 2002, Employee was terminated during an Agency-wide reduction in force (the “RIF”). She was rehired on December 26, 2002, and reinstated to the same Correctional Officer position. She listed her address of record as “450 Xenia Street, S.E., Suite 3, Washington, D.C. 20032” on the Employee Locator Sheet, the official address of record document that she filed to indicate her residential address at the time of rehire. *Exhibit #13.*
5. In approximately April 2005, Wanda Patten, Chief, Office of Internal Affairs, brought to the attention of S. Elwood York, Jr., then Interim Director, that a recent background screening of Agency’s law enforcement officials, mandated as a component of passing and maintaining firearms proficiency, revealed that some of the referenced employees had criminal records of felony or misdemeanor crimes of domestic violence convictions, a direct violation of 18, U.S.C., § 922 (g)(1) and § 922 (g)(9).²

² Sec. 922(g) makes it illegal for certain groups of people to carry a firearm. Section (g)(9) further makes it illegal for anyone who has been convicted of a misdemeanor crime of domestic violence to possess any firearm or ammunition. These provisions also apply retroactively, affecting persons whose offense occurred prior to the passage of the law. There is no exception for law enforcement and/or correctional officers. Patten’s memo further advised that: “If you are affected by this statute (1) you may not be issued or possess any firearm or ammunition; (2) you must immediately notify your supervisor; (3) you must return any Government-issued firearm or ammunition to the tower or the Major;

6. Agency determined that, based upon her 1990 conviction of a crime of domestic violence, i.e., Cruelty to Children, Employee was incompetent,³ and no longer legally capable of serving as a Correctional Officer, as both her position description and job-related duties mandated that she carry a firearm. Further, there was no evidence that Employee had either sought or obtained a legal pardon or expungement of the record for the offense in question, as provided for in 18 U.S.C. § 921 (a)(33)(B)(ii).⁴
7. Between late February to early March, 2007, the Human Resource Management unit of Agency prepared and delivered an adverse action packet to Employee, initiating the termination process. Employee, when served, listed the Xenia Street address of record, as her still current address. *Agency Exhibit # 7*. On the date of this Status Conference, Employee listed her address as still 450 Xenia Street, S.E., #3, Washington, D.C. 20032. *See Sign-In Sheet from the Status Conference*.
8. On May 22, 2007, Agency issued an Official Notice of Final Decision letter to Employee at the established residential address of record, notifying that she was being removed from her position, effective May 26, 2007, based upon a charge of Incompetence. *Agency Exhibit #6*. The letter was sent by U.S. Express Mail, issued by the United States Postal Service (the “USPS”), and mailed to the Xenia Street, S.E., address of record. *See Agency Exhibit # 6a*
9. After subsequent delivery attempts and notices to the Employee by the USPS, the letter was returned to the Agency, marked “unclaimed.”
10. On or about May 22, 2007, Agency reissued the same letter, identical in all respects, except that Agency accorded Employee the equivalence of a 30-day notice prior to the effective date of termination. The adjusted date of termination in the second letter was June 27, 2007. *Agency Exhibit #5*.
11. Agency, while proffering that there is no evidence in the record which reflects that the second letter was also sent via express mail, stands by its belief that the second letter was probably sent by regular first class U.S. mail, likewise to 450 Xenia Street, S.E., Suite 3, Washington, D.C., 20032, the only address of record.
12. When Employee reported to work on or about June 27, 2007, she was advised that she had been terminated, and was no longer a D.C. Correctional Officer. She was subsequently escorted from the work place by other uniformed personnel.
13. On March 6, 2009, Wanda Patten, Chief, Office of Internal Affairs, issued a letter to Employee, demanding that she immediately return unsundered D.C. Government property, i.e., her uniform and badge, which Employee was observed as wearing while

and (4) surrender your weapon permit immediately to the Chief, Office of Internal Affairs.” *See Agency’s Answer and Motion to Dismiss*.

³ Pursuant to DPM § 1603.3, the definition of the terms “incompetence” or “incompetent” does not necessarily carry a negative connotation. The terms as defined above are broad enough to also include situations and circumstances where an employee is unable to perform the job’s mandated duties, and includes situations where the nature of the job requires that the incumbent must be able to fully discharge the duties, such as drive a motor vehicle, operate certain equipment, or, as in the matter at hand, be qualified to carry a fire-arm in the course of discharging their duties.

⁴ This section of the code states, “A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned ...”

attending a March 4, 2009, meeting the D.C. Council's Committee on Public Safety and the Judiciary. The letter also reiterated that Employee had been terminated from Agency, effective June 27, 2007. *Agency Exhibit #2*.

14. During the Status Conference, Employee represented to the AJ that, between the period of June 27, 2007, the last day that she was on the job, and July 27, 2010, the date her union representative allegedly told her that she had been terminated three years ago, she was still trying to find out what happened, because she allegedly was never served with a notice of job termination.
15. To this AJ's further query regarding her termination status, she proffered that she had been to numerous other forums, including the D.C. Council and the Superior Court of D.C., and consulted with public officials, but had never been notified by the Agency that she had been terminated.
16. Employee claimed discrimination, asserting that certain Correctional Officers, who allegedly had criminal convictions, remained on the job and carried fire-arms. Agency replied that, as far as Agency knew, anyone in that category, and who continued to serve as a Correctional Officer, had either been granted an official pardon or the record of their alleged offense and/or conviction had been expunged.⁵
17. Employee asserted that Agency should have offered her another job with a position description that did not require that she be authorized to carry a firearm. In reply, Agency noted that Employee's talents were that of a Correctional Officer. There was no obligation to switch her to some other job in the Agency, nor any indication that another job was available for which she might qualify.
18. Because this matter is being decided on the issue of jurisdiction, there is no need to also address the substantive issue of whether Employee was competent to discharge the job-related duties of her position.

ANALYSIS AND CONCLUSIONS

Effective October 22, 1998, the Omnibus Personnel Reform Amendment Act of 1998, D.C. Law 12-124 ("OPRAA") amended certain sections of the D.C. Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139, D.C. Code § 1-601.1 *et seq.* ("CMPA"). Of specific relevance to this Office, § 101(d) of OPRAA amended Section 603(a) D.C. Code § 1-606.3(a) of the Code by restricting the Office's jurisdiction over Employee appeals and reads as follows:

- (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to title XII-A), an adverse action for cause that results in removal, reduction in grade, or suspension of 10 days or more (pursuant to title XVI-A), or a reduction in force (pursuant to title XXIV) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. **Any appeal shall be filed**

⁵ See footnote #4, *supra*.

within 30 days of the effective date of the appealed agency action.

Emphasis supplied.

Thus, as of October 22, 1998, this Office no longer has jurisdiction over, *inter alia*, appeals filed beyond 30 days of the effective date of the appealed agency action.

"The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 753, 756 (1975). "[A] statute that is clear and unambiguous on its face is not open to construction or interpretation other than through its express language." *Caminetti v. United States*, 242 U.S. 470 (1916); *McLord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980); *Banks v. D.C. Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992), _ D.C. Reg. __ ().

The record reflects that Agency, as directed by the mandates of federal law, determined that no one could serve as a Correctional Officer who was not in compliance with the directives of 18, U.S.C., § 922 (g)(1) and § 922 (g)(9), which govern the legal capability of said officers to carry firearms during the discharge of their job duties. Employee, unfortunately, found herself caught in the web. She had never obtained a pardon for her offense, and likewise, her offense was never expunged. As well, and determinative at this time, she did not file her Petition for Appeal until August 27, 2010. Claiming to be trying to determine "what happened" for more than the last three years, Employee now claims, belatedly, that she was never served a proper notice of termination, and therefore, Agency erred in serving her job termination notification.

I find her claim to be without merit. First, Agency issued an express mail letter on May 22, 2007, which Employee never collected, despite numerous reminder notices.⁶ The letter was returned, marked "unclaimed." To the AJ's query regarding whether she received the notices from USPS, Employee could not specifically recall, remarking that she was "working," impliedly too busy to collect the unclaimed mail. Having been personally served the Notice of Proposed Removal letter, dated February 21, 2007, she was well aware that termination was pending, perhaps imminent. Yet she chose to hide, perhaps thinking that her refusal to collect the notice of termination letter would somehow cancel Agency's decision.

Second, Agency proffered that it issued an additional letter, also dated May 22, 2007, but which accorded Employee a 30-day notice, effective June 27, 2007. This letter was sent by regular first class U.S. mail to the address of record, and was not returned, marked "unclaimed," to the Agency. Therefore, there is a strong presumption of a timely delivery of the letter, despite Employee's assertion to the contrary. Third, it is unreasonable to assume that Employee essentially wandered from forum to forum for more than three years, including consulting with her union and filing unknown documents with the Superior Court of the District of Columbia, but never managed to note a timely appeal with OEA, now belatedly claiming that she was never notified that her job had been terminated. I conclude that Employee knew that her job had ended, and likewise was

⁶ There is no indication that the express mail letter was also issued, "certified mail, return receipt requested."

aware of Agency's more than reasonable efforts to notify her of her job status, including her rights to note a timely appeal. Instead, she elected to hide from receiving the notice, and now seeks to deny that notice was ever given.

Here, as of October 22, 1998, § 101(d) of OPRAA "clearly and unambiguously" removed appeals filed more than 30 days of the effective date of Agency's action from the jurisdiction of the Office. The filing deadline is now statutory and thus cannot be waived.⁷ The time limit for filing an appeal with an administrative adjudicatory agency, as with a court, is mandatory and is considered a jurisdictional matter.⁸ Employee's appeal of the agency's termination action was filed on, well more than thirty days after the effective date of the termination. Employee has proffered no legally justifiable argument that would erase the bright-line rule of *D.C. Official Code* § 1-606.3(a).

I find that, based upon the above mandatory filing requirement, Employee's appeal to this Office was untimely filed. I conclude that the Office lacks jurisdiction to decide this matter and to address any of the substantive issues raised in the Petition for Appeal. Thus, the matter must be dismissed for lack of jurisdiction.

It is not necessary to address the substantive issue of whether Employee was competent, within the mandate of the statute, to serve as a Correctional Officer, including the directive that the incumbent must be qualified to carry a fire-arm.

ORDER

It is hereby ORDERED that this matter is DISMISSED.

FOR THE OFFICE:

S/S
ROHULAMIN QUANDER, Esq.
Senior Administrative Judge

⁷ *White v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0149-91, *Opinion and Order on Petition for Review* (Sept. 2, 1994), __D.C. Reg. __ () at 2.

⁸ See *District of Columbia Pub. Employees Bd. V. Metropolitan Police Dep't*, 593 A.2d 641 (D.C. 1991); *Thomas v. District of Columbia Dep't of Employment Services*, 490 A.2d 1162, 1164 (D.C. 1985).