

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Reynard Doy)	OEA Matter No. J-0070-11
Employee)	
)	
v.)	Date of Issuance: May 9, 2011
)	
)	Joseph Lim, Esq.
)	Senior Administrative Judge
D.C. Department of Public Works)	
Agency)	
_____)	

Reynard Doy, *Pro se*
Pamela Washington, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

On February 11, 2011, Employee, a Parking Enforcement Officer, Grade 8/5, filed a petition for appeal from Agency’s decision removing him for: “Neglect of Duty (failure to maintain a valid motor vehicle operator’s permit. This matter was assigned to me on April 14, 2011.

Employee admits that Agency’s “Notice of Termination”, dated September 27, 2011, was delivered to him on that day. In pertinent part, the notice reads as follows:

The effective date of your termination is close of business on Friday, October 1, 2010. . . .

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.* (italicized emphasis added). [The notice goes on to provide the address and phone number of the OEA as well as the appeal forms.]

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

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.

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).

Employee filed his appeal on February 11, 2011, more than 2 months beyond the statutory 30-day filing deadline. *See also* OEA Rule 604.2, 46 D.C. Reg. 9299 (1999). Agency submitted its Answer to Employee's petition for appeal on March 28, 2011. Contained therein was a motion to dismiss the case for untimely filing that reads as follows:

District of Columbia Official Code Title 1 Chapter 6 Section 606-03(a) provides that an employee may appeal an agency final decision that affects a performance rating that results in removal of

the employee, an adverse action for cause that results in removal, reduction in grade, placement on enforced leave, or suspension for ten (10) days or more. The law further provides that an appeal ***shall be filed within thirty (30) days of the effective date of the appealed agency action*** (emphasis added).

Agency's Answer to Petition for Appeal at 3.

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. ____ ().

To date, this Office has recognized only one exception to the mandatory nature of the timeliness rule. The only exception that the Office Board has established is that a late filing will be excused if an agency fails to provide the employee with "adequate notice of its decision and the right to contest the decision through an appeal". *McLeod v. District of Columbia Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003), ___ D.C. Reg. ____ (). Such is not the case here, thus that exception is not germane to this case.

In his letter to this Office, Employee responded in pertinent part as follows:

Then, I received a final notice of removal on September 27, 2010. The September 27 letter indicated that I had 30 days to file an appeal using the attached forms.

After many unsuccessful attempts to contact my attorney, I wrote an appeal myself, using forms from my union. I sent two copies of my appeal to your office, within the 30-day period specified in the September 27 notice. When I spoke to your office in November, you informed me that you had no record of my letter being received. As stated above, I was aware of the 30-day timeframe within which to file an appeal, and I appealed the final decision myself within the time period. Your office indicates they have no record of that appeal, which must be a postal or clerical error. I am therefore requesting that you consider my appeal now.

Employee insists that despite the February 11, 2011, date stamp on his appeal, he had actually filed his appeal much earlier, sometime in October 2010. This Office has established three procedures to ensure that any legal document submitted gets its date of receipt recorded

accurately in a timely manner. First, upon receipt by either postal mail or personal delivery, the Office date-stamps the document(s). Second, the Office scans the document into its database, thereby providing another record not only of the date that it was received, but also of the date that such document was scanned in. Lastly, an appeal automatically generates another form that is sent to the Agency asking for its response to Employee's appeal.

As noted above, this Office has no record of anything submitted by Employee prior to February 11, 2011. His alleged earlier filed appeal does not appear in the Office database. In addition, Agency's answer was filed in March 2011, not in November 2010 as would have been the case if Employee's appeal was indeed filed in October 2010.

All this leads to the conclusion that Employee's appeal, filed here on February 11, 2011, more than two months after the filing window closed, was untimely. 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:

Joseph Lim, Esq.
Senior Administrative Judge