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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
NURSAT AYGEN)	OEA Matter No. 1601-0011-09
Employee)	
)	
)	Date of Issuance: September 29, 2009
v.)	
)	
DISTRICT OF COLUMBIA)	Rohulamin Quander, Esq.
PUBLIC SCHOOLS)	Senior Administrative Judge
Agency)	
_____)	

Nursat Aygen, *pro se*, Employee Representative
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Employee was terminated from her position as a Visiting Instruction Teacher, ET-15, with the D.C. Public Schools (the “Agency”), based upon allegations of willful disobedience. Agency issued a Notice of Final Decision letter on May 6, 2008, which removed Employee from employment, effective May 27, 2008. Employee filed her Petition for Appeal with the Office of Employee Appeals (the “Office” or “OEA”) on October 24, 2008.

Once notified of the appeal, Agency filed a timely Answer on December 1, 2008, which included a Motion to Dismiss. The basis for Agency’s motion was two-fold, pleaded in the alternative. First, Agency noted that Employee did not file her appeal to the Office until October 24, 2008, although she was terminated effective May 27, 2008. Such belated action was untimely, well beyond the 30-day mandate, within which to note an appeal.

Second, Agency noted that on June 3, 2008, the Washington Teacher's Union (the "Union") filed a grievance on Employee's behalf, requesting a hearing and invoking Step III of the grievance and arbitration procedure. Therefore, Employee, when notified of the two available appeal options, as referenced and outlined in her termination letter issued on May 6, 2008, elected to invoke the provisions of the Collective Bargaining Agreement, rather than to pursue her appeal through the Office. Agency underscored that the same letter which outlined Employee's appeal options, also stated that there was a choice of one option or the other, but not both (*emphasis added by Agency in its letter of termination.*)

The case was assigned to this administrative judge (the "AJ") on March 16, 2009. I convened a Status Hearing on April 2, 2009, at which time I advised Employee that there was a threshold question of jurisdiction. The timeliness of her filing the appeal was at issue, being about 120 days after her termination, and well beyond the 30-day appeal window as noted in the law, the Office's regulations (OEA Rule 604.2), and the notification of appeal rights, as enumerated in Agency's final action letter. I further advised Employee that, pursuant to OEA Rule 629.2, employees have the burden of proof as to issues of jurisdiction, including timeliness of filing.

In response, Employee, *pro se*, proffered that she did not authorize the Union to file a grievance on her behalf, and that once she learned that they had done so, she requested that they not represent her in this matter any further. Also, Employee raised an additional basis as a component of her argument, asserting that her appeal was still timely. Employee claimed that, although she did receive the letter of termination, dated May 6, 2009, and effective May 27, 2009, she was confused upon receipt of a subsequent letter from Agency on or about August 1, 2008, which directed her to report on August 19, 2008, to a new teaching assignment at the Brightwood Elementary School.

She reported as directed, and worked as a teacher from that date until September 24, 2008, when she was suddenly and inexplicably barred from the building by the principal, who referred Employee to Agency's human resource's staff, for an explanation of why she could not enter the building. It is from that date, September 24, 2008, that Employee proffered that she calculated that she must file her appeal within 30 days of the effective date of Agency's new action of barring her from entry.

Agency was represented by Sara White, Esq., who reiterated Agency's Motion to Dismiss, asserting that Employee's Petition was not filed within the statutorily mandated time of 30 calendar days of the effective date of the action and, in the alternative, that Employee, when faced with two avenues for a possible appeal, made a decision to pursue her appeal through the Union. She is statutorily barred from now belatedly seeking an alternative appeal route.

Agency counsel also argued that Employee's directive to report to Brightwood School was a clerical error, and that once it was discovered, the principal was directed by the Chancellor's office to immediately bar Employee from further access to the building, and to likewise direct her to report to human resource staff for appropriate adjustments to

arrange for compensation for the period of time that Employee was erroneously directed to report to the Brightwood School. Agency noted that in May 2008, Employee was served with a legally complaint notice of termination, and that a relevant Form One was prepared by Agency's human resource's office when Employee was separated, effective May 27, 2008. There was no subsequent personnel action taken to reflect a reversal of the separation. Because the case could be decided based on the documents of record, no evidentiary hearing was held. The record is now closed.

Untimely filing.

Effective October 21, 1998, § 101(d) of the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, modified certain sections of the Comprehensive Merit Personnel Act ("CMPA") pertaining to this Office. The amendments clearly and unambiguously removed from the jurisdiction of the Office all appeals filed more than 30 days after the effective date of the action being appealed, and likewise any opportunity for an appellant to submit a written "statement of justification"¹ to explain the failure to comply with the statutorily mandated appeal time frame. As such, ". . . , the 30-day filing deadline is statutory and cannot be waived." *King v. Department of Human Services*, OEA Matter No. J-0187-99 (November 30, 1999), _ D.C. Reg. _ ().

The only exception to this rule would be a situation where an agency neglected to provide an employee with the proper appeal rights notification. Such is not the case here. Employee acknowledged receiving the termination letter of May 6, 2008, which clearly stated the 30-day time frame within which an appeal must be noted, including the appeal form and a copy of the rules, and provided the contact information for this Office, which letter underscored that there were two appeal option routes available, but mandated that the appellant elect a route, but not both. During the Prehearing Conference, I specifically asked Employee if she received a copy of the OEA Rules as an insert to her letter of termination. She assured me that she had received said rules, and was likewise familiar with them, having previously had a matter before this Office.

"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. _ (). Further, "[t]he time limits for filing with administrative adjudicatory agencies, as with the courts, are mandatory and jurisdictional matters." *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991); *White v. D.C. Fire Department*, OEA Matter No. 1601-0149-91, *Opinion and Order on Petition for Review*

¹ Prior to OPRAA, the Office was able to consider a "Statement of Justification", in which a petitioner could explain why he or she did not file the Petition for Appeal within a certain time frame. Now that the time frame is mandated by law, and not merely a regulation or policy, that option has been eliminated.

(September 2, 1994), __ D.C. Reg. __ (); *Taylor v. D.C. Department of Corrections*, OEA Matter No. 1601-0061-99, __ D.C. Reg. __ ().

Employee has proffered that she did not authorize the Union to take action on her behalf, and was initially unaware that they had filed a grievance to contest her termination. Further, when she “discovered” that they had filed a grievance on her behalf, she requested them to not continue with her case, or to represent her further. If that were the case, with the Union electing to take unilateral action upon its own motion, the chronology of the situation is simply that Employee, once terminated effective May 27, 2008, took no action to note an appeal to this Office within the 30-day period.

At any rate, I find that Employee did not note a timely appeal to this Office within 30 days of her being terminated from Agency. I further find that Agency’s clerical error of allowing Employee to return to work, pursuant to an erroneous report-to-work letter, did not confer a new employment status upon her. The Form One dated May 27, 2008, and the act of separation was officially implemented on that date. As such, Agency was not mandated to reissue another later of termination, as Employee was already terminated, and missed the appeals window for this Office. Hanging by a thread, she has tried to find a window of opportunity, which the fact pattern and circumstances do not support.

Election of Remedies

Having concluded that Employee’s appeal was not timely filed, it is not necessary to delve into the merits of Agency’s election of remedies argument, other than to note that pursuant to *D.C. Official Code* § 1-616.52(e), matters covered under Subchapter XVI-A, General Discipline and Grievances, that also fall within the coverage of a negotiated grievance may, in the discretion of the aggrieved employee, be raised either pursuant to § 1-606-03, or the negotiated grievance procedure, but not both.

Thus, assuming *arguendo* that Employee might have otherwise been able to establish subject matter jurisdiction, I find that the appeal was untimely filed, based upon the mandatory filing requirement. Having determined that the Office lacks jurisdiction to decide this matter, I likewise find that there is no jurisdiction to address any of the substantive issues raised in the Petition for Appeal. Therefore, this matter must be dismissed.

ORDER

It is hereby ORDERED that Agency’s Motion to Dismiss is GRANTED, and that this matter is DISMISSED.

FOR THE OFFICE:

_____/s/
ROHULAMIN QUANDER, Esq.
Senior Administrative Judge