

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
SAMUEL QUIJADA-CRUZ)	OEA Matter No. 1601-0117-09
Employee)	
)	
)	Date of Issuance: November 2, 2009
v.)	
)	Rohulamin Quander, Esq.
DISTRICT OF COLUMBIA)	Senior Administrative Judge
DEPT. OF TRANSPORTATION)	
Agency)	

Samuel Quijada-Cruz, *pro se*, Employee
Clifford Lowery, Employee Representative
Christine V. Davis, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Background

On April 27, 2009, Employee, a former Masonry Worker WS-3603-08 with the D.C. Department of Transportation (the “Agency”) filed a Petition for Appeal with the Office of Employee Appeals (the “Office”) challenging Agency’s final notice of December 24, 2008, which terminated him from employment, effective January 2, 2009, due to Unauthorized Absence of 10 or more consecutive days. His actions constituted job abandonment pursuant to D.C. Personnel Manual § 1619.6(a). The case was assigned to this administrative judge (the “AJ”) on September 29 2009. Agency, once notified of Employee’s appeal, filed an Answer on June 29, 2009, which Answer noted alleged job abandonment as the basis for Employee’s termination. Further, Agency requested that the appeal be dismissed due to untimely filing.

I convened a Status Conference on October 28, 2009. Both Employee and Agency appeared. However, Clifford Lowery, Employee’s AFGE union representative, failed to

appear. Because this AJ needed to advance the conference from 10:00 a.m. to 9:30 a.m., on October 27, 2009, the day before the proceeding, I personally attempted to call Mr. Lowery at his two telephone numbers of record, neither one of which would accept a message. I also issued a fax and an e mail notice to Mr. Lowery. Further, James Fisher, Esq., Agency's representative, likewise sent an e mail to Mr. Lowery, to advise him of the 30 minute adjustment in time. Mr. Lowery did not appear. To date this Office has not heard from him regarding why he did not attend the proceedings to represent his client.

Employee, once made aware of the efforts expended to contact and advise his representative, elected to waive his presence and to proceed *pro se*. Because the case could be decided based upon the documents of record, no evidentiary hearing was held. The record is now closed.

JURISDICTION

Pursuant to the requirements of the *D.C. Official Code*, § 1-606.03 (2001 ed.) the jurisdiction of this Office to hear and decide this matter has not been established.

Untimely filing

Effective October 21, 1998, 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. Of specific relevance to this case is § 101(d) of OPRAA, which amended § 1-606.03(a) of the *D.C. Official Code* (2001) in pertinent part as follows: "Any appeal [to this Office] shall be filed within 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. __ (). 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* (September 2, 1994), __ D.C. Reg. __ (); *Taylor v. D.C. Department of Corrections*, OEA Matter No. 1601-0061-99, __ D.C. Reg. __ ().

Employee filed his petition for appeal on April 27, 2009. I find that that date was more than 30 days after the effective date of the termination action, January 2, 2009. However, as of October 21, 1998, § 101(d) of OPRAA 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. The documents of record reflect that on November 4, 2008, Agency issued to Employee a 15-day Advanced Written Notice of Proposed Removal, which set forth the specifications related to his alleged job abandonment. The letter also reflected the personal efforts of Employee’s supervisors to assist him with his personal problems, including telephone conversations and at least one visit to Employee’s home for one-on-one contact.

During the Status Conference, Employee denied that he ever received the Advanced Written Notice letter, pointing out that the certified letter listed the address as 5213 13th Street, N.W., while he then resided at 5313 13th Street, one block to the north. Agency’s Exhibit #1 consisted of three documents, a copy of the November 4th letter, bearing the incorrect address of 5213 13th Street, plus a photocopy of the mailing envelope and the Return Receipt Requested card. While the card clearly reflects the correct mailing address as 5313 13th Street, the mailing address on the envelope is crossed out and illegible.

Employee also denied ever receiving the Notice of Final Decision letter, dated December 24, 2008, Agency’s Exhibit #3. Employee admitted, however, that his family vacated the residence in about late November 2008, due to foreclosure. Although he did visit the former residence on occasion to see what accumulated mail might have been delivered, he stated that he never received the notice of termination letter, and only learned of his termination in April 2009, through his union representatives. He then filed this belated appeal.

Assuming *arguendo* that Employee had otherwise established jurisdiction, I find that his appeal to this Office was untimely filed, based upon the above mandatory filing requirement. Employee admitted that he was having a series of personal problems, and that Agency tried to intervene to provide information for troubled employees, including a COPE referral for his clinical depression and alcohol-related issues. Further, he acknowledged that his supervisors and co-workers did try to help, by urging him to return to work and to also follow through with the referrals for assistance. He did not do so, and admitted as much during the Status Conference. Along the way he also neglected to protect his appeal rights by noting a timely appeal with the Office. Agency’s efforts to assist Employee were more than reasonable, as the notice of termination letter of December 24, 2008, effective January 2, 2009, was properly issued, and notified Employee of his appeal rights, if he had elected to pursue them at that time.

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.

Employee's non receipt of the letter was directly due to his having moved from the residence without filing a formal notice of change of address with Agency. I find that the Office lacks jurisdiction to decide this matter. As such, he does not qualify to claim entitlement to the "lack of adequate notice" exception that would justify a late-filed appeal. I likewise find that there is no jurisdiction to address any of the substantive issues raised in the Petition for Appeal. Therefore, the 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:

ROHULAMIN QUANDER, Esq.
Senior Administrative Judge