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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
BARRON BROWN, SR.)	
Employee)	OEA Matter No. 1601-0038-05
)	
v.)	Date of Issuance: November 29, 2005
)	
D.C. METROPOLITAN POLICE)	Rohulamin Quander, Esq.
Agency)	Senior Administrative Judge
)	

Harold Vaught, Esq., Employee Representative
Andrea Comentale, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On March 18, 2005, Employee, *pro se*, a 17-year career police officer with the Metropolitan Police Department (the "Agency") filed a Petition for Appeal with the Office of Employee Appeals (the "Office"). He challenged Agency's final notice terminating him from employment for cause, i.e., conviction of simple assault against a member of the general public. Although the initial termination date was listed as January 22, 2005, the date was briefly postponed to allow Kyle A. McGonigal, the Fraternal Order of Police's legal counsel, the opportunity to file a written response to the Memorandum of Termination (the "Memorandum"), addressed to MPD Chief Charles Ramsey on January 21, 2005. After giving due consideration to the many points raised in Mr. McGonigal's letter, Chief Ramsey rejected the tenets of the letter, and reaffirmed the contents of the Memorandum in a letter issued by the chief and dated February 8, 2005.

Although the Memorandum advised Employee of his right to appeal his termination to the Office, it erroneously indicated that he had to file his appeal within 15 days of the effective date of agency action. Employee challenged the severity of the penalty, asserting

that the appropriate penalty for simple assault should be significantly less than the maximum penalty of termination. Being fully cognizant of the statutorily accorded requirement and legal right to file the Petition of Appeal within 30 days of the effective date of the termination action, i.e., within 30 days of February 8, 2005, neither Employee nor his counsel elected to challenge the clerical error. The case was assigned to this administrative judge (the "AJ") on September 22, 2005.

Agency is represented by Kay Comentale, Esq., Assistant Attorney General for the District of Columbia. Employee is now represented by Harold Vaught, Esq., since Mr. McGonigal is no longer on the union's legal staff. I convened a Prehearing Conference on October 18, 2005, at which time I entertained Agency's Motion to Dismiss the Petition, on the basis that it was untimely filed. Agency asserted that Employee's Petition was not filed within the statutorily mandated time of 30 calendar days of the effective date of the action. Because the case could be decided based on the documents of record, no evidentiary hearing was held. The record is now closed.

Issue

The issue to be decided is whether this Office has jurisdiction in this matter

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

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. __ ().

In addition to the above, the Office's Rules are illuminating and should be visited at this time.

OEA Rule 603.2, Computation of Time, states:

If a party has a right or duty to act or proceed within a prescribed period after service of a notice or other document upon him or her, three (3) calendar days shall be added to the prescribed period whenever the document or notice is service upon the party by mail.

OEA Rule 604.2, Jurisdiction, states:

An appeal filed pursuant to Rule 604.1 must be filed within thirty (30) days of the effective date of the appealed agency action.

OEA Rule 608.3, Filing Requirements, states:

The date of filing shall be determined by the date of receipt by the Office.

OEA Rule 629.2, Burden of Proof, states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing.

Employee asserts that his Petition for Appeal was filed on March 2, 2005, as evidenced by the date appearing on the Petition, as well as the post mark date of the envelope in which the Petition was mailed to the Office. He further asserts that allowing three calendar days for the Petition to arrive by mail, there is a conclusive presumption that the petition arrived at the Office by March 5, 2005, well within the 30 day mandate. Further, he implies that his Petition was somehow "floating" around the Office for several days, and was not file stamped until March 18, 2005. Acknowledging that the burden of proof rests solely with the Employee in this matter, Employee asserts that the presumption of the delivery of a correctly addressed, timely mailed Petition for Appeal, "outweighs whatever evidentiary value can be properly assigned to the date stamp on Employee's Petition." However, he cites no legal authority for that bare assertion.

OEA Rule 608.4 anticipates that a Petition for Appeal may be filed in person or by mail. However, it is a tenet of the common law that a filing by mail also assumes the risk of non-delivery or untimely delivery of the mailed document. The mail handling procedure of this Office is to place the mail on the designated desk immediately adjacent to the file stamping machine. As each Petition for Appeal document is opened, it is immediately filed-stamped and then assigned an appeal number as it is logged into the record book of all noted appeals. Checking the book prior to issuing this Initial Decision, I noted the receipt of the above-noted appeal, entered on march 18, 2005, and likewise assigned a case file number that matches in sequence all other Petitions for Appeal which were filed within a day or two before and after this one, all of which were apparently timely filed.

Based upon the above, I find that the date of March 18, 2005, was the date the Employee's Petition for Appeal was received by this Office. This was 38 days after the

effective date of the disciplinary action. 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. __ ().

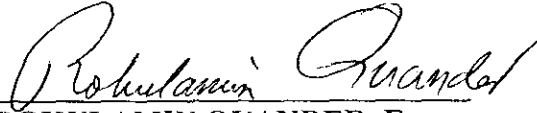
The only exception to this rule would be a situation where an agency neglected to provide an employee with the proper appeal rights notification. Such is not the case here, because although the final notice erroneously indicated that the appeal had to be filed within fifteen (15) days of the effective action, Employee's counsel knew that the appellate time had been statutorily expanded to 30 days under the current law, and acknowledged that they were likewise fully aware of the filing requirements in all of their relevant communications with the Office. Therefore, they were in no way misled as to the statutorily mandated time frame.

Thus, assuming *arguendo* that Employee had otherwise established jurisdiction, I find that, based upon the above mandatory filing requirement, his appeal to this Office was untimely filed. 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, 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

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.