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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

\_\_\_\_\_  
In the Matter of: )  
)  
EUGENE MIKE )  
Employee )  
)  
v. )  
)  
DISTRICT OF COLUMBIA )  
PUBLIC SCHOOLS )  
Agency )  
\_\_\_\_\_ )

OEA Matter No. J-0052-99P03

Date of Issuance: **October 15, 2003**

**OPINION AND ORDER**  
**ON**  
**PETITION FOR REVIEW**

On November 4, 1998, Employee filed with the Office of Employee Appeals (OEA) a Petition for Appeal from Agency's final decision separating him from District government service pursuant to a reduction-in-force (RIF). The record contains a copy of a May 29, 1998 specific notice of RIF addressed to Employee stating that his position of Maintenance Worker Engineer, RW-06, had been identified for abolishment and his last day of work would be May 29, 1998. He was then to be placed on administrative leave with pay from May 30 through

June 29, 1998 when his separation pursuant to the RIF was to be effected. The notice did not state that Employee could appeal his separation to this Office, nor did it set forth the time limit for filing such an appeal. Rather, the notice provided that Employee's appeal rights were set forth at 5 DCMR 1506 and listed an address wherein the regulations and records pertinent to the action were located.

Agency asserts that Employee received a copy of the May 29, 1998 notice. The record reveals that Agency sent Employee a copy of this notice by certified mail on June 2, 1998. The certified mail receipt reflects that Agency paid for the return receipt service showing to whom, date and address of delivery. The record does not, however, contain a return receipt card.

Employee denies ever receiving the May 29, 1998 notice. He maintains that he continued to work until August 21, 1998, which is when he first learned of the RIF. Employee submitted as his Exhibit 4 a Sign In/Sign Out Sheet covering the time period of August 17 through August 21, 1998 on which he signed in and out through August 19, 1998.<sup>1</sup> It was on August 21, 1998 that he testified his supervisor informed him that he would be separated pursuant to a RIF effective that day. It was also that day that Employee testified he received by mail a Personnel Form One dated August 6, 1998 reflecting that his separation had been effected August 4, 1998.

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<sup>1</sup> The exhibit was admitted into evidence over the objection of Agency as to its authenticity, but we note that Agency has not challenged the evidentiary ruling on appeal.

Employee filed his appeal in this Office on November 4, 1998. On February 1, 1999, the Administrative Judge issued an Order for Employee to Make a Submission Regarding Jurisdiction. In the Order, the Administrative Judge advised Employee that it appeared this Office lacked jurisdiction to consider his appeal due to the timing of his having filed it here. Employee was informed that this Office's rules place the burden of proof as to issues of jurisdiction on an employee. *See* OEA Rule 629.2, 46 D.C. Reg. 9297, 9317 (1999). Thus, the Administrative Judge ordered Employee to submit a brief showing why his appeal should not be dismissed.

By Initial Decision dated February 18, 1999, the Administrative Judge dismissed Employee's appeal believing that Employee had not responded to the February 1, 1999 Order. In fact, Employee had filed his brief by the stated deadline. Employee thereafter filed with this Board a Petition for Review of the Initial Decision. On June 3, 1999, an Opinion and Order on Petition for Review was issued in which we remanded the matter to the Administrative Judge because Employee's brief had not been considered before the appeal was dismissed.

On April 18, 2003, the Administrative Judge issued an Initial Decision on Remand in which he again dismissed Employee's appeal for lack of jurisdiction. The decision was based on the exhibits of record and testimony elicited at an evidentiary hearing. The Administrative Judge noted that, at the time of Employee's separation, this Office's rules contained the following time limit for filing an appeal in this Office:

Petitions for appeal must be filed anytime during the period beginning with the day after the effective date of the action being appealed, but not later than fifteen (15) business days after the effective date.

OEA Rule 608.2, 39 D.C. Reg. 7404, 7408 (1992). In addition, the rules permitted an administrative judge to waive the time limit upon a showing of good cause. *See* OEA Rule 602.3, 39 D.C. Reg. at 7405. Applying those rules to this appeal, the Administrative Judge determined that Employee had fifteen (15) business days from August 4, 1998, the stated effective date of the RIF, to file an appeal with this Office, which gave Employee until August 19, 1998. He did not file within that time period, and therefore, he concluded that the appeal was untimely. In addition, the Administrative Judge determined that Employee had not established good cause to waive the filing requirement because Employee testified that he spoke to his attorney about filing an appeal in this Office on August 21, 1998 and he waited two and a half months to file his petition without any explanation for that subsequent delay.

On May 23, 2003, Employee filed with this Board a timely Petition for Review from the Initial Decision on Remand. Employee contends that, pursuant to D.C. Code Ann. §1-625.4 (1999 repl.) and OEA Rule 608.2, 39 D.C. Reg. at 7408, he had the right to file his RIF appeal within fifteen (15) calendar days of the effective date of the action, in this case by August 19, 1998. He maintains that he was excused, however, from complying with that deadline because of impossibility in that he allegedly was not notified of the RIF until August 21, 1998, after the filing deadline had passed.

Employee also argues that Agency failed to comply with the prerequisites of D.C. Code Ann. §1-625.2(c) (1999 repl.) by not informing him of his appeal and retention rights. He avers that in letters dated September 11 and September 22, 1998, he attempted to gain Agency's compliance with those requirements by requesting that Agency send Employee the proper notification. Employee assumed that once Agency did so, he could then file his appeal in this Office. Although not what he considers to be in strict compliance with Section 1-625.2(c), in a letter mailed October 19, 1998 which Employee's counsel asserts he received on October 21, 1998, Agency informed Employee that he had a right to appeal his RIF to OEA. Employee maintains that Agency's letter started the appeal clock running anew and notes that he filed his appeal within fifteen (15) days of his receipt of that letter. Therefore, his appeal was timely filed. Even if untimely, however, Employee contends that he did establish good cause to waive the filing requirement.

Lastly, Employee argues that Agency should not be allowed to benefit from its non-compliance with the law to Employee's detriment. Employee was without fault in the filing of his appeal, and therefore, he should not be penalized by having his appeal dismissed. If that were the case, Agency would be rewarded for its failure to comply with the law and Employee would be severely prejudiced.<sup>2</sup>

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<sup>2</sup> Employee also submits that the evidence does not support the Administrative Judge's conclusion that his testimony was unreliable. Such a conclusion could have played a part in the Judge's decision to dismiss the case. Since there is no evidence to support the Judge's conclusion about the testimony, he argues that the Initial Decision should be overturned and the Judge's observations about the demeanor rejected.

In dismissing this appeal, the Administrative Judge applied the time limit set forth at OEA Rule 608.2, 39 D.C. Reg. 7404, 7408 (1992). However, final rulemaking action was taken on November 4, 1999 to replace those rules in their entirety. *See* 46 D.C. Reg. 9297 (1999). OEA Rule 602 governs the scope of the current rules. Of specific relevance here, Rule 602.2 reads as follows:

These rules shall apply to all appeals filed on or after their effective date *and to all appeals then pending final disposition in the Office.*

*Id.* at 9298. By its terms, the rules apply to appeals filed on or after the effective date of the rules and to those pending final disposition at that time. In this case, Employee's appeal was filed on November 4, 1998, which was prior to the November 1999 effective date of the rules. However, inasmuch as Employee's appeal was pending final disposition in this Office when the rules took effect, Rule 602.2 provides that they apply to his appeal. Therefore, we find that the Administrative Judge applied the incorrect time limit.

The current rules contain a section governing this Office's jurisdiction, which addresses the time limits for filing an appeal here. *See* OEA Rule 604, 46 D.C. Reg. at 9299-300. First, Rule 604.4 carries over from the earlier rules the fifteen (15) business day time limit cited by the Administrative Judge in this case:

*An appeal filed before October 21, 1998* must have been filed within fifteen (15) business days of the effective date of the appealed agency action.

*Id.* at 9300. By its terms, however, the fifteen (15) business day time limit only applies to

appeals filed before October 21, 1998. As noted, Employee's appeal was filed on November 4, 1998, which is after and not before October 21, 1998. Therefore, Rule 604.4 does not apply. Second, Rule 604.2 contains the following time limit:

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

*Id.* at 9299. By its terms, that section must be read in tandem with Rule 604.1, which sets forth the subject matter jurisdiction of this Office for appeals filed on or after October 21, 1998. *Id.* Therefore, this Office's rules provide that, for appeals filed on or after October 21, 1998, like the instant appeal, a thirty (30) calendar day time limit is applicable.

The Office made the above changes to the filing deadlines in order to make them consistent with legislation that came into effect on October 21, 1998; namely, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124. OPRAA substantially amended portions of the Comprehensive Merit Personnel Act (CMPA), which is the statute under which this Office operates. Among other changes, OPRAA amended the subchapter of the CMPA governing this Office to include the following filing deadline: "Any appeal shall be filed within 30 days of the effective date of the appealed agency action." D.C. Code Ann. §1-606.3(a) (1999 repl.).<sup>3</sup>

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<sup>3</sup> Employee correctly points out that the subchapter of the CMPA governing RIFs contains a fifteen (15) day deadline for filing a RIF appeal in this Office. *See* D.C. Code Ann. §1-625.4 (1999 repl.). That provision came into existence before OPRAA added to the subchapter governing this Office the thirty (30) day deadline for filing "any appeal" here. Since October 21, 1998, this Office has consistently applied the thirty (30) day time limit to all appeals filed on or after that date, including RIF appeals.

The District of Columbia Court of Appeals has held that the time limit for filing an appeal with an administrative adjudicatory agency, such as the Office of Employee Appeals, is mandatory and jurisdictional in nature. *See, e.g., District of Columbia Pub. Employee Relations Bd. v. District of Columbia Metro. Police Dep't*, 593 A.2d 641, 643 (D.C. 1991); *Thomas v. District of Columbia Dep't of Employment Servs.*, 490 A.2d 1162, 1164 (D.C. 1985). Following these cases, we recently held that the statutory thirty (30) day time limit for filing an appeal in this Office is mandatory and jurisdictional. *See King v. Department of Corrections*, OEA Matter No. T-031-01, *Opinion and Order on Petition for Review* (Oct. 16, 2002), \_\_ D.C. Reg. \_\_ ( ).

By its terms, the time limit begins to run with the effective date of the appealed agency action. In this case, the Administrative Judge and the parties considered the effective date as August 4, 1998. As previously mentioned, the August 6, 1998 Personnel Form One covering Employee's separation listed August 4, 1998 as the effective date of the action. Nonetheless, Employee has continued to assert from the time he filed his Petition for Appeal through the filing of the instant Petition for Review that he worked until August 21, 1998. As noted, he submitted as his Exhibit 4 a Sign-In/Sign-Out Sheet for the week of August 17, 1998, which reflects his having signed in and out through August 19, 1998. However, whether the effective date of Employee's separation was August 4 or August 21, 1998 is of no decisional consequence. In the best of cases for Employee, he had thirty (30) days from August 21, 1998 to file his appeal in this Office. November 4, 1998 was outside of that time period.

Nonetheless, the District of Columbia Court of Appeals and this Board have held that an agency may not invoke a jurisdictional bar based upon untimely filing unless the agency first gave the appellant adequate notice of its decision and the right to contest the decision through an appeal. *See, e.g., Bailey v. District of Columbia Dep't of Employment Servs.*, 499 A.2d 1223, 1224-25 (D.C. 1985); *Ploufe v. District of Columbia Dep't of Employment Servs.*, 497 A.2d 464, 465 (D.C. 1985); *Thomas*, 490 A.2d at 1164; *Hammond v. Department of Human Servs.*, OEA Matter No. 1601-0080-88-P95, *Opinion and Order on Petition for Review* (May 22, 1998), \_\_\_ D.C. Reg. \_\_\_ ( ), *appeal docketed*, No. 99MPA15 (D.C. Super. Ct. Aug. 20, 1999). Further, the CMPA also specifically requires an agency to provide such notice:

Each agency shall advise each employee against whom action is taken adversely affecting the employee of his or her right to appeal to the Office as provided in this subchapter.

D.C. Code Ann. §1-606.4(e) (1999 repl.).

In this case, the Administrative Judge did not make a finding as to whether Agency properly notified Employee of its decision and the right to contest the decision in this Office. He considered such a determination irrelevant because Employee waited two and a half months to file his appeal after he became aware from his attorney of his right to appeal to OEA and he did not explain that subsequent delay. We disagree that whether Agency properly notified Employee of its action and his appeal rights is irrelevant to this jurisdictional determination. As noted, proper notice is a prerequisite to an agency having the ability to invoke this particular jurisdictional bar. If Agency did not comply with its statutory notice obligations, which we

note are not onerous, Agency cannot invoke the jurisdictional bar. That is true even though Employee was fortunate enough to subsequently learn from another source that he had a right to appeal here. Agency cannot benefit from its non-compliance with the law. The question that remains is whether Agency afforded Employee the requisite notice.

Employee contends that he did not receive the May 29, 1998 specific notice of RIF, which raises the question whether Agency properly served the notice on Employee. We also note that, even assuming Agency properly served Employee with this notice, a question remains regarding the adequacy of the contents of the notice. The May 29, 1998 notice does not mention OEA at all, nor does it contain the time limit for filing an appeal here. Rather, the notice gives only the citation to the pertinent regulation and an address at which a copy is located.

There are several problems with this approach. First, by its terms, D.C. Code Ann. §1-606.4(e) (1999 repl.) requires an agency to advise an employee of his right to appeal here. We do not consider that obligation discharged when an agency does not even mention this Office in its notice. Second, the approach requires an employee who often is not either an attorney or represented by one to be able to understand the regulation. Lastly, the regulation itself does not contain any time limit for filing an appeal here. We therefore conclude that Agency's notice to Employee was inadequate as a matter of law. To comply with its statutory notice requirements, at a minimum, Agency must include in its RIF notices a statement that the

employee has a right to appeal his or her separation to this Office and the time limit for doing so.<sup>4</sup>

Because we have found that Agency's notice to Employee, even if properly served, was inadequate as a matter of law, we conclude that Agency is estopped from invoking the applicable jurisdictional bar. As such, we remand this matter to the Administrative Judge to consider the merits of Employee's appeal.

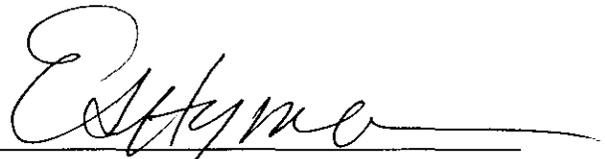
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<sup>4</sup> In the past, Agency's RIF notices clearly advised employees of their right to file an appeal in this Office and the deadline for doing so. *See, e.g.*, attached section of 1992 RIF Notice.

ORDER

Accordingly, it is hereby **ORDERED** that the Initial Decision on Remand is **VACATED**, Employee's Petition for Review is **GRANTED** and this appeal is **REMANDED** to the Administrative Judge for further action consistent with this order.

FOR THE BOARD:



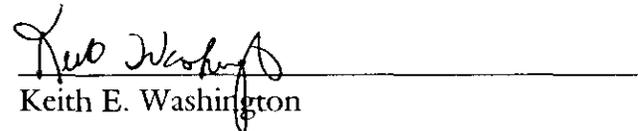
Erias A. Hyman, Chair



Horace Kreitzman



Brian Lederer



Keith E. Washington

The initial decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.

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If you have any evidence to indicate that this action has not been in accordance with the RIF regulations, or that there has been a violation of your rights, you may appeal to the D.C. Office of Employee Appeals (OEA), 415-12th Street, N.W., Room 307, Washington, D.C. 20004. The appeal must be filed no sooner than the day after the effective date of the action being appealed but no later than fifteen (15) calendar days after the effective date. Enclosed is Chapter 15, 5 DCMR, which contains the procedures used to conduct this RIF. Information regarding appeal procedures and the appropriate form may be obtained from the Personnel Adjustment Team in Room 903.

Sincerely,

  
Karen Jones Herbert  
Assistant Superintendent (Acting)

KJH/wpm

Enclosures

cc: Union Representative  
Office of Labor Relations  
Supervisor  
Staffing Branch  
Personnel File