THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
MELVIN YATES, Employee	OEA Matter No. 1601-0044-05
v.	Date of Issuance: November 22, 2005
DISTRICT OF COLUMBIA PUBLIC SCHOOLS, Agency	ERIC T. ROBINSON, Esq. Administrative Judge

E. Lindsey Maxwell II, Esq., Employee Representative
Sara Moskowitz, Esq., Agency Representative

INITTIAL DECISION

INTRODUCTION, PROCEDURAL HISTORY, AND STATEMENT OF FACTS

On April 4, 2005, Melvin Yates (hereinafter "Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals (hereinafter "OEA" or "the Office"), contesting D.C. Public Schools (hereinafter "Agency") final decision to terminate him from his position as a Guidance Counselor at M. M. Washington Career High School. According to a letter dated July 12, 1999 (hereinafter "Termination Letter"), the Employee was terminated for inefficiency and incompetency pursuant to D.C. Official Code § 1-617(d) and D.C. Municipal Regulations (hereinafter "DCMR") Title 5 § 1401.2 (a) & (c). The effective date of Employee's termination was September 14, 1999. On June 1, 2005, the Employee filed a Motion to have the Agency found to be in default, alleging that the Agency's Answer, in this matter, was untimely. On June 3, 2005, Senior Administrative Judge Daryl Hollis issued an Order denying Employee's Motion to have the Agency found to be in default.

I was assigned this matter on June 14, 2005. I issued an Order Convening a Prehearing Conference for August 9, 2005. I then received a joint request by the parties to reschedule the Prehearing Conference. Pursuant to the joint request, I issued an Order Rescheduling the Prehearing Conference to September 13, 2005. At the Prehearing Conference, the Employee argued that this Office should decide this matter on the merits, because the Agency failed to adequately inform the Employee that he had appeal rights to this Office. The Agency countered with the assertion that the Employee availed himself of the grievance process as outlined in the Collective Bargaining Agreement (hereinafter "CBA") between the Agency and the Washington Teachers' Union (hereinafter "WTU").[1] Furthermore, the Agency, upon information and belief, at the time of the Prehearing Conference, alleged that the Employee had litigated this cause of action in another forum. Based upon the parties' positions as stated at the Prehearing Conference, I ordered the Agency to investigate whether or not this cause of action had been litigated to its conclusion in another forum. I also ordered the Parties to return for a Status Conference on October 6, 2005.

A Status Conference was held on October 6, 2005. During this conference it was revealed that the Employee had litigated this matter in several forums.

As evidenced by the documents submitted by the parties, the Agency showed that the employee availed himself of the grievance procedure as outlined in the CBA. The following represents the timeline for Employee's grievance proceedings:

1. The termination letter notified the Employee that he was to be terminated effective September 14, 1999. The stated grounds for his termination were Incompetency and Inefficiency.

2. By letter dated October 13, 1999, Bernard Lucas, Hearing Officer, informed the Employee of his Step II grievance decision. According to this letter, the Step II proceeding occurred on September 10, 1999. In this letter, the Employee's termination for Incompetency and Inefficiency was upheld.

3. By letter dated October 22, 1999, Rachel Hicks, Field Representative for the WTU, invoked Step III of the grievance and arbitration procedure.

4. Ava Greene Davenport, Agency's Director of Labor Management and Employee Relations, sent a signed letter dated November 2, 1999, to Rachel Hicks which scheduled the Step III Grievance Hearing for Friday, December 17, 1999 at 2:00 pm. This letter goes on to state that "[i]f for any reason you have to cancel the hearing, please advise this office at least 24 hours prior to the hearing." This letter was sent by both facsimile and U.S. mail.

[1] The Employee was notified of his right to utilize the grievance process in his termination letter.

5. Karl W. Carter Jr. Esq., sent a signed letter dated December 17, 1999 to Ms. Davenport informing her that he now represents the employee in this matter. He also requested a continuance so that he could prepare his case.

6. As evidenced by a Sign-In Sheet dated Friday, December 17, 1999, the Agency proceeded with the Step III grievance in this matter. According to this Sign-In Sheet, in attendance were six persons on behalf of the administration and one person on behalf of the Employee. This Sign-In sheet was also signed by the Hearing Officer for the Step III grievance hearing - Clinton Evans.

7. Clinton Evans, by unsigned draft letter dated January 19, 2000, sent to Barbara Bullock, WTU President, his findings in the Step III hearing. Of note, the issue of the absence of the Employee was addressed. Since the Employee failed to follow the 24 hour cancellation rule as outlined in the November 2, 1999 letter, the Hearing Officer was instructed by Ms. Davenport to proceed with the hearing anyway. Mr. Evans ultimately ruled against the Employee and upheld his termination.[2]

The Employee then sought relief in the United States District Court for the District of Columbia, *Melvin Yates v. District of Columbia et al.*, 224 F.Supp 2d. 68 (D.D.C. 2002). In that case, the Employee sued the Agency, the former school superintendent, and the school board under 42 U.S.C. § 1983. That case arose out of the same set of facts that give rise to the instant matter. The Court found that the employee's allegation did not give rise to federal question jurisdiction and, thus, the Court lacked subject matter jurisdiction over the dispute.

The Employee appealed the aforementioned decision to the United States Court of Appeals for the District of Columbia Circuit. The Court found that despite the magistrate judge's description, the ruling did not rest on a lack of jurisdiction, but was a decision on the merits. *Melvin Yates v. District of Columbia et al.*, 324 F.3d 724 (D.C. Cir. 2003). To buttress its opinion, the Court cited the U.S. Supreme Court case of *Bell v. Hood*, 327 U.S. 678, 90 L. Ed. 939, 66 S. Ct. 773 (1946), which established that even meritless claims are to be dismissed on the merits rather than for lack of jurisdiction.

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[2] The Employee was notified of the time, place and purpose of the Step III proceeding. Further, he was informed of the proper procedure for rescheduling the Step III proceeding. The Employee failed to notify the Agency at least 24 hours prior to the proceeding as mandated by the November 2, 1999 letter. Because the Employee was represented by the WTU, as well as his own legal counsel, I conclude that he knew of the importance of the proceeding, and how a negative ruling would impact future litigation. Simply put, the Employee failed to follow proper procedure. The fact that the Employee failed to fully participate in the Step III grievance was solely the Employee's choice. He must now live with the consequences. Notwithstanding the Employee's absence at the proceeding, the Employee's interests were not totally unheard at the hearing. According to the Sign-In Sheet, Ann L. Moore appeared on the behalf of the Employee.

I ordered the parties to submit final legal briefs on the issues of the jurisdiction of this Office, the applicability of the laches doctrine, and the substantive merits of the case. I informed the parties that based on these briefs and the documents of record I would either issue an Initial Decision or I would convene a Status Conference in order to plan for an Evidentiary Hearing in this matter.

Based on Parties' position as stated during the Prehearing Conference, the Status Conference, and the documents of record I determined that an Evidentiary Hearing was unnecessary. The record is closed.

JURISDICTION

As will be explained below, the jurisdiction of this Office has not been established.

ISSUE

Whether this matter should be dismissed for lack of jurisdiction.

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
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> > That 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.

OEA Rule 629.2, *id.*, states that "the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing."

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 (July 12, 2001), __ D.C. Reg. __ ( ).

The Employee filed his petition for appeal on April 4, 2005. That date was approximately six years after the effective date of the disciplinary action. As of October 21, 1998, § 101(d) of OPRAA clearly and unambiguously removed from the jurisdiction of this 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"[3] 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 Employee has litigated his cause of action in various judicial and quasi-judicial forums. During the past six year period, the Employee availed himself of the grievance process, as mandated by the CBA, and received an adverse ruling. The Employee then appealed his removal to the United States District Court for the District of Columbia, and received an adverse ruling. Then, he appealed that decision to the United States Court of Appeals for the District of Columbia, where again he received an adverse ruling, this time on the merits of his appeal. Lastly, the Employee has appealed his cause of action with this Office. The Employee, to date, has litigated his cause of action in four separate forums.

Affirmative Defenses

The Employee argues that the affirmative defense of promissory estoppel should allow for this matter to be decided on the merits. The OEA does not have any special rules regarding the pleading of an affirmative defense. In a judicial forum, an affirmative defense is one which admits all the elements in the opposing party's case, but asserts a new matter as a basis for why the opposing party should not prevail. The party raising an affirmative defense has the burden of proving that the defense negates the opposing party's claim. *See W.R. Grace Co. v. Scotch Corp. Inc.*, 753 S.W.2d 743 (Tex. App.

[3] Prior to OPRAA, the Office was able to consider a "Statement of Justification" or "Good Cause Statement," 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.

Austin 1988); *Second Exeter Corp. v. Epstein*, 499 A.2d 429 (Conn. App. 1985); *O'Neil v. Carolina*, 309 S.E.2d 776 (S.C. App. 1983); *Modicut v. Bremer*, 398 So.2d 570 (La. App. 1980). Examples of affirmative defenses can be found at D.C. Super. Ct. Civ. R. 8(c) and include:

> Accord and satisfaction, arbitration and award, assumption of the risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, and waiver.

See Brown v. District of Columbia Pub. Sch., OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993), __ D.C. Reg. __ ( ).

In *Chamberlain v. Barry*, 606 A.2d 156, 158 (D.C. 1992), a case involving a landlord and the District government, the District of Columbia Court of Appeals stated:

> To assert an estoppel effectively, appellant must show that: (1) the District made a promise to him; (2) he suffered injury due to reasonable reliance on it; and (3) the promise must be enforced to prevent injustice and promote the public interest.

The Employee argues that the requirements of the promissory estoppel defense were met because the letter of termination dated July 12, 1999 failed to outline all of his appeal rights. Specifically the Employee argues that:

> " [t]here was no mention of Mr. Yates right to review by the Superintendent, there was no copy of the statute attached and there was no mention of the right to bring a complaint to the Office of Employee Appeals. By reasonably relying on Ms. Reed's statements in the letter, Mr. Yates was under the impression that he had no other recourse than to file a grievance. Ms. Reed's failure to comply with the requirements of the regulation prevented Mr. Yates from pursuing his rights at this Office before the filing deadline.

Employee's October 25, 2005 Prehearing Brief p. 4.

Pursuant to the termination letter, the Employee was led to believe that his only recourse for contesting his termination was through the CBA. I agree with the Employee that he may have been misled by the aforementioned termination letter into thinking that the grievance process was his only avenue for contesting his termination. Therefore, I find that that the first element of Employee's Estoppel defense has been met.[4]

[4] Notwithstanding the fact that the Employee's termination letter neglected to inform him of his appeal

As to the injury element, it is unclear whether or not the Employee suffered an unavoidable injury. The Employee received adverse rulings in both the Step II and III grievance proceeding. However, based on the documents of record, I cannot say for certain that the Employee would have received a ruling in his favor even if he had timely elected to adjudicate his matter with this Office.

The Employee does not meet the third and final element of a Promissory Estoppel defense.[5] As was said before, the Employee has had his day in Court, several days as a matter of fact. The Employee has a decision on the merits from three of his previous four forums – the Step II grievance, the Step III grievance, and the United States Court of Appeals for the District of Columbia. To allow the Employee to continue to litigate his cause of action in forum after forum is against the public interest. To do so would allow a cloud of continuing litigation to hang over the proverbial head of the Agency. This is not the result contemplated for a successful Promissory Estoppel defense. Therefore, I find that Employee's Promissory Estoppel defense must fail.

The Agency counters with the affirmative defense of Laches. This affirmative defense is based upon considerations of public policy which require, for the peace of society, the discouragement of stale claims. It recognizes the need for speedy vindication or enforcement of rights so that courts may arrive at safe conclusions as to the truth. *See Brundage v. United States*, 504 F.2d 1382 (Ct. Cl. 1974); *Shafer v. United States*, 1 Ct. Cl. 437, 438 (1983); *Burke v. District of Columbia Pub. Sch.*, OEA Matter No. 1602-0246-89, *Opinion and Order on Petition for Review* (Nov. 30, 1990), __ D.C. Reg. __ ( ) at 3.

To establish the defense of laches, the defendant must show undue delay by the plaintiff resulting in prejudice to the defendant. *See Brundage*, 504 F.2d at 1382; *Deering v. United States*, 620 F.2d 242, 245 (Ct. Cl. 1980); *National Wildlife Fed'n v. Burford*, 835 F.2d 305 (D.C. Cir. 1987); *Beins v. Board of Zoning Adjustment*, 572 A.2d 122, 126 (D.C. 1990); *Interdonato v. Interdonato*, 521 A.2d 1124, 1137 (D.C. 1987).

The Agency goes on to argue that:

> The types of prejudice that may support a laches defense include the loss of evidence or witnesses supporting the defendant's position. *Interdonato* at 1138. Such prejudice is present in the instant case. On information and belief, most, if not all of the DCPS personnel employed during Employee's tenure with DCPS

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rights with this Office, the Employee was represented at the time of his Step II and III grievance process by Karl W. Carter Jr., Esq. or the WTU. I note that during the pendency of said grievance process, the Employee never attempted to invoke the jurisdiction of this Office.

[5] The promise must be enforced to prevent injustice and promote the public interest. *Chamberlain* at 158.

> are no longer employed by DCPS. The M.M. Washington students who registered complaints about the Employee are no longer at M.M. Washington. Notwithstanding these facts, the almost six year delay in the filing of this appeal has most likely negatively impacted the memories of witnesses (to the extent any can be located) and has similarly made the recovery and preservation of relevant documents unnecessarily difficult.

District of Columbia Public Schools' Response to Employee's Pre-hearing Brief p. 5.

Agency's argument is persuasive. As was said before, the Employee's cause of action arose approximately six years ago. The Employee has litigated this matter in several forums. Before coming to this Office, the Employee received his last adverse ruling, on the merits, in April 2003. It is now November 2005. I find that the undue delay element of Agency's laches defense has been met.

Prejudice to the Agency is the final element of a laches defense. The types of prejudice that may support a laches defense include the loss of evidence or witnesses supporting the defendant's position. *Interdonato* at 1138. Critical evidence has more than likely been lost. The memories of potential witnesses in this matter have probably eroded over time. That assumes that these witnesses can be found and compelled to appear in this matter. This is very critical since the Agency, if this matter were to go to an Evidentiary Hearing, would have the burden of proof in justifying its termination of the Employee. I find that the prejudice element of a laches defense has been met. Furthermore, I find that the Agency has established the affirmative defense of laches.

I am compelled to dismiss this matter on jurisdictional grounds for the following reasons:

1. The Employee filed his petition for appeal almost six years after the statutorily mandated window for filing with this office has closed.

2. The Employee has litigated his cause of action in several different judicial and quasi-judicial forums resulting in one adverse decision on jurisdictional grounds and three adverse decisions on the merits of the case; and,

3. The Agency has asserted and proven the affirmative defense of Laches.

ORDER

It is hereby ORDERED that this matter be DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

ERIC T. ROBINSON, Esq.
ADMINISTRATIVE JUDGE