

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
Earl Gardner)	Matter No. J-0290-10
Employee)	
)	Date of Issuance:
v.)	June 9, 2010
)	
D.C. Fire & Emergency Services Dept)	Senior Administrative Judge
Agency)	Joseph E. Lim, Esq.

Thelma Chichester, Esq., Agency Representative
Lathal Ponder, Esq., Employee Representative

INITIAL DECISION

BACKGROUND

On March 29, 2010, Employee, a Firefighter/ Paramedic, IC-9, filed a petition for appeal with the Office of Employee Appeals (OEA). The employee grieved the fact that he was not promoted to Battalion Supervisor.

Agency states that although Employee took the EMS Battalion Supervisor Promotion Exam, he did not score high enough to be eligible for promotion. Agency denies Employee's claim that the test was subjective, noting that it was administered by an independent body. Agency also avers that this Office lacks jurisdiction over this matter because Employee's claim was a grievance and that in addition, his appeal was untimely.

The matter was assigned to the undersigned judge on May 11, 2010. I ordered Employee to address the jurisdiction issue raised by the Agency. I closed the record after Employee submitted his final arguments on June 2, 2010. No hearing was held, as there were no material facts in dispute.

JURISDICTION

Jurisdiction in this Matter was not established.

ISSUE

Whether Employee's appeal should be dismissed for lack of jurisdiction.

FINDINGS OF FACT

The following facts were submitted by the parties and are uncontroverted:

1. Employee was an Emergency Medical Service Supervisor (EMS) in Agency's EMS Division.
2. Employee transferred from the EMS Division to Agency's Firefighting Division.
3. Employee states that he transferred to the Firefighting Division to compete for the Battalion Supervisor position on the promise that he could return to the EMS Division with his rank intact if he chose.
4. In accordance with Agency's Special Order (SO) Number 08, Series 2009, issued on May 23, 2009, Agency provided notice that the Industrial/Organizations Solutions, Inc. (I/O Solutions) would conduct Promotion Orientation Seminars for the upcoming EMS Battalion Supervisory Examination process.
5. On June 12, 2009, Agency issued SO 19, Series 2009, which explained how the examination would be scored and listed the eligible candidates to take the exam. Employee's name was on the list.
6. On July 2009, Employee took the EMS Battalion Supervisor Promotion Exam and earned a score of 52.992.
7. On August 28, 2009, Agency issued SO 37, Series 2009, which pegged the passing score as 60 or higher and listed the names of the passing candidates. Employee was not on the list.
8. On September 4, 2009, Agency issued SO 38, Series 2009, which listed the names of those on the promotion register and their period of eligibility.
9. On December 1, 2009, Employee asked to be returned to his EMS Supervisor position. Agency has not acted on that request.
10. On March 29, 2010, Employee filed a petition for appeal with this Office.
11. In his brief, Employee complains that the scoring was subjective, that his education was not fully credited, and that the District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Code 1613.1(c) (1) states, "An employee shall not suffer a loss in pay, tenure, or other rights and benefits by reason of participation in any training or career development program when such participation has been approved or authorized by the District government."

ANALYSIS AND CONCLUSION

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999) states: "The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." Thus, Employee has the burden of proving that this Office has jurisdiction over his appeal. According to OEA Rule 629.1, *id*, a party's burden of proof is by a "preponderance of the evidence," which is defined as "[t]hat 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."

Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998

(OPRAA), D.C. Law 12-124, amended certain sections of the CMPA. Of specific relevance to this Office, § 101(d) of OPRAA amended § 1-606 of the Code in pertinent part as follows:

(1) D.C. Code § 1-606.3(a) is amended as follows:

(a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee . . . an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . . or a reduction in force. . . .

Thus, § 101(d) restricted this Office's jurisdiction to employee appeals from the following personnel actions only: a performance rating that results in removal; a final agency decision effecting an adverse action for cause that results in removal, reduction in grade, or suspension of 10 days or more; or a reduction in force

Therefore, as of October 21, 1998, this Office no longer has jurisdiction over appeals from grievances. "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. __ ().

Here, as of October 22, 1998, § 101(d) of OPRAA "clearly and unambiguously" removed appeals from grievance denials from the jurisdiction of the Office. Employee's complaints and grounds for appeal are all grievances over which this Office has no jurisdiction. Thus, the matter must be dismissed for lack of jurisdiction.

Employee further asserts that District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Code 1613.1(c) (1) confers jurisdiction over this appeal to the OEA. Employee's argument arises from a misreading of the Code. The statute Employee is quoting applies to any training or career development program that an employee engages in. It does not apply to an examination taken for the purpose of promotion. Nonetheless, it does not erase the fact that Employee's complaint is still in the nature of a grievance.

In addition, effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, amended certain sections of the CMPA. Among these amendments was the addition of a statutory time limit for filing an appeal in this Office. The relevant section reads as follows: "Any appeal shall be filed within 30 days of the effective date of the appealed agency action." D.C. Official Code § 1-606.03(a) (2001). The Office's Rules and Regulations have been amended to reflect this change. *See* OEA Rules 604.1 and 604.2, 46 D.C. Reg. 9299 (1999).

The District of Columbia Court of Appeals has held that the time limit for filing an appeal with an administrative adjudicatory agency such as this Office is mandatory and jurisdictional in nature. *See, e.g., District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991); *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162, 1164 (D.C. 1985). Following these cases, this Office has held that the statutory 30-day time limit for filing an appeal in this Office is mandatory and jurisdictional in nature. *See King v. Department of Corrections*, OEA Matter No. T-0031-01, *Opinion and Order on Petition for Review* (October 16, 2002), ___ D.C. Reg. ___ (). Further, in *McLeod v. D.C. Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003), ___ D.C. Reg. ___ (), it was held that the only situation in which an agency may not “benefit from the [30-day] jurisdictional bar” is when the agency fails to give the employee “adequate notice of its decision and the right to contest the decision through an appeal.” *McLeod*, slip op. at 8. (citations omitted).

Employee filed his appeal on March 29, 2010, several months after he learned that he had not passed his exam and months after knowing that Agency failed to act on his request to return to his former position. Accordingly, I conclude that Employee has failed to meet his burden of establishing this Office’s jurisdiction over his appeal. Thus, Agency’s motion to dismiss is hereby granted and Employee’s petition for appeal is dismissed.

ORDER

It is hereby ORDERED that this matter is DISMISSED.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge