SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

LELONIE CURRY-MILLS, *Petitioner*, v. DISTRICT OF COLUMBIA DEPARTMENT OF YOUTH AND REHABILITATION SERVICES, and DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS, *Respondents*.	)	Case Number: 2016 CA 003190 P(MPA) Calendar No.: Civil 2, Calendar 14 Judge: Steven M. Wellner Next date: November 16, 2016 Status Hearing

PETITIONER'S BRIEF

Jonathan H. Levy (DC Bar No. 449274)
Priyanka Gupta*
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, DC 20005
Tel: (202) 628-1161
Fax: (202) 727-2132
jlevy@legalaiddc.org

Counsel for Petitioner Lelonie Curry-Mills

*Admitted to practice law in Illinois. Practicing *pro bono publico* pursuant to DC Court of Appeals Rule 49(c)(9)(B). Supervised by Jonathan H. Levy, DC Bar Number 449274.

ISSUES PRESENTED

Ms. Curry-Mills was terminated from her employment by the District for an alleged criminal offense of which she was acquitted. The questions presented are:

1. Did the District provide Ms. Curry-Mills with proper pre-termination notice by taking no further action when its mailed notices were returned undelivered even though it had Ms. Curry-Mills' correct address stored in its database?

2. Did the District provide Ms. Curry-Mills with proper notice when, after her termination had become effective, it finally informed Ms. Curry-Mills of her termination but told her that the time to file an administrative appeal had already passed?

STATEMENT OF FACTS

Lelonie Curry-Mills was employed by the District of Columbia as a Correctional Officer for the Department of Youth Rehabilitation Services (DYRS) beginning in October 2005. Ex. B (Employment Offer) at 1.[1] After a one-year probationary period, her position was a "Permanent Appointment." *Id.* She was terminated, purportedly for cause, effective January 10, 2014. Final Notice 2.

A. Ms. Curry's Defense of Her Family

On September 11, 2011, Ms. Curry-Mills awoke to the sounds of screaming and her fifteen-year-old son telling her that a group of adults was threatening his younger sister. Petition 3. Amid the screaming, Ms. Curry-Mills heard unidentifiable individuals jeering that her son and daughter

[1] The Administrative Record was provided to this Court without its own pagination. Accordingly, references to the Record in this brief are by page number of each individual document within the Record. For brevity: (1) "Final Notice" is the December 24, 2013 Final Written Notice of Proposed Removal; (2) "Petition" is Ms. Curry-Mills' February 27, 2015 petition for review by the Office of Employee Appeals; (3) "Ex." is an exhibit to the Petition; and (4) "ALJ Op." is the Administrative Law Judge's March 30, 2016 Final Decision.

were in trouble and one individual proclaiming he would "send her children to the morgue." *Id.* at 3-4. Through her window, Ms. Curry-Mills saw a group of adults harassing her daughter. *Id.*

These events were particularly traumatic for Ms. Curry-Mills because, six years earlier, she had similarly awoken to the sounds of screaming and rushed outside her building to find her eldest daughter shot and bleeding to death. Ex. C-1 (Police Report) at 3; Ex. C-2 (Curry-Mills Statement) at 1-2. On September 11, 2011, Ms. Curry-Mills again rushed outside, but this time, she first retrieved her legally-registered handgun from a locked safe. Petition 4. Ms. Curry-Mills rescued her daughter by displaying her gun without discharging the weapon or physically injuring anyone. *Id.* As the Criminal Division of this Court later found, Ms. Curry-Mills acted lawfully in defending her children. ALJ Op. 5 (¶ 29); Ex. E (Jury Verdict) at 1-2. Nonetheless, Ms. Curry-Mills was arrested and charged with several felonies. ALJ Op. 2 (¶ 6), 3 (¶15).

B. Resulting Adverse Employment Actions

On September 22, 2011, DYRS placed Ms. Curry-Mills on "non-contact status" because of her arrest. *Id.* at 2 (¶¶ 6, 7). Under this status, Ms. Curry-Mills could continue to work and receive pay but could not interact with the children in DYRS's custody. Petition 5. The very next day, DYRS notified Ms. Curry-Mills that it was seeking to place her on enforced leave because she had been arrested for a felony. ALJ Op. 3 (¶ 8). Ms. Curry-Mills contested this proposal, explaining the lawfulness of her actions and pointing out that she had not been convicted of any wrongdoing. *Id*. at 3 (¶ 10). DYRS responded with a final decision dated October 19, 2011, which placed her on enforced leave immediately. *Id.* at 3 (¶ 11). This action was not technically a termination of employment but did prevent Ms. Curry-Mills from working and from getting paid (except for previously accrued annual leave and compensatory time). *Id.*; Ex. I (Decision on Proposed Enforced Leave) at 2.

DYRS left Ms. Curry-Mills in unpaid leave status for over two years.[2] In the meantime, on February 7, 2012, Ms. Curry-Mills updated her address in the District's PeopleSoft database to accurately reflect the fact that she had moved to 1234 Southern Avenue, S.E., #304, Washington, DC 20032. ALJ Op. 3 (¶ 13).[3] The Office of Pay and Retirement Services, which controls the payroll for DYRS employees, almost immediately accessed this database to obtain the new address and sent Ms. Curry-Mills' hours-and-earnings statements there during all of the remaining time at issue in this case. *Id.* at 4 (¶ 17); Timothy Howell Dep. 8:19-22. None of those hours-and-earnings statements was returned undelivered. *See* ALJ Op. 4 (¶ 17).

On November 4, 2013 – after Ms. Curry-Mills had been on unpaid leave for over two years – DYRS issued a written notice of a proposal to remove Ms. Curry-Mills from employment, which it mailed to the wrong address (3422 22nd St., S.E., Washington, DC 20020). *Id.* at 4 (¶¶ 18, 20). The notice was returned undelivered, and DYRS mailed a second copy to a different wrong address (1443 Southern Ave., Apt. 101, Oxon Hill, MD 20745), which was also returned undelivered. *Id.* at 4 (¶¶ 20, 21).[4] DYRS used these erroneous addresses despite the fact that the correct address had been placed in its PeopleSoft database by Ms. Curry-Mills herself. *Id.* at 3 (¶ 13). The Record contains no explanation for DYRS's failure to use this correct address; to the contrary, it was "'not necessarily uncommon'" for DYRS to retrieve employee addresses from the PeopleSoft system,

[2] While on enforced unpaid leave, Ms. Curry-Mills was evicted, lost her husband to cancer, and was forced to file for personal bankruptcy. Exs. Q-S (Bankruptcy Discharge Order, Eviction Notice, and Certificate of Death).

[3] The PeopleSoft database tracks contact information, such as addresses, for all District employees, including all DYRS employees. ALJ Op. 2 (¶ 5).

[4] These two incorrect addresses came from Ms. Curry-Mills' personnel file, which contained addresses supplied when Ms. Curry-Mills was hired more than eight years earlier and which was not updated as a matter of course. *See* ALJ Op. 2 (¶ 4), 5 (¶ 26).

doing so "would only take . . . a couple of minutes," and yet DYRS did not do so. *Id.* at 4 (¶ 19), 5 (¶ 27).

Because the two notices were sent to the wrong addresses, and DYRS did not take "a couple of minutes" to access the correct address, Ms. Curry-Mills did not receive the notices and did not know of the proposed termination. *See id.* at 4 (¶¶ 18-22). On December 11, 2013, the Hearing Officer recommended that Ms. Curry-Mills' proposed removal be upheld on the grounds advanced in the (misaddressed and therefore undelivered) notices. Ex. M (Hearing Officer Recommendation) at 1-3. Two weeks later (Christmas Eve 2013), the DYRS Deputy Director issued a final decision terminating Ms. Curry-Mills. Final Notice 1.

In this decision, the Deputy Director explained that "after careful review of the advance written notice and the Hearing Officer's *Written Report and Recommendation*; and due consideration of [Ms. Curry-Mills'] response, I find that the cause(s) for the proposed removal is/are supported by the evidence, and it is my final decision to sustain the proposed removal action." Final Notice 2. The Deputy Director stated that the charges "were set forth in the advance written notice [Ms. Curry-Mills] received," *id.* at 1, that Ms. Curry-Mills was served with advance written notice, and that she did not submit a response, *id.* at 2. The final decision made Ms. Curry-Mills' termination effective at close of business on January 10, 2014. *Id.* at 2.[5]

[5] The termination decision failed to give "'full and reasoned consideration to all material facts and issues'" and is therefore invalid. *Brown v. D.C. Dep't of Emp't Servs*., 83 A.3d 739, 748 & n.31 (D.C. 2014) (quoting *Coumaris v. D.C. Alcoholic Beverage Control Bd*., 660 A.2d 896, 902 (D.C. 1995)). The decision does not include the most basic analysis, such as the number of bases alleged for termination. Final Notice 2 ("I find that the *cause(s)* for the proposed removal *is/are* supported by the evidence . . . .") (emphases added). It specifically (but falsely) recites that Ms. Curry-Mills "received" notice of her proposed termination. *Id.* at 1. And it also states that "due consideration" was given to Ms. Curry-Mills' response, despite also (correctly) noting that Ms. Curry-Mills submitted no response. *Id.* at 2.

The termination decision also contained a section entitled "Right to Appeal," which stated that Ms. Curry-Mills was "entitled to appeal this removal action to the Office of Employee Appeals (OEA) within thirty (30) days of this final decision." *Id.* The final decision was sent to 1443 Southern Ave., Apt. 101, Oxon Hill, MD 20745, despite the facts that (1) the notice previously erroneously sent to this address had been returned undelivered, and that fact had been noted in DYRS records, ALJ Op. 4 (¶ 21-23); and (2) DYRS could have accessed Ms. Curry-Mills' correct address in its PeopleSoft database in less than two minutes, *id.* at 4 (¶ 19), 5 (¶ 27). This final notice was returned undelivered and never resent. *See id.* at 4 (¶ 23).

On February 27, 2014, a jury found that Ms. Curry-Mills had acted legally in defense of her children and acquitted her on all counts. ALJ Op. 5 (¶ 29). Ms. Curry-Mills reported for work at DYRS on March 6, 2014. *Id.* at 5 (¶ 30). DYRS Management Liaison Specialist Ohler met with Ms. Curry-Mills and informed her (for the first time) that she had been terminated, *id.* at 5 (¶ 30), and handed Ms. Curry-Mills copies of the advance notices of removal, the Hearing Officer's report, and the final notice of removal, *id.* at 5-6 (¶ 32). With respect to the possibility of an administrative appeal, Ms. Ohler advised Ms. Curry-Mills that thirty days from her termination (which had been effective January 10, 2014) "would have been February 10, [2014,]" Ohler Dep. 50:1-9, or almost a month before this conversation took place (March 6, 2014), so, Ms. Ohler told Ms. Curry-Mills, "her time for appealing her removal had lapsed," *id.* 57:20-22.

C. Administrative Appeal

At first, Ms. Curry-Mills did not file an administrative appeal because Ms. Ohler told her that the time to do so had lapsed, as did the written materials she was provided. Eventually, however, Ms. Curry-Mills concluded that she should have a right to appeal despite these statements, and she filed her administrative appeal on February 27, 2015. ALJ Op. 1.

Administrative Law Judge (ALJ) Joseph E. Lim dismissed her administrative appeal as untimely on March 30, 2016. *Id.* at 1, 13.

With respect to notice, the ALJ explained that the Due Process Clause requires an agency to "comprehensibly" and "meaningfully" inform the employee of its proposed action and then of its final decision, and to provide the employee with enough information so that the employee "can assess the correctness of the agency's decision, make an informed decision as to whether to appeal, and be prepared for the issues to be addressed at the hearing." *Id.* at 6. The ALJ also explained that once the final decision is made, the District Personnel Regulations explicitly require an agency to send notice of the decision to the employee's last known address before it becomes effective. *Id.* at 8. The ALJ specified that this notice must inform the employee of her right to administratively appeal the termination to the Office of Employee Appeals (OEA) and the requirement that the administrative appeal "'be filed within thirty (30) days of the effective date of the appealed agency action.'" *Id.* (quoting 6-B DCMR § 1618.3 (2013)).[6]

The ALJ then held that all of DYRS's mailed notices failed to meet the requirements of due process or the applicable regulations. *Id.* at 8-9. The ALJ pointed to *Jones v. Flowers*, 547 U.S. 220, 227-29 (2006), which requires an agency to "do something more" before undertaking any adverse action when it learns that its attempts to provide notice have failed, and suggested that this standard was not met when DYRS's notices were returned undelivered at the same time that a glance at DYRS's own database would have revealed the correct address. ALJ Op. 8-9. Accordingly, the ALJ concluded that DYRS "failed to exercise due diligence" and that the mailed notices did not meet the requirements of due process or the applicable regulations. *Id.* at 9.

[6] The regulations relevant here are those in effect in 2013. These regulations were amended in 2016, but those amendments are not relevant to this case.

Nonetheless, the ALJ determined that Ms. Curry-Mills received legally sufficient, actual notice of her right to administratively appeal on March 6, 2014 – nearly two months after the final decision to terminate became effective – when she showed up for work and was handed copies of the documents previously mailed to incorrect addresses. *Id.* He rejected her argument that this notice was constitutionally inadequate because it did not inform her of her appeal rights, claiming that Ms. Curry-Mills had not provided any cases analogous to her factual situation and that "the notice that she actually received would have been deemed adequate in of itself." *Id.* The ALJ then read 6-B DCMR Section 1618.3 as providing her with thirty days from "the date that she received actual notice" in which to file her administrative appeal. *Id.* Despite agreeing that Ms. Curry-Mills "was not told that she had 30 more days to appeal from her receipt of the notices," *id.* at 6 (¶ 32), the ALJ dismissed her administrative appeal as untimely, *id.* at 13.

Following the ALJ's dismissal of her administrative appeal, Ms. Curry-Mills timely filed a petition to review that decision with this Court on April 28, 2016. D.C. Code § 1-606.03(d); SCR Agency Review 1(a).

SUMMARY OF THE ARGUMENT

Ms. Curry-Mills never received adequate notice of her right to participate in her termination proceedings or to challenge the resulting termination decision. The ALJ correctly found that the mailed notices were inadequate because (1) they were mailed to incorrect addresses, and (2) when the notices were returned undelivered, DYRS made no reasonable effort to correct its obvious mistakes by resending the notices to the correct address, which it had in a database that it commonly consulted for employee addresses and would have taken mere minutes to access.

Based on this failure, the ALJ should have provided Ms. Curry-Mills with the obvious remedy: proper notice and the opportunity to be heard, which, in this context, means the opportunity to submit her argument and evidence to a Hearing Officer in the first instance and to

have the termination decision made considering that argument and evidence (and then to have any resulting termination decision subject to further administrative and judicial review).

Instead, the ALJ found that Ms. Curry-Mills had no remedy because she did not file an administrative appeal within thirty days of receiving the delayed notice of her termination. This was legal error because DYRS never notified Ms. Curry-Mills that she could file an administrative appeal. Instead, the very first time that Ms. Curry-Mills was notified that she had been terminated (on March 6, 2014), DYRS also told her (orally and in writing) that the time to file an administrative appeal had *already* passed (on February 10, 2014). In short, the notice given to Ms. Curry-Mills was either too late (because it was provided after the time for appeal had passed) or it was materially inaccurate (because it stated that the time for appeal had already passed rather than explaining that she had thirty days to appeal starting on the date she received notice). This failure to provide accurate and timely notice is not just a violation of District regulations and due process; it is also grossly unfair conduct that has deprived an innocent person of her livelihood.

ARGUMENT

I. DYRS DID NOT PROVIDE MS. CURRY-MILLS WITH NOTICE OR THE OPPORTUNITY TO BE HEARD BEFORE TERMINATING HER EMPLOYMENT.

A. Ms. Curry-Mills was Entitled to Constitutionally Adequate Notice Prior to the Termination of Her Employment.

Ms. Curry-Mills had an undisputed due-process-protected property interest in her DYRS employment at the time she was terminated. She was a permanent public employee removable only for cause, and therefore had "a constitutionally protected property interest in [her] tenure" and could not "be fired without due process." *Gilbert v. Homar*, 520 U.S. 924, 928-29 (1997). Additionally, Ms. Curry-Mills was a career service employee covered by the District's Comprehensive Merit Personnel Act, D.C. Code §§ 1.616.51-54, and such employees have a

"protected property interest" in their employment. *Leonard v. District of Columbia*, 794 A.2d 618, 626 (D.C. 2002).

This property interest entitled Ms. Curry-Mills to the right to notice and the opportunity to be heard before losing her job. "The essence of due process is the requirement that a person in jeopardy of serious loss [of a property interest] be given notice of the case against him and opportunity to meet it." *Wall v. Babers*, 82 A.3d 794, 801-02 (D.C. 2014) (citation and internal quotation marks omitted); *see also Quincy Park Condo. Unit Owners' Ass'n v. D.C. Bd. of Zoning Adjustment*, 4 A.3d 1283, 1289 (D.C. 2010) ("[D]ue process requires 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'") (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Notice and the opportunity to be heard apply to administrative proceedings. *E.g.*, *Brown v. D.C. Dep't of Employment Servs.*, 83 A.3d 739, 747 n.27 (D.C. 2014) ("[T]he Constitution mandates that agencies provide 'fair and adequate notice of administrative proceedings' such that parties 'have an opportunity to defend [their] positions.'") (citation omitted) (alteration in original); *OMB v. Webb*, 28 A.3d 602, 605 (D.C. 2011).

The Constitution thus places both substantive and procedural requirements on notices of adverse administrative action. Substantively, "[n]otice must reasonably convey the necessary information." *In re N.N.N.*, 985 A.2d 1113, 1123 (D.C. 2009). Procedurally, notice must "afford a reasonable time for interested parties to [act]," *id*., and must be "reasonably calculated to reach the intended recipient when sent," *Jones*, 547 U.S. at 226.

Additionally, the regulations applicable to Ms. Curry-Mills' termination specifically require notice both before a hearing is held and when a termination decision is made. 6-B DCMR §§ 1608.2(g), 1614.1 (2013). Of course, any notice under the regulations must comply with

constitutional requirements. *Id.* § 1603.10 (notices must satisfy the Due Process Clause).

B. Ms. Curry-Mills Received No Notice Prior to or Contemporaneous with Her Termination.

The ALJ correctly concluded that Ms. Curry-Mills received no notice regarding her termination from DYRS before (or immediately after) it terminated her. Indeed, DYRS's own records showed that every notice sent was returned undelivered. The ALJ also correctly determined that DYRS's supposed attempts to notify Ms. Curry-Mills were inadequate. DYRS first used addresses likely to be inaccurate because they came from a source (Ms. Curry-Mills' personnel file) that is not routinely updated. Then, when the notices sent to those wrong addresses were returned undelivered, DYRS failed to take "a couple of minutes" to access its own database where employees often place updated address information and where, it turns out, Ms. Curry-Mills had placed her correct address. DYRS's attempts to provide notice were thus: (1) unsuccessful, (2) known by DYRS to be unsuccessful, and (3) unreasonable. *See, e.g.*, *Kidd Int'l Home Care, Inc. v. Prince*, 917 A.2d 1083, 1087 (D.C. 2007) (holding agency was "plainly required to undertake further measures to effect service" when mailed notice was returned undelivered); *Lopez v. United States*, 201 F.3d 478, 480-81, 340 U.S. App. D.C. 28, 30-31 (D.C. Cir. 2000) (then-judge Ginsburg holding that efforts to notify were inadequate to provide due process when, after two mailed notices were returned undelivered, agency took no additional steps despite having some relevant information regarding the recipient's actual whereabouts); *Chavis v. Heckler*, 577 F. Supp. 201, 205 (D.D.C. 1983) (finding agency "violated plaintiff's procedural due process rights when it terminated plaintiff's benefits without actual or adequate notice of the termination and appeal rights," and notice was inadequate when it was not sent to address designated by plaintiff); *see also Brown v. District of Columbia*, 115 F. Supp. 3d 56, 69 (D.D.C. 2015) (noting plaintiffs stated claim for relief by alleging that government "violated their due process rights by failing to

mail notices at all *or by sending them to an obviously incorrect address*") (emphasis added). Because Ms. Curry-Mills was thus deprived of her constitutional right to notice and the opportunity to be heard, this matter must be remanded to DYRS for an initial adversary (rather than *ex parte*) hearing on Ms. Curry-Mills' proposed termination that satisfies due process. *See, e.g.*, *Kidd Int'l*, 917 A.2d at 1088-89 (remanding for new hearing where party did not receive notice of hearing); *OMB*, 28 A.3d at 605-06 (remanding for new hearing in light of concerns of inadequate notice of hearing); *Camacho v. White*, 918 F.2d 74, 78 (9th Cir. 1990) (proper remedy for holding a hearing with inadequate notice is to order a new hearing).[7]

II. THE WRITTEN AND ORAL NOTICES PROVIDED ON MARCH 6, 2014 ALSO VIOLATED DUE PROCESS AND THEREFORE MS. CURRY-MILLS' ADMINISTRATIVE APPEAL CANNOT BE DISMISSED AS UNTIMELY.

The ALJ appeared to correctly understand that, until more than thirty days after she was terminated, Ms. Curry-Mills had no notice that (1) she had a right to a hearing prior to removal, (2) such a hearing was going to be held, (3) such a hearing had been held, (4) a recommendation

[7] The failure to provide notice and to hold an adversary hearing were *not* harmless. At an adversary hearing, DYRS would have been unable to show that Ms. Curry-Mills had engaged in any misconduct because, as the jury found, she acted entirely appropriately in defense of her children. The facts that Ms. Curry-Mills was arrested and prosecuted could not, by themselves constitute sufficient proof of misconduct. *See Schware v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 241 (1957) ("The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense."); *Amobi v. D.C. Dep't of Corr.*, 755 F.3d 980, 993, 410 U.S. App. D.C. 338, 351 (D.C. Cir. 2014); EEOC Enforcement Guidance, No. 915.002, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (2012). Indeed, in the context of an African-American like Ms. Curry-Mills, finding misconduct based on arrest is arguably prohibited race-based discrimination. *See Pouncy v. Prudential Ins. Co. of Am.*, 668 F.2d 795, 800 (5th Cir. 1982) ("A disparate impact analysis may be used to challenge . . . an employer's refusal to employ persons . . . who have a record of arrests . . . ."); *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970) (employer policy of rejecting applicants with number of arrests violates Title VII), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972); EEOC Enforcement Guidance, No. 915.002.

had been made to terminate her, or (5) a final decision had been made to terminate her. ALJ Op. 4 (¶¶ 18-23). That should end this case. *See, e.g.*, *Kidd Int'l*, 917 A.2d at 1088 (where notice is inadequate, remedy is to reverse and remand "for a hearing on the merits"); *Ploufe v. D.C. Dept. of Employment Servs.*, 497 A.2d 464, 466 (D.C. 1985) (same).

The ALJ, however, held that this constitutional violation should not be remedied because Ms. Curry-Mills received adequate notice on March 6, 2014 and failed to file her administrative appeal within thirty days thereafter. ALJ Op. 9, 13. This conclusion was legal error because, although Ms. Curry-Mills did receive notice on March 6, 2014 that she had been terminated (effective the preceding January 10), that notice failed to inform her that she had a right to administrative appeal and, instead, stated that her time to file such an appeal had already expired.

Both of the notices Ms. Curry-Mills received on March 6, 2014 (one written and one oral) clearly informed her that her time to file an administrative appeal had already passed. The written notice was the termination decision itself. It was dated December 24, 2013 and stated that Ms. Curry-Mills was "entitled to appeal this removal action to the Office of Employee Appeals (OEA) *within thirty (30) days of this final decision*." Final Notice 2 (emphasis added). The only reasonable interpretation of this notice was that Ms. Curry-Mills' time to file an administrative appeal had expired on January 23, 2014, well before she received the notice on March 6, 2014.[8] The oral notice was Ms. Ohler's statement (also made on March 6, 2014) that thirty days from her termination "would have been February 10, [2014,]" Ohler Dep. 50:1-9, so Ms. Curry-Mills' "time for appealing her removal had lapsed," Ohler Dep. 50:1-9, 57:20-22. Thus, although the two

[8] And to the extent this notice could be interpreted as stating that the thirty-day period for filing an administrative appeal did not start until the termination became effective, that effective date was January 10, 2014 and the deadline therefore would have been February 9, 2014, still long before Ms. Curry-Mills received the notice on March 6, 2014.

notices Ms. Curry-Mills received were not identical, both unequivocally informed her that the date for filing an appeal had already passed and that she therefore had no ability to initiate an administrative appeal.

These two notices were unquestionably deficient. They fail to meet the regulatory requirements for a variety of reasons, most notably for the obvious reason that they were not provided to Ms. Curry-Mills before the effective date of her termination. *See* 6-B DCMR § 1608.1 (2013). They also fail to meet basic constitutional requirements. "[D]ue process requires the government to provide 'notice reasonably calculated, under all the circumstances, to . . . afford [interested parties] an opportunity to present their objections.'" *Jones*, 547 U.S. at 226 (quoting *Mullane*, 339 U.S. at 314); *accord, e.g.*, *OMB*, 28 A.3d at 605; *Lopez*, 201 F.3d at 480, 340 U.S. App. D.C. at 30. The notices were not calculated to afford Ms. Curry-Mills any opportunity to present her objections because they told her that the time for administrative appeal had already passed. Even if Ms. Curry-Mills actually had thirty days from her receipt of these papers to file her administrative appeal, as the ALJ concluded,[9] these notices did not "reasonably convey the necessary information," *In re N.N.N.*, 985 A.2d at 1123, because they stated that the time for appeal had lapsed and did not state that an additional thirty days was available for this purpose. In short, these notices "precluded a meaningful response" by Ms. Curry-Mills. *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 599, 299 U.S. App. D.C. 206, 211 (D.C. Cir. 1993).

This Court has repeatedly found much more minor errors with respect to notice of the timing of an administrative appeal to violate due process and to preclude an agency from denying

[9] It is unclear whether the ALJ was correct in this regard. The applicable regulation stated that an administrative appeal "shall be filed within thirty (30) days of the *effective date* of the appealed agency action." 6-B DCMR § 1618.3 (2013) (emphasis added).

such an appeal as untimely. For example, in *Wright-Taylor v. Howard Univ. Hosp.*, 974 A.2d 210, 218 (D.C. 2009), this Court reversed and remanded for a new hearing because, although the notice informed a claimant that his administrative appeal would be deemed filed when mailed, it did not inform him that this would not be the case if the appeal did not arrive at the agency with a legible postmark. In *McDowell v. Southwest Distribution*, 899 A.2d 767, 768-70 (D.C. 2006), this Court cited numerous cases holding that the government cannot reject administrative appeals as untimely when its notices failed to convey the relevant deadline clearly or accurately. These include cases in which (1) the inaccuracies in the notices were minor, including the failure to specify whether a "day" was a calendar day, a business day, or a school day; (2) the notices failed to explain what constitutes "filing;" and most directly applicable here, (3) "employees of the administrative agency gave erroneous oral or written advice to the claimant." *Id.* at 768-69 (collecting cases). Here the notices were either untimely (because they were given on March 6, 2014, which was after the thirty-day deadline had already passed) or the notices were inaccurate (because they stated that the deadline had already passed when there was still time to seek review). Either way, the notices were deficient as a matter of law.

The failure to provide proper notice does not merely toll the time for filing an administrative appeal. Rather, the government is prohibited from asserting an administrative appeal is untimely in the absence of proper notice. *Wright-Taylor*, 974 A.2d at 217 (citing *Thomas v. D.C. Dep't of Employment Servs.*, 490 A.2d 1162, 1164 (D.C. 1985)); *McDowell*, 899 A.2d at 768 (quoting *Lundahl v. D.C. Dep't of Employment Servs.*, 596 A.2d 1001, 1002 (D.C. 1991)). The time limit for filing an administrative appeal simply does not *start* until proper notice is given. *See, e.g.*, *Selk v. D.C. Dept. of Employment Servs.*, 497 A.2d 1056, 1058 (D.C. 1985) (adequate notice is required "in order to start the running of time for appeal"); *see also Burke v. Kodak*

Retirement Income Plan, 336 F.3d 103, 108-09 (2d Cir. 2003) (unclear notice with regard to 90-day time limit meant that government could not challenge as untimely administrative appeal that was filed almost eight months after the decision to be reviewed). Accordingly, the thirty-day limit for Ms. Curry-Mills to file an appeal was never triggered, meaning her administrative appeal could not have been untimely and the ALJ's dismissal on timeliness grounds was legal error.

CONCLUSION

For the foregoing reasons, the decision of the Office of Employee Appeals should be reversed and the matter remanded to DYRS with instructions to hold an adversary hearing on the merits of Ms. Curry-Mills' termination.

Respectfully Submitted,

/s/ Jonathan H. Levy
Jonathan H. Levy (No. 449274)
Priyanka Gupta**
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, DC 20005
Tel: (202) 628-1161
Fax: (202) 727-2132
jlevy@legalaiddc.org
pgupta@legalaiddc.org

Counsel for Petitioner Lelonie Curry-Mills

CERTIFICATE OF SERVICE

I will electronically file the foregoing Petitioner's Brief with the Clerk of Court using the CaseFile Express System, which will then send notification and service of such filing on August 26, 2016 to:

Andrea G. Comentale, Esq.
Jhumur Razzaque, Esq.
Office of the Attorney General for the
District of Columbia
441 4th Street, N.W., Suite 1180N
Washington, DC 20001
Counsel for Defendant Department of Youth Rehabilitation Services

Lasheka Brown Bassey, Esq.
District of Columbia Office of
Employee Appeals
1100 4th Street, N.W., Suite E260
Washington, DC 20024
Counsel for Defendant Office of Employee Appeals

/s/ Jonathan H. Levy
Jonathan H. Levy