SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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

PETITIONER'S REPLY BRIEF

Jonathan H. Levy (DC Bar No. 449274)
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

Two concessions in the District's brief mandate ruling in Ms. Curry-Mills's favor. First, prior to March 6, 2014, "DYRS' attempts to notify Petitioner were inadequate." District Br. 13. Second, even on March 6, 2014, "[Ms. Curry-Mills] received [the Final Notice] after the time for appealing to the OEA, as stated in the Final Notice, lapsed." District Br. 14.

I. PRE-TERMINATION NOTICE WAS INADEQUATE.

The District does not deny that Ms. Curry-Mills had a property interest in her employment by the District and was therefore entitled to *pre-termination* notice under the Constitution and District regulations. *See* Curry-Mills Br. 8-11; District Br. 10-11. Ms. Curry-Mills was terminated effective January 10, 2014, and before that date, DYRS's only attempt at notice was to send documents to two addresses from her personnel file. District Br. 5-6; ALJ Op. 5 (¶ 26). It is undisputed that both notices were returned undelivered and that therefore Ms. Curry-Mills received no notice before her termination became effective. *Id.*

As a matter of law, sending two notices that are returned undelivered does not meet due process requirements. *E.g.*, *Lopez v. United States*, 201 F.3d 478, 480-81, 340 U.S. App. D.C. 28, 30-31 (D.C. Cir. 2000) (attempted notice constitutionally insufficient where agency mailed two notices that were returned undelivered); *Kidd Int'l Home Care, Inc. v. Prince*, 917 A.2d 1083, 1087 (D.C. 2007) (if notice "was returned [undelivered], then the [agency] was plainly required to undertake further measures to effect service") (citing *Jones v. Flowers*, 547 U.S. 220, 229-33 (2006)); Curry-Mills Br. 10-11 (collecting cases). And here, DYRS had an easy and obvious option to provide notice. DYRS should have taken "a couple of minutes" to access Ms. Curry-Mills's PeopleSoft address, which was unquestionably (1) correct, (2) used by the District to send Ms. Curry-Mills her pay stubs, and (3) available to, and commonly used by, DYRS. ALJ Op. 3-5 (¶¶ 12, 13, 16, 17, 27). *See*, *e.g.*, *Small v. United States*, 136 F.3d 1334, 1337 (D.C. Cir. 1998)

("[W]hen the government knows (*or can easily ascertain*) where a person may be found, it must direct its notice there, and not to some other address where the designee formerly resided.") (Emphases added); *Foehl v. United States*, 238 F.3d 474, 480 (3d Cir. 2001) (constitutional notice requirement violated where notice sent to wrong address was returned undelivered and the government failed to make even a "minimal effort" to obtain the correct address).

The District asserts that "[t]here exists no rule, regulation, or statute that DYRS look outside its personnel file for Petitioner's address." District Br. 13. That assertion is highly misleading because it fails to mention the Constitution, which requires notice "reasonably calculated to afford the party an opportunity to be heard." District Br. 12; *accord id.* 11. That assertion is also wrong because a regulation (6-B DCMR § 1608.07) "requir[es] DYRS to send the advance decision notice to an employee's last known address if the employee is not at work," District Br. 13, and here the last known address was the PeopleSoft address, which was concurrently being used by the District to send Ms. Curry-Mills her pay stubs.

The District's suggestion that "sometimes the information in PeopleSoft is inaccurate," District Br. 13, is irrelevant. DYRS knew that the PeopleSoft address couldn't be worse than the personnel file addresses, which it knew with certainty were wrong. Indeed, it was DYRS's "regular or normal practice to look into PeopleSoft to see if there was another address" when it was "unable to get a good address from the employee personnel file." Catherine Ohler Dep. (Feb. 18, 2016), at 37. So, DYRS has already conceded that PeopleSoft addresses are routinely used in the very situation at issue here and has offered no reasonable excuse for its failure to use Ms. Curry-Mills's PeopleSoft address for her termination notice (or any other notice).

Finally, the District asserts that its failure to provide pre-termination notice is irrelevant because it provided post-termination notice. *See* District Br. 6, 12 (noting that Ms. Curry-Mills

was terminated effective January 10, 2014 but asserting proper notice on March 6, 2014). But if after-the-fact notice were sufficient, the constitutional pre-termination notice requirement would be meaningless. *See*, *e.g.*, *Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 231 (5th Cir. 1998) ("in the termination of a public employee, dischargeable only for cause, a post-termination hearing cannot satisfy the requirements of due process except when it is coupled with pretermination notice and pretermination opportunity to respond"); *Lightfoot v. D.C.*, 246 F.R.D. 326, 338 (D.D.C. 2007) ("post-deprivation process does not cure a potential pre-deprivation due process violation").

Because the District's attempts to provide pre-termination notice were deficient and unsuccessful, Ms. Curry-Mills is entitled to reversal and remand for a hearing on the merits. *See*, *e.g.*, *Kidd*, 917 A.2d at 1088-89; *OMB v. Webb*, 28 A.3d 602, 605-06 (D.C. 2011).

II. THE POST-TERMINATION (MARCH 6, 2014) NOTICE TO MS. CURRY-MILLS WAS INADEQUATE BECAUSE IT STATED THAT THE TIME TO SEEK FURTHER REVIEW HAD ALREADY PASSED.

The District agrees that, after her termination, Ms. Curry-Mills was entitled to notice that gave her a meaningful "opportunity to be heard." District Br. 12 (citing *OMB*, 28 A.3d at 605); *accord Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 599 (D.C. Cir. 1993) (notice that "preclude[s] a meaningful response" is invalid). The March 6, 2014 (post-termination) notice was invalid because it failed to provide the information necessary for her to meaningfully respond by filing an administrative appeal. Instead, the notice provided misinformation.

The District concedes that "[Ms. Curry-Mills] received [the Final Notice] after the time for appealing to the OEA, as stated in the Final Notice, lapsed." District Br. 14; *accord* District Br. 9 ("Petitioner received [the Final Notice] after the deadline to appeal the decision had lapsed"). The notice stated that it could be appealed within 30 days of its date (December 24, 2014), but was not handed to Ms. Curry-Mills until over 70 days later (March 6, 2014). Final Notice 2; ALJ Op. 5 (¶

25); *see also* ALJ Op. 6 (¶ 32) (Ms. Curry-Mills "was not told that she had 30 more days to appeal from her receipt of the notices."). The District admits that the Final Notice was unambiguous in this regard, and was reinforced by a DYRS employee who told Ms. Curry Mills that "her time to appeal had lapsed." District Br. 14, 17.

The District cites no case holding or even implying that a notice providing such grossly and prejudicially false information complies with constitutional or regulatory requirements. Such a notice is defective in numerous respects not countered by the District. A notice including a time for appeal that has already passed does not provide a meaningful "opportunity to be heard," which even the District agrees is required. District Br. 12 ("[A]n administrative agency must provide notice reasonably calculated to afford the party an opportunity to be heard."). Similarly, such a notice does not "reasonably convey the necessary information" regarding the administrative appeal. *In re N.N.N.*, 985 A.2d 1113, 1123 (D.C. 2009). Accordingly notice is constitutionally invalid when it conveys the time for seeking review ambiguously or inaccurately, even in minor respects. *See Wright-Taylor v. Howard Univ. Hosp.*, 974 A.2d 210, 218 (D.C. 2009); *McDowell v. Southwest Distribution*, 899 A.2d 767, 768-70 (D.C. 2006) (collecting cases). The notice here was grossly inaccurate in a way that prejudiced Ms. Curry-Mills ability to enforce her rights.

The District's criticism of Ms. Curry-Mills for not filing an administrative appeal or consulting with an agency or an attorney, District Br. 12, 14, 17, is unfounded. Having been clearly informed *by the District* that the time for appeal had passed, the District cannot fault Ms. Curry-Mills for believing that she had no recourse, could not file an administrative appeal, and had no basis to consult either an agency or an attorney. Indeed, it is unseemly for the District to make false statements to Ms. Curry-Mills regarding her administrative appellate rights and then to fault her for believing those false statements. *See Cohen v. United States*, 578 F.3d 1, 11 (D.C. Cir.

2009) (rejecting as "chutzpah" the IRS's assertion that "taxpayers should have realized all the options the Service said were closed to them . . . were nonetheless sufficient to fulfill their administrative refund obligations and to serve as a prerequisite to judicial review"), *vacated in part*, 599 F.3d 652 (D.C. Cir. 2010).

Moreover, any alleged delay by Ms. Curry-Mills is legally irrelevant. The time for filing an administrative appeal does not start until proper notice is given. *See* Curry-Mills Br. 14-15 (collecting cases). Because Ms. Curry-Mills never received proper notice, her time to file an administrative appeal never started, and it was legal error to dismiss that appeal as untimely. The ALJ's decision must therefore be reversed and the matter remanded. *See* District Br. 14-15 nn.12, 13 (noting two instances in which Court of Appeals found notice problems and reversed and remanded, despite delays by the petitioners that the District asserts are analogous to Ms. Curry-Mills's alleged delay here).

CONCLUSION

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..

Respectfully Submitted,

/s/ Jonathan H. Levy
Jonathan H. Levy (No. 449274)
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

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 October 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