SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

LELONIE CURRY-MILLS, **Petitioner,** **v.** **DISTRICT OF COLUMBIA DEPARTMENT OF YOUTH AND REHABILITATION SERVICES *et al.*,** **Respondents.**	**Case No. 2016 CA 003190 P(MPA)** **Judge Steven M. Wellner** **Civil Calendar 14**

ORDER

This case comes before the Court on a Petition For Review Of Agency Decision, filed April 28, 2016. Petitioner challenges the Initial Decision issued by the Office of Employee Appeals ("OEA") on March 30, 2016.[1] For the reasons stated below, the Petition is granted. The Initial Decision issued by OEA is reversed, and the matter is remanded to OEA for further action consistent with this decision.

I. BACKGROUND

A. Findings Of Fact

Neither party challenges OEA's Findings Of Fact, which this Court concludes are supported by substantial evidence in the record. The Findings Of Fact are adopted here and restated for reference, with footnotes omitted:

> 1. DYRS [or, "the Agency"] is the District of Columbia's cabinet level juvenile justice agency tasked with the responsibility of providing security, supervision, and rehabilitation service s for youth committed to its care and custody.

[1] OEA Matter No. 1601-0047-15.

2. Youth Development Representatives ("YDRs"), formerly known as Correctional Officers, are among the most essential staff at the Agency. YDRs are responsible for the "rehabilitation, direct supervision, and active positive engagement, and safety and security of youth" in the Agency's secure facilities.
3. Employee worked as a YDR with Agency since October 3, 2005.

4. Agency maintains personnel folders for every employee. Each personnel folder contains contact information provided by an employee upon his or her entrance of duty; all updates to this information, including address changes, are provided by the employee voluntarily.

5. Contact information for all Agency employees is also located in PeopleSoft, an electronic automated system that houses personnel information for the District of Columbia's 30,000 plus employees. District employees' address information is located in PeopleSoft.

6. On or around September 12, 2011, Employee was arrested and charged with an Assault with a Dangerous Weapon. Employee was placed into Pretrial Services Agency's (PSAs) High Intensity Supervision Program and ordered to abide by an electronically monitored curfew, abide by the stay away order, and submit to regular drug testing on a weekly basis.

7. As a result, Employee was placed on non-contact status on September 22, 2011, and directed to report to New Beginnings, a different facility from where she was originally assigned.

8. On September 23, 2011, Employee reported to New Beginnings and received a written notice proposing her placement on enforced leave. The notice pointed to Employee's arrest, her felony charge, and a relationship between the felony charge and her position as grounds for the proposed enforced leave.

9. The mailing address on the notice was 1218 Southern Avenue #103, Washington, DC 20032. This was Employee's correct mailing address as of September 23, 2011.

10. On September 30, 2011, Employee submitted a written response denying her criminal charges to the written notice. She wrote: "I am not guilty of the charges that stand before me.... My life should not be destroyed due to a crime that I have not been pr oven to have committed."

11. On October 19, 2011, Employee received a final written decision that she would be placed on enforced leave immediately. Thus, Employee ceased coming to work.

12. Throughout her employment with DYRS, Employee updated her address information in PeopleSoft when she changed addresses.

13. On February 7, 2012, Employee changed her address in PeopleSoft from 1218 Southern Avenue #103, Washington, DC 20032 to 1234 Southern Avenue, SE, Number 304, Washington, DC 20032.

14. When an employee makes an address change in the PeopleSoft System, the system does not send notification to the employee's agency. Employee did not separately inform DYRS of the address change made in PeopleSoft.

15. On or around August 29, 2012, Employee was indicted on felony charges for (1) assault with a dangerous weapon, (2) Possession of a firearm during the time of violence, (3) Carrying a pistol without a license outside the home/business, and (4) threatening to kidnap or injure a person.

16. Employee's February 7, 2012 change of address to 1234 Southern Avenue, SE, Number 304, Washington, DC 20032 in PeopleSoft was available to DYRS in November and December of 2013.

17. Employee received hours-and-earnings statements issued by the Office of Pay and Retirement Services from February 24, 2012 through at least January 2014, at 1234 Southern Avenue, SE, Number 304, Washington, DC 20032.

18. On November 4, 2013, the Agency issued a 15-day advanced written notice of proposal to remove Employee. Employee's proposed removal was based on the following causes: 1) An on-duty or employment-related act or omission that interfered with the efficiency and integrity of government operations: malfeasance; 2) An act which constitutes a criminal offense whether or not the act results in convictions; and 3) An on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious: violation of the District's Employee Conduct policy as outlined in the District Personnel Manual ("DPM") and violation of the Youth Services Administration "YSA") policy 13-004-Employee Conduct policy, in effect in September 2011 and superseded by DYRS Policy #DYRS-010 on September 4, 2012.

19. Agency could have, but did not, use the PeopleSoft System to determine Employee's current address in 2013.

20. This notice was mailed by Federal Express. The address on the notice — 3422 22nd St., SE, Washington, DC 20020 — was incorrect, and the notice was returned to DYRS undelivered.

21. On November 18, 2013, the Agency mailed a second copy of the Advance Written Notice of Proposed Removal to Employee. The address on this notice — 1443 Southern Ave., Apt. 101, Oxon Hill, MD 20745 — was incorrect, and the notice was returned to DYRS undelivered.

22. On December 11, 2013, the Hearing Officer assigned to review the case found that there was sufficient cause to warrant the removal of Employee from her position. The

Hearing Officer issued a report recommending that DYRS uphold Employee's proposed removal. The report noted that the November 4, 2013 Advance Written Notice was returned undelivered and "multiple attempts were made to deliver the Notice to Employee's addresses on record with the DYRS Office of Human Resources; however, the correspondence was returned undelivered."

23. On December 24, 2013, DYRS sent Employee a Final Written Notice of Proposed Removal removing her effective January 10, 2014, and mailed it to Employee. DYRS noted Employee's failure to respond to the Advance Written Notice. The address on the Final Written Notice — 1443 Southern Ave., Apt. 101, Oxon Hill, MD 20745 — was incorrect, and the notice was returned to DYRS undelivered.

24. The notice advised Employee that she could elect to file an appeal with the Office of Employee Appeals within thirty calendar days of the final decision or elect to file a grievance pursuant to the Negotiated Grievance Procedure of the collective bargaining agreement between Agency and Employee's union.

25. The December 24, 2013 Final Written Notice included a section about appealing to the Office of Employee Appeals ("OEA"). Labeled "Right to Appeal," it stated: "[Y]ou are entitled to appeal this removal action to the Office of Employee Appeals (OEA) within thirty (30) days of this final decision." The section also provided OEA's address, OEA's telephone number, and the instruction to call OEA for any questions about the OEA appeal process. Enclosed with the Final Written Notice were an OEA appeal form and a copy of the OEA regulations.

26. Agency used Employee's last known address based on their personnel records. Based on Agency's records, Employee never directly notified Agency of any change in mailing address or reached out to Agency after being placed on enforced leave since October 2011.

27. It is "not necessarily uncommon" for DYRS Human Resources staff to pull up employee address information from the PeopleSoft system. Agency could have checked Employee's contact information by looking in PeopleSoft and it would only take a DYRS Human Resources staff person a couple of minutes to retrieve an employee's address information from the PeopleSoft System.

28. Sometimes, the address information in PeopleSoft is inaccurate while the address information in an employee's personnel folder is accurate.

29. On February 27, 2014, a jury acquitted Employee on all felony counts, finding that she had acted lawfully in defense of her children.

30. On March 6, 2014, Employee appeared at the Agency, in person, more than 2 years since she last reported to work. Employee was informed by Agency's Management Liaison Specialist Ms. Ohler that she had been removed from her position.

31. Ohler also told Employee that the removal notices sent to the addresses DYRS had for her. When Employee informed Ms. Ohler that she did not receive any of the removal notices, Ohler stated that the notices were indeed returned undelivered.
32. Ms. Ohler then handed over the documents and Employee signed for and received copies of her Advanced Notice of Removal, Supporting Documents for Removal, Hearing Officer Report, and Final Notice of Removal. Ohler opined that while she advised Employee to reach out to OEA. Employee was not told that she had 30 more days to appeal from her receipt of the notices.

33. Together with Employee's December 24, 2013, Final Written Notice of Proposed Removal were the OEA appeal forms and a copy of the OEA regulations. The notice also advised Employee to contact the OEA at (202) 727 - 0004 if she need ed additional information on filing an appeal.

34. It was not until February 27, 2015, more than a year after the effective date of her termination, and more than eleven months after she signed for her notice of the separation, that Employee filed [her appeal to OEA].

B. Agency Decision

OEA dismissed as untimely Petitioner's appeal of the Final Written Notice of Proposed Removal. Senior Administrative Judge Joseph E. Lim concluded that Petitioner had missed the 30-day jurisdictional appeal deadline set by D.C. Code § 1-606.03(a): "Any appeal shall be filed within 30 days of the effective date of the appealed agency action."

The Administrative Judge agreed with Petitioner that the appeal deadline did *not* begin to run when DYRS mailed copies of its Final Written Notice Of Proposed Removal to various "wrong" addresses – addresses from which the U.S. Postal Service had returned Petitioner's mail as undeliverable. Citing *Jones v. Flowers*, 547 U.S. 220, the Administrative Judge found such notice constitutionally inadequate because the Agency had not "exercise[d] due diligence" to find a good address for Petitioner after mail sent to other addresses was returned as undeliverable. Initial Decision at 9.

The Administrative Judge nevertheless concluded that the appeal deadline *did* start to run on March 6, 2014, when Petitioner reported for work after a more-than-two-year absence and

received by hand a copy of the Final Written Notice Of Proposed Removal, with appeal rights. *Id*. He found that this notice, considered together with the Management Liaison Specialist's recommendation that Petitioner "reach out to OEA" for more information about the appeal process, was both constitutionally and statutorily adequate to trigger the 30-day jurisdictional appeal deadline. He acknowledged that more than 30 days had already passed since the date of the Final Written Notice of Proposed Removal and the effective date of her removal. He also acknowledged that neither the Management Liaison Specialist nor any other official had advised Petitioner of any new appeal deadline. He noted, however, that Petitioner was then on notice that her time to appeal was limited and that she could make inquiries about the appeals process at OEA. She therefore had an obligation, the Administrative Judge concluded, to file an appeal within 30 days or lose the right to appeal altogether.

The Administrative Judge also considered but rejected Petitioner's argument that the appeal deadline was not jurisdictional and that notions of fairness – specifically, principles underlying the equitable tolling doctrine – might require extension of the deadline to accommodate the unusual circumstances of the case. His reasons for rejecting that argument appear two-fold: First, he noted that the Court of Appeals has repeatedly held "that the time limit for filing an appeal with an administrative adjudicatory agency such as [OEA] is mandatory and jurisdictional in nature" and that equitable tolling was not available in such cases. Initial Decision at 13. Second, or perhaps in the alternative, he found that Petitioner had not demonstrated the "due diligence" necessary to warrant tolling of the deadline even if such equitable relief was available. *Id*.

II. LEGAL STANDARD

In reviewing an agency ruling, the Court must "base its decision exclusively upon the administrative record and shall not set aside the action of the agency if supported by substantial

evidence in the record as a whole and not clearly erroneous as a matter of law." Super. Ct. Agency Rev. R. 1(g). The Court may set aside any agency findings and conclusions that are

> (A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) Contrary to constitutional right, power, privilege, or immunity;
> (C) In excess of statutory jurisdiction, authority, or limitations or short of statutory jurisdiction, authority, or limitations or short of statutory rights;
> (D) Without observance of procedure required by law, including any applicable procedure provided by this subchapter; or
> (E) Unsupported by substantial evidence in the record of the proceedings before the Court.

D.C. Code § 2-510 (a)(3).

The Court will not overturn an agency decision if the "decision flows rationally from the facts, and those facts are supported by substantial evidence on the record." *Upchurch v. D.C. Dep't of Empl. Servs.*, 783 A.2d 623, 627 (D.C. 2001). But if the question is one of law, the judicial branch "remains 'the final authority on issues of statutory construction.'" *Id.* (quoting *Genstar Stone Prods. v. D.C. Dep't. of Employment Servs.*, 777 A.2d 270, 272 (D.C. 2001)); *see also Georgetown Univ. v. D.C. Dep't. of Employment Servs.*, 862 A.2d 387, 391 (D.C. 2004) ("The agency's legal conclusions are entitled to less deference than its factual findings because of the court's legal expertise.") "Generally, this court will defer to the agency's interpretation of the statute and regulations it administers unless its interpretation is unreasonable or in contravention of the language or legislative history of the statute and/or regulations." *Georgetown*, 862 A.2d at 391 (internal citations omitted).

III. DISCUSSION AND ANALYSIS

As a preliminary matter, this Court agrees with OEA that the appeal deadline at issue is jurisdictional. As the Administrative Judge correctly states in his Initial Decision, the Court of Appeals has repeatedly (and recently) held such appeal deadlines jurisdictional. *See, for example, Yates v. United States Dep't of the Treasury*, 2016 D.C. App. LEXIS 422 (D.C. Nov.

23, 2016) (acknowledging that the characterization of such deadlines as jurisdictional remains the law); *Getachew v. Shoreham*, 2014 D.C. App. LEXIS 604 (D.C. Dec. 15, 2014) (affirming an administrative decision dismissing a late unemployment appeal for lack of jurisdiction); and *Hoggard v. District of Columbia Pub. Employee Relations Bd.*, 655 A.2d 320 (D.C. 1995) (analogous deadline for appeals to the D.C. Public Employee Relations Board is jurisdictional). Although the Court of Appeals has questioned whether this rule might warrant reconsideration under principles recently articulated by the Supreme Court,[2] as of today the rule is that such deadlines are, in fact, jurisdictional. *Id.*

This Court also agrees with OEA that notice sent to Petitioner and returned as undeliverable was not Constitutionally effective to trigger an appeal deadline. *See Kidd Int'l Home Care, Inc. v. Prince*, 917 A.2d 1083, 1087 (D.C. 2007) (citing *Jones v. Flowers*, 126 S. Ct. at 1716-18, for the rule that an order and appeal rights returned to an administrative agency as undeliverable is insufficient to trigger a jurisdictional appeal deadline). Given the ready

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[2] We have consistently held that the statutory "[time] period provided for administrative appeals under [the D.C. Unemployment Compensation Act] is jurisdictional, and failure to file within the period prescribed divests the agency of jurisdiction to hear the appeal." *Chatterjee v. Mid Atl. Reg'l Council of Carpenters*, 946 A.2d 352, 354 (D.C. 2008) (quoting *Calhoun v. Wackenhut Servs.*, 904 A.2d 343, 345 (D.C. 2006)). *Savage-Bey* argues that this holding has been called into question by doctrinal developments in recent Supreme Court decisions, including *Henderson v. Shinseki*, 131 S. Ct. 1197, 179 L. Ed. 2d 159 (2011) (clarifying the distinction between claims-processing rules and jurisdictional limits), and *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008) (recognizing that limitations periods fall into two categories: claims-processing rules that are subject to equitable tolling, and jurisdictional limits that cannot be extended for equitable reasons). Because we conclude in any event that the appeal should not have been dismissed as untimely, we agree with *Savage-Bey* that we need not [revisit with] this case whether the time limit is jurisdictional.

Savage-Bey v. La Petite Acad., 50 A.3d 1055, 1060 (D.C. 2012).

availability and routine use of the PeopleSoft database for this purpose, the Agency had an obligation to do more than it did to serve notice of this important action on Petitioner.

The only remaining questions in this case, then, are when Petitioner's appeal deadline was triggered and whether Petitioner appealed within the time allowed by law.[3] On these two points, this Court parts company with OEA.

OEA concludes that Petitioner received constitutionally and statutorily adequate notice of her appeal rights when she finally received by hand, on March 6, 2014, a copy of the Final Notice of Proposed Removal and its 30-day appeal rights language. At oral argument, OEA emphasized that Petitioner knew at that moment that OEA had rendered a final decision terminating her employment. But the Court of Appeals has repeatedly made clear that giving "notice" in these circumstances requires not only the communication of information about the effect of the decision but also the communication of unambiguous information about appeal rights. *See Wright-Taylor v. Howard Univ. Hosp.*, 974 A.2d 210, 217 (D.C. 2009) ("notice must unambiguously set forth the conditions for filing an appeal") and many cases cited therein; *Lundahl v. District of Columbia Dep't of Employment Services*, 596 A.2d 1001, 1002-1003 (D.C. 1991) ("a prerequisite to the jurisdictional bar is notice to the claimant of the decision *and* of any right to an administrative appeal of the decision") (internal citations omitted; emphasis supplied); *McDowell v. Southwest Distrib.*, 899 A.2d 767, 769-770 (D.C. 2006) (appeal deadline not triggered by ambiguous deadline).

[3] Given the decision reached here, there is no need to address the issue of equitable tolling raised by the Administrative Judge and rejected by him as a basis to extend a *jurisdictional* appeal deadline. This Court notes, however, that the Court of Appeals has raised the possibility that the equitable doctrine of unique circumstances, or lulling, might be applicable even in cases involving jurisdictional appeal deadlines. *McDowell v. Southwest Distrib.*, 899 A.2d 767, 770 (D.C. 2006). *See Kamerow v. D.C. Rental Hous. Comm'n*, 891 A.2d 253 (D.C. 2006) (setting out the elements of a "lulling" claim).

In this case, Petitioner received only a puzzling message about her appeal rights on March 6, 2014. A plain reading of the Initial Decision and the appeal rights would have indicated that the appeal deadline had already passed. Whether that even constitutes "ambiguity" – Petitioner's counsel suggested at oral argument that the notice was *un*ambiguously wrong – ambiguity was certainly introduced when DRYS's Management Liaison Specialist contemporaneously suggested, apparently without much optimism,[4] that Petitioner contact OEA to find out whether she could still appeal. *See Calhoun v. Wackenhut Servs.*, 904 A.2d 343, 346 (D.C. 2006) ("we have also held that ambiguity was compounded when employees of the administrative agency gave erroneous oral or written advice to the claimant"); *Selk v. D.C. Dep't of Empl. Servs.*, 497 A.2d 1056 (D.C. 1985) (incorrect information from agency representative rendered appeal rights ambiguous); and *Ploufe v. D.C. Dep't of Empl. Servs*, 497 A.2d 464, 466 (D.C. 1985) (ambiguity in appeal deadline introduced by incorrect advice from agency official).

OEA therefore erred in holding that Petitioner's 30-day appeal period ran from March 6, 2014. On March 6, 2014, she would at best have been confused. She was holding a paper that at least implied her appeal deadline had passed. An agency representative had told her that "she believed Employee's time to appeal had lapsed" but nevertheless suggested Petitioner inquire further. Initial Decision Finding # 32. Whatever all that might mean to a sophisticated lawyer when considered in light of the applicable appeal statute, case law and the Constitution, it does not constitute notice to Petitioner that her appeal deadline ran from that date. It also does not mean the appeal deadline actually ran from that date as a matter of law.

It is true that as of March 6, 2014, Petitioner was on notice that she was the aggrieved subject of an administrative decision. And there may be a point beyond which a general statute

[4] *See* Administrative Judge's Finding #32.

of limitations or the concept of laches might render the Final Written Notice of Proposed Removal unchallengeable. Respondent identified no statute or case law from which such a date could be drawn in this case, however, or even in a hypothetical case where a decision was delivered without appeal rights at all.[5] Respondent argues that it has been prejudiced by Petitioner's delay in appealing,[6] but the reference to a "delay" only highlights the parties' different perspectives. As far as the record reveals, Petitioner has never received clear notice of her appeal rights. From Petitioner's perspective, then, there has been no "delay." It is possible that in some other case, the passage of time might result in a fundamental unfairness to an agency faced with an appeal long after it failed to give timely notice of appeal rights. The passage of time in such a case might warrant special scrutiny, especially if the record contained evidence of bad faith by the appellant. In this case, however, the delay was not so extraordinary that the usual principles of ambiguous notice should not apply.

In sum, Petitioner received only ambiguous notice of her appeal rights, and her appeal on February 27, 2015 – before the ambiguity was cured – was therefore timely. The Initial Decision of OEA is reversed.[7] The case is remanded to OEA for further proceedings consistent with this decision.

[5] Respondent has not suggested, and the case law would not support the argument, that Petitioner was on constructive notice of the appeal deadline based on the statute, regulations or other publicly available information.

[6] At oral argument, counsel for Respondent indicated that the passage of time might adversely affect the Agency's ability to collect and present evidence.

[7] OEA's Initial Decision sets out in a footnote some of the Administrative Judge's analysis of the merits of Petitioner's appeal. This Court expresses no opinion as to that analysis.

IV. CONCLUSION AND ORDER

For the foregoing reasons, the Petition For Review Of Agency Decision is **GRANTED**, the Initial Decision issued March 30, 2016, is **REVERSED**, and the case is **REMANDED** for further proceedings consistent with this order.

DATED: December 22, 2016

Steven M. Wellner
Associate Judge

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