

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
COMMISSION ON HUMAN RIGHTS**



Marion S. Barry, Jr., Building
441 Fourth Street, NW, Suite 290N
Washington, DC 20001-2714
TEL: (202) 727-0656 FAX: (202) 727-3781

**APPLICANT/APELLANT,
Applicant/Appellant,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT
OF BEHAVIORAL HEALTH
Agency/Appellee.**

Docket No.: 2021-CBX-827 (DCS)

DECISION AND ORDER

Before:

**Commissioner Eleanor Collinson
Commissioner Anika Simpson
Commissioner Teri Janine Quinn**

On December 20, 2021, Applicant/Appellant filed an appeal pursuant to the Criminal Background Checks for the Protection of Children Act of 2004, D.C. Code §§ 4-1501.01 – 4-1501.11 (“Protection Act”). The Commission on Human Rights (“Commission”) docketed the case as 2021-CBX-827. For the reasons discussed below, the Commission lacks jurisdiction over Appellant’s appeal because Appellant was not denied employment based on the Protection Act.¹ Appellant’s appeal should have been filed with the District of Columbia Department of Human Resources (“DCHR”) pursuant to 6B DCMR § 437.4. Based on DCHR having provided

¹ Appellant has another appeal pending against the District of Columbia Department of Transportation which is properly before the Commission.

Appellant with the incorrect appeal rights, the Commission recommends that DCHR permit Appellant to transfer his appeal request to DCHR *nunc pro tunc* to December 20, 2021.

I. Findings of Fact

1. On September 5, 2021, Appellant applied for a position as a Housekeeping Aid with the D.C. Department of Behavior Health (“DCDBH”). The position is located at St. Elizabeth’s Hospital, a psychiatric facility for adults with serious and persistent mental illness who need intensive inpatient care. Agency Position at 3.
2. The vacancy announcement for the position states: “This position is deemed as ‘Safety Sensitive’ pursuant to Section 410 of Chapter 4 of the D.C. Personnel Regulations, in addition to the general suitability screening, individuals applying for or occupying safety sensitive positions are subject to the following checks and tests: a. Criminal background check; b. Traffic record check (as applicable); c. Pre-employment drug and alcohol test; d. Reasonable suspicion drug and alcohol test; e. Post-accident or incident drug and alcohol test; f. Random drug and alcohol test; and g. Return-to-duty or follow-up drug and alcohol test.” DCHR Exhibit (“Ex.”) 2.
3. The position of Housekeeping Aid has been designated by the DCDBH as a safety sensitive position subject to enhanced suitability screening and is published as such in the Electronic-District Personnel Manual (“E-DPM”).²

²https://dataviz1.dc.gov/t/OCTO/views/SuitabilityDesignationIssuance/Chapter4SuitabilityDesignations?:showAppBanner=false&:display_count=n&:showVizHome=n&:origin=viz_share_link&:embed=yes&:toolbar=no.

4. The position, however, does require the employee to come into contact with any children or youth.
5. On November 3, 2021, Appellant received a conditional offer of employment pending completion of his criminal background check.
6. On November 12, 2021, Appellant was given a “Notification of Criminal Background and Traffic Records Check” informing him that the position for which he applied was “safety sensitive.” DCHR Ex. 5. It defined safety sensitive positions to include: “positions with duties or responsibilities which if performed under the influence of drugs or alcohol, could lead to a lapse of attention that could cause actual, immediate, and permanent physical injury or loss of life to self or others.” *Id.*
7. The Notification of Criminal Background required Appellant to make an affirmation regarding his “entire adult criminal history” with respect to certain offenses including robbery, burglary, assault, violation of narcotic laws, and sexual offenses. DCHR Ex. 5. Appellant answered “No” to the question whether he had ever been convicted of any of these offenses. *Id.*
8. Appellant’s background check reflects convictions in 1981, 1988, and 1990 for burglary, robbery, distribution of a controlled substance, and rape. DCHR Exs. 6-12; Agency Statement at 4-5. Appellant was incarcerated from 1990 until his release in August 2015. DCHR Ex. 10.

9. In an email dated December 9, 2021, DCHR notified the Department of Behavioral Health and Appellant that he was found unsuitable for the position and for any position with a similar safety designation.
10. The December 9, 2021, email contained the following appeal rights: “The individual named above may appeal this determination by filing a notice of appeal with the Commission on Human Rights within 30 days from the date of this notification.”
11. Appellant timely filed his appeal with the Commission on December 20, 2021.

II. Discussion and Conclusions of Law

Appellant timely filed his appeal on December 20, 2021. Upon receiving his appeal, DCHR was asked to submit a Position Statement which it provided on February 14, 2022. Along with providing a substantive response and 16 exhibits, DCHR argued in its Position Statement that the Commission lacks jurisdiction over Appellant’s appeal because the job for which he applied is not covered under the Criminal Background Checks for the Protection of Children Act (“Protection Act”). It appears that DCHR included erroneous appeal rights in its suitability determination informing Appellant he could appeal to the Commission.

The Protection Act confers jurisdiction on the Commission to review the appeal of an applicant, employee, or volunteer who is denied employment because it is determined that the applicant presents a present danger to children or youth. *See* D.C. Code § 4-1501.05a(c); 6B DCMR § 438. The Act applies to an applicant who is under consideration for paid employment by a covered child or youth services provider. D.C. Code § 4-1501.03(a)(1). A “covered child or youth services provider” means any District government agency providing direct services to

children or youth and any private entity that is licensed by or contracts with the District to provide direct services to children or youth, or for the benefit of children or youth, that affect the health, safety, and welfare of children or youth, including individual and group counseling, therapy, case management, supervision, or mentoring. 4 DCMR § 1501.02(3).

The DCHR regulations provide: “If an applicant or volunteer applying for a protection sensitive position is found to pose a present danger to a child or youth, as provided by D.C. Official Code § 4-1501.05a (2012 Repl.), and deemed unsuitable for a District government position, he or she may seek review of that determination with the Commission in accordance with this section.” 4 DCMR § 438.2. The record in this case reflects that the position for which Appellant was found unsuitable was not with a covered child or youth service provider and DCHR did not determine that Appellant posed a present danger to children or youth. The position is located at St. Elizabeth’s hospital which serves vulnerable adults. As such, the position was one designated as a safety sensitive position under the DCHR regulations which has suitability requirements similar to the Protection Act. *See* 6B DCMR § 406.

To appeal a suitability determination based on enhanced screening for a safety sensitive position that is not covered by the Protection Act, the personnel regulations provide: “An appointee or volunteer that is deemed unsuitable and cannot appeal to the Commission may, if applicable, file a grievance with the personnel authority regarding his or her application for employment pursuant to Chapter 16 of these regulations.” 6B DCMR § 437.4. Thus, the proper procedure was for Appellant to file a grievance with DCHR. Chapter 16 of the regulations provide that such a grievance must be filed within 45 business days of the suitability determination. 16 DCMR § 1628.5. However, because Appellant was not provided with the correct appeal rights, he has missed the deadline for filing a grievance with DCHR.

The District of Columbia Court of Appeals has held that such erroneous notices of appeal amount to ambiguous notice rendering it inadequate as a matter of law to trigger the operation of statutory timeframes. *See e.g., Calhoun v. Wackenhut Services*, 904 A.2d 343 (D.C. 2006); *Zollicoffer v. District of Columbia Public Schools*, 735 A.2d 944, 947 (D.C.1999) (failure of notice and regulations to explain whether “ten days” means ten calendar days, ten business days, or ten school days). A prerequisite to invoking the jurisdictional bar imposed by the statutory filing periods is “the agency’s obligation of giving notice which was reasonably calculated to apprise petitioner of the decision of the claims deputy and an opportunity to contest that decision through an administrative appeal.” *Wright-Taylor v. Howard Univ. Hosp.*, 974 A.2d 210, 217 (D.C. 2009). Thus, the Court of Appeals has interpreted this holding to require that the notice must unambiguously set forth the conditions for filing an appeal. In light of the ambiguity in the notice given here, I recommend DCHR permit Appellant to transfer his appeal to DCHR *nunc pro tunc*. Accordingly, I recommend the Commission dismiss this appeal for lack of Jurisdiction.

June 15, 2022
Date

Erika L. Pierson
Chief Administrative Law Judge
D.C. Commission on Human Rights

III. TRIBUNAL DECISION

Pursuant to the Criminal Backgrounds Check for the Protection of Children Act of 2004, if an application is denied because the applicant presents a present danger to children or youth, the applicant may appeal to the Commission on Human Rights. D.C. Code § 4-1501.05a.(c). The Commission has not issued regulations specific to cases brought under the Protection Act. The D.C. Human Rights Act, which is the Commission's enabling Act, provides that in taking any authorized action, the Commission may act through panels of not less than three of its members, a majority of whom shall constitute a quorum. D.C. Code § 2-1403.01(d).

The DCHR personnel regulations implementing the Protection Act provide that the Commission shall issue a decision affirming or reversing a suitability determination based exclusively on the notice of appeal and the Agency's answer and record. The regulations further provide that: "When the Commission disagrees with a suitability determination it may make recommendations to the personnel authority. Upon review of the Commission's decision, the personnel authority shall consider the recommendations and issue a final decision without further appeal to the Commission or any court." 6B DCMR § 438.8(f). Thus, DCHR is not bound by the recommendations of the Commission.

The below signed Commissioners having fully reviewed the record in this case and agree with the findings and recommendations of the Administrative Law Judge.

Therefore, it is:

ORDERED, that Appellant's appeal is **DISMISSED** for lack of jurisdiction. Because DCHR gave Appellant incorrect appeal rights, the Commission recommends that DCHR permit Appellant

to file a grievance with DCHR and that such filing date back to December 20, 2021, the date his appeal was filed with the Commission.

Commissioner Anika Simpson

Date

Commissioner Eleanor Collinson

Date

Commissioner Terri Janine Quinn

Date