DISTRICT OF COLUMBIA
DOH OFFICE OF ADJUDICATION AND HEARINGS

IN RE: RICHARD AFOLABI-BROWN Respondent	Case No.: B-03-80170

ORDER

A hearing was held in this matter on September 24, 2003. Maureen Zaniel, Esq., appeared on behalf of the Government, along with Gregory Scurlock, who appeared as a witness on behalf of the Government. John Iweanoge, Esq., appeared on behalf of Respondent. Pursuant to this administrative court's order of September 16, 2003, the sole issue to be decided at this juncture is whether Respondent's request for a hearing on a Notice of Summary Action to Suspend Naturopath Registration, and a Notice of Summary Action to Suspend License (physician assistant) (collectively, "Notices") were timely for purposes of the summary action provision of the District of Columbia Health Occupations Revision Act of 1985, as amended, (the "Act"), D.C. Official Code § 3-1205.15.[1]

I. Findings of Fact

On September 12, 2003, at 10:55 A.M., Gregory Scurlock, Investigator for the Department of Health, personally served Respondent with the Notices at Respondent's office,

[1] D.C. Official Code § 3-1205.15(c) provides:

> A licensee shall have the right to request a hearing within 72 hours after service of notice of the summary suspension or restriction of license. The Mayor shall hold a hearing within 72 hours of receipt of a timely request, and shall issue a decision within 72 hours after the hearing.

located at 1008 6th Street, N.W., Washington, DC.[2] There was no counsel of record for Respondent in this administrative proceeding at the time Mr. Scurlock served Respondent with the Notices.

At the time of service, Mr. Scurlock spoke to Respondent, and advised him that he must submit a hearing request within 72 hours if he sought to have a hearing on the Notices. Indeed, the Notices themselves expressly provided:

> If you wish to appeal this summary suspension of your license, you must file a written request for a hearing within seventy-two (72) hours after service of this notice on you. Should you request a hearing, a hearing will be held within seventy-two (72) hours of receipt of a timely request. The request for a hearing must be submitted to Managing Docket Clerk, Office of Adjudication and Hearings, Department of Health, Suite 4150, 825 North Capitol Street, N.E., Washington, D.C. 20002. A copy of your request should be delivered to Maureen W. Zaniel, Senior Counsel, Public Protection and Enforcement, Office of the Corporation Counsel, Suite 450 North, 441 4th Street, N.W., Washington, D.C. 20001.

The correct address for the administrative court's Managing Docket Clerk is reflected in the Notices.[3] On September 15, 2003 at 4:47 P.M., the OAH Managing Docket Clerk's office received a copy of Respondent's request, through counsel, for a hearing on the Notices.

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[2] Mr. Scurlock testified at the hearing that he was certain of the exact time of service because he checked his watch upon handing the Notices to Respondent. As the parties have not contested the time of service upon Respondent, however, I need make no finding as to the precision of Mr. Scurlock's watch for purposes of this disposition.

[3] Respondent contends that, based on the experience of his courier in attempting to deliver the request for a hearing, the address for the OAH Managing Clerk's Office as reflected in the Notices was somehow incorrect. The Government requested, without objection by Respondent, that this administrative court take judicial notice that the address set forth in the Notices was correct, and that request is hereby granted. *See* FED. R. EVID. 201; *Sherman v. Comm'n on Licensure*, 407 A.2d 595, 598 (D.C. 1979).

Respondent's request was received by this administrative court approximately 77 hours after the Notices were personally served upon Respondent.[4]

II. Conclusions of Law

The provision of the Act at issue, D.C. Code § 3-1205.15, plainly provides that a licensee "shall have the right to request a hearing within 72 hours after service of notice of the summary suspension or restriction of license." Where, as here, adequate notice of the place of filing has been provided, the "time limits for filing appeals with administrative adjudicative agencies, as with the courts, are mandatory and jurisdictional matters," and therefore cannot be waived by the parties. *Zollicoffer v. District of Columbia Public Schools*, 735 A.2d 944, 945-46 (D.C. 1999). *See also Cavallaro 556 Valley Street Corp. v. Alcoholic Beverage Control*, 796 A.2d 938, 944 (N.J. Super. Ct. App. Div. 2002) (concluding that 60-day expired license renewal requirement was jurisdictional, and thus untimely renewal request could not be entertained "[n]o matter what excuses for failing to renew in timely fashion are asserted . . . ."); *Watt v. Wing*, 719 N.Y.S. 2d 258, 259 (N.Y. App. Div. 2001) (concluding deadline for filing fair hearing request on disability determination was jurisdictional and, as such, commissioner lacked jurisdiction to entertain untimely request); *Bd. of Selectmen of North Attleborough v. Civil Service Comm'n*, 451 N.E.2d 1175, 1176 (Mass. App. Ct. 1983) (holding failure to request hearing on disciplinary action within 48 hours was jurisdictional and barred right to hearing).

[4] During the hearing, Respondent's counsel referenced a document indicating that the hearing request was actually received by an apparent employee of the Department of Health approximately one hour earlier than the time the request was received by this administrative court. As that document was not formally moved into evidence and, even if it had been so moved and credited, would still indicate that the hearing request was received beyond 72 hours from the service of the Notices, it has no material bearing on this disposition.

Respondent has suggested that, in fact, the request for a hearing was timely filed because, pursuant to the Act's implementing regulations, specifically 17 DCMR 4124.1, the day of the event (in this case, the day of the service of the Notices) should not be included in the time computation.[5] As the Government correctly observed, however, § 4124 specifically refers to "days", while the applicable statute refers to "hours." As such, this administrative court concludes that § 4124 has no application to this summary proceeding. *Compare* D.C. Official Code § 3-1205.15(c) *with* 17 DCMR 4124.1. Moreover, had the District of Columbia Council intended the time limit contained in the summary action provision to be "3 days," as opposed to "72 hours", it would have provided as such, as it has in other sections of the Act. *Cf.* D.C. Official Code § 3-1205.16 (providing that recipient of a cease and desist order under the Act "may, within *15 days* of the service of the order, submit a written request to the board or the Mayor to hold a hearing on the alleged violation.") (emphasis supplied). *See Holt v. United States*, 565 A.2d 970, 975 (D.C. 1989) (discussing use of the *in pari materia* approach as a tool in statutory construction). *See also In re Mental Commitment of Ryan E. M.*, 642 N.W.2d 592, 594 (Wis. Ct. App. 2002) (noting that "there are many statutes in which the legislature has chosen '3 days' rather than '72 hours' to express a time limit."); *State of New York v. Lethenia*, 386 N.Y.S.2d 799, 801 (N.Y. Crim. Ct. 1976) (noting that "[i]t seems incongruous, therefore, for the court system to have interpreted a strict '72-hour' time limit into a 'three business day' rule, in effect stretching '72 hours' to five days in some instances.").

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[5] 17 DCMR 4124.1 provides:

> In computing any period of time specified in this chapter, the day of the act, event, or default shall not be counted, and the last day of the period shall be counted unless it is a Saturday, Sunday, legal holiday, or day on which the Department is officially closed, in which event the time period shall continue until the next day that is not a Saturday, Sunday, legal holiday, or day on which the Department is officially closed.

Respondent has alternatively argued that because the Notices were served directly upon Respondent, as opposed to his counsel, service was defective under 17 DCMR 4105. There is no evidence in the record, however, that the Government was or should have been aware that Respondent was represented by counsel in this administrative proceedings. Moreover, § 4105 makes service upon counsel of record permissive, not mandatory. *See* 17 DCMR 4105.1 ("If a party has appeared through counsel, service *may* be made upon the counsel of record.") (emphasis supplied).[6]

Accordingly, this administrative court concludes that, based on the plain meaning of D.C. Official Code § 3-1205.15(c), a request for a hearing on a summary action must be received by this administrative court within 72 hours after service of the notice of the action. In this case, Respondent's request for a hearing on the Notices was received by this administrative court after the 72-hour mark, thereby depriving this administrative court of any jurisdiction to hold a hearing on the merits of the summary action. *Zollicoffer*, 735 A.2d at 945-46. Accordingly, Respondent's request for a hearing on the Notices is untimely, and must be denied.

Therefore, it is, this _____ day of _____, 2003:

ORDERED, that Respondent's request for a hearing on the Notice of Summary Action to Suspend Naturopath Registration and Notice of Summary Action to Suspend License, consolidated herein, is hereby **DENIED**; and it is further

[6] Respondent also raises what is characterized as an "equitable" argument that because the hearing in this matter was not held within 72 hours due to the closing of the federal and District of Columbia governments on September 18-19, 2003 due to the effects of Hurricane Isabel, Respondent should be given some latitude with respect to the timeliness of his hearing request. As the issue before this administrative court is one of jurisdiction as opposed to equity, however, Respondent's argument in this regard is unavailing. *Zollicoffer*, 735 A.2d at 945-46.

ORDERED that, pursuant to D.C. Official Code §§ 2-510 and 3-1205.15(d), judicial review of this order may be obtained by filing a petition for review with the District of Columbia Court of Appeals. Pursuant to D.C. App. R. 15(a), any such petition must be filed within thirty-five (35) days of the service date of this order stated below.

September 25, 2003

/s/

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Mark D. Poindexter
Administrative Judge