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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
BRIAN JORDAN,)	OEA Matter No. 1601-0003-06
Employee)	
)	Date of Issuance: July 24, 2008
)	
)	
D.C. METROPOLITAN POLICE)	
DEPARTMENT,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Brian Jordan (“Employee”) was the Assistant Chief of Police at the D.C. Metropolitan Police Department (“Agency”). Employee was involved in a traffic incident with another motorist while he was off-duty, wearing civilian clothes, and operating an unmarked car. He initiated a traffic stop and issued a ticket to the motorist. According to Agency, because Employee was not in uniform and in an unmarked car, he could not issue a ticket to the motorist unless she posed an immediate threat to the safety of others. They found that she did not, and on October 7, 2005, Agency issued a final notice of adverse action against Employee.¹ According to the notice, Employee was

¹ *Petition for Appeal*, Attachment # 1 (October 12, 2005).

suspended for ten days, two days in which leave could have been used in lieu of the suspension and eight days that were held in abeyance.

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on October 12, 2005. He argued that Agency’s charge was not supported by preponderance of the evidence. Therefore, he requested that OEA reverse the suspension and remove the disciplinary action from his and Agency’s records.²

The Administrative Judge (“AJ”) in this matter requested that both parties submit jurisdiction briefs. In his brief, Employee argued that OEA had jurisdiction to consider this matter because according to Agency’s Final Notice, he was suspended for ten days. It was Employee’s belief that the actual amount of days served was irrelevant. He also asserted that Agency’s effort to hold eight of the ten days in abeyance did not void his right to appeal its decision.³

Agency argued that although it suspended Employee for ten days, he forfeited two days of leave and had not served the eight-day suspension. It provided that because Employee only served two days of the ten-day suspension, OEA lacked jurisdiction to consider the case.⁴ Agency believed that the suspension only applied to the actual days Employee served.⁵

On February 17, 2006, the AJ issued his Initial Decision. He found that OEA did not have jurisdiction to adjudicate this matter because Employee had not been subjected

² *Id.* at 3.

³ *Employee’s Response to Question of Jurisdiction*, p. 1-3 (February 2, 2006).

⁴ Agency relied heavily on *Thomas v. Metropolitan Police Department*, OEA Matter No. J-0149-04 (June 10, 2005). It provided that in that case OEA focused on the actual time served when considering issues of jurisdiction when an employee serves a suspension.

⁵ *Agency’s Jurisdictional Brief*, p. 3-4 (February 16, 2006).

to a ten-day suspension. He concluded that Agency amended Employee's ten-day suspension to a two-day suspension in its Final Notice of Adverse Action. The AJ stated that because D.C. Official Code § 1-606.03 provides that OEA can only consider suspensions of ten days or more, Employee's case does not qualify. Consequently, he dismissed Employee's petition for lack of jurisdiction.⁶

Employee disagreed with the AJ and filed a Petition for Review. He argued that he did not have an option of taking the two-day leave, but he was ordered to take it according to the Final Agency Decision. He also provided that Agency's final notice of a suspension is key in determining jurisdiction, not whether an employee served their entire suspension. Employee also highlighted that the OEA Rules do not state that a case may be appealed after a suspension has been served. Moreover, he believed that if he waited until he actually served all ten days of the suspension, he would have missed the OEA deadline to appeal his decision within 30 days. He based his argument on the fact that Agency held the remaining eight days that he did not serve in abeyance for one year.⁷

There are a couple of issues which must be addressed to resolve this case. The first is if an employee must serve a complete ten-day suspension before he has the right to appeal to OEA. OEA has not decided any cases that speak directly to this issue.⁸ Secondly, we must determine if Employee was actually suspended for ten days, a requirement for appeal to OEA.

D.C. Official Code § 1-606.03 and OEA Rule 604.2 provide that an appeal must

⁶ *Initial Decision*, p. 2-3 (February 17, 2006).

⁷ *Employee's Petition for Review*, p. 3-6 (February 24, 2006).

⁸ Employee correctly analyzed in his Petition for Review that *Thomas v. Metropolitan Police Department*, OEA Matter No. J-0149-04 (June 10, 2005) hinged on a failure to prosecute issue. The AJ in that case never decided if five days held in abeyance actually counted toward the total ten-day suspension.

be filed within thirty (30) days of the effective date of the appealed agency action. As Employee argued in his Petition for Review, neither regulation states that in cases of suspensions of ten days or more, an employee must serve the entire ten-day suspension before they are eligible to appeal an agency action. The language of both regulations are clear, an agency's final action against an employee triggers the jurisdictional clock to appeal to OEA. Employees have thirty days from the effective date of the notice in which to file Petitions for Appeal with OEA. Accordingly, Employee had the right to appeal when he received Agency's Final Decision and not after he served all ten days of his suspension.

Although Employee could properly file a Petition for Appeal with OEA, we do not believe that OEA has the requisite jurisdiction to consider this matter. D.C. Official Code § 1-606.03 and OEA Rule 604.1 provide that employees may appeal a final agency decision affecting an adverse action for cause that results in removal, reduction in grade, or suspension for ten (10) days or more. It is this Board's belief that Employee was not subjected to a true ten-day suspension by Agency.

Agency decided in its final decision "to reduce [Employee's] suspension to ten (10) workdays, two (2) in which leave may be forfeited in lieu of suspension, and eight (8) which will be held in abeyance for one year." Agency clearly gave Employee a choice to use leave days instead of or in place of suspension. If this were a true imposition of a ten-day suspension, Agency would not have presented the option to take

leave.⁹ As a consequence of Employee's decision to use two leave days in lieu of his suspension, he was actually only suspended for eight days – all of which were held in abeyance for one year.

Accordingly, OEA lacks jurisdiction to adjudicate this case on this basis alone. An eight-day suspension falls short of the requirement for causes which may be appealed to OEA. As outlined in the D.C. Official Code and OEA Rules, only those actions resulting in suspensions of ten days or more may be appealed. Therefore, we must deny Employee's Petition for Review.

⁹ Contrary to Employee's claim that he was forced to take the 2-day leave, the language of Agency's Final Notice stated that he *may* forfeit two leave days in lieu of the suspension. Agency clearly gave him a choice. If Employee did not want to use his leave, he could have objected and taken the entire ten-day suspension. However, he did not.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for
Review is **DENIED**.

FOR THE BOARD:

Sherri Beatty-Arthur, Chair

Barbara D. Morgan

Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.