

Notice: This decision may be revised before publication in the *District of Columbia Register*. Parties should promptly notify the Office of any formal errors so that this Office can correct them before publishing this decision. This notice is not intended to provide an opportunity for substantive challenge to the decision.

**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	
TIMOTHY P. EBERT	)	
Employee	)	OEA Matter No. 1601-0223-98
v.	)	
	)	Date of Issuance: December 31, 2002
METROPOLITAN POLICE	)	
DEPARTMENT	)	
Agency	)	
	)	

**OPINION AND ORDER**  
**ON**  
**PETITION FOR REVIEW**

Employee, a Police Officer, was terminated upon allegations that he accessed confidential law enforcement computer data and obtained criminal warrant information that he transmitted to a criminal suspect in Switzerland. According to the allegations, the suspect, a friend of Employee, was to be arrested upon his return to the United States but changed his plans to return upon learning from Employee that he was subject to arrest.

Upon appeal to OEA, the Administrative Judge reversed Agency's removal of Employee on the ground that the adverse action was not brought within the statutorily mandated 45-day period.

After review of the Initial Decision, we reverse the Initial Decision and remand this appeal for further proceedings.

D.C. CODE § 1-617.1(b-1)(1) (1992) reads as follows:

Except as provided in paragraph (2) of this subsection, no corrective or adverse action shall be commenced pursuant to this section more than 45 days, not including Saturdays, Sundays, or legal holidays, after the date that the agency knew or should have known of the act or occurrence allegedly constituting cause, as that term is defined in subsection (d) of this section.

The exception found at D.C. CODE § 1-617.1(b-1)(2) (1992) states that:

In the event that an act or occurrence allegedly constituting cause is the subject of an ongoing criminal investigation, the 45-day limit imposed by paragraph (1) of this subsection shall be tolled until the conclusion of the criminal investigation.

On April 7, 1997, the U.S. Customs Service referred the matter to the U.S. Attorney for the Eastern District of Virginia for consideration of criminal prosecution of Employee, and on April 11, 1997, agents from the FBI notified Agency of Employee's possible misconduct. On February 2, 1998, the U.S. Attorney for the Eastern District of Virginia declined prosecution. Agency then referred the case to the U.S. Attorney for the District of Columbia for criminal prosecution. On March 3, 1998, the U.S. Attorney for the District of Columbia issued a letter declining to prosecute Employee. On May 4, 1998, Agency initiated an adverse action against employee, within 45-days of the March 3, 1998, when the final declination letter was issued.

Under the D.C. Code, the 45-day period is tolled during an "ongoing criminal investigation." Under the circumstances here, there can be no doubt that the "ongoing criminal investigation" was concluded only when a formal decision not to prosecute was issued on March 3, 1998. The date of the declination letter is an objective "bright line" signaling of the end of a criminal investigation. For us to adopt a different rule

would require a subjective analysis of the investigative process, on a case-by-case basis. In our view, this is not an appropriate function for a civil administrative agency such as OEA. Agency should not have a guess about the precise date on which the 45-day rule begins to run; it does not run as long as there is an “on-going criminal investigation,” which is concluded by a formal decision not to prosecute. It was error for the Administrative Judge to rule otherwise. Agency’s Petition for Review is granted.

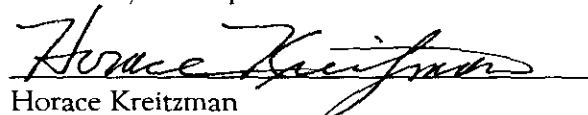
**ORDER**

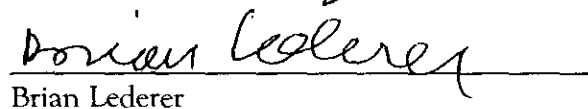
Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **GRANTED**, and this matter is **REMANDED** for further proceedings consistent with this Opinion and Order.

FOR THE BOARD:

  
\_\_\_\_\_  
Erias A. Hyman, Chair

\_\_\_\_\_  
Gwendolyn Hemphill

  
\_\_\_\_\_  
Horace Kreitzman

  
\_\_\_\_\_  
Brian Lederer

The initial decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance 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.