

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

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
EDWIN LEHAN,)	OEA Matter No. J-0166-12
Employee)	
)	Date of Issuance: March 4, 2014
)	
DISTRICT OF COLUMBIA FIRE AND)	
EMERGENCY MEDICAL SERVICES,)	
Agency)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Edwin Lehan (“Employee”) worked as a Firefighter with the D.C. Fire and Emergency Medical Services (“Agency”). On July 10, 2012, Employee received a notice from Agency that he was suspended for two days. The suspension arose from an incident surrounding an overtime submission made by Employee.¹

Employee disagreed with the suspension and filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on July 26, 2012. In his petition, he alleged that in his twenty-nine years (29) of service, he never had any disciplinary action taken against him. Employee also provided that prior to his suspension, on November 28, 2011, he was reassigned to a Firefighter position from the Sergeant position that he previously held.² He considered this

¹ *Letter of Decision/Suspension* (August 1, 2012).

² Employee provided that on December 5, 2011, he filed formal complaints with the D.C. Office of Human

action a demotion. Additionally, he explained that the Agency Trial Board did not follow District law when suspending him. Therefore, he sought to have OEA reverse his suspension and the Trial Board's ruling.³

On August 9, 2012, Agency filed a Motion to Dismiss Employee's Petition for Appeal. It contended that in accordance with D.C. Official Code § 1-606.03, OEA lacked jurisdiction to consider this case. Therefore, it requested that the matter be dismissed.⁴ Employee responded by filing a brief which highlighted Agency's failure to address his alleged demotion, over which, he claims, OEA does have jurisdiction.⁵

The OEA Administrative Judge ("AJ") issued his Initial Decision on October 18, 2012. He held that in accordance with D.C. Official Code § 1-606.03, OEA lacked jurisdiction over appeals of suspensions of less than ten days. As for Employee's demotion claim, the AJ held that the demotion was never the subject of the current appeal and would not be considered. Furthermore, he found that an appeal of the demotion was untimely because it was filed more than seven months after the alleged action. Accordingly, the AJ dismissed Employee's appeal.⁶

Employee promptly filed a Petition for Review with the OEA Board. He claims that on the same day that he received the AJ's Initial Decision, he was verbally demoted from Sergeant to an unknown rank. Employee asserts that he was notified that effective October 20, 2012, he was officially demoted without cause which is an adverse action. Employee's Petition for Review finally provided that he "would like to submit a (new) additional filing to [his] case OEA Matter No. J-0166-12."⁷

Resources and the Equal Employment Opportunity Commission.

³ *Petition for Appeal*, p. 7-9 (July 26, 2012).

⁴ *Respondent's Motion to Dismiss* (August 9, 2012).

⁵ *Brief on Demotion* (September 5, 2012).

⁶ *Initial Decision*, p. 2 (October 18, 2012).

⁷ *Petition for Review*, p. 1 (October 30, 2012).

Agency responded to Employee's filing by arguing that OEA lacked jurisdiction to consider a two-day suspension. Moreover, it reasoned that Employee's Petition for Review does not provide any objections to the Initial Decision and does not seek to have the decision reviewed. Finally, Agency contended that the OEA Board lacks the power to permit an employee to amend their Petition for Appeal through a Petition for Review. Accordingly, it requests that the Board dismiss Employee's Petition for Review.⁸

It appears that Employee is attempting to file a Petition for Review and a Petition for Appeal within the same document. This is contrary to the procedures established in the OEA Rules. OEA Rule 607.1 provides that "an employee shall initiate an appeal by filing a petition for appeal with the Office." Additionally, OEA Rule 608 provides the content of all Petitions for Appeal.⁹ Employee's filing is lacking much of the required information for it to be considered a

⁸ *D.C. Fire and Emergency Medical Services Department's Motion to Dismiss Employee's Petition for Review*, p. 2-4 (May 29, 2013).

⁹ OEA Rule 608.1 A petition for appeal may be filed on the form the Office approved.

OEA Rule 608.2 A petition for appeal made without use of the form of the Office shall be in writing and contain the following information:

- (a) The name of the employee and the name of the agency which took the action;
- (b) The type and the effective date of the action taken by the agency;
- (c) The name, address, and telephone number(s) of the employee's representative, if any;
- (d) The employee's address and telephone number(s);
- (e) A copy of the agency's notice of final decision;
- (f) A statement as to whether the employee or anyone acting on his or her behalf has filed an appeal under any negotiated review procedure pursuant to a collective bargaining agreement, or has filed a complaint with any other agency regarding this matter;
- (g) The identity of the collective bargaining unit (if any) of which the employee is a member; and
- (h) The signature of the employee and his or her representative, if any.

OEA Rule 608.3 Along with the petition for appeal, the employee shall also submit the following information:

- (a) A statement as to whether the employee requests an evidentiary hearing or oral argument;
- (b) A concise statement of the facts giving rise to the appeal;
- (c) An explanation as to why the employee believes the agency's action was unwarranted; and
- (d) A statement of the specific relief the employee is requesting.

OEA Rule 608.4 The Office shall not consider the filing of a petition for appeal complete until the employee provides all of the information required under § 608.2 and 608.3.

properly filed Petition for Appeal. Thus, this office can only consider the document a Petition for Review, as it is titled. Consequently, this Board can only consider what was raised on appeal before the AJ.¹⁰

As it relates to Employee's two-day suspension, the AJ was correct in providing that OEA lacks jurisdiction to consider his appeal. D.C. Official Code § 1-606.03(a) provides the following:

An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or *suspension for 10 days or more* (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action (emphasis added).

Similarly, OEA Rule 604.1(d) provides that "except as otherwise provided in the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code §§ 1-601.01, *et seq.* (2006 Repl. & 2011 Supp.)) or § 604.2 below, any District of Columbia government employee may appeal a final agency decision affecting a suspension for ten (10) days or more." Hence, Employee's two-day suspension does not fall under the appeals over which OEA has jurisdiction to consider.

As for Employee's allegations of a demotion, the AJ also properly held that the action was untimely. As noted above, D.C. Official Code § 1-606.03(a) provides, *inter alia*, that "any appeal shall be filed within 30 days of the effective date of the appealed agency action."¹¹ According to documents filed by Employee, the alleged demotion occurred on November 28,

¹⁰ OEA Rule 633.4 provides that "any . . . legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board."

¹¹ Moreover, OEA Rule 604.2 provides that "an appeal filed pursuant to § 604.1 must be filed within thirty (30) calendar days of the effective date of the appealed agency action."

2011. Therefore, to comply with the statutory regulations, he was required to file an appeal of this action by December 28, 2011. However, Employee did not file his appeal until July 26, 2012. This is two days shy of a seven-month period. Thus, his demotion appeal is untimely. As previously discussed, this Board will not address the new allegations made by Employee in his Petition for Review regarding the alleged verbal demotion in October of 2012.

The AJ's decision to dismiss Employee's Petition for Appeal was based on substantial evidence.¹² Employee did not prove that OEA could assert jurisdiction over his appeal. Additionally, the allegations regarding his demotion were untimely. Therefore, this Board must DENY Employee's Petition for Review.

¹² Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

ORDER

It is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

William Persina, Chair

Sheree L. Price, Vice Chair

Vera M. Abbott

A. Gilbert Douglass

Patricia Hobson Wilson

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.