THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
EMPLOYEE,	OEA Matter No. 1601-0072-22
v.	Date of Issuance: January 26, 2023
METROPOLITAN POLICE DEPARTMENT, Agency	ERIC T. ROBINSON, ESQ. SENIOR ADMINISTRATIVE JUDGE

Employee *Pro-Se*[1]
Lauren Schwartz, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Employee appeals a suspension from the Metropolitan Police Department ("MPD") imposed for the following: (1) engaging in Reckless Driving by operating his motor vehicle at 106 mph in a 70-mph zone on July 13, 2015 in the Commonwealth of Virginia; (2) failing to appear at the Smyth County General District Court for the Reckless Driving charge on September 2, 2015 and a capias warrant was issued; (3) being arrested by the Metropolitan Washington Airports Authority Police Department for the capias warrant on November 11, 2015 at Dulles International Airport; and (4) being found guilty of Reckless Driving in the Commonwealth of Virginia on January 27, 2016. Employee engaged in conduct prejudicial to the District of Columbia Government as defined by the District Personnel Manual ("DPM") § 1605.4(a)(3) as "conduct that an employee should reasonably know is a violation of law or regulation," as well as DPM § 1605.7(2)(a)(5), "off-duty conduct that adversely affects 2 the employee's job performance or trustworthiness, or adversely affects the employing agency's mission or has an otherwise

[1] Employee was represented by Union counsel during the aforementioned Prehearing/Status Conference; however, I find no record of an entry of appearance on Employee's behalf. Accordingly, this Order is being sent solely to Employee and MPD's designated representative. If Employee opts to be represented by Union counsel, that person needs to enter an appearance with the OEA so that he/she can be included in future communications.

identifiable nexus to the employee's position."[2] Employee's position of record is CCTV Evidence Specialist, Grade 11, Step 7. Initially, Employee was sanctioned with a 15 day suspension with seven (7) days held in abeyance. Employee served the remaining eight (8) days of suspension from September 6 – 15, 2022.

Employee filed his Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office") on August 3, 2022. On that same date, the OEA's Executive Director sent a notice to Robert J. Contee, III, MPD Chief of Police, requiring Agency to Answer Employee's Petition for Appeal by September 2, 2022. MPD timely filed its Answer in this matter. This matter underwent mandatory mediation under the auspice of the OEA's Mediation Department. Regrettably, mediation failed, and this matter was assigned to the Undersigned on October 4, 2022. By Order dated October 11, 2022, a Prehearing/Status Conference ("PHC") was scheduled for November 16, 2022. The PHC was held as scheduled. During this conference, the parties presented their version of the salient facts and circumstances surrounding this matter. On November 17, 2022, after considering the opposing points of view, the undersigned issued an Order setting a briefing schedule. Surprisingly, thereafter, on December 2, 2022, Agency submitted a Motion to Dismiss wherein it noted that it had unilaterally rescinded seven days of Employee's suspension. Employee has and will only have served eight days of suspension. MPD contends that given the circumstances, an eight-day suspension is below the jurisdictional threshold of the OEA and argues that this matter should be dismissed for lack of jurisdiction.

Upon review, on December 19, 2022, the Undersigned issued a briefing Order that expressly superseded the November 19, 2022, Post Prehearing/Status Conference Order. In compliance with this new briefing order, Employee was required to respond to MPD's Motion to Dismiss. Employe submitted a response that was unresponsive noting he has certain medical issues but failed to provide any substantiation to that claim or request a definitive timeline for responding. After reviewing the documents of record, the Undersigned has determined that no further proceedings are warranted. The record is now closed.

JURISDICTION

As will be explained below, the OEA lacks authority to adjudicate this matter.

ISSUE

Whether this matter should be dismissed.

BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021) states:

> The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

[2] Notice of Final Decision DRD# 340-22; IS# 22-000264 (July 29, 2022).

> That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 631.2 id. States:

> For appeals filed under §604.1, the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Protections Act (hereinafter "CMPA"), sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") states in pertinent part that:

> (a) 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.

When Employee filed his appeal with this tribunal, he was appealing a 15-day suspension with seven (7) days held in abeyance. However, on November 22, 2022, MPD unilaterally rescinded the seven (7) days held in abeyance and updated the record to reflect that Employee's final imposed discipline was only an eight (8)-day suspension. MPD persuasively contends that given the instant circumstances the Office should focus only on the suspension time imposed. The facts in this matter are uncontroverted that Employee has not suffered a lasting harm that is presently appealable to the OEA. MPD has noted that the adverse action has been rescinded with Employee only having suffered eight days of suspension. Employee never endured the subject seven days of suspension and with its rescission he will not have that specter of impending adverse action to dread as he continues being employed by MPD. I find that the adverse action was undone as if it never happened. I also find that what is left is best characterized as a corrective action. I further find that Employee's cause of action is no longer within OEA's jurisdictional purview.

Conclusion

Taking into account the discussion above, I find that Employee has failed to meet his

burden of proof regarding the OEA's ability to exercise jurisdiction over the instant matter.[3] [4] Accordingly, I conclude that I must dismiss this matter for lack of jurisdiction.

ORDER

Based on the foregoing, it is hereby **ORDERED** that this matter be **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE: /s/ *Eric T. Robinson*
ERIC T. ROBINSON, Esq.
Senior Administrative Judge

[3] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin,* 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater,* 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

[4] Since I have found that he OEA lacks jurisdiction over this matter, I am unable to address the factual merits, if any, contained within Employee's petition for appeal.