

Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals’ website. 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:)	
)	
EMPLOYEE ¹)	
)	OEA Matter No. 1601-0072-22
)	
v.)	
)	Date of Issuance: June 1, 2023
)	
METROPOLITAN POLICE)	
DEPARTMENT,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a CCTV² Evidence Specialist with the Metropolitan Police Department (“Agency”). On June 3, 2022, Employee was served with a fifteen-day Advanced Notice of Proposed Adverse Action based on charges of conduct prejudicial to the District government; conduct that an employee should reasonably know is a violation of the law; and off-duty conduct that adversely affects the employee’s job performance or adversely affects his or her agency’s mission or has an otherwise identifiable nexus to the employee’s position.³ The charges

¹ Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

² Closed Captioned Television.

³ Employee was charged with violating District Personnel Manual (“DPM”) Chapter 16, Sections 1605.4 (a)(3) and 1607.2 (a)(5).

stemmed from Employee's reckless driving by operating his motor vehicle at 106 miles per hour in a seventy miles per hour zone on July 13, 2015; failing to appear at the Smyth County General District Court on September 2, 2015; being arrested by the Metropolitan Washington Airport Authority Police Department for an associated *capias* warrant on November 11, 2015; and being found guilty of reckless driving in the Commonwealth of Virginia on January 27, 2016. Initially, Agency's notice proposed a thirty-day suspension. However, on July 29, 2022, Agency issued a final decision, reducing the imposed penalty from thirty days to a fifteen-day suspension with seven days held in abeyance. Thereafter, on November 22, 2022, Agency unilaterally rescinded the seven days held in abeyance and updated Employee's records to reflect that the final imposed discipline was an eight-day suspension. Employee served the suspension from September 6, 2022, through September 15, 2022.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on August 3, 2022. He argued that this was his first disciplinary offense, and that Agency never informed him of any policies related to his alleged violations of conduct. Employee characterized Agency's actions as a "fishing expedition" and requested that the imposed suspension be reversed and removed from his personnel record.⁴ Agency filed its answer on September 2, 2022. It denied Employee's claims and requested a hearing on the substantive arguments.⁵

An OEA Administrative Judge ("AJ") held a prehearing conference on November 16, 2022, and concluded that this Office retained jurisdiction over Employee's appeal after eliciting the parties' oral arguments. The parties were subsequently ordered to submit briefs addressing whether Agency established cause to impose discipline upon Employee, and if so, whether the

⁴ *Petition for Appeal* (August 3, 2022).

⁵ *Answer to Petition for Appeal* (September 2, 2022).

penalty was appropriate.⁶

On December 2, 2022, Agency filed a Motion to Dismiss, asserting that OEA lacked jurisdiction over the instant appeal. It provided that under D.C. Code § 1-606.03(a), OEA's jurisdiction is explicitly limited to suspensions of ten days or more and that if an employee serves less than ten suspension days, the agency's action resulting in that suspension is not appealable to this Office. Agency went on to explain that on November 22, 2022, it unilaterally rescinded the seven days held in abeyance and confirmed that Employee's final discipline was an eight-day suspension. Therefore, Agency reasoned that the suspension served by Employee did not meet the threshold for OEA's jurisdiction because it was less than ten days. Consequently, it requested that Employee's appeal be dismissed.⁷

The AJ issued an Initial Decision on January 26, 2023. He highlighted OEA's governing statute, Title 1, Chapter 6, Subchapter VI of the D.C. Code (2001), which provides *inter alia* that an employee may appeal to this Office suspensions for ten days or more. He explained that when Employee filed his appeal with this Office, he was appealing a fifteen-day suspension with seven days held in abeyance. However, on November 22, 2022, Agency unilaterally rescinded the seven days held in abeyance and updated the record to reflect that Employee's final imposed discipline was only an eight-day suspension. The AJ agreed with Agency's position that given the instant circumstances, OEA should only focus on the actual suspension time imposed. According to his assessment, Employee failed to suffer an enduring harm that was appealable to OEA. The AJ noted that the adverse action was rescinded with Employee only having suffered an eight-day

⁶ *Post-Prehearing Conference Order* (November 17, 2022).

⁷ *Agency's Motion to Dismiss for Lack of Jurisdiction* (December 2, 2022). After reviewing Agency's motion, the AJ ordered Employee to submit a brief addressing the issue of jurisdiction. *Order Requesting Brief* (December 19, 2022). In response, Employee explained that he was not physically or mentally well enough to fully respond to the AJ's order. *See Employee's Brief* (January 3, 2023).

suspension. Thus, he reasoned that Employee never endured the subject seven days of suspension and would not have the threat of an impending adverse action as he continued to be employed by Agency. As a result, he concluded that at best, the current appeal constituted a corrective action. Consequently, Employee's appeal was dismissed for lack of jurisdiction.⁸

Employee disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on February 28, 2023. He contends that contrary to the AJ's findings, this Office retains the jurisdiction to adjudicate Agency's suspension action. Employee believes that Agency erred by unilaterally reducing the proposed suspension from fifteen days to eight days. He also asserts that Agency engaged in procedural errors when it initiated the instant adverse action. Specifically, he submits that Agency violated General Order PER-201.22, OEA Rule 605, and Chapter 16, Sections 1613.1 and 1623 of the DPM. According to Employee, the imposed penalty is excessive in light of his good record with Agency. Additionally, he takes issue with the amount of time Agency took to initiate its adverse action. Employee requests that the Board find that OEA may exercise jurisdiction over his appeal. He further asks that the suspension action be removed from his personnel record; Agency restore his leave balances and benefits; the AJ impose punitive measures against Agency; and that the case be remanded to be decided on its merits.⁹

Discussion

According to OEA Rule 637.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence

⁸ *Initial Decision* (January 26, 2023).

⁹ *Petition for Review* (February 28, 2023).

that a reasonable mind could accept as adequate to support a conclusion. Therefore, if there is substantial evidence to support the AJ's decision that OEA lacks jurisdiction to consider the merits of this case, then this Board must accept it. After reviewing the record, this Board believes that the AJ's decision was not based on substantial evidence.

On December 2, 2022, Agency filed a Motion to Dismiss Due to Lack of Jurisdiction. Agency's motion stemmed from its position that OEA lacks the purview to adjudicate the instant appeal because it rescinded the days held in abeyance and updated the records to reflect that Employee's final imposed discipline was an eight-day suspension. Agency argues that pursuant to D.C. Code § 1-606.03(a), OEA's jurisdiction is explicitly limited to suspensions of ten days or more and since Employee served less than ten suspension days, Agency's action resulting in that suspension is not appealable to OEA.¹⁰

In accordance with D.C. Code § 1-606.03(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. . . .” Therefore, the Code requires that suspensions be for ten days or more before OEA can assume jurisdiction.

In *Royal v. Metropolitan Police Department*, OEA Matter No. 1601-0003-10 (March 28, 2013), this Office held that OEA's jurisdiction is determined by the penalty imposed by an agency at the time the appeal is filed.¹¹ OEA has relied on the Merit Systems Protection Board's (“MSPB”)

¹⁰ *Agency's Motion to Dismiss Due to Lack of Jurisdiction* (December 22, 2022).

¹¹ See also *Hagan v. Department of the Army*, 99 M.S.P.R. 313 (2005).

holding in *Himmel v. Department of Justice*, 6 M.S.P.R. 484 (June 2, 1981), which held that once jurisdiction is attached, it cannot be divested by an agency's decision to unilaterally amend an imposed penalty, unless the employee consents to such divestiture or unless the agency completely rescinds the action being appealed. This holding was reiterated by this Office in *Davis v. Department of Motor Vehicles*, OEA Matter No. 1601-0124-15 (December 2, 2016), wherein the employee's suspension was unilaterally reduced by the agency from a fifteen-day suspension to a two-day suspension. Similar to Agency in this matter, the agency in *Davis* argued that the act of unilaterally rescinding the charges and penalty against the employee to two days divested OEA of jurisdiction to hear the appeal. The AJ disagreed, citing the holdings in *Royal, Hagan, and Himmel* and held that this Office retained the jurisdiction to adjudicate the employee's appeal. The AJ noted that the Employee in *Davis* failed to consent to the unilateral reduction of the proposed penalty.¹²

Here, Employee was served with a Proposed Notice of Adverse Action on June 3, 2022, which proposed to suspend him for thirty days. On July 29, 2022, Agency issued a Notice of Final Decision. The final notice replaced the proposed suspension and reduced the suspension to fifteen days with seven days held in abeyance for one year. On November 22, 2022, Agency issued a letter to Employee stating that “[u]pon further review[,] this office has determined that the remaining seven days that were held in abeyance will be rescinded. Your record will be updated to reflect that the final discipline imposed on this matter was an eight[-]day suspension.”¹³ Thus, Employee's suspension was unilaterally reduced nearly four months after Agency issued its final notice of adverse action.

There is no evidence in the record to indicate that Employee consented to the reduction of

¹² See *Davis, Order on Jurisdiction* (December 2, 2016).

¹³ *Agency's Motion to Dismiss Due to Lack of Jurisdiction*, Exhibit 1.

the proposed penalty in this case. Employee's August 3, 2022, Petition for Appeal was based on Agency's final decision to imposed a fifteen-day suspension with seven days held in abeyance. Agency's subsequent decision to reduce the imposed penalty after Employee filed his petition with OEA cannot now be used as a basis for denying jurisdiction over this appeal. Employee's initial appeal from Agency's final notice of adverse action meets the threshold for jurisdiction in accordance with D.C. Code § 1-606.03(a). Consistent with the holdings in *Royal*, *Hagan*, and *Himmel*, this Board finds that OEA may exercise jurisdiction over Employee's petition. Therefore, this matter must be remanded to the AJ to adjudicate the parties' substantive arguments. Based on the foregoing, we hereby grant Employee's Petition for Review.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **GRANTED**. This matter is **REMANDED** to the Administrative Judge for proceedings consistent with this Order.

FOR THE BOARD:

Clarence Labor, Jr., Chair

Jelani Freeman

Peter Rosenstein

Dionna Maria Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.