THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MELISSA PETERSON[1]	)	OEA Matter No. 1601-0229-09
Employee	)	
	)	Date of Issuance: September 29, 2011
v.	)	
	)	Lois Hochhauser, Esq.
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT	)	Administrative Judge
Agency	)	
	)	

Steven B. Chasin, Employee Representative
Thelma Chichester, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

Melissa Peterson, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on August 21, 2009, appealing the final decision of the D.C. Fire and Emergency Medical Services Department, Agency herein, to suspend her without pay for 11 calendar days, based on charges of insubordination and inexcusable neglect of duty. At the time of the adverse action, Employee, an Emergency Medical Technician, was in permanent career status.

The prehearing conference took place on February 16, 2011, and the hearing took place on March 15, 2011. At the proceeding, the parties were given full opportunity to, and did in fact, present testimonial and documentary evidence on the issues of insubordination and inexcusable neglect of duty.[2] Employee was present at the hearing and was represented by Steven Chasin. Thelma Chichester, Esq., represented Agency. Following the submissions of closing briefs, the record closed on or about June 30, 2011. However, while preparing the Initial Decision, the Administrative Judge reviewed the record and determined that this Office's jurisdiction was at issue.

[1] Employee's surname is now "Turner". However, the caption still identifies her as "Peterson," her surname at the time the appeal was filed.

[2] Witnesses testified under oath and the hearing was transcribed. Exhibits are identified as "J" if jointly introduced, "A" if introduced by Agency and "E" if introduced by Employee, followed by the exhibit number.

Specifically, the final Agency notice had reduced the proposed period of suspension to 72 work hours. Although this matter had not been raised by the parties, jurisdiction is always at issue. Therefore, the Administrative Judge issued an Order on July 7, 2011, directing Employee to show cause why the matter should not be dismissed based on lack of jurisdiction. Thereafter, both parties were given the opportunity to brief the issue, and a number of unopposed requests by the parties for extensions were granted. The record closed on September 26, 2011.

JURISDICTION

The Office jurisdiction of this Office was not established.

ISSUE

Should this matter be dismissed for lack of jurisdiction?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

On May 28, 2009, Agency issued an advance notice of suspension notifying Employee of its intention to suspend her "without pay for ninety six (96) duty hours or seventeen (17) calendar days or twelve (12) work days". (Ex J-1). However, in its notice of final decision issued on July 18, 2009, Agency stated, in pertinent part, that the suspension was reduced to "seventy-two (72) duty hour suspension, nine (9) work days or eleven (11) calendar day suspension without pay". (Ex J-3).

This Office's jurisdiction is conferred upon it by law. Pursuant to D.C. Code §1-606.3(a), this Office's jurisdiction is limited to appeals involving performance ratings that result in removals, final agency decisions that result in removals, reductions in grade, suspensions of ten days or more, and reductions-in-force. OEA Rule 604.1, 46 D.C.Reg. 9299 (1999). Appeals involving suspensions of less than ten days are not within OEA's jurisdiction. See, e.g., *Osekre v. Department of Human Services*, OEA Matter No. J-0080-00 (February 13, 2002). _____ D.C. Reg. _____ ( ).

Employee has the burden of proof on issues of jurisdiction, pursuant to OEA Rule 629.2, 46, D.C. Reg. 9317 (1999). Employee argues that she was in fact suspended for ten calendar days without pay and that the "days" as stated in D.C. Code §1-606.3(a), refers to calendar days and not business days. She contends that there is a difference in how the definition of the time for suspension should be interpreted for a non-uniformed member of Agency Employee's Reply to Agency's Supplemental Brief. Agency argues that Employee's suspension was for nine work days and therefore this Agency lacks jurisdiction.

D.C. Code §1-606.3(a) and its implementing regulation at 6B DCMR§1203.1, states that the workweek consists of 40 hours that cannot be extended more than six or seven consecutive days. Uniformed members of Agency are exempt from this provision. Employee focuses on the argument that Employee does not come within the exception; but this argument does not address the basic issue of why 72 hours or nine business days without pay should not be considered the length of

suspension imposed in this matter.

The Supreme Court stated in *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 753,756 (1975), "[t]he starting point in every case involving construction of a statute is the language itself." If the language is clear and unambiguous on its face it is not open to interpretation. Although the word "days" is not defined in the provision noted above, the final Agency notice refers to 72 duty hours or nine work days.

In order to determine how "day" should be interpreted, the applicable provisions of the D.C. Code must be read with the implementing regulations. As the Court of Appeals for the District of Columbia stated in *Gondelman v. D.C. Department of Consumer and Regulatory Affairs*,789 A.2d 1238 (D.C. (2002), statutory provisions must be construed with related provisions and "against the backdrop of its policies and objectives". If an employee is suspended without pay, the days of suspension reasonably refer to days on which the employee would otherwise be paid. The Administrative Judge concludes that the reasonable conclusion is that the reference must be to work days or duty hours. Employee was suspended without pay for 72 duty hours or nine work days. This Office does not have jurisdiction to hear appeals involving suspensions of less than ten days.

Employee's burden of proof on the issue of jurisdiction must be met by a "preponderance of the evidence" which is defined in OEA Rule 629.1, as 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". After carefully reviewing the arguments and the applicable laws, rules and regulations in this matter, the Administrative Judge concludes that Employee did not meet her burden and that this matter must be dismissed for lack of jurisdiction.

ORDER

It is hereby ORDERED that the petition for appeal is DISMISSED.

FOR THE OFFICE:

LOIS HOCHHAUSER, ESQ.
Administrative Judge