

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Administrative Assistant 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:)	
)	
YONG AHN)	
Employee)	
)	
)	OEA Matter No. 1601-0159-98
)	
)	
v.)	
)	Date of Issuance: January 27, 2005
)	
D.C. METROPOLITAN POLICE)	
DEPARTMENT)	
Agency)	
)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Sometime during 1997, the Federal Bureau of Investigation (FBI), working with the Office of Internal Affairs of the Metropolitan Police Department, initiated an investigation into alleged corruption involving uniformed officers of the department. As the investigation progressed, the FBI, along with Agency, began to focus its attention on the activities of Employee. Employee began his tenure with Agency in 1984 as a police officer and was a Lieutenant at the time of the misconduct.

The investigation of Employee centered on his conduct between the time periods of September 3, 1997, and January 27, 1998. The investigation revealed that Employee, during this time period, accepted five illegal payments from at least two Chinatown massage parlors in exchange for protection. The protection was in the form of allowing the massage parlors to operate without having the proper permits or licenses and agreeing to notify the businesses in advance in the event that a search warrant was issued. The illegal payments totaled approximately \$8,000.

Having enough evidence to secure an arrest warrant, Employee was arrested on February 10, 1998. On February 20, 1998, Employee met with FBI officials and federal prosecutors and agreed to enter a plea to one count of bribery and to cooperate with the investigation. Over the course of the next several weeks, Employee had more discussions with federal officials and on March 11, 1998, Employee pleaded guilty to receiving illegal gratuities. Employee continued to cooperate with the investigation until April 20, 1998, at which time Employee ceased his cooperation. Employee claims that because a news report aired on television concerning the probe, his ability to gather information was comprised thereby necessitating that he cease cooperating with the investigation. Employee was sentenced on November 16, 1999.

Meanwhile, Agency's Office of Internal Affairs prepared a final investigative report concerning Employee's illegal conduct. That report was issued to Agency officials on May 1, 1998. The investigating officials concluded the report by recommending that adverse action procedures be commenced against Employee. Thus on May 5, 1998, Agency issued to Employee a notice of proposed adverse action. In this particular notice

Agency proposed terminating Employee. Agency followed up the May 5, 1998 notice with a second notice issued May 26, 1998. This second notice proposed suspending Employee without pay based on the causes of conduct unbecoming an officer and violating the regulation that prohibits an officer from accepting gratuities. Agency stated that this notice was being issued pending the resolution of the criminal and administrative action against Employee.

On June 3, 1998, Agency issued to Employee its final notice of indefinite suspension without pay. The notice provided that Employee would be indefinitely suspended without pay 15 days after his receipt of the notice. Further, the notice provided that Employee could appeal the suspension to the Chief within ten days of receiving the notice and that the Chief's response, which was due within 15 days of the appeal, would constitute the final agency action. Also within this notice Employee was told that he could appeal the final agency action to the Office of Employee Appeals (Office) within 15 days of the effective date of the agency action. Employee received the notice on June 8, 1998. Thus, the suspension took effect on June 23, 1998.

On June 11, 1998, Employee notified the Chief that he was appealing the Agency action and requested a meeting with the Chief. On June 16, 1998, the Assistant Chief responded to Employee's appeal by stating that the appeal had been denied, that he could not meet with the Chief, and that the indefinite suspension without pay would begin 15 days after receipt of the final notice.¹ On July 20, 1998, Employee determined that his pay had indeed been withheld. Thus, on July 22, 1998, Employee appealed the indefinite suspension action to this Office.

¹ Nothing in the record indicates that the Chief ever responded to Employee's appeal.

With respect to the termination notice issued to Employee, Agency amended the notice on June 24, 1998. On three separate occasions—April 28, 1999, March 31, 2000, and October 3, 2000—Agency conducted a hearing concerning Employee's conduct of accepting illegal gratuities. On November 6, 2000, Agency issued to Employee a final notice of termination. Employee was to have been terminated effective December 1, 2000; however, on December 4, 2000, Employee resigned from his position.

The Administrative Judge was faced with two questions in this appeal: whether Employee filed a timely petition for appeal with this Office and whether Agency initiated the adverse action against Employee within the requisite time period. The Administrative Judge held that even though Employee had filed his petition for appeal five days past the 15 day filing period, the circumstances dictated that the late filing be excused. With respect to the second issue, Agency had 45 business days within which to initiate an adverse action procedure against Employee. This is what is commonly referred to as the "45-day rule." Because there was an ongoing investigation of Employee's conduct, by law the 45 days were tolled and did not begin to accrue until after Agency had completed its investigation. According to the Administrative Judge, Agency failed to initiate the adverse action procedures within the required time period. The Administrative Judge reached this conclusion even after considering several possible dates as to when Agency presumably completed the investigation. Thus, in an Initial Decision issued June 4, 2001, the Administrative Judge reversed Agency's action and ordered that Employee be reimbursed all of the salary and benefits he had lost as a result of the suspension.

On July 10, 2001, Agency filed a Petition for Review. Agency contends that the Initial Decision should be reversed on the basis that its action did not violate the 45-day rule and that in any event, Employee did not timely file his Petition for Appeal.

Timeliness of Appeal

Agency submits four reasons as to why Employee's late filing should not be excused: 1) Employee was on notice that he would be suspended effective June 23, 1998; 2) Employee did not receive from Agency or the Chief any communication that indicated that the suspension would not take effect as planned; 3) Employee knew, based on agency regulations, that an appeal to the Chief would not serve to delay the effective date of the action; and 4) Employee knew, based on the notice, that he had 15 days from the effective date of the Agency action within which to file an appeal with this Office.

At the time Employee filed his appeal with this Office, OEA Rule 604.4 required that the appeal be filed "within fifteen (15) business days of the effective date of the appealed agency action." The Administrative Judge correctly found that the 15-day filing period was mandatory and considered a jurisdictional matter. However, as the Administrative Judge further found, the filing period may be excused for good cause shown. Determining whether good cause exists to excuse a late filing depends upon the length of the delay; whether the employee was aware of the time limitation; whether circumstances existed that were beyond the employee's control and that affected the employee's ability to comply with the time limits; whether the employee was inexcusably negligent; and the existence of unavoidable casualty or misfortune.

We believe there is substantial evidence in the record to uphold the Administrative Judge's finding that the untimely filing of Employee's appeal is excusable. The suspension took effect on June 23, 1998. Employee should have filed the Petition for Appeal by July 15, 1998; however, he did not file it until July 22, 1998. This was a delay of only five days. In the June 3, 1998 notice, Employee was told that he could appeal the action to the Chief and that the Chief would respond to the appeal within 15 days. According to the notice, the Chief's response would constitute the final agency action. Employee appealed to the Chief yet the Chief never responded to the appeal. Instead, the *Assistant Chief* wrote to Employee that his appeal was being denied. Agency did not follow its own policy in this regard.

Adding another layer of confusion to this issue is Agency's own regulation which states that once the *Chief* has responded to an employee's appeal, then the employee may appeal the adverse action to this Office. This particular regulation and the appeal provision that is contained within the notice that Employee received are confusing at best and may perhaps conflict with one another. Based on these factors, we find that there is substantial evidence in the record to excuse the untimely filing of Employee's Petition for Appeal.

The 45-day Rule

At the time of Agency's action the law required that an agency initiate an adverse action against an employee within 45 business days of when the agency knew or should have known of the act or occurrence giving rise to the adverse action. There was an

exception to this rule that applied in the event of an ongoing criminal investigation. In that case, the time period did not commence until after the investigation was completed.

Specifically, D.C. Code Ann. §1-617.1(b-1)(2)(1992 repl.) stated:

In the event that an act or occurrence allegedly constituting cause is the subject of an ongoing investigation, the 45-day limit . . . shall be tolled until the conclusion of the criminal investigation.

The legislative history of this provision reveals that the exception was inserted so that employees who were the subject of a criminal investigation could be assured with some certainty that when the investigation was completed, an agency had only 45 days within which to initiate an adverse action.

Because Employee's misconduct gave rise to a criminal investigation, the Administrative Judge had to determine what event during the course of the investigation caused the 45 days to begin to run. The Administrative Judge found that the conclusion of the criminal investigation coincided with the last date on which Employee accepted an illegal gratuity—January 27, 1998. This date, according to the Administrative Judge, was the pivotal date that triggered the 45-day rule. In that Agency did not initiate the adverse action against Employee until May 26, 1998—over 80 business days later—the Administrative Judge held that Agency had violated the law. Thus, she reversed Agency's action.

In its Petition for Review, Agency claims that it did not violate the 45-day rule because the indefinite suspension was not a disciplinary action but rather an administrative action and because the criminal investigation was still in progress even on

January 27, 1998. With respect to its second argument, Agency does not put forth a precise date as to when the investigation concluded.

We believe there is substantial evidence in the record to support the Administrative Judge's finding that the indefinite suspension was indeed a disciplinary action and not merely an administrative action. We are in agreement with the Administrative Judge that suspensions are ordinarily recognized as an adverse action. (Citations omitted). Further, if Agency had not considered the indefinite suspension as a disciplinary action, there would have been no need for it to include in the final notice the provision that Employee could appeal the action to this Office. Although we recognize an agency's need to summarily discipline an employee, that alone does not change the fact that a suspension, particularly an indefinite suspension as in this case, is a disciplinary action.

Concerning the date on which the criminal investigation concluded thus triggering the 45 days, we believe the Administrative Judge erred when she held that "[u]sing the January 27, 1998 date, the 45 day time period expired on April 1, 1998." *Initial Decision* at 8. We believe that the Administrative Judge further erred when she held that "[e]ven if Employee's plea on March 11, 1998 is used as the triggering date, that proceeding ended the criminal investigation and the 45-day time period would have expired on May 13, 1998." *Id.* Due to the ongoing nature of the criminal investigation, it did not conclude on January 27, 1998 (the last date on which Employee accepted an illegal gratuity) nor did it conclude on March 11, 1998 (the date on which Employee entered a guilty plea).

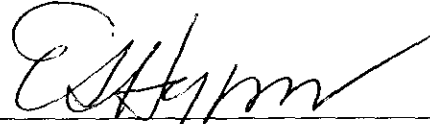
The record reveals that for several months following his guilty plea, Employee continued to actively cooperate with Agency and federal officials with a view toward uncovering corruption within the department. It was not until October of 2000 that Agency was able to conduct its last departmental hearing with respect to Employee's misconduct. Shortly thereafter, on December 4, 2000, Employee resigned from the department.

Agency has not asked us, in its Petition for Review, to determine an exact date on which it concluded the criminal investigation. Rather, we find persuasive Agency's contention that the investigation was ongoing. Thus we reverse the Administrative Judge on this issue and hold that Agency did not violate the 45-day rule when it proposed the adverse action against Employee. We further hold that based on this finding, Employee is not entitled to an award of backpay or benefits.

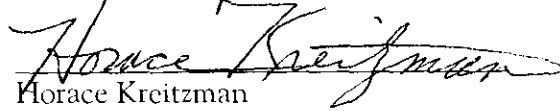
ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **DENIED** in part and **GRANTED** in part and that the Initial Decision is **UPHELD** in part and **REVERSED** in part.

FOR THE BOARD:

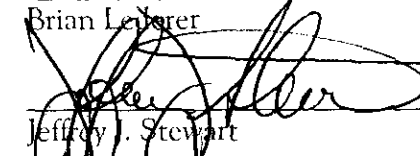


Erias A. Hyman, Chair

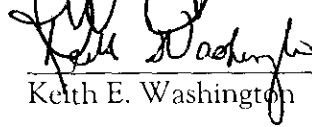


Horace Kreitzman

Brian Leiserer



Jeffrey J. Stewart



Keith E. Washington

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.