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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
GENE RYAN,)	
Employee)	OEA Matter No. 1601-0010-16
)	
v.)	Date of Issuance: January 6, 2016
)	
D.C. FIRE AND EMERGENCY)	
MEDICAL SERVICES,)	MONICA DOHNJI, Esq.
Agency)	Administrative Judge
_____)	
Ari M. Wilkenfeld, Esq., Employee Representative)	
Rosalind Herendeen, Esq., Employee Representative)	
Andrea Comentale, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On October 20, 2015, Gene Ryan (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) contesting the D.C. Fire and Emergency Medical Services Department’s (“Agency”) decision to suspend him for eighty-four (84) hours. On October 30, 2015, Agency filed a Motion to Dismiss Employee’s appeal for lack of jurisdiction.

This matter was assigned to the undersigned Administrative Judge on November 4, 2015. Thereafter, On November 12, 2015, I issued an Order requiring Employee to address the jurisdiction raised by Agency in its Motion to Dismiss. Employee’s brief on jurisdiction was due on or before November 27, 2015, and Agency had the option to submit a reply to Employee’s brief on jurisdiction on or before December 7, 2015. Employee timely submitted his brief addressing the jurisdiction issue in this matter. On December 7, 2015, Agency filed a Consent Request for Extension of Time to File Reply Brief. Subsequently, on December 14, 2015, Agency submitted its reply brief. Because this matter could be decided on the basis of the documents of record, no proceedings were conducted. The record is now closed.

JURISDICTION

The jurisdiction of this Office, pursuant to *D.C. Official Code, § 1-606.03 (2001)*, has not been established.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. “Preponderance of the evidence” shall mean:

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 628.2 *id.* states:

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.

ANALYSIS AND CONCLUSION

The threshold issue in this matter is one of jurisdiction. This Office’s jurisdiction is conferred upon it by law, and was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 (“CMPA”), D.C. Official Code §1-601-01, *et seq.* (2001). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 (“OPRAA”), D.C. Law 12-124, which took effect on October 21, 1998. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions. According to 6-B of the District of Columbia Municipal Regulation (“DCMR”) § 604.1¹, this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting:

- (a) A performance rating which results in removal of the employee;
- (b) An adverse action for cause which results in removal;
- (c) A reduction in grade;
- (d) *A suspension for ten (10) days or more* (emphasis added);
- (e) A reduction-in-force; or
- (f) A placement on enforced leave for ten (10) days or more.

¹ See also, Chapter 6, §604.1 of the District Personnel Manual (“DPM”) and OEA Rules.

As noted above, OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), states that “[t]he employee shall have the burden of proof as to issues of jurisdiction...” Pursuant to this rule, the burden of proof is by a preponderance of the evidence which is defined as “[t]hat 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.” This Office has no authority to review issues beyond its jurisdiction.² Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.³

Here, following a Trial Board hearing, Agency issued its Final Agency Decision on September 17, 2015, suspending Employee for eighty-four (84) duty hours. Employee was a Firefighter/Paramedic at the time of his suspension. Employee argues that OEA has jurisdiction over his suspension because he was suspended for a specific number of days. Employee explains that in determining the duration of his suspension, Agency did not convert the eighty-four (84) hours into three and a half (3.5) days as it now suggests, but rather noted in his Final Agency Decision that “your suspension for eighty-four (84) duty hours will commence at 0700 on October 18, 2015 and conclude at 0700 on October 31, 2015.”⁴ Employee argues that the suspension spans a total of thirteen calendar days. Employee maintains that the number of hours he works during a regular thirteen (13) day period is significantly more than eighty-four (84) hours. Employee asserts that his case is distinguishable from *Harvell v. DCFEMS*, OEA Matter No. 1601-0122-14.⁵ Employee maintains that unlike in *Harvell*, here, Employee’s Final Agency Decision clearly reflected the effective dates of Employee’s suspension. Further, given his twenty-four (24) hour shift, he would have worked significantly more than eighty-four (84) hours in the thirteen day span for which he was suspended and prevented from working any hours during that time.⁶

Agency on the other hand highlights that Employee is trying to appeal a three and a half (3.5) day suspension which does not meet the statutory requirement for appealable actions. Additionally, citing to *Harvell* and *Lehan v. DCFEMS*, OEA Matter No. J-0166-12, Agency maintains that because Employee has not been subjected to an appealable adverse action for which OEA has jurisdiction, Employee’s Petition for Appeal must be dismissed. Agency additionally submitted Employee’s timesheets in support of its assertion that based on

² See *Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

³ See *Brown v. District of Columbia Public Schools*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (January 22, 1993); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).

⁴ Employee Motion in Opposition of Agency’s Motion to Dismiss Employee’s Petition for Appeal (November 25, 2015).

⁵ The Employee in *Harvell* was suspended for ninety-six (96) hours. During his appeal process with this Office, Mr. Harvell explained that, he served a ninety-six (96) hours suspension without pay over four (4) shifts and that based on his twenty-four (24) hours shift that he works, a four (4) days suspension represents ninety-six (96) hours. Mr. Harvell argued that in the eight (8) hour work day which many city employees work, the ninety-six (96) hours would be equivalent to twelve (12) days suspension and this meets the ten (10) days or more suspension rule for jurisdiction, thus, entitling him to an appeal. The Administrative Judge (“AJ”) in this case held that, although the ninety-six (96) hours suspension resulted from an adverse action for cause, the suspension was for less than 10 calendar days.

⁶ *Id.*

Employee's tour of duty; Employee generally works a total of no more than eighty-four (84) hours in a two-week period.

I agree with Agency's assertion that OEA does not have jurisdiction over this matter. Based on the record, Employee was suspended for eighty-four (84) *duty* hours effective October 19, 2015 through October 31, 2015(emphasis added). While Agency specified a start and end date for the adverse action which spans over a thirteen (13) day period, according to Employee's twenty-four (24) hours work schedule, the eighty-four (84) duty hours constitutes three and a half (3.5) calendar days. Further, Agency submitted Employee's timesheets supporting the fact that Employee did not work more than eighty-four (84) duty hours during any given two-week period. Moreover, while Employee stated that he would have worked more than eighty-four (84) regular duty hours from October 18, 2015, to October 31, 2015; he fails to provide any evidence in support of this assertion.

Further, OEA Rule 603.1 provides in part as follows: "[i]n the computation of time periods which involve calendar days, the first day counted shall be the next calendar day following the day the event occurs from which the time period begins to run." Therefore, pursuant to OEA Rule 603.1, I conclude that although eighty-four (84) hours in a regular eight (8) hours duty schedule is equivalent to twelve (12) calendar days, as it applies to employee's compressed work schedule, this is equivalent to three and a half (3.5) calendar days.

Moreover, Black's Law Dictionary (Free 2nd Edition) defines a day as "a period of time consisting of twenty-four hours and including the solar day and the night." Based on this definition, the eighty-four (84) hours divided by a twenty-four (24) hour period is equivalent to three and a half (3.5) days. Consequently, I find that although the eighty-four (84) hours suspension resulted from an adverse action for cause, the suspension was for less than 10 calendar days. And as such, I conclude that Employee's appeal is similar to *Harvell* and *Lehan*, and this Office does not have jurisdiction over Employee's appeal.⁷ For this reason, the Petition for Appeal must be dismissed.

ORDER

It is hereby **ORDERED** that Agency's Motion to Dismiss is **GRANTED**: and it is

FURTHER ORDERED, that Employee's Petition is **DISMISSED**.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

⁷ See *Lehan v. District of Columbia Fire and Emergency Medical Services*, OEA Matter No. J-0166-12, *Opinion and Order on Petition for Review* (March 4, 2014).