THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
PAULA EDMISTON	)	
Employee	)	
	)	OEA Matter No.: 1601-0057-07
v.	)	
	)	Date of Issuance: January 25, 2010
D.C. METROPOLITAN POLICE DEPARTMENT	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Paula Edmiston ("Employee") was a Captain with the D.C. Metropolitan Police Department ("Agency"). On April 1, 2006 Employee and one of her fellow officers were at a grocery store to purchase groceries for the officer appreciation cookout. While in the checkout line, Employee allegedly made disrespectful comments to the cashier pertaining to the cashier's race and national origin. Employee then left the groceries on the conveyor belt. Thereafter, Employee and her fellow officer went to another grocery

store. While at that store, Employee encountered a male patron and allegedly made disparaging remarks to him pertaining to his sexual orientation.

These events came to the attention of Agency officials and on June 2, 2006, Agency issued to Employee a proposed notice of adverse action. Agency charged Employee with conduct unbecoming an officer, failure to obey orders or directives, and willfully and knowingly making an untruthful statement. As punishment for these violations, Agency proposed to demote Employee to the rank of Lieutenant.

On July 25, 2006, Agency issued to Employee its final notice of adverse action. The notice advised Employee that she could appeal its action to the Chief of Police. Employee appealed to the Chief and on August 29, 2006 the Chief rendered his opinion. Not only did he uphold Agency's action, he went one step further and increased the penalty from demotion to removal. Thereafter, Employee presented her case to a police trial board. After a three day evidentiary hearing, the trial board found Employee guilty of all three charges and recommended that she be terminated. On January 10, 2007 Agency issued to Employee a second final notice of adverse action. It informed Employee that she would be removed effective March 2, 2007. Again, Employee appealed to the Chief and on February 23, 2007, the Chief denied the appeal. The removal then took effect as scheduled.

Employee timely filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). The facts of the case were not in dispute. Rather, the issues presented to the Administrative Judge were whether Agency commenced its adverse action in a timely manner and whether Agency had the authority to increase the penalty from demotion to removal. Pursuant to D.C. Official Code § 5-1031 Agency had 90 business days to

commence the adverse action against Employee. The 90 day period began to run on April 1, 2006 which was the date Agency became aware of Employee's alleged misdeeds.[1] Employee argued that Agency did not commence the adverse action until August 29, 2006 which was the date the Chief rendered his opinion and increased the penalty from demotion to removal. Because August 29, 2006 was more than 90 business days after April 1, 2006, Employee contended that Agency violated the law. According to Employee this violation required a reversal of the removal action. Agency countered this argument by stating that the August 29, 2006 letter from the Chief related back to the June 2, 2006 proposed notice of adverse action. Based on this reasoning, Agency stated that it had complied with the law.

Employee's second argument was that the Chief had no authority to increase the penalty from demotion to removal. According to Employee, § 1613.2 of the District Personnel Manuel governed this appeal. That section prohibits a deciding official from increasing a penalty. Instead, it requires that the official either sustain the proposed penalty or reduce it. Agency argued that § 1613.2 of the District Personnel Manuel had been superseded by a General Order which allowed the Chief to impose a penalty higher than the one recommended by the proposing official. Even though this particular General Order did not go into effect until April 13, 2006, Agency argued that it was retroactive and thus applicable to Employee's case.

In an Initial Decision issued April 30, 2008, the Administrative Judge found that Agency had not violated the 90 day period. According to the Administrative Judge, the Chief's August 29, 2006 letter did not commence Agency's adverse action against Employee. Instead, that letter was "simply [the Chief's] response to Employee's final

[1] The first day of the 90 day period began on April 3, 2006 (Monday) and continued to August 10, 2006.

appeal to him of an adverse action."[2] The Administrative Judge found that the "June 2, 2006, Notice is the initial notice of adverse action, and that the August 29, 2006, letter is not."[3] Because the June 2, 2006 notice was "well within the 90-day deadline, . . . [it was] timely."[4]

With respect to the second issue, the Administrative Judge determined that "Employee's right not to have her proposed penalty increased was impaired by Agency's retroactive use of [the General Order.]"[5] The Administrative Judge went on to state the following:

> When the underlying events occurred on April 1, 2006, [the General Order] was not in place, and the Chief of Police was not authorized to increase [the] punishment. The enactment of the new General Order . . . would increase the Employee's liability for past conduct because she would be subject to a removal rather than a mere demotion. Under [relevant case law], the Employee's punishment cannot be increased by means of the General Order applied retroactively to conduct occurring before its enactment.

Because the Chief impermissibly increased Employee's penalty from demotion to removal, the Administrative Judge determined that the proper remedy was to apply the appropriate penalty. Accordingly the Administrative Judge found that the proper remedy was to reinstate the proposed penalty of demotion.

Subsequently, on June 2, 2008, Employee filed a Petition for Review. Before we could consider this matter, Agency filed a Petition for Review in the D.C. Superior Court on July 3, 2008. While Agency's petition was pending in Superior Court, it filed with us on July 17, 2008 an opposition to Employee's June 2, 2008 petition. On June 9, 2009,

---

[2] *Initial Decision* at 5.
[3] *Id.*
[4] *Id.*
[5] *Id.*

the D.C. Superior Court dismissed Agency's petition without prejudice pending the outcome of our decision in this matter. On July 9, 2009, Agency filed with us a Motion for Extension of Time to File Petition for Review of Agency Decision. On July 13, 2009, Employee filed an Opposition to Agency's motion. On July 31, 2009, the parties requested that we stay this matter. That request was granted. On August 26, 2009, the parties requested that we lift the stay. Thusly, it appears that we now have before us Employee's June 2, 2008 Petition for Review, Agency's opposition to that petition, Agency's motion for an extension of time to file a petition for review, and Employee's opposition to that motion.

Employee's sole argument in her petition is that the "[Administrative Judge] lacked the power to *sua sponte* demote [Employee] without permitting her the opportunity to petition OEA for a de novo evidentiary hearing."[6] According to OEA Rule 625.1, a party may request the opportunity for an evidentiary hearing. It is within the discretion of the administrative judge to grant or deny such a request. Having only the two aforementioned issues before him, the Administrative Judge did not think an evidentiary hearing was warranted. The Administrative Judge stated in the Initial Decision that "Employee was given due process in a hearing and was afforded several opportunities to appeal her penalty. Where Agency erred only in the choice of its penalty, but not in its decision to penalize Employee, the proper remedy is to apply the proper penalty."[7] We agree with the Administrative Judge's reasoning and find that he did not abuse his discretion by making a decision based on the submissions of the parties and the applicable law. Therefore, we must deny Employee's Petition for Review.

---

[6] *Employee's Petition for Review* at 5.
[7] *Initial Decision* at 8.

Moreover, we must deny Agency's Motion for Extension of Time to File Petition for Review of Agency Decision. Pursuant to D.C. Official Code § 1-606.03(c), a party may file a petition for review within 35 days from issuance of the initial decision. This filing deadline is jurisdictional and thus mandatory. The Initial Decision was issued on April 30, 2008. The parties had until June 4, 2008 to file a Petition for Review. Because Agency failed to file its petition by that date, it cannot now do so.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED** and Agency's Motion for Extension of Time to File Petition for Review of Agency Decision is **DENIED**.

FOR THE BOARD:

_____
Sherri Beatty-Arthur, Chair

_____
Barbara D. Morgan

_____
Richard F. Johns

_____
Hilary Cairns

_____
Clarence Labor, Jr.

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.