

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. 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 substantive challenge to the decision.

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)
In the Matter of:)
JUAN ESPINAL) OEA Matter No. 1601-0118-09
Employee) Date of Issuance: March 25, 2010
v.) Sheryl Sears, Esq.
METROPOLITAN POLICE) Administrative Judge
DEPARTMENT)
Agency)
_____)

James E. McCollum, Jr., Esq., Employee Representative
Brenda S. Wilmore, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND FINDINGS OF FACT

Juan Espinal (“Employee”) was a Lieutenant in the Metropolitan Police Department (“Agency” or “MPD”). According to the final investigative report presented on September 15, 2008, by Agent/Sergeant Barbara L. Brantley of the Internal Affairs Division, Employee left the scene of an accident after he hit a parked car while driving a marked Agency cruiser and knowingly made untrue statements about the incident on May 9, 2008.

On December 9, 2008, Agency served Employee with notice of proposed removal. Employee was advised of his right to have a hearing on January 7, 2009. Employee requested a continuance. The hearing was rescheduled for April 6, 2009. Employee submitted a request to resign effective on March 13, 2009. It was approved. Then, Employee asked to delay his separation until May 1, 2009. Agency denied that request. On or about March 18, 2009, Agency notified Employee that he would be fined

because he was separating prior to satisfying the penalty imposed in the matter described above.¹ Employee left Agency employment on March 20, 2009.

On May 9, 2009, Employee filed an appeal with this Office challenging the fine on the grounds that Agency delayed beyond the required time period in initiating action against him and wrongly penalized him for allegations of misconduct not proven at a hearing. On January 28, 2010, Employee presented a “Memorandum of Points and Authorities in Support of Jurisdiction” pursuant to the order of this Judge. The record is now closed.

JURISDICTION

As will be discussed in detail below, this Office does not have jurisdiction over this matter.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

BURDEN OF PROOF

OEA Rule 629.2, 46 D.C. Reg. 9297 (1999) states that “[t]he employee shall have the burden of proof as to issues of jurisdiction.” Employee has the burden of proving that this Office has jurisdiction over her appeal.

ANALYSIS AND CONCLUSION

The Office of Employee Appeals was established by the D.C. Comprehensive Merit Personnel Act of 1978 (CMPA), effective March 3, 1979, D.C. Law 2-139, D.C. Code § 1-601.01 *et seq.* to provide a venue where employees can seek review of adverse personnel actions. Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, amended some sections of the CMPA. Section 101(d) of OPRAA amended § 1-606.03 of the Code to provide for appeals of the following adverse actions:

1

DC Municipal Regulation 877 “Retirement/Resignation of Members While Under Disciplinary Investigation,” provides for a range of penalties against a Police Officer who retires during an investigation of misconduct as follows:

877.7 Upon completion of the investigation, if the allegations of serious misconduct are sustained and if the member would have been suspended as a penalty for the misconduct, the Director of DDRO shall assess the member a fine in lieu of suspension in accordance with the schedule established in General Order 201.15 “Retirement Program.” Such fine shall not be less than \$100 nor greater than \$5,000.

(a) An employee may appeal a final agency decision effecting a performance rating which results in removal of the employee . . . an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . . or a reduction in force.

Employee urges that, in accordance with provisions of the D.C. Official Code, he has the right to pursue this appeal. D.C. Official Code § 5-803 provides, in relevant portion, that “if a member of the Metropolitan Police Department retires or resigns while under disciplinary investigation, that member shall be deemed to be in conditional retirement until the disciplinary investigation is completed and factual findings are made.” The provision goes on to note that if allegations of serious misconduct are sustained, the disciplinary process shall proceed “as if the member in conditional retirement continued to be a member of the Metropolitan Police Department.” The member is guaranteed “all rights to which he is entitled under federal and District of Columbia law and regulations, police regulations, and any applicable labor agreement.”

Employee seeks relief from a fine imposed by the agency. While the above provision may preserve the right of an employee of the MPD who is in conditional retirement to pursue the disciplinary process including an appeal before this Office (and even that is questionable), it does not create the subject matter jurisdiction of this Office. This Office does not have jurisdiction over fines. Therefore, the Office does not have jurisdiction over Employee’s appeal and it must be dismissed.

ORDER

It is hereby ordered that the petition in this matter is dismissed for lack of jurisdiction.

FOR THE OFFICE:

Sheryl Sears, Esq.
Administrative Judge