

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
Gerald Burton)	OEA Matter No. 1601-0156-09
Employee)	
)	Date of Issuance: November 7, 2011
v.)	
)	Senior Administrative Judge
D.C. Fire & Emergency Services Dept.)	Joseph E. Lim, Esq.
Agency)	

Donna Rucker, Esq., Employee Representative)	
Kevin Turner, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On July 10, 2009, Employee, a Firefighter, filed a Petition for Appeal with this Office regarding Agency's action suspending him for 180 hours after a Trial Board found him guilty of two out of four charges. Specifically, Employee was found guilty of insubordination and of violating standard operating guidelines governing fireground operations.

This matter was assigned to this Judge on February 24, 2010. I scheduled prehearing conference for March 24, 2010, but Agency did not appear. I held a conference on May 24, 2010, after Agency showed cause for its non-appearance and after the parties requested a postponement of a May 7, 2010, conference. Again the Agency was a no-show and was asked to show good cause. After Agency showed cause, I held a conference on September 17, 2010. The parties were asked to brief the issues on this Pinkard matter. Subsequently, the parties asked to mediate the matter, and a mediation was held on October 17, 2011. However, the parties failed to settle. On November 3, 2011, Agency reduced the penalty to 72 hours or six (6) days suspension.¹ Agency also filed a motion to dismiss the appeal for lack of jurisdiction. Based thereon, and further inquiry, no proceedings were held. Accordingly, the record is closed.

JURISDICTION

Jurisdiction has not been established.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

¹ Chief Ellerbe's Amended Letter of Decision/Suspension to Employee, dated November 3, 2011.

BURDEN OF PROOF

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999) states that “[T]he employee shall have the burden of proof as to issues of jurisdiction, including timeliness.”

ANALYSIS AND CONCLUSIONS

This Office was established by the D.C. Comprehensive Merit Personnel Act (CMPA), D.C. Code Ann. § 1-606.01 *et seq.* (2001) and has only that jurisdiction conferred upon it by law. The types of actions that employees of the District of Columbia government may appeal to this Office are stated in D.C. Code Ann. § 1-606.03. Those actions include, *inter alia*, suspensions of 10 days or more.

Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act (OPRAA), amended certain sections of the CMPA.² Of specific relevance to this Office, § 101 (d) of OPRAA amended § 1-606 of the Code in pertinent part as follows:

(1) D.C. Code § 1-606.3(a) is amended as follows:

(a) An employee may appeal a final agency decision affecting 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 . . .

Therefore, as of October 21, 1998, this Office no longer has jurisdiction over appeals from suspensions of less than ten (10) days. OEA Rule 604.3, 46 D.C. Reg. 9299 (1999).

It is well-settled that this Office lacks jurisdiction over suspensions less than ten (10) days and those proposed suspensions that have been held in abeyance and therefore not effected. *See, eg., Osekre v. Department of Human Services*, OEA Matter No. J-0080-00 (February 13, 2002) __ DCR __ () (The Office did not have jurisdiction over employee’s 5-day suspension); *Thomas v. Metropolitan Police Department*, OEA Matter No. J-0149-04 (June 10, 2005), __ DCR __ (), (the Office focused on the actual time served when considering issues of jurisdiction when an employee serves a suspension); *Jordan v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0003-06, *Opinion and Order on Petition for Review* (July 24, 2008).

Here, Employee’s appeal is now about a seventy two (72) duty hour or 6-day suspension, which does not meet the statutory requirement for appealable actions. Thus, his Petition For Appeal must be dismissed.

ORDER

It is hereby ORDERED that this matter is DISMISSED

² Prior to OPRAA, this Office exercised jurisdiction over an employee appealing a final agency decision that, *inter alia*, “effects an adverse action against him or her.”

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Administrative Judge