THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

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| In the Matter of: | ) | |
| | ) | |
| ELLSWORTH W. COLBERT | ) | |
| Employee | ) | OEA Matter No. 1601-0063-98P99 |
| v. | ) | Date of Issuance: April 5, 2006 |
| | ) | |
| DEPT. OF PUBLIC WORKS | ) | |
| Agency | ) | |
| | ) | |

OPINION AND ORDER
ON
PETITION FOR REVIEW

On August 7, 1997 the Department of Public Works ("Agency") informed Ellsworth Colbert ("Employee") of its intentions to remove him from his position as an Electronics Mechanic based on the charges of discourteous treatment of the public, a supervisor, or other employee; inexcusable neglect of duty; and insubordination. The first cause was based on a June 3, 1997 incident in which Employee engaged in a physical altercation with a supervisor. The second cause, inexcusable neglect of duty, was based on Employee's failure to perform certain tasks and comply with certain Agency rules during the period of June 16, 1997 to July 24, 1997.

The third cause, insubordination, was based on a July 21, 1997 incident in which Employee appeared at a particular work site in violation of a direct order not to do so.

Although Employee did not deny any of the charges, he nevertheless filed a Petition for Appeal with this Office to dispute the severity of the penalty. By Initial Decision dated March 1, 1999, the Administrative Judge dismissed the cause of discourteous treatment of the public, a supervisor, or other employee. The Administrative Judge reasoned that Agency had violated D.C. Code § 1-617.1(b-1)(1) by not commencing the adverse action within 45 business days of the act which formed the basis for the discourteous treatment charge.[1] As for the other two charges, the Administrative Judge sustained them but remanded the appeal to Agency for it to reconsider the penalty in view of the fact that only two charges had been upheld.

In "Agency's Decision on Remand," Agency again determined that Employee's conduct during the period from June 16, 1997 through July 24, 1997 and on July 21, 1997 warranted removing him from his position as an Electronics Mechanic. Agency argued that because removal was within the range of penalties for the sustained causes, it did not abuse its discretion by imposing that penalty. Agency also reviewed Employee's historical work record and found that it "reflect[ed] . . . [Employee's] disregard[] [for] established policies and procedures of the Agency." *Agency's Decision on Remand* at pg. 4. Thus Agency upheld its decision to remove Employee. Again Employee appealed this action claiming that the penalty was too severe.

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[1] The Administrative Judge found that the incident which formed the basis for this charge occurred on June 3, 1999; however, Agency did not propose Employee's removal until August 7, 1997– 47 business days after the incident.

In a second Initial Decision issued on May 24, 1999 the Administrative Judge reversed Agency's actions and ordered Agency to reimburse Employee for lost pay and benefits as a result of its original action. Even though the Administrative Judge recognized that "[r]emoval [was] a permitted penalty for both violations," she, nevertheless, determined that it was an inappropriate penalty in this case. The Administrative Judge reasoned that because Agency's consideration of Employee's prior work record was not within the bounds permitted by section 1608.2 of Chapter 16 of the District Personnel Manual, it had abused its discretion. Further the Administrative Judge found that Agency had failed to consider certain factors, commonly known as the Douglas factors, when it evaluated the appropriateness of the penalty. Therefore, the Administrative Judge ordered Employee back to work. Subsequently, Agency filed a Petition for Review.

When we considered this case for the first time on February 25, 2000, we were not able to conclude that Agency had fully evaluated its penalty in light of the Douglas factors as enunciated in *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280 (1981). Therefore, we remanded the appeal to Agency to consider each of the Douglas factors as they may relate to Employee's case and to reconsider the penalty in this case in light of those factors.

In its report on remand Agency cited to all of the Douglas factors and concluded that most of the factors were relevant in this case.[2] Agency also submitted several more documents, including letters to Employee, personnel action forms, performance rating reports, and an affidavit of Employee's supervisor, to support its claim regarding the appropriateness of the

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[2] Agency found that the Douglas factor regarding the notoriety of the offense was insignificant to Agency's decision to terminate Employee and that Employee's past disciplinary record could not be considered in light of section 1608.2 of the District Personnel Manual which governs admonitions, reprimands, and prior corrective [illegible] adverse actions.

penalty chosen in this case. When we looked at all of this evidence in its totality, we found that the penalty of removal was still warranted. Thus in a second Opinion and Order issued May 18, 2000 we upheld Agency's action.

Employee then filed a petition for review in the Superior Court of the District of Columbia. That court reversed our decision finding that it was clearly erroneous for several reasons.

Thereafter, Agency appealed to the District of Columbia Court of Appeals. In a decision rendered May 5, 2005, that court remanded the appeal to us so that we could reconsider the Administrative Judge's "decision within the established scope of review and limited to the evidentiary record presented to the [Administrative Judge]". The court held that we had erred :n we considered the documents pertaining to Employee's historical work record that Agency submitted in its Report on Remand. The court reasoned that because the Administrative Judge had not admitted those documents into evidence before the record was closed, we were without the authority to consider them. Also, the court suggested that we remand the appeal to the Administrative Judge so that he or she may consider "DPW's Agency Report on Remand applying the *Douglas* factors, including the additional evidence supplied by DPW and Colbert."

In our third Opinion and Order, issued June 22, 2005, we remanded this appeal to the Administrative Judge with instructions for him to admit into the record all of the documents pertaining to Employee's historical work record. Further, we ordered him to give this information "the proper consideration in light of the *Douglas* factors that Agency deemed applicable to this :eal."

On September 8, 2005, the Administrative Judge reopened the record for the purpose of admitting into evidence Employee's historical work records and Employee's response to this documentation. Thereafter, the record was closed on September 17, 2005. After a careful and thorough consideration of this newly admitted evidence, the Administrative Judge issued an Initial Decision on Remand on October 3, 2005 in which he upheld Agency's action of removing Employee from his position. By operation of law, that decision became final on November 7, 2005.

On February 17, 2006, Employee filed a Petition for Review. Because Employee's petition was not timely filed, we no longer have jurisdiction to consider this appeal. D.C. Official Code § 1-606.03(c) provides that an "initial decision . . . shall become final 35 days after issuance, unless a party files a petition for review of the initial decision with the Office within the 35-day filing period." That section goes on to provide that "[a]dministrative remedies are considered exhausted when a decision becomes final in accordance with this section." We have consistently held that a petition for review filed after the initial decision becomes final must be dismissed for lack of jurisdiction. *See Alexis v. Office of the Chief Fin. Officer*, OEA Matter Nos. 1601-0120-97 *et. seq*, *Opinion and Order on Petition for Review* (Oct. 10, 1997), ___D.C. Reg. ___ ( ); *Hutton v. D.C. School of Law*, OEA Matter No. 1602-0091-92, *Opinion and Order on Petition for Review* (Jan. 29, 1998), ___D.C. Reg.___ ( ). Employee should have filed his Petition for Review by November 7, 2005. Because he did not, we must deny the Petition for Review and dismiss this appeal for lack of jurisdiction.

## ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is DENIED and this appeal is **DISMISSED.**

FOR THE BOARD:

Brian Lederer, Chair

Horace Kreitzman

Jeffrey T. 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.