

1 **II. FACTUAL BACKGROUND**

2 ¶2 At all times material hereto, Petitioner was employed by the Commonwealth’s Department
3 of Finance. On or about May 11, 1998, he was served with a Notice of Disciplinary Action
4 suspending him for a period of three working days. Petitioner filed a formal grievance with the
5 Secretary of Finance to protest the disciplinary action on or about May 25, 1998. When the
6 Secretary of Finance failed to address the grievance, on or about June 12, 1998, Petitioner appealed
7 to CSC.

8 ¶3 Shortly thereafter, Petitioner received a notice of proposed adverse action to suspend him for
9 a period of fifteen days without pay for his alleged failure to comply with instructions and
10 insubordination. Although Petitioner responded to the notice, he was suspended for a fifteen days.

11 ¶4 While his appeal of the suspension was pending, on or about August 25, 1998, the Secretary
12 of Finance issued another notice of proposed adverse action to terminate Petitioner’s employment
13 based on Petitioner’s alleged refusal and failure to carry out instructions, insubordination, and
14 neglect of duties. On or about September 25, 1998, the Secretary of Finance terminated Petitioner’s
15 employment, effective September 26, 1998. On September 28, 1998, Petitioner timely appealed his
16 termination to the CSC.

17 ¶5 The Commission convened to hear the two pending grievances and three appeals on March
18 29, 2000. A Decision and Order subsequently issued, signed and dated by five of the
19 Commissioners, on August 17, 2000, and by a sixth Commissioner on August 22, 2000. The
20 Decision and Order does not bear a date stamp indicating when it was filed or entered.

21 ¶6 Petitioner contends that his counsel received a copy of the Decision and Order on August 24,
22 2000 (Complaint, Ex. “G”), and that the period of time for filing his appeal should commence upon
23 receipt of the decision. Without reference to any authority, Respondents argue that the period for
24 review commences on the date that the administrative decision was executed, and, where, as here,
25 the administrative decision was executed on two separate dates, the date triggering the start of the
26 period for filing a petition for judicial review is August 22, 2000, the date upon which the sixth
27
28

1 Commissioner executed the Order.^{1/} Since the statute creating the right to an appeal does not specify
2 when the date that the period for filing a petition for judicial review begins, the issue in this case is
3 the when the date triggering the time for appeal begins to run.

4 III. QUESTION PRESENTED

5 ¶7 In the absence of a statute specifying when the period for filing a petition for judicial review
6 of agency action begins to run, whether the thirty day period for filing an appeal begins to run on
7 the last date that a Commissioner executes the decision, the date that the decision was received, or
8 some other point in time.

9 IV. ANALYSIS

10 ¶8 The Administrative Procedure Act (the “APA”) provides for judicial review of “[a]gency
11 action made reviewable by statute and final agency action for which there is no other adequate
12 remedy in a court.” See 1 CMC § 9112(d). A party aggrieved by an agency’s action may seek
13 judicial review of the action within thirty days of the agency’s final decision about the matter in
14 question. See 1 CMC § 9112(b).^{2/} This court lacks jurisdiction to review administrative decisions
15 under the APA that are not appealed within thirty days of the agency action. See *Rivera v.*
16 *Guerrero*, 4 N.M.I. 79, 84 (1993).

17 ¶9 The parties agree that in this case, the agency action at issue is the Decision and Order
18 upholding the suspensions, affirming the unsatisfactory performance rating, and sustaining the
19 termination of Petitioner’s employment. Pursuant to 1 CMC § 9110, moreover, the Decision and
20 Order is the consummation of CSC’s decisionmaking process. The parties thus agree, and the court
21 therefore finds, that in this case, the Decision and Order qualifies as final agency action subject to
22 judicial review. See *Tano Group, Inc. v. Zachares*, Civil Action No. 01-0191E (N.M.I. Super.Ct.
23 June 11, 2001) (Order Granting Motion to Dismiss); *In re Bitoy v. Rodeo*, Civil Action No. 93-1073

24
25 ^{1/} Respondents further maintain that the Commission’s Order was final on August 17, 2000 since the statutory two-
26 thirds had executed the order on that date. Motion at 2, n.1.

27 ^{2/} 1 CMC § 9112 provides for judicial review of all agency actions unless the statute governing the agency action
28 explicitly precludes such review. In material part, 1 CMC § 9112(b) provides: “ A person suffering legal wrong because
of agency action, or adversely affected or aggrieved by agency action, is entitled to judicial review of the action within
30 days thereafter in the Commonwealth Superior Court.”

1 (N.M.I. Super.Ct. May 5, 1994) (agency action should be considered “final” when the agency has
2 spoken decisively on the issue and when judicial involvement in the dispute will settle it).

3 ¶10 Although 1 CMC § 9112(b) conditions the entitlement to an appeal to its commencement
4 within thirty days of the agency action, Petitioner nevertheless argues that the time for filing an
5 appeal under 1 CMC § 9112(b) should commence upon receipt of the agency’s decision. Without
6 reference to any statutory authority, the Commonwealth argues that the thirty day period begins to
7 run either on the date that two-thirds of the members of the Civil Service Commission sign and date
8 a decision or, as in this case, on the last date that the decision was executed by a member of the
9 Commission.

10 ¶11 In addressing a similar question under the Nonresident Worker’s Act, 3 CMC § 4446, the
11 CNMI Supreme Court has ruled that the period for filing a petition for judicial review of agency
12 action begins to run from the date that the decision was issued: that is, on the date that the agency
13 entered or filed the decision. *See Pacific Saipan Technical Contractors v. Rahman*, Appeal No. 99-
14 0143 (N.M.I. Sup.Ct. Oct. 17, 2000), Slip Op. at 7. In so doing, the Court noted that although the
15 Nonresident Worker’s Act did not use the word “issuance,” construing the date of the decision as
16 the date of issuance was reasonable when, as here, the decision or order of the agency qualified as
17 “final agency action.” *Id.* Integral to the Court’s ruling, moreover, was the absence of any
18 reference in the statute to judicial review being initiated upon “receipt” of the order or decision.
19 *See Id.* at 8, citing *Holzbau v. United States*, 866 F.2d 427 (Fed. Cir. 1989) (noting that had
20 Congress intended for the “date of receipt” to govern the 30-day appeal period under Equal Access
21 to Justice Act, it would have provided as such); *Tielsch v. City of Anaheim*, 160 Cal. App.3d 576,
22 206 Cal. Rptr. 740 (Cal. Ct. App. 1984) (concluding that if Legislature intended time for appeal
23 from local agency action to run from date of service of notice instead of date of decision, it could
24 have so provided). Notwithstanding the due process concerns that, in Petitioner’s view, threaten to
25 deprive complainants of their right to appeal absent evidence of timely notice, moreover, the Court
26 expressly rejected a construction of the statute that would trigger the period for filing an appeal upon
27 the receipt of the administrative decision. *See Rahman*, Slip Op. at 8-9.

28

1 ¶11 Although the APA, like the Nonresident Worker’s Act, does not specifically condition the
2 finality of an agency’s decision upon issuance, the court concludes that where, as here, CSC’s Order
3 and Decision qualifies as final agency action, the deadline for filing a petition for judicial review
4 likewise begins to run from the issuance of the agency’s decision. Such an interpretation is not only
5 consistent with the plain language of the APA, conditioning the right to appeal upon a petition for
6 judicial review being filed within thirty days of the agency action, but also has the advantage of
7 providing an unambiguous and well-documented starting point for the thirty-day period. *See*
8 *Rahman*, Slip Op. at 8.

9 ¶12 Absent a date stamp indicating the date upon which the decision was filed or entered, or
10 other evidence conclusively establishing these facts, the court cannot determine what this date was
11 under the facts and circumstances presented. Moreover, when considering a motion to dismiss, the
12 court must accept the allegations in the complaint as true and construe them in a light most favorable
13 to the plaintiff. *Govendo v. Micronesian Garment Mfg., Inc.*, 2 N.M.I. 272 (283 (1990)). Dismissal
14 is improper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of
15 his claim which would entitle him to relief. *Id.* Although the Decision and Order was signed and
16 executed, as noted above, on two separate dates, there is no concrete evidence establishing the date
17 of the decision’s issuance. Since Petitioner could, conceivably, prove a set of facts establishing that
18 the decision was filed or entered later than the date when it was supposedly signed, this court cannot
19 rule at this point in the proceedings that the Petition for Judicial Review was untimely as a matter
20 of law. Accordingly, the motion to dismiss for lack of jurisdiction is DENIED.

21 ¶13 Respondents seek to dismiss the Department of Finance from this proceeding on grounds that
22 it is not a proper party to this suit. There being no objection from Petitioner, the court GRANTS
23 the motion and dismisses the Department of Finance as a respondent.

24 ¶14 Com. R. Civ. P. 12(f) provides in pertinent part that “upon motion by a party . . . the court
25 may order stricken from any pleading . . . any redundant, immaterial, impertinent, or scandalous
26 matter.” Without specifically naming which portions of the petition qualify as redundant, immaterial
27 or impertinent, however, Respondent contends that those portions of the petition relating to the
28

1 factual background, as well as “assertions and summaries set forth in paragraphs 5-62” are
2 immaterial and impertinent and should be stricken.

3 ¶15 “'Immaterial' matter is that which has no essential or important relationship to the claim for
4 relief or the defenses being pleaded.” 5 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE
5 § 1382, at 706-07 (1990). “'Impertinent' matter consists of statements that do not pertain, and are
6 not necessary, to the issues in question.” *Id.* at 711. When a complaint does not comply with Rule
7 8(a)(2)’s requirements of conciseness and simplicity, the court has the power, on its own initiative
8 or in response to a motion by the defendant, to strike any portions that are redundant or immaterial,
9 or to dismiss the complaint. *See* Com. R. Civ. P. 12(f). Motions to strike, however, are disfavored
10 in the absence of prejudice. *Wailua Associates v. Aetna Cas. and Sur. Co.*, 183 F.R.D. 550, 555
11 (D.Haw. 1998). As the District Court of Hawaii has recognized, “[a] motion to strike is a severe
12 measure and it is generally viewed with disfavor [and is] not normally granted unless prejudice
13 would result to the movant from the denial of the motion.” *United States v. 729, 773 Acres of Land*,
14 531 F.Supp. 967, 971 (D.Haw.1982).

15 ¶16 Where, as here, a party fails to identify or specify which particular portions of the petition
16 are immaterial or impertinent and merely refers to 53 paragraphs of a complaint, the court has no
17 obligation to sift through the allegations to determine which of them should be stricken. For this
18 reason, the motion to strike is DENIED.

19 **ORDER**

20 ¶17 On the basis of the foregoing, the motion to dismiss or strike the petition is DENIED. The
21 Department of Finance is hereby dismissed as a respondent in this proceeding.

22
23 So ORDERED this 7th day of August, 2001.

24
25
26 /s/ _____

27 TIMOTHY H. BELLAS, Associate Judge