**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| LAKEBA WATKINS, | ) | |
| Employee | ) | |
| | ) | |
| v. | ) | OEA Matter No. 1601-0093-07 |
| | ) | |
| | ) | Date of Issuance: January 25, 2010 |
| DEPARTMENT OF YOUTH | ) | |
| REHABILITATION SERVICES, | ) | |
| Agency | ) | |
| | ) | |

**OPINION AND ORDER**
**ON**
**PETITION FOR REVIEW**

Lakeba Watkins ("Employee") worked as a Youth Correctional Officer for the Department of Youth Rehabilitation Services ("Agency"). On August 29, 2006, Employee tested positive for an illegal substance when a random drug test was administered in accordance with Agency's Mandatory Employee Drug and Alcohol Treatment Program ("MEDAT"). Employee agreed to enter the District Government's Employee Assistance Program to determine the severity of her drug problem and to get treatment for the substance abuse. As a condition of her employment, Employee agreed to periodic testing for drug and alcohol use for six months following the completion of

her treatment.[1]

On February 6, 2007, Employee was subjected to a urinalysis. The collector noted that the specimen was below the required temperature of at least ninety degrees. As a result, the specimen was considered adulterated and was not tested.[2] In accordance with the MEDAT policy, Employee was terminated.[3]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on June 29, 2007. She argued that Agency improperly terminated her because it violated its own 45-day rule in issuing its final decision. Therefore, she asked to be reinstated with back pay.[4]

On August 10, 2007, Agency filed its response. It asserted that Employee was properly terminated because she either tampered with the test specimen or attempted to circumvent the test procedure. Agency believed that Employee's conduct threatened the integrity of government operations because the use of illegal drugs could have hampered Employee's judgment; hindered her ability to effectively manage crisis situations at work; and was an immediate hazard to the youth within her care. Agency also argued that because of Employee's drug use, her supervisors and coworkers could not depend on her judgment or her mental and physical abilities.[5]

As for Employee's argument regarding the 45-day rule, Agency contended that

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[1] *Petition for Appeal,* Attachment #5 (June 29, 2007).
[2] Specimen under ninety degrees are deemed outside of the range of temperature acceptable for testing.
[3] Agency relied on MEDAT Program Policy Number YSA 3.10.1 (V)(D)(4) which states that "a refusal to submit urine or breath testing, willful tampering with test specimens or any attempt to circumvent the testing process constitutes a violation of this policy and shall result in termination of employment." *Agency's Answer to Employee's Petition for Appeal,* p. 3 (August 10, 2007).
[4] *Petition for Appeal,* p. 3 (June 29, 2007).
[5] *Agency's Answer to Employee's Petition for Appeal,* p. 3-4 (August 10, 2007).

although the District Personnel Regulations provides that a final agency decision "shall be rendered not later than forty-five days from the date of delivery of the summary suspension or summary removal notice," case law found that the language was directory and not mandatory. Agency argued that *Teamsters Local Union 1714 v. Public Employee Relations Board,* 579 A.2d 706 (D.C. 1990), held that a statutory time period is not mandatory unless it both expressly requires an agency to act within a particular time period and specifies a consequence for its failure to comply. Therefore, because the personnel regulation regarding the 45-day rule does not specify a consequence, the regulation is not mandatory. Additionally, it argued that any prejudice that Employee may have faced by it rendering its decision after 45 days is outweighed by the public's interest.[6]

On November 21, 2007, the OEA Administrative Judge ("AJ") held an evidentiary hearing on the merits of the case. After hearing from a number of witnesses, the AJ issued his Initial Decision on January 30, 2008. He held that because Employee's urine sample was below ninety degrees, it was indeed adulterated. Therefore, he concluded that because Employee's urine sample was deemed adulterated, it was positive for drugs. He did not find Employee's reasons for why the specimen was below the required temperature to be credible and believed that her testimony contradicted that of the Agency's medical expert. Hence, he ruled that Employee was properly removed and upheld Agency's decision.[7]

Employee disagreed with the Initial Decision and filed a Petition for Review with

[6] *Id.*
[7] *Initial Decision,* p. 4 (January 30, 2008).

the OEA Board on March 4, 2008. She provided that the Initial Decision was erroneous because the AJ found that Employee tested positive for drugs when the evidence clearly proved that her specimen was never tested. Employee also argued that Agency violated the 45-day rule when it issued its final decision after the required deadline. Accordingly, she requested that the Board reverse Agency's decision to remove her.[8]

This Board will not address whether the AJ properly concluded that an adulterated urine sample is considered positive for drug use. We will, however, focus on Employee's argument that Agency violated the 45-day rule. District Personnel Regulation §1614.3 provides that:

> "the final decision in the case of a summary removal . . . shall be rendered not later than forty-five days from the date of delivery of the summary suspension or summary removal notice . . . except that the period may be extended as follows:
> (a) When the employee requests and is granted an extension of time in which to respond under section 1611.2; or
> (b) When the employee agrees to an extension of time requested by the agency."

Agency properly asserts that a statutory time period is not mandatory unless it both expressly requires an agency to act within a particular time period and specifies a consequence for its failure to comply. District Personnel Regulation §1614.3 provides a clear time limit for issuing final decisions in summary removal matters, but it does not offer a consequence for failing to strictly adhere to the regulation.[9] Therefore, because the personnel regulation regarding the 45-day rule in this case does not specify a

[8] *Petition for Review* (March 4, 2008).
[9] For example, the Court in *Metropolitan Police Department v. Public Employee Relations Board,* 1993 WL 761156 (D.C. Super.), found statutory language mandatory, not directory, where it provided that no adverse action shall be commenced 45 days after an agency knew or should have known of the act constituting the charge. The current case is clearly distinguishable.

consequence, the regulation is directory, not mandatory.[10]

In this case, the summary removal notice was issued on February 9, 2007. However, Agency's final decision was not issued until May 21, 2007; 101 days after the summary notice was issued. It is likely that the purpose of 45-day limit was to shorten the time in which an employee is faced with the uncertainty about when they may be subjected to removal. However, as suggested in *Teamster*, the designation of a time limit cannot be considered a limitation of an agency's power to act.[11] Therefore, Agency's failure to adhere to the 45-day rule does not prevent it from removing Employee.

The Court in *JBG Properties, Inc. v. D.C. Office of Human Rights*, found that although lengthy delays could unfairly prejudice an employee, it should be balanced against the public interest. In this case, Agency argued that Employee's conduct threatened the integrity of government operations because the use of illegal drugs could have hampered Employee's judgment; hindered her ability to effectively manage crisis situations at work; and was an immediate hazard to the youth within her care. When weighed against the prejudice to Employee, it is clear that the public interest outweighs any procedural delay in this matter.

Removal was appropriate in this matter because the MEDAT Program Policy Number YSA 3.10.1 (V)(D)(4) provides that "a refusal to submit urine or breath testing, willful tampering with test specimens or any attempt to circumvent the testing process constitutes a violation of this policy and shall result in termination of employment." The

[10] *Id.* and *JBG Prop., Inc. v. D.C. Office of Human Rights*, 364 A.2d 1183, 1185 (D.C. 1976).
[11] *Teamsters Local Union 1714 v. Public Employee Relations Board*, 579 A.2d 706 at 710 (D.C. 1990).

AJ relied on Agency's Laboratory Technician and its Medical Review Officer to conclude that Employee's urine sample was adulterated and could have only been below ninety degrees if Employee was in a coma. In contrast, Employee offered no reasonable explanation, nor did she present any expert witnesses to dispute Agency's witnesses' claims. This Board has consistently held that on credibility issues, we will defer to the AJ's assessment.[12] Accordingly, we deny Employee's Petition for Review.

[12] *Metropolitan Police Department v. Ronald Baker,* 564 A.2d 1155 (D.C. 1989), ruled that great deference to any witness credibility determinations are given to the administrative fact finder.

**ORDER**

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

FOR THE BOARD:

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Sherri Beatty-Arthur, Chair

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Barbara D. Morgan

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Richard F. Johns

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Hilary Cairns

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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.