THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	OEA Matter No. 1601-0037-20
	)	
v.	)	Date of Issuance: February 24, 2022
	)	
DEPARTMENT OF YOUTH REHABILITATION SERVICES, Agency	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Maintenance Mechanic Lead for the Department of Youth Rehabilitation Services ("Agency"). On December 31, 2019, Employee was notified of Agency's decision to suspend him without pay for fifteen (15) days for violation of Chapter 6B of the District Personnel Manual ("DPM") §1607.2 (d)(2) - Failure/Refusal to Follow Instructions: Deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions. According to Agency, Employee refused to follow several directives to hand-scan in and out of the Youth Services Center to track his time and attendance. After conducting an internal

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.

review, Agency's Deciding Official found that there was cause for Employee to be suspended. On February 18, 2020, the Deciding Official issued their final decision, suspending Employee for fifteen days.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on March 19, 2020. Employee argued that the adverse action violated the terms of the Collective Bargaining Agreement ("CBA") between Agency and the American Federation of State, County & Municipal Employees (the "Union"); the suspension violated the DPM; and the adverse action was based on factual inaccuracies that served as a pretext to his discipline. He further claimed that Agency violated Chapter 6-B, § 1602.3(a) of the DPM, commonly referred to as the "90-day rule" which requires an agency to initiate adverse action proceedings against employees within ninety days after it knew or should have known of the act constituting cause. Additionally, Employee contended that the imposition of the fifteen-day suspension failed to honor the principal of progressive discipline as required by the DPM and the CBA. As a result, he requested that his suspension be reversed.[2]

Agency submitted its Answer to Employee's Petition for Review on August 5, 2020. It disagreed with Employee's argument and explained that it had cause to discipline him for failure to follow instructions when he did not hand-scan upon the start and the end of the workday, in accordance with the time and attendance policies. Additionally, Agency stated that Employee's suspension was an appropriate penalty under the applicable personnel regulations and the relevant

[2] *Petition for Appeal* (March 19, 2020).

Douglas factors.[3] It opined that Employee's conduct interfered with the efficiency and integrity of government operations. Therefore, it asked that Employee's appeal be dismissed.[4]

An OEA Administrative Judge ("AJ") was assigned to the matter in December of 2020. The AJ held a status conference on February 17, 2021 to assess the parties' arguments. During the conference, the AJ determined that an evidentiary hearing was warranted. However, prior to the April 7, 2021 hearing, she ordered the parties to submit briefs addressing whether Agency violated

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[3] In *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), the Merit Systems Protection Board, this Office's federal counterpart, set forth factors that are relevant for consideration in determining the appropriateness of a penalty. Though not exclusive, the factors include the following:

1. The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;
2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; 3.
3. The employee's past disciplinary record;
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7. Consistency of the penalty with any applicable agency table of penalties;
8. The notoriety of the offense or its impact upon the reputation of the agency;
9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10. Potential for the employee's rehabilitation;
11. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[4] *Agency's Answer to Employee's Petition for Review* (August 5, 2020).

DPM § 1602.3(a) and whether it engaged in progressive discipline prior to the instant adverse action.

In its brief, Agency asserted that the fifteen-day suspension was a proper exercise of managerial discretion and that it engaged in progressive discipline with Employee. According to Agency, Employee was provided with verbal counseling on July 16, 2019, during which the hand-scan requirement was discussed. It also maintained that the scan requirement was re-emphasized by way of several emails to Employee from July of 2019 through November of 2019. Agency noted that Employee previously received notice of a three-day suspension based on a separate failure to follow instructions charge. Regarding the 90-day rule, Agency maintained that it did not violate § 1602.3(a). It reasoned that there was no way that it could have known that Employee would never comply with the instructions for hand-scans and explained that Employee's refusal to comply with the time and attendance policy was gradual and ongoing. Thus, Agency believed that the fifteen-day suspension constituted progressive discipline and did not violate the 90-day rule because the advance notice was issued in a timely manner.[5]

In his brief, Employee stated that Agency failed to provide him with verbal counseling as it claimed. He submitted that there was no credible evidence in the record to show that Agency took progressive steps before suspending him. As it related to DPM § 1602.3(a), Employee opined that the mandatory nature of the regulatory language, as well as relevant case law, required Agency to issue its notice of proposed adverse action no later than ninety days after Employee first refused to follow instructions for hand-scanning on July 15, 2019. He further contended that many of

[5] *Agency's Brief* (March 10, 2021).

Agency's assertions contained in its brief were contrary to the documentary evidence in the record. Therefore, Employee requested that his suspension be reversed.[6]

Agency filed a Sur-Reply Brief on April 9, 2021. It disagreed with Employee's argument that the ninety-day period under § 1602.3(a) was triggered on July 15, 2019. Instead, it posited that it was not until Employee continued to fail to hand-scan, in the face of repeated instruction through November of 2019, that Agency realized that Employee was refusing to follow instructions. Thus, it was Agency's position that it did not violate the 90-day rule. Moreover, Agency maintained that Employee's counterarguments failed based on his interpretation of the CBA, relevant case law, and the regulatory language of DPM § 1602.3(a). Consequently, it reiterated its previous assertion that Employee's Advance Notice of Fifteen-Day Suspension was timely.[7]

The AJ issued an Initial Decision on September 22, 2021. First, she highlighted the language of DPM § 1602.3(a), which provides that a "corrective or adverse action shall be commenced no more than ninety (90) business days after the agency or personnel authority knew or should have known of the performance or conduct supporting the action." She noted that the OEA Board has previously held that the legislative intent of the provision was to "establish a disciplinary system that included *inter alia*, agencies provide prior written notice of the grounds on which the action is proposed to be taken." Additionally, the AJ provided that like its statutory counterpart found in D.C. Code § 5- 1031, the language of § 1602.3(a) is mandatory in nature.[8]

Concerning when Agency first knew or should have known of Employee's conduct forming the basis of the instant appeal, the AJ held that July 31, 2019, was the date that should

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[6] *Employee's Brief* (March 25, 2021).
[7] *Agency's Sur-Reply Brief* (April 9, 2021).
[8] D.C. Code § 5-1031 is only applicable to those employed by the Metropolitan Police Department or the D.C. Fire and Emergency Medical Service agencies

serve as the anchor date for purposes of § 1602.3(a). She explained that Employee was given specific instructions to set up a scan profile by July 19, 2019, and to begin hand-scanning on July 22, 2019. However, the AJ stated that a July 31, 2019 follow-up email presented clear evidence that Agency knew or should have known that Employee was not following instructions considering the specific deadline it set for him to comply with its instructions. She provided that the documentary and testimonial evidence supported a finding that Agency consistently referred to Employee's failure to abide by the instructions for hand scans as a refusal to follow instructions.[9]

As it related to Agency's argument that it could not have known that Employee was going to fail to follow instructions until November of 2019, the AJ concluded that this argument was disingenuous because it relied on July dates in its adverse action as a basis for suspending Employee. According to the AJ, the October 2019 and November 2019 emails regarding hand-scanning were memorandums sent to all staff members. As such, she concluded that that Agency knew or should have known that Employee was refusing to follow instructions by the time it sent its July 31, 2019 correspondence. Because Agency's Advanced Written Notice was dated December 31, 2019, the AJ held that the notice was untimely because it was issued more than ninety days after December 10, 2019, the ninetieth business day following the date when Agency was placed on notice of Employee's failure to follow instructions. Accordingly, the AJ ruled that Agency violated the mandatory nature of DPM § 1602.3(a). Therefore, Employee's fifteen-day suspension was reversed, and Agency was ordered to reimburse Employee all back-pay and benefits lost as a result of the adverse action.[10]

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[9] *Id.*

[10] *Id.* The AJ noted that she would not address whether Agency, in administering this adverse action, had cause to do so or any other issues raised by the parties because the violation of the 90-day rule warranted an outright reversal of Employee's suspension.

Agency disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on October 27, 2021. It contends that the record contradicts the AJ's finding that July 31, 2019, was the correct date to trigger the 90-day rule. It states that the record makes clear that Agency's suspension was based on Employee's deliberate refusal to clock in and out of work using a hand-scanner and that it could not have reasonably known by July 31, 2019, that Employee's failure to use the hand-scanner was deliberate. Agency also states that the Initial Decision is not based on substantial evidence record, noting that the application of DPM § 1602.3(a) was unnaturally rigid.[11]

According to Agency, the AJ did not sufficiently explain its finding in context with the record, as she omitted a discussion of material issues of fact relevant to three of the five instances wherein Employee ignored instructions. Agency echoes its previous sentiment that it could not reasonably have known by July 31, 2019, that Employee's failure to follow hand-scanning instructions was deliberate or malicious. Alternatively, Agency suggests that even if the OEA Board upholds July 3l, 2019, as the trigger date, it should nonetheless be permitted to discipline Employee for his refusal to follow instructions. As a result, it opines that the Initial Decision is based on an erroneous interpretation of DPM § 1602.3(a). Therefore, it requests that this Board reverse the Initial Decision and uphold Employee's fifteen-day suspension.

Substantial Evidence

On Petition for Review, this Board is tasked with determining whether the AJ's findings of fact and conclusions of law are based on substantial evidence in the record. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527

[11] *Petition for Review* (October 27, 2021).

A.2d 313 (D.C. 1987) found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. For the reasons discussed herein, this Board finds that the AJ's conclusions regarding the 90-day rule are not supported by substantial evidence in the record.

90-Day Rule

Agency relied on the following DPM regulation to suspend Employee for fifteen days:

> 1602.3 Corrective and adverse actions taken against employees are subject to the following limitations:
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> a. A corrective or adverse action shall be commenced no more than ninety (90) business days after the agency or personnel authority knew or should have known of the performance or conduct supporting the action.

Historically, courts have ruled on matters pertaining to the ninety-day rule as it related to D.C. Code § 5-1031. This statutory language is only applicable to those employed by the Metropolitan Police Department or D.C. Fire and Emergency Medical Services agencies. In 2016, the ninety-day rule was established in the form of a regulation to apply to other District Government agencies. According to the comments provided in the 2016 regulation, the "rules implemented the new discipline and grievances provision pursuant to D.C. Official Code § 1- 616.51 et seq." D.C. Official Code § 1- 616.51 provided that the District government sought "a radical redesign of the adverse and corrective action system[,] by replacing it with more positive approaches toward employee discipline[,] is critical to achieving organizational effectiveness." To achieve its goal, the Mayor, Board of Education, and the Board of Trustees of the University of the District of Columbia issued rules and regulations to establish a disciplinary system that included, inter alia, that agencies provide prior written notice of the grounds on which the action is proposed to be

taken. This was also interpreted by this Office as the intent for the newly-revised DPM § 1602 regulation.[12]

In *District of Columbia Fire and Medical Services Department v. D.C. Office of Employee* Appeals, the D.C. Court of Appeals held that the goal of the D.C. Council, in establishing the ninety-day rule, was "motivated by the 'exorbitant amount of time that the [adverse-action] process' was taking, such that . . . employees had to wait 'months or even years to see the conclusion of an investigation against them." The Court found that the deadline was intended to bring certainty to employees of an adverse action that may otherwise linger indefinitely. Since the language in the D.C. Official Code § 5-1031(a)-(b) and DPM § 1602.3(a) is sufficiently the same, it follows that under the DPM, an agency is barred from issuing a notice of adverse action, if it was not done by the mandated ninety-day deadline of when the agency knew or should have known of the employee's conduct.

At issue in this matter is when Agency knew or should have known of the conduct forming the basis of the charges against Employee. Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. The DPM provides that failure or refusal to follow instructions constitutes cause for adverse action. Specifically, DPM §1607.2(d)(2) defines failure/refusal to follow instructions to include the deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions. In this case, Agency's Advance Notice of Fifteen-Day Suspension provided the following:

> "Grounds for Discipline": The DPM defines Failure/Refusal to Follow instructions in part as'[d]eliberate or malicious refusal to

[12] *Employee v. Department of General Services*, OEA Matter No. 1601-0053-17 (January 14, 2020).

> comply with rules, regulations, written procedures or proper supervisory instructions.' Here, you deliberately failed to follow supervisory instructions…."[13]

The notice specified several instances on which Agency provided hand-scan instructions to Employee as July 15, 2019, July 31, 2019, August 19, 2019, October 1l, 2019, and November 19, 2019. The AJ concluded that July 31, 2019, was the date on which Agency knew or should have known that Employee was refusing to follow instructions for time reporting. She reasoned that following Employee's failure to abide by specific instructions to set up a scan profile by July 19, 2019 and to begin hand scanning on July 22, 2019, Agency sent an email to Employee on July 31, 2019. According to the AJ, Agency's July 31, 2019 follow-up email constituted clear evidence that it knew that Employee was not following instructions, particularly given the specific deadline it set for Employee to comply with its instructions. However, this Board believes that the record does not support a finding that Employee's failure to comply with the hand-scan protocol on July 31, 2019, just days after the initial July 22, 2019 deadline, constitutes clear evidence of deliberate or malicious refusal to follow instructions.

On July 15, 2019, Employee's Supervisor, Justin Samples ("Samples"), instructed Employee via email to meet with Human Resource Specialist, Christina Courtney ("Ms. Courtney"), to go over instructions for how to properly log in using the hand-scan machine.[14] When asked about the request, Samples testified that Employee initially refused to set up the scan until his union representative was present.[15] However, the next day, Employee had an in-person, verbal counseling session with his union representative, Samples, Program Manager William Boberg ("Boberg"), and another supervisor, wherein they informed him that he was required to

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[13] *Agency Answer to Petition for Appeal*.
[14] *Evidentiary Hearing Transcript*, Tab 6.
[15] *Tr*. pg. 22.

begin using the scanning device no later than July 22, 2019.[16] While he did not set up his account by that date, on July 31, 2019, Samples sent another email to Employee stating that Ms. Courtney was available at 10 a.m. on August 1, 2019, to assist with setting up the account.[17] When asked about the July 31, 2019 email, Employee testified to the following:

> Q: Okay, and emphasis on the word completing. Does this indicate that you were moving forward with setting up the [hand-scan] process?
>
> A: Yes, this is actually the second time I met with Ms. Courtney. I was unable to do it the first time.[18]

Moreover, Employee eventually met with Ms. Courtney on August 2, 2019, to set up his hand-scan account.[19] Then, on August 19, 2019, when Agency followed up with Employee about why he had yet to begin scanning, Employee stated that his hand was in a medical cast because of a recent injury; therefore, he could not use the scanning device. Based on a review of the record as well as the testimony provided during the evidentiary hearing, this Board does not believe that Agency's July 31, 2019 follow-up email to Employee constituted a date on which it reasonably could have known that his conduct amounted to a clear repudiation of instructions. There is no persuasive evidence in the record to support a finding that Employee's failure to comply with the July 19, 2019 instructions for time reporting on July 31st was deliberate or malicious. Employee was still in communication with Agency regarding setting up his account prior to, and after July 31, 2019. Therefore, we find that utilizing July 31, 2019, as an anchor date for purposes of calculating the ninety-day deadline under DPM § 1602.3(a) was unreasonable based on a totality of the circumstances because using this date failed to provide Agency sufficient time to determine

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[16] Tr. pgs. 25-26.
[17] Evidentiary Hearing Transcript, Tab 4.
[18] Tr. pg. 299.
[19] Tr. pg. 197.

whether Employee's conduct was intentional. Using this date would have also placed an unburden on Agency to institute the instant adverse action with such time rigidity that it disallowed Employee a reasonable opportunity to comply with instructions. Consequently, we cannot sustain the AJ's finding that July 31, 2019, is the date when Agency knew or should have known that Employee was in willful noncompliance with its instructions for hand-scanning.

As previously stated, historically, the courts have ruled on matters pertaining to the ninety-day rule as it related to D.C. Official Code § 5-1031, in an effort to bring certainty to employees who have potential discipline hanging over their heads, customarily in the form a pending investigation. Although not specifically discussed in the DPM, the OEA Board has concluded that it is reasonable to believe that the intent of § 1602.3(a) was similar to that provided by the D.C. Council when establishing the statutory language of the ninety-day rule.[20] However, in this case, there was no formal investigation into Employee's conduct. The instant adverse action is based on Employee's repeated failure to perform hand-scanning when clocking in and out of work. This Board agrees with Agency's position that Employee was not put on notice of an investigation that hung over his head that subjected him to the uncertainty of potential discipline because Employee continued his misconduct up to and through the date that Agency initiated discipline. This behavior is inconsistent with an employee who is concerned of impending discipline. Additionally, it is routine practice for an agency to institute adverse actions for failure to follow instructions based on several instances of misconduct.[21] Accordingly, we find that Agency's managerial discretion of not choosing to institute a suspension action against Employee until after it provided him with

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[20] *See Bickford supra*.
[21] *See Employee v. Department of Human Services*, OEA Matter No. 1601-0048-18 (June 17, 2021); *Employee v. D.C Office of Police Complaints*, OEA Matter No. 1601-0055-19 (August 6, 2020); and *Employee v. Department of Rental Housing*, OEA Matter No. 1601-0020-20 (February 25, 2021).

several opportunities to comply and avoid discipline is not contrary to the purpose of the 90-day rule as provided in the DPM.

Employee was given instructions to hand-scan on July 15, 2019, July 31, 2019, August 19, 2019, October 1l, 2019, and finally on November 19, 2019.[22] Agency provided Employee numerous opportunities to comply with the directives to avoid potential discipline; however, he failed to comply. As a result, Agency initiated its adverse action on December 31, 2019. For Agency to have violated DPM § 1602.3(a), the 90-day trigger date would have to be before August 2l, 2019, or ninety business days before December 31, 2019. The record reflects that Employee was still in active communication with Agency as of August 19, 2019, when he stated that he could not scan to clock in or out of work because of a cast on his hand. Accordingly, because Agency was not reasonably certain that Employee's failure to follow hand-scanning procedures by August of 2019 was deliberate or malicious, as required by DPM §1607.2(d)(2), its December 31, 2019 proposed notice of suspension of Employee did not violate the 90-day rule.

Conclusion

Based on the foregoing, this Board cannot sustain the AJ's finding that Agency violated DPM § 1602.3(a) by issuing its Advance Notice of Fifteen-Day Suspension to Employee on December 31, 2019. There is insufficient evidence in the record to show that Employee was either deliberately or maliciously defying Agency directives as of July 31, 2019. As a result, we find that Agency's advance notice was timely. Therefore, we reverse the Initial Decision and uphold Employee's fifteen-day suspension.

[22] The final notice to Employee was an email sent to all maintenance staff regarding time reporting.

ORDER

Accordingly, it is hereby ordered that Agency's Petition for Review is **GRANTED**. Therefore, the Initial Decision reversing Employee's fifteen-day suspension is **REVERSED** and Agency's suspension action is **UPHELD**.

FOR THE BOARD:

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Clarence Labor, Chair

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Patricia Hobson Wilson

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Jelani Freeman

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Peter Rosenstein

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Dionna Maria Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1