THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	
	)	OEA Matter No. 1601-0034-22
v.	)	
	)	Date of Issuance: September 7, 2023
DEPARTMENT OF CORRECTIONS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as an Operations Research Analyst with the Department of Corrections ("Agency"). On September 2, 2021, Employee received a Fifteen-Day Advance Written Notice of Proposed Removal based on charges of failure to meet established performance standards, and negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions.[2] She was also charged with violating Agency's Policy and Procedure, Section 3300.1E - Employee Code of Ethics and Conduct, Section 10 (Personal Accountability). Specifically, Agency alleged that Employee failed to meet the performance standards as established in a May 24, 2021, Performance Improvement Plan ("PIP"). Agency subsequently conducted an administrative review of the charges and a Hearing Officer

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] *See* 6B D.C. Municipal Regulations1 ("DCMR") §§1607.2(d)(1) and (2).

recommended that removal was appropriate in accordance with the Table of Illustrative Actions. Agency issued its final notice of termination to Employee, sustaining the charges and the Hearing Officer's recommendation. The effective date of her termination was December 3, 2021.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on January 6, 2022. She argued that Agency retaliated against her after filing a complaint with the Equal Employment Opportunity Commission ("EEOC") based on allegations of sexual harassment and verbal abuse. Employee also contended that her supervisor falsified performance documents to accelerate the disciplinary action against her. As a result, she requested to be reinstated with back pay and benefits lost as a result of the termination action.[3]

Agency filed its answer on February 22, 2022. It denied Employee's allegations of retaliation and claimed that the termination action was based solely on Employee's failure to meet the required standards of the PIP. Agency also submitted that Employee's behavior did not comport with what was expected of an Operations Research Analyst. Finally, it opined that the *Douglas* factors[4] were properly considered in reaching its decision to terminate Employee. Therefore, Agency requested that Employee's termination be upheld.[5]

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[3] *Petition for Appeal* (January 6, 2022).

[4] *See Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters: 1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed 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) 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 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.

[5] *Agency Answer* (February 22, 2022).

An OEA Administrative Judge ("AJ") was assigned to the matter in May of 2022. On August 3, 2022, Agency filed a Motion to Dismiss, arguing that Employee's appeal was filed more than thirty days after the effective date of her termination. In response, Employee submitted a Brief Opposing Agency's Motion to Dismiss on August 25, 2022. A status conference was held August 30, 2022, to assess the parties' positions regarding jurisdiction.[6] During the conference, the AJ verbally denied Agency's motion and ordered the parties to submit briefs addressing whether Agency followed the appropriate PIP procedures in terminating Employee; whether Agency established cause to initiate its termination action; and if so, whether the penalty of termination was appropriate under District laws, regulations, and the Table of Illustrative Actions.[7]

In its brief, Agency explained that the Operations Research Analyst position was demanding and required complex technical analysis for top-level decision makers, but Employee failed to meet the required performance expectations. It clarified that Employee was placed on a PIP because of her performance issues which addressed core competencies and S.M.A.R.T. Goals.[8] Agency believed that it complied with the relevant PIP procedures, namely Chapter 6B, §§ 1410.3 through 1410.6 of the D.C. Municipal Regulations ("DCMR"). It stated that Employee's PIP identified specific performance areas that required improvement and provided concrete, measurable steps for skill advancement. Agency also averred that a final written decision as to whether Employee was successful in her PIP was issued within ten business days of the end of the PIP period. However, it stated that Employee's supervisor continued to observe deficiencies in her work performance. Therefore, Agency believed that it established cause to institute an adverse

[6] *Order Rescheduling Status/Prehearing Conference* (July 28, 2022).
[7] *Post-Status Conference Order* (August 31, 2022).
[8] The overall performance rating indicates the level of an employee's actual performance of assigned competencies and S.M.A.R.T Goals during the performance management period. S.M.A.R.T stands for (Specific, Measurable, Attainable, Realistic, Time-Related) Goals. *See* Chapter 14, DCMR. Section 1407.1.

action against Employee pursuant to 6B DCMR §§1607.2(d)(1) and (2) and Agency's Policy and Procedures, Section 3300.1E. Agency further argued that Employee was terminated after it considered all available options under the District's performance regulations. It provided that the relevant *Douglas* factors were considered in reaching its decision to terminate Employee and that it exercised proper managerial discretion in selecting the penalty. Consequently, Agency requested that Employee's termination be upheld, or alternatively, that an evidentiary hearing be convened if Employee presented evidence showing a genuine issue of material fact.[9]

In response, Employee alleged that Agency wrongfully placed her on a PIP, in violation of DCMR § 1410.2 and failed to comply with the PIP duration period as outlined in DCMR § 1410.3. She argued that her work performance only became an issue after she complained about being harassed by a coworker. According to Employee, Agency's decision to terminate her was unjustified because her conduct did not violate 6B DCMR §§1607.2(d)(1) and (2). Further, she asserted that her supervisor failed to provide her with the necessary guidance regarding performance expectations and objectives. Employee also took issue with several aspects of the notice of proposed removal as it related to the due process requirements of 6B DCMR § 1622 and the subsequent administrative review as outlined in § 1615.[10]

Employee's brief also highlighted a 2021 grievance that she filed concerning alleged issues with the PIP; however, she claimed to have not received the resolution notices from Agency. She disagreed with Agency's assessment of the *Douglas* factors, namely factor three (employee's past disciplinary record), factor eight (notoriety of the offense), and factor eleven (mitigating circumstances). She stated that Agency refused to provide her with a necessary extension to meet S.M.A.R.T. goals and claimed that one of the goals was unachievable and therefore should not

[9] *Agency Brief* (February 16, 2023).
[10] *Employee Brief* (March 1, 2023).

have been considered in her proposed removal. Lastly, Employee asserted that Agency violated DCMR § 1410.5 by failing to issue written notification of the PIP outcome within ten days after the conclusion of the PIP period. Therefore, she asked that the termination be reversed.[11]

In its sur-reply brief, Agency clarified that Employee's discrimination complaint was outside the scope of OEA's jurisdictional purview because such claims are typically vested in the D.C. Office of Human Rights. Alternatively, it suggested that if this tribunal could exercise jurisdiction over these complaints, Employee has nonetheless failed to proffer a prima facie showing of a claim of discrimination. Agency also argues that Employee's claim that her supervisor failed to set forth performance expectations is contrary to the facts because Employee's supervisor, Dr. Chakraborty, discussed Employee's Fiscal Year ("FY") 2021 performance goals and Individual Performance Plan ("IPP") with her on November 4, 2020. Moreover, it proposes that OEA reject Employee's argument that the S.M.A.R.T. goals assigned to her were unreasonable and without merit.

According to Agency, the grievance that Employee filed in relation to the PIP was immaterial since OEA has no role in the grievance review process. It also opines that Employee's arguments relevant to DCMR §§ 1615 and 1622 are peripheral to the specific issues directed by the AJ for briefing. Finally, Agency averred that Employee's disagreement with the appropriateness of the penalty was not a basis for reversing the termination action because it acted within its managerial discretion in selecting the penalty after performing a thorough assessment of the *Douglas* factors. Therefore, Agency again requested that the termination action be upheld.[12]

The AJ issued an Initial Decision on May 17, 2023. She first explained that Employee's PIP, which began on May 24, 2021, could not exceed a total of ninety days, or August 21, 2021,

[11] *Id*.
[12] *Agency's Sur-Reply Brief* (March 16, 2023).

pursuant to DCMR § 1410.3. She provided that § 1405.5 required that Agency issue a written decision to Employee within ten business days as to whether the PIP requirements were met or failed. The AJ noted that the ten-day time period in this case expired on September 3, 2021, but Employee was on approved leave until at least September 8, 2021. She acknowledged that the written decision stating that Employee failed to meet the PIP requirements was dated September 2, 2021, and was sent by U.S. Postal Service Priority Mail Express.

However, she highlighted the holding in *Aygen v. District of Columbia Office of Employee Appeals*, No. 2009 CA 006528; No. 2009 CA 008063 (D.C. Super. Ct. April 5, 2012) in which the Superior Court for the District of Columbia held that where an employee is not in duty status, the notice of final decision "must be sent to employee's last known address by courier, or by certified or registered mail, return receipt requested, before the time of the action becomes effective."[13] In analyzing whether Agency's notice regarding the PIP result was timely, the AJ determined that Agency failed to provide this Office with any information evidencing proper written notice to Employee prior to September 3, 2021, as required under DCMR § 1405.5. According to the AJ, written notice of the PIP results was not provided to Employee until September 10, 2021, when Employee admitted to receiving the documents after being denied access to the workplace. Moreover, she concluded that pursuant to the holding in *Aygen*, "a dated cover letter, by itself, was insufficient evidence" of a mailing date or proof of receipt by an employee." Thus, the AJ held that the September 2, 2021, date on the PIP notice was inadequate proof of service to Employee under the regulations. Since the time period between August 22, 2021, and September 10, 2021, was thirteen business days, the AJ concluded that Agency violated §1410.5. Further, she opined that Agency's error was reversible since the mandatory requirement under DCMR § 1410.11

[13] *Initial Decision* (May 17, 2021).

provides that whenever an immediate supervisor or a reviewer fails to issue a written decision within the specified time period as provided in Subsections 1410.5 or 1410.9, the employee shall be deemed to have met the requirements of the PIP.[14]

Next, the AJ held that assuming *arguendo* Agency complied with DCMR §1410.5, it nonetheless violated §1410.3 which states that "a PIP issued to an employee shall last for a period of thirty to ninety days and must: (a) identify the specific performance areas in which the employee is deficient; and (b) provide concrete, measurable action steps the employee can take to improve in those areas." The AJ assessed that while Agency's customary practice was to place its employees on automatic ninety-day PIPs, Employee in this case was never informed of the duration of her PIP because it was not included on the notice. Additionally, she determined that during a May 24, 2021, Microsoft TEAMS meeting, Dr. Chakraborty informed Employee that the length of her PIP period would run through the end of FY 2021, approximately forty days beyond the maximum ninety-day time period. However, the AJ acknowledged that Agency subsequently realized its error and unilaterally ended the evaluation period on August 22, 2021, exactly ninety days from the start of the PIP period, without providing Employee with notice that the PIP would end. Notwithstanding, she concluded that Agency violated DCMR §1410.3 in light of its procedural error.[15]

Finally, the AJ held that Agency violated DCMR §1410.2 by placing Employee on a PIP based on her FY 2020 performance, and not the then-current fiscal year performance (FY 2021). In support thereof, the AJ cited to the Department of Human Resources ("DCHR") "EPerformance - Frequently Asked Questions (FAQs) Performance Improvement Plan (PIP)" which was located on their website. She provided that according to the FAQ page, a PIP could only be based on the

[14] *Id*.
[15] *Id*.

employee's current performance plan and cannot be extended into the next performance management period.[16] According to the AJ, during the May 24, 2021, TEAMS meeting, Dr. Chakraborty informed Employee that her PIP was implemented to address performance issues from FY 2020 in areas where Employee did not receive a satisfactory rating. Thus, she reasoned that Agency's failure to address the correct performance period constituted a violation of DCMR §1410.2. The AJ further believed that Employee was not provided with the opportunity to fully perform her assigned tasks pursuant to her FY 2021 performance plan before being placed on the PIP because she had less than two months to meet the requirements after returning from FMLA leave. As a result, she determined that Agency lacked cause to discipline Employee as a result of its various violations of DCMR § 1410. Consequently, Agency's termination action was reversed, and Employee was ordered to be reinstated with back pay and benefits lost as a result of the adverse action.[17]

Agency disagreed with the Initial Decision and filed a Petition for Review and a Memorandum in Support of Petition for Review with the OEA Board.[18] It argues that Employee's Petition for Appeal should have been dismissed because she failed to file an appeal with OEA within thirty days of the effective date of Agency's termination action, in violation of D.C. Code § 1-606.03(a) and 6B DCMR § 604.2. Alternatively, it suggests that if § 1-606.03(a) is a nonmandatory claims-processing deadline that can be equitably tolled, the AJ should have made a finding of such before considering Employee's appeal. Agency opines that it was prejudiced after the AJ denied it a reasonable opportunity to engage in discovery. It further submits that the AJ

[16] *See* https://dchr.dc.gov/publication/performance-improvement-plan-faq.
[17] *Id*.
[18] *Petition for Review* (June 21, 2023) and *Agency's Memorandum in Support of Petition for Review* (June 26, 2023). Agency's initial filing requested an extension of time in which to file a supporting memorandum. In response, Employee filed an opposition to Agency's request on June 22, 2023, requesting that Agency be denied an extension of time to file a supporting brief.

erred by relying on the holding in *Aygen supra* because that Court interpreted an unrelated, former regulation, and not the applicable language of DCMR § 1410.5. Agency reasons that unlike the regulation at issue in *Aygen*, the language in § 1410 only refers to the date that the PIP finding was issued, but makes to reference to service, delivery, or an employee's duty status. Thus, it is Agency's position that the September 2, 2021, notice to Employee regarding the outcome of her PIP was within the ten-day deadline required under § 1410.5.[19]

Agency also argues that the AJ relied on an undated and unsigned Frequently Asked Question's page on the DCHR website in concluding that Employee required additional time to improve her work performance before being placed on a PIP. It submits that the AJ failed to rely on a statute, regulation, formal policy, or other binding precedent in support of her conclusion that Agency's alleged error formed a basis for reversal of the termination action. Thus, Agency reasons that at a minimum, a hearing on remand this issue could have elicited testimony regarding the nature and author of the FAQ page, and whether Employee relied on it in any way. Accordingly, Agency requests that its Petition for Review be granted.[20]

In response, Employee argues that the AJ did not improperly deny Agency's Motion to Dismiss the Petition for Appeal in light of circumstances beyond her control, including government closures due to inclement weather. She contends that the AJ correctly applied binding authority when denying Agency's motion. Employee also submits that the AJ correctly considered the evidence and made a sound decision regarding the implementation of the PIP and the related policies and procedures. According to Employee, Agency was not prejudiced by being denied a meaningful opportunity to engage in discovery, as all relevant evidence was made available during the proceedings before OEA. She also believes that the AJ applied the correct laws and regulations

[19] *Id.*
[20] *Id*.

governing PIPs and utilized the proper burden of proof in concluding that Agency failed to establish cause in initiating its termination action. Therefore, Employee believes that the Initial Decision is based on substantial evidence and asks that the Board deny Agency's petition.[21]

Substantial Evidence

According to OEA Rule 633.3(c), the Board may grant a Petition for Review when the AJ's findings are not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then they must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[22]

Late Filing

Agency argues that the AJ erred by failing to dismiss Employee's Petition for Appeal because it was filed beyond the thirty-day mandatory time deadline. Regarding the timeliness requirement, D.C. Code § 1-606.03(a) provides that "[a]ny appeal shall be filed within 30 days of the effective date of the appealed agency action." Similarly, OEA Rule 604.2 provides that "an appeal filed pursuant to Rule 604.1 must be filed within thirty calendar days of the effective date of the appealed agency action." In *Sium v. Office of State Superintendent of Education*, 218 A.3d 228 (D.C. 2019), the D.C. Court of Appeals held that the presumption is that filing deadlines are not jurisdictional but waivable claims-processing rules. The *Sium* court relied heavily on the ruling in *Mathis v. D.C. Housing Authority*, 124 A.3d 1089 (D.C. 2015), holding that filing deadlines in particular are quintessential claim-processing rules, which seek only to promote the orderly

[21] *Employee's Motion for Summary Affirmance in Support of Denying Agency's Petition for Review* (July 6, 2023).
[22] *Black's Law Dictionary*, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

progress of litigation, and generally do not have jurisdictional force.[23] In *Sium*, the Court reasoned that even procedural rules codified in statutes are non-jurisdictional in character. It found that if a deadline is contained in a statute and its language is mandatory, it *may* be jurisdictional (emphasis added).

The Court further went on to explain that D.C. Code § 1-606.03(a), which provides that any appeal shall be filed within thirty days of the effective date of the appealed action, meets both requirements. However, it opined that more is required. Relying on *Mathis*, the D.C. Court of Appeals held that for a filing deadline to be deemed a jurisdictional bar, the traditional tools of statutory construction must also make clear that the legislature intended it to serve this purpose. The Court of Appeals saw no indication that the D.C. City Council affirmatively sought to curtail OEA's jurisdiction; therefore, it ruled that the thirty-day deadline to file appeals is not jurisdictional. As a result, OEA cannot dismiss a late-filed appeal outright. However, OEA can dismiss the appeal if the Agency seasonably objects to the untimeliness of Employee's filing as a defense.

In *Brewer v. D.C. Office of Employee Appeals*, 163 A.3d 799 (D.C. 2017), the Court of Appeals held that as a claims-processing rule, a thirty-day deadline is subject to equitable tolling. However, in accordance with the *Mathis* holding, claims-processing rules may be tolled (or relaxed or waived) if equity compels such a result.[24] The Court in *Brewer* reasoned that equitable tolling turns on balancing the fairness to both parties and that equity aids the vigilant. Therefore, where a timing rule should be tolled turns on (1) whether there was unexplained or undue delay and (2) whether tolling would work an injustice to the other party.[25] Furthermore, the Court held that

[23] (citing *Wong,* 135 S. Ct. at 1632 (quoting *Henderson, 562 U.S.* at 435, 131 S.Ct. 1197).
[24] *See Neill v. District of Columbia Public Employee Relations Bd.,* 93 A.3d 229, 238 (D.C.2014), (explaining that claim-processing rules "may be relaxed or waived").
[25] *See Simpson v. District of Columbia Office of Human Rights,* 597 A.2d 392 (D.C.1991) and *Mathis v. D.C. Housing*

consideration of the importance of ultimate finality in legal proceedings can also be considered when deciding on tolling a deadline.

In this case, Employee, who is *pro se*, filed a Petition for Appeal with this Office on January 6, 2022, after being terminated effective December 3, 2021. This Board acknowledges that Agency's August 3, 2023, Motion to Dismiss raised a seasonable objection to Employee's late filing of the Petition for Appeal, citing to D.C. Code § 1-606.03(a). However, Agency suggests that if § 1-606.03(a) is deemed a nonmandatory claims-processing deadline, Employee failed to show cause as to why it should have been equitably tolled. In response, Employee presented evidence to support her assertion that she mailed her appeal to OEA by way of Priority Express Mail Service on December 31, 2021, which guaranteed a two-day delivery. However, she stated that there was a snow delay in the District.[26]

Employee's supporting documents also include a published announcement from Mayor Muriel Bowser which reflected an existence of a snow emergency in the District on January 2, 2023.[27] After eliciting oral arguments from the parties during the August 30, 2022, status conference, the AJ issued a verbal denial of Agency's motion to dismiss. While she did not elaborate as to why Agency's motion was denied, in reviewing the record, we believe that the AJ's decision was based on a sound evaluation of the circumstances. This Board has historically relied on *Murphy v. A.A. Beiro Construction Co. et al*., 679 A.2d 1039, 1044 (D.C. 1996), in which the District of Columbia Court of Appeals held that "decisions on the merits of a case are preferred whenever possible, and where there is any doubt, it should be resolved in favor of trial."[28]

Authority 124 A.3d 1089 (D.C. 2015)).

[26] *Employee Brief Opposing Agency's Motion to Dismiss*, Exhibit 1. The U.S. Postal Office receipt states "January 3, 2022" in the area designated for the scheduled delivery date.

[27] *Id*.

[28] *See Diane Gustus v. Office of Chief Financial Officer*, OEA Matter No. 1601-0025-08, *Opinion and Order on Petition for Review* (December 21, 2009); *Jerelyn Jones v. D.C. Public Schools*, OEA Matter No. 2401-0053-10, *Opinion and Order on Petition for Review* (April 30, 2013); *Cynthia Miller-Carrette v. D.C. Public Schools*, OEA

Employee provided a reasoned basis for the late filing of her Petition for Appeal. To dismiss this petition for late filing after it has been adjudicated by an OEA AJ would constitute an affront to Employee's continued efforts in prosecuting her appeal. Agency has also failed to proffer any evidence that it was prejudiced by Employee's brief delay because a snow emergency. Therefore, in the interest of justice, this Board finds it appropriate to uphold the AJ's denial of Agency's motion to dismiss.

Discovery

Agency opines that it was prejudiced by the AJ's decision to deny it a reasonable opportunity to engage in discovery. It expounds that the AJ failed to follow the liberal standard of relevance that governs discovery. Moreover, Agency claims that the AJ offered no explanation as to why she denied certain discovery including Employe's claims related to disparate treatment. According to Agency, it requested sanctions pursuant to 6B DCMR § 624 and D.C. Super. Ct. R. Civ. P. 30 as a result of Employee's failure to answer numerous questions without asserting any privilege against testimony.

OEA Rule 620.7 provides that "discovery matters before the Office are intended to be of a simplified nature. Discovery procedures shall be established by the Administrative Judge as appropriate under the circumstance. . . ." Under OEA Rule 620.5, the Administrative Judge may deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding. Therefore, the AJ has discretion to make her own determination regarding discovery requests. However, it is clear from the record that the AJ considered Agency's October

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Matter No. 1601-0173-11, *Opinion and Order on Petition for Review* (October 29, 2013); and *Carmen Faulkner v. D.C. Public Schools*, OEA Matter No. 1601-0135-15R16, *Opinion and Order on Petition for Review* (March 29,

13, 2022, Motion to Compel Discovery after evaluating the parties' respective positions.[29] The AJ was the trier fact in this case and was in the best position to assess the reasonableness of Agency's discovery requests. Since there is no credible evidence in the record to show that the AJ abused her discretion in this regard, this Board finds no basis for overturning her ruling.

Performance Improvement Plan

Chapter 14 of the DCMR governs the implementation and regulation of PIPs. A PIP is a performance management tool designed to offer an employee the opportunity to demonstrate improvement in his or her work performance.[30] Under § 1410.4, a supervisor or other reviewer is required to complete a PIP when an employee's performance has been observed by the supervisor as being deficient. A PIP must last at least thirty days but cannot exceed ninety days.[31] Additionally, §§ 1410.5 and 1410.6 state the following with respect to implementing a PIP:

> 1410.5 Within ten (10) calendar days of the end of the PIP period, the employee's immediate supervisor or, in the absence of that individual, the reviewer shall make a determination as to whether the employee has met the requirements of the PIP. If the determination is that the employee has met the requirements of the Performance Improvement Plan, the employee's immediate supervisor, or in the absence of that individual, the reviewer, shall so inform the employee, in writing. If the determination is that the employee failed to meet the requirements of the Performance Improvement Plan, the employee's immediate supervisor or in the absence of that individual, the reviewer, as appropriate, shall issue a written decision to the employee to:
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> > (a) Extend the Performance Improvement Plan for an additional thirty (30) and not to exceed ninety days total, to further observe the employee's performance; or
> >
> > (b) Reassign, reduce in grade, or remove the employee.
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> 1410.6 Failure on the part of the supervisor, or, in the absence of that individual, the reviewer, to issue a written decision within the

[29] *Order on Agency's Motion to Compel Discovery and Agency's Motion to Modify Briefing Order* (October 13, 2022).
[30] DCMR § 1410.2.
[31] DCMR § 1410.3.

> specified time period will result in the employee's performance having met the PIP requirements.

The language of § 1410.5 creates a mandatory obligation for Agency to issue a written decision regarding Employee's PIP results within ten calendar days of the end of the PIP period. In *Thomas v. Barry*, 729 F.2d 1469 (D.C. Cir. 1984), the D.C. Circuit Court held that "[t]he general rule is that '[a] statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision." [32] Likewise, in *Metro. Police Dep't. v. Pub. Employee Relations Bd.*, No. 92-29, 1993 WL 761156 (D.C. Super. Ct. Aug. 9, 1993), Superior Court stated that "the phraseology used in a statute can create a mandatory limit on a government's authority to act," noting that the statute at issue which addressed an agency's ability to commence adverse actions against employees contained both mandatory language and a consequence for noncompliance. Additionally, in *Rodriguez v. Office of Employee Appeals*, 145 A.3d 1005 (D.C. 2016), the Court of Appeals held that language contained in a Collective Bargaining Agreement regarding an agency's duty to notify the employee and his or her union about proposed disciplinary or adverse actions was mandatory. It reasoned that the agreement "did not simply require that the union be notified[;] it spelled out specific consequences if the union was not notified within forty-five days of the date that the [e]mployer knew or should have known of the act or occurrence: the adverse action could not be taken."[33]

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[32] *See also Watkins v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0093-10, *Opinion and Order on Petition for Review* (January 25, 2010), wherein this Board adopted the reasoning provided in *Teamsters Local Union 1714 v. Pub. Employee Relations Bd.*, 579 A.2d 706, 710 (D.C. 1990) when examining a forty-five-day regulation which addressed the time limit in which an agency was required to issue a final decision in cases of summary removal. The Board in *Watkins* noted that the personnel regulation regarding the forty-five-day rule did not specify a consequence for the agency's failure to comply; therefore, the regulation was construed to be directory in nature. Unlike a mandatory provision, a directory provision requires a balancing test to determine whether "any prejudice to a party caused by agency delay is outweighed by the interest of another party or the public in allowing the agency to act after the statutory time period has elapsed."

[33] *Rodriguez* at 1012.

Section 1410.5 establishes a clear timetable for issuing a written decision regarding whether an employee has met the requirements of the PIP. Additionally, DCMR § 1410.6 establishes a consequence for the failure to comply with § 1410.5. Thus, an agency's failure to issue a written decision within ten days will result in the employee's performance having met the PIP requirements. Such a provision suggests that no other exceptions to the limitation established in DCMR § 1410.5 were intended by the D.C. Council. The relevant day here is August 22, 2021, the day on which Employee's PIP ended. Under § 1410.5, Agency was required to issue a written decision within ten calendar days of the completion of the PIP period, or September 3, 2021.

In this case, it is undisputed that Employee was not in duty status on September 2, 2021, when Dr. Chakraborty mailed a written decision to Employee regarding the results of her PIP. The decision stated that Employee was unsuccessful in the PIP and the letter was mailed via USPS Priority Mail Express. The record reflects that Agency mailed two additional letters to Employee by way of USPS Priority Mail Express, one placing her on administrative leave and the second proposed Employee's termination. The parties disagree; however, as to whether the date of issuance of the PIP notification, or the date of receipt, should dictate whether Agency complied with DCHR § 1410.5.

In support of her decision, the AJ cites to *Aygen v. District of Columbia Office of Employee Appeals supra*, in which the employee, a teacher with the Visiting Instruction Service ("VIS") program, was terminated due to declining student enrollment/equalization, while she was not in duty status. In its interpretation of then-current 6B DCMR §1614 (2011), as it related to final agency decision notices, the Court held that when an employee is in duty status, "the notice of final decision must [be] delivered to the employee on or before the time the action is effective, with a request for employee to acknowledge it." The Court went on to explain that under DCMR

§1614.6, if the employee refused to acknowledge receipt, a signed written statement by a witness may be used as evidence of service.[34] Further, the *Agyen* Court found that where an employee is not in duty status, the notice "must be sent to employee's last known address by courier, or by certified or registered mail, return receipt requested, before the time of the action becomes effective."[35]

As previously stated, the applicable regulation in this matter is DCMR § 1410.5, which requires an employee's immediate supervisor to *issue* a written decision to the employee as to whether he or she has met or failed to meet the requirements of the PIP. (emphasis added). To that end, the current regulations governing the implementation and administration of PIPs make no reference to the service, delivery, or duty status of employees who have completed a PIP. Further, the regulations cited to in *Agyen* were specific to the delivery of final agency notices of adverse and corrective actions only. The AJ in this case erred in relying on an out-of-date regulation analyzed in *Aygen* in finding that delivery of the PIP results in this case was untimely effectuated. Therefore, this Board cannot confidently conclude that her ruling on this issue is supported by the record.

According to the AJ, Agency failed to provide this Office with any information evidencing service on Employee prior to September 3, 2021 – the ten-day deadline – and opined that the September 2, 2021, date on the PIP notice was insufficient evidence of proof of receipt by Employee. Conversely, Agency reiterates its position that its notice of the PIP results satisfied the mandatory time requirement of DCMR § 1410.5. Agency notes that it possesses a certificate of service indicating how the decision was delivered; however, it was not introduced as part of the

[34] Regulations related to Final Agency Decisions can now be located in Chapter 6B, Section 1623 of the DCMR. However, the AJ made no reference to this section of the regulations.
[35] *Aygen* at p. 9.

record prior to the filing of the Petition for Review.[36] This relevant evidence is germane to the disposition of whether Agency satisfied the service requirement under the regulations. Furthermore, we believe that the parties' arguments related to service of the PIP notice present a contested issue of fact that cannot be deciphered based on the record in its current state. Therefore, in light of the AJ's error in the application of *Aygen* to the facts of this matter, as well as the issue of service under § 1410.5, this Board finds it necessary to remand the matter for additional fact finding.

6-B DCMR § 1410.3

As an alternative basis for overturning Employee's termination, the AJ held that Agency violated DCMR § 1410.3, which states that "a PIP must: 1) identify specific performance areas in which an employee is deficient; and 2) provide concrete, measurable actions steps which the employee needs to take to improve the identified areas of deficiency." In her analysis, the AJ suggests that Agency erred by placing Employee on a PIP without providing her additional time to improve her performance. To support this finding, the AJ relied on the "EPerformance Frequently Asked Questions (FAQs) Performance Improvement Plan (PIP)" found on the DCHR website. The website addresses various questions regarding whether an employee's performance evaluation can be extended into a new performance management period and whether a PIP based on past performance can be considered when issuing a new PIP to an employee.

The AJ reasoned that Agency violated § 1410.3 because Employee was not aware of the length/duration of the PIP since the notice did not inform her of the PIP end date. According to the AJ, Dr. Chakraborty, stated during the May 24, 2021, meeting with Employee that the PIP would run through the end of FY 2021, which is forty calendar days more than the prescribed maximum

[36] *Petition for Review* at p. 27.

length for a PIP. She further posited that it appeared that Agency realized its error and unilaterally ended the PIP on August 22, 2021, without providing Employee with any notice that the PIP would end on August 22, 2021.

We believe that the AJ erred by relying *sua sponte* on a DCHR website without allowing the parties an opportunity to present briefs or oral testimony related to the FAQ section. This Board cannot decipher whether the FAQ page is current, accurate, or whether it provides any binding legal authority to support a finding that Agency violated DCMR § 1410.3. There is no testimonial evidence in the record to support the AJ's conclusion that Employee was unapprised of the ending date of the PIP period. Agency's basis or methodology for unilaterally ending the PIP on August 22, 2021, is also unknown. These arguments further bolster this Board's finding that the record is incomplete in its current form and requires additional evidence on remand, as Agency requests. Since we cannot assuredly conclude that the Initial Decision is based on substantial evidence, this matter must be remanded to the AJ for further consideration.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **GRANTED** in part and **DENIED** in part**.** This matter is therefore remanded to the Administrative Judge for further proceedings.

FOR THE BOARD:

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_____Clarence Labor, Jr., Chair

_____
Jelani Freeman

_____
Peter Rosenstein

_____
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.