THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
SHERMAN LANKFORD, Employee	
v.	OEA Matter No.: 1601-0147-06
D.C. METROPOLITAN POLICE DEPARTMENT, Agency	Date of Issuance: November 13, 2008

OPINION AND ORDER

ON

PETITION FOR REVIEW

Sherman Lankford ("Employee") was appointed to the Metropolitan Police Department ("Agency") on March 18, 1985. Employee obtained the rank of Lieutenant prior to his removal. On July 26, 2005, Employee was at a crime scene and allegedly failed to properly maintain and secure evidence, specifically, a pair of binoculars that he removed from a vehicle that had been seized. On July 27, 2005, Agency commenced an investigation of the incident, which resulted in Employee being administratively charged with committing misconduct. Agency issued a Notice of Proposed Adverse Action to

Employee on March 2, 2006 pursuant to General Order 1202.1. This order requires an Administrative Services Officer to decide the case and issue a Final Notice of Adverse Action to the affected employee within forty five (45) days (hereinafter the "45-day Rule") of the member's receipt of the proposed notice, unless extended by the employee personally or through the applicable agreement.[1] On May 4, 2006, Agency held a hearing before a three member Adverse Action Panel, which recommended that Employee should be terminated. Agency served its Final Notice of Adverse Action on Employee on July 20, 2006, terminating him effective September 1, 2006. The Final Notice of Adverse Action was therefore served on Employee one hundred and forty (140) days after the date of the Notice of Proposed Adverse Action and seventy-seven (77) days after the Panel hearing.

On August 30, 2007, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). The Administrative Judge ("AJ") held a pre-hearing conference on January 17, 2007, but did not hold a hearing on the merits of the case. The AJ closed the record after the parties submitted their final briefs on the issues and decided in favor of Employee. In an Initial Decision issued on March 26, 2007, the AJ held that the Agency violated its own 45-day Rule by failing to issue a Final Notice of Adverse Action within the prescribed period. The AJ further ordered that the Agency's removal of Employee should be reversed and that Employee was entitled to be repaid all compensation and benefits of which he was deprived as a result of the adverse action.

Agency then filed a Petition for Review on May 24, 2007. Agency asks us to reverse the Initial Decision on the grounds that the AJ's findings were based on an

[1] *Agency's Brief*, Attachment 1 (February 20, 2007).

erroneous interpretation of General Order 1202.1. Agency contends that the 45-day Rule is inapplicable in this matter because according to Agency, the time limit is a requirement for "commencing" an action and not a time limit for issuing a decision. Agency further argues that the time limit on Agency to make a decision in an adverse action is directory rather than mandatory.

We disagree with Agency's argument. Agency's General Order 1202.1 Part 1 H states:

> "Members shall be given a written decision and the reasons therefore within forty-five (45) days of the date that charges are preferred, except when extended by the member personally or by contract, or when hearings are held, by the chairperson in the interest of "due process."

We believe that had Agency intended the 45-day rule to be a time limit for commencing an adverse action, General Order 1202.1 would clearly state that. Former D.C. Code § 1-617(b-1) (1992) (repealed 1998), required agencies to *commence* adverse actions against employees no more than 45 days after the date agency knew or should have known of the act allegedly constituting cause (emphasis added). General Order 1202.1, although similar to this former Code provision, does not mention the word "commence". Therefore, we construe this order to mean that Agency should have *rendered* its final decision well before July 20, 2006 (emphasis added).[2]

With respect to the second argument — that the 45-day rule is directory rather than mandatory —Agency suggests that failure to comply with such rule does not necessarily render the adverse action invalid.[3] In support of this argument, Agency cites decisions in the cases of *Byron A. Scott. v. Dep't of Housing and Community*

[2] General Order 1201.1 was replaced by Agency with General Order PER 120-21.
[3] *Petition for Review* at 3-5.

Development[4], *Employee v. Agency*[5], and *Metropolitan Police Department v. Public Employee Relations Board.*[6] We do not believe, however, that Agency is absolved from adhering to its own internal regulation in the instant matter. The word "shall" within the context of a statute, while not completely controlling, generally creates a mandatory duty.[7]

This Office has adjudicated several cases concerning a similar repealed 45-day rule[8] and the following became settled principles: 1) the 45-day limitation was mandatory rather than directory; and 2) any violation of the rule by an agency resulted in a summary reversal of the adverse action.[9] Although the above 45-day rule is no longer applicable, the principle that agencies do not have an unlimited time to issue a final decision of an adverse action is clearly established within this Office. Furthermore, there is no language in the Agency's General Order to suggest that the 45-day provision was intended to be applied on a discretionary basis.[10]

Lastly, Agency was required to file a Petition for Review with this Office within thirty-five (35) calendar days, including holidays and weekends, of the issuance of the initial decision.[11] The AJ issued his decision on March 26, 2007 and Agency's Petition for Review was filed on April 30, 2007, which was more than thirty-five days after the

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[4] OEA Matter No. 1601-0078-91 (August 21, 1992), 41 D.C. Reg. 4227 (June 24, 1994).
[5] OEA Docket No. 1601-0207-81, 32 D.C. Reg. 4396.
[6] MP 92-29, (D.C. Sup. Ct. Aug. 5, 1993), 122 DWLR 29 (January 6, 1994).
[7] *Scott*, supra at 4 (citing *JBG Prop., Inc. v. D.C. Office of Human Rights*, 364 A.2d 1183, 1185 (D.C. 1976)).
[8] D.C. Code Ann. § 1.617.1(b-1)(1)(1992 repl.) required agencies to commence an adverse action against employee within 45 days (not including Saturdays, Sundays, or legal holidays, after the date that the agency knew or should have known of the act or occurrence allegedly constituting cause. The 45-day rule applied to all appeals filed in this Office prior to October 21, 1998.
[9] *Wiggins v. D.C. Public Schools*, OEA Matter No. 1601-0189-98 (February 12, 2002); *Scott v. Department of Housing and Community Development*, OEA Matter No. 1601-0078-91, 41 D.C Reg 4227 (1994); OEA Matter No. 1601-0041-04.
[10] *See Scott* at 4. The AJ applied the plain meaning test to § 1-617.1(b), noting that the word "shall" within the statutory context of the case constituted precatory language.
[11] Notice of Appeal Rights.

issuance of the Initial Decision. Even though we could deny Agency's Petition for this reason alone, we choose to deny it for the reasons just mentioned.

Based on the foregoing we are compelled to deny Agency's Petition for Review and uphold the Initial Decision.

ORDER

Accordingly, it is hereby **ORDERED** that Agency'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

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 the formal notice of the decision or order sought to be reviewed.