THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ABRAHAM EVANS, Employee	
v.	OEA Matter No.: 1601-0081-13
METROPOLITAN POLICE DEPARTMENT, Agency	Date of Issuance: September 13, 2016

OPINION AND ORDER
ON
PETITION FOR REVIEW

Abraham Evans ("Employee") worked as a Police Officer with the Metropolitan Police Department ("Agency"). On June 26, 2012, Agency issued a Notice of Proposed Adverse Action to Employee, charging him with "Failure to obey orders and directives issued by the Chief of Police" and "Willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Department Officer…."[1] Specifically, Employee was alleged to have violated Agency's General Order Series 120.21 by providing security for Calvert Woodley Liquor Store between December 15, 2008 and May 4, 2009. The notice also stated that he received discounts from the liquor store and

[1] *Agency Answer to Petition for Appeal*, Tab 2 (May 29, 2013).

purchased wine while on duty. Lastly, Employee was charged with making untruthful statements during an investigation of his alleged misconduct.[2]

On January 17, 2013, Agency held an Adverse Action Hearing regarding the charges and specifications against Employee. At the conclusion of the hearing, the Adverse Action Panel found him guilty of all three charges. On March 1, 2013, Agency issued a Final Notice of Adverse Action to Employee, accepting the Panel's recommended penalty of termination. The effective date of the termination was April 19, 2013.[3]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on April 24, 2013. In his appeal, he argued that Agency's policies and procedures were not followed in making the decision to terminate him.[4] Employee requested that OEA reinstate him with back pay and benefits. He also demanded that Agency remove from his personnel file any negative information pertinent to the criminal charges against him.[5]

Agency filed an Answer to Employee's Petition for Appeal on May 29, 2013. It denied Employee's claim that his termination was not done in accordance with the appropriate policies and procedures. It also requested that OEA conduct an evidentiary hearing in the matter.[6]

The matter was assigned to an OEA Administrative Judge ("AJ") on February 25, 2014. On March 6, 2014, the AJ issued an Order Convening a Prehearing Conference to assess the parties' arguments. He subsequently ordered the parties to submit briefs addressing whether Agency's termination action was supported by substantial evidence, whether the penalty was appropriate under the circumstances, and whether Agency committed any harmful procedural

[2] *Id*.
[3] Employee filed an appeal with the Chief of Police on March 11, 2013. However, his appeal was denied by Chief Lanier on March 22, 2013.
[4] *Petition for Appeal* (April 24, 2013).
[5] *Id*.
[6] *Agency Answer to Petition for Appeal*.

error.[7] In his brief, Employee argued that Agency violated D.C. Official Code § 5-1031(a) because more than ninety days passed since Agency knew, or should have known of the pending criminal investigation against him.[8] In addition, Employee asserted that the record did not establish by a preponderance of the evidence that he was guilty of the charges of misconduct. He, therefore, requested that the Panel's decision be overturned. In the alternative, Employee asked that the matter be remanded to the Panel for the purpose of conducting a penalty determination on Charge No. 3 that was consistent with Agency's Table of Penalties.[9]

Agency filed its brief on January 23, 2015, arguing that each charge and specification against Employee was supported by substantial evidence.[10] It also contended that there was no ninety-day rule violation because the time limit for initiating an adverse action under D.C. § 5-1031 is tolled when an employee's alleged misconduct is the subject of an ongoing criminal investigation.[11] Lastly, Agency stated that the penalty of termination was appropriate based on an analysis of the factors enumerated in *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981).[12] Accordingly, it believed that Employee's termination should be upheld.

---

[7] *Post-Conference Order* (May 27, 2014).
[8] *Employee Brief*, p. 4 (August 12, 2014).
[9] *Id*.
[10] Agency Brief (January 23, 2015.
[11] Id.
[12] In *Douglas*, the Merit Systems Protection Board, this Office's federal counterpart, set forth a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Although not an exhaustive list, the factors are as follows:

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. 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;

An Initial Decision was issued on April 6, 2015. The AJ first determined that under the holding in Elton *Pinkard v. D.C. Metropolitan Police Department* 801 A.2d 86 (D.C. 2002), OEA may not conduct a *de novo* hearing, but must rather base its decision solely on the record if certain conditions are met.[13] Having determined that each condition set forth in *Pinkard* was met, the AJ stated that the issues to be decided before OEA were: 1) whether the Adverse Action Panel's decision was supported by substantial evidence; 2) whether there was harmful procedural error; and 3) whether Agency's termination action was done in accordance with applicable laws

---

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.

[13] *Initial Decision* (April 6, 2013). Under *Pinkard*, the following conditions must be met:

1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
2. The employee has been subjected to an adverse action;
3.The employee is a member of a bargaining unit covered by a collective bargaining agreement;
4. The collective bargaining agreement contains language essentially the same as that found in *Pinkard*, *i.e.*: "[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [*i.e.*, Trial Board] has been held, any further appeal shall be based solely on the record established in the Departmental hearing;" and
5. At the agency level, Employee appeared before a Trial Board that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action being taken against Employee.

or regulations.[14] According to the AJ, January 21, 2011, the date Employee was indicted on criminal charges in the United States District Court, was the latest date on which Agency should have known of his alleged misconduct.[15] However, Agency did not issue its Notice of Proposed Adverse Action to Employee until June 26, 2012. Because more than ninety days elapsed between the two dates, the AJ found that Agency committed harmful procedural error, thus violating D.C. Official Code § 5-1031. He, therefore, reversed Agency's termination action and ordered that Employee be reinstated with back pay and benefits.[16]

Agency disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on May 11, 2015. It argues that the AJ's findings were based on an erroneous interpretation of law, statute, or regulation.[17] Specifically, Agency submits that it did not violate the 90-day rule with respect to Charge No. 1 and Charge No. 2 because Employee was the subject of an ongoing criminal investigation. Under D.C. Code § 5-1031(b), the time limit for commencing an adverse action against Employee should have been tolled until February 17, 2012, the date on which the U.S. Attorney's Office issued a Letter of Declination. According to Agency, if the AJ had used the correct date in calculating the ninety-day period, he would have concluded that it did not commit a harmful procedural error. With respect to Charge No. 3 (Untruthful Statements), Agency contends that it could not have known about Employee's statements until February 22, 2012, the date on which he allegedly made false statements during his interview with MPD's Internal Affairs Division.[18] Accordingly, it asks this Board to reverse

[14] *Id*. at 2.
[15] *Id*. at 6.
[16] *Id*. at 11.
[17] *Petition for Review* (May 11, 2015).
[18] *Id*. at 6.

the Initial Decision, or remand the matter to the AJ for further proceedings that flow rationally from the correct factual findings.[19]

Employee filed an Answer to Agency's Petition for Review on August 5, 2015. He contends that Agency waived its argument regarding compliance with the ninety-day rule because the issue was not raised in its January 23, 2015 brief.[20] He further maintains that the AJ properly considered D.C. Code § 5-1031(a) in his analysis of Agency's termination action. Employee believes that the Petition for Review should be denied, and the Initial Decision should be upheld.[21]

Ninety-day rule

D.C. Official Code § 5-1031 provides the following regarding the 90-day rule:

> (a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.
>
> (b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department, the Office of the United States Attorney for the District of Columbia, or the Office of Corporation Counsel, or an investigation by the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) of this section shall be tolled until the conclusion of the investigation.

It is well-settled that the 90-day deadline is a mandatory, rather than directory provision. Therefore, any violation of the statute by an agency would result in a reversal of the adverse

[19] *Id*. at 7.
[20] *Answer to Petition for Review*, p. 2 (August 5, 2015).
[21] *Id*.

action.[22] The only exception to this rule lies within subsection (b) of the statue. Under § 5-1031(b), the ninety-day deadline shall be tolled until the conclusion of the criminal investigation.

In *Timothy Ebert v. Metropolitan Police Department*, OEA Matter No. 1601-0223-98, *Opinion and Order on Petition for Review* (December 31, 2002), the OEA Board held that "the date of the declination letter is an objective 'bright line' signaling the end of a criminal investigation." The Board reasoned that agencies should not have to guess about the date the deadline begins to run because, in accordance with the statute, it is tolled as long as there is an on-going criminal investigation. The Board also determined that a formal decision not to prosecute concludes the investigation. Moreover, the Superior Court for the District of Columbia held in *District of Columbia v. District of Columbia Office of Employee Appeals and Robert L. Jordan,* 883 A.2d 124 (2005), that "the natural meaning of the statutory language . . . is that the 'conclusion of a criminal investigation' must involve action taken by an entity with prosecutorial authority—that is, the authority to review evidence, and to either charge an individual with the commission of a criminal offense, or decide that charges should not be filed."

In this case, the act allegedly constituting cause occurred on December 10, 2008, when officer Lillian Colter was being interviewed by MPD's Internal Affairs ("IAD") on an unrelated matter.[23] During the interview, Colter disclosed that Employee and two other police officers were being paid for providing security at Calvert Woodley Liquor store during their tours of duty. In response, IAD agents conducted preliminary surveillance of the liquor store between December 15, 2008 and January 6, 2009. According to IAD, the surveillance revealed that the

---

[22] *McHugh v. Department of Human Services,* OEA Matter No. 1601-0012-95 (November 20, 1995); *Ross v. Department of Human Services,* OEA Matter No. 1601-0338-94 (May 15, 1995); *Robert L. King v. D.C. Housing Authority,* OEA Matter No. 1601-0062-98, p. 16 (May 24, 2000); *Velerie Jones-Coe v. Department of Human Services,* OEA Matter No. 1601-0088-99, p. 3 (June 7, 2002); *Curtis Adamson v. Metropolitan Police Department,* OEA Matter No. 1601-0041-04 (February 14, 2006); and *Sherman Lankford v. Metropolitan Police Department,* OEA Matter No. 1601-0147-06, p. 3-4 (March 26, 2007).

[23] *Answer to Petition for Review*, Tab 1 (May 29, 2013).

three officers, including Employee, were providing security for the store each night during closing time. The investigation was subsequently assigned to an Assistant United States Attorney ("AUSA"), who conducted a criminal investigation into the allegations against Employee and the other two officers. On January 21, 2011, Employee was indicted in the United States District Court for the District of Columbia on charges of receipt of illegal gratuities and illegal supplementation of salary.[24]

On February 17, 2012, AUSA Steven Durham issued a Letter of Declination to Employee.[25] The letter provided that the United State Attorney's Office decided to dismiss the indictment against Employee because he appeared to have been on his lunch break during the times that he provided security for the liquor store.[26] The notice further stated that "since officers do not get paid for their lunch break, the government could not charge them with Supplement of Income."[27] Agency subsequently conducted an internal investigation of the allegations against Employee, during which he denied being paid for providing security services at the liquor store.

Based on the aforementioned timeline of events, the tolling exception under D.C. Official Code § 5-1031(b) was triggered because the allegations against Employee were the subject of a criminal investigation by the United States Attorney's Office. However, the U.S Attorney made a decision not to charge Employee with a criminal offense after reviewing the evidence. Therefore, based on the holdings in *Ebert* and *Jordan*, the conclusion of the criminal investigation occurred with the Letter of Declination. Agency subsequently had ninety business days from February 17,

---

[24] *Id.*
[25] *Id.* The notice was sent to Assistant Chief of Police, Michael Anzallo, and provided that "This letter will confirm our e-mail indicating declination of criminal prosecution involving allegations of false statements and supplementation of public salary in your above-referenced case number. This matter is referred back to your office for whatever administrative action you deem appropriate…."
[26] *Id.*
[27] *Id.* One officer pled guilty to a charge of illegal supplementation of salary on November 21, 2010. The other officer was terminated based on an unrelated matter in November of 2011.

2012 to serve him with its Notice of Proposed Adverse Action. Agency issued the notice on June 26, 2012; eighty-nine (89) non-holiday/non-weekend days after the U.S. Attorney's Office issued its Letter of Declination. This Board finds that the AJ erred by using a date of November 29, 2011, and not February 17, 2012, to calculate the ninety-day period. Therefore, Agency acted within the statutory period, as required by § 5-1031(b) with respect to all three charges.

Substantial Evidence

Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[28] 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 it must be accepted even if there is substantial evidence in the record to support a contrary finding. This Board believes that the AJ's assessment of the 90-day rule was not based on substantial evidence. As previously discussed, Agency issued Employee a Notice of Proposed Adverse Action within the statutory time period. While Agency was timely in instituting its termination action, the AJ failed to address whether the charges levied against Employee were supported by substantial evidence. Based on the foregoing, this matter must be remanded to the AJ for proceedings consistent with this opinion.

[28] *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).

ORDER

It is hereby **ORDERED** that Agency's Petition for Review is **GRANTED** and the Initial Decision is **REMANDED** to the Administrative Judge for further consideration.

FOR THE BOARD:

_____
Sheree L. Price, Interim Chair

_____
Vera M. Abbott

_____
A. Gilbert Douglass

_____
Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. 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.