THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
KYLE QUAMINA,	)	
Employee	)	OEA Matter No. 1601-0055-17
	)	
v.	)	
	)	
D.C. DEPARTMENT OF YOUTH REHABILITATION SERVICES,	)	Date of Issuance: September 17, 2018
Agency	)	Michelle R. Harris, Esq.
	)	Administrative Judge
	)	

David A. Branch, Esq., Employee Representative
Milena Mikailova, Esq., Agency Representative[1]

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On June 2, 2017, Kyle Quamina ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Youth Rehabilitation Services' ("Agency" or "DYRS") decision to suspend him from service for thirty (30) days from his position as a Materials Handler. Agency filed its Answer on July 19, 2017. Following an unsuccessful attempt at mediation, this matter was assigned to the undersigned Administrative Judge ("AJ") on November 3, 2017. On November 7, 2017, I issued an Order Convening a Prehearing Conference in this matter for December 13, 2017. On December 5, 2017, Employee, by and through his counsel, filed a Consent Motion to Continue the Prehearing Conference. As a result, I issued an Order on December 7, 2017, rescheduling the Prehearing Conference for January 9, 2018.

Both parties appeared for the Prehearing Conference on January 9, 2018. On January 11, 2018, I issued a Post Prehearing Conference Order codifying verbal orders that were prescribed during the hearing. The parties were ordered to submit briefs in accordance with the briefing schedule agreed upon during the conference. Further, parties agreed that discovery in this matter would be completed by March 2, 2018. Agency's brief was due on or before March 19, 2018. Employee's brief was due on or before April 19, 2018. Both parties filed their briefs within the prescribed deadline. Upon review of the briefs, I determined that Agency was required to submit a

[1]This case was reassigned to Atty. Mikailova in May of 2018. Agency was initially represented by Atty. Janea Hawkins.

supplemental brief and address issues not covered in its previous brief. As a result, I issued an Order on May 9, 2018, requiring Agency to submit its supplemental brief on or before May 30, 2018. On May 25, 2018, Agency filed a Consent Motion for an Extension of time to file its brief. I issued an Order on May 28, 2018, granting Agency's request and requiring the brief be submitted by June 14, 2018. Agency complied with the new date. After a review of the briefs, the undersigned issued an Order on June 19, 2018, scheduling Status/Prehearing Conference for July 11, 2018. During the Status Conference held on July 11, 2018, the undersigned required both parties to submit a supplemental brief with regard to the Final Notice in this matter. Briefs were due on July 27, 2018. Both parties submitted their briefs by the deadline. Based on the briefs submitted by the parties, I determined that an Evidentiary Hearing was not warranted. The record is now closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

1. Whether Agency had cause to take adverse action against Employee.
2. Whether Agency's final notice of adverse action was administered in accordance with all District of Columbia statutes, regulations and laws.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

SUMMARY OF PARTIES' POSITION

Agency's Position

Agency asserts that there was just cause for the adverse action levied against Employee, and that the penalty of thirty (30) days suspension was appropriate. Agency contends that it had cause to suspend Employee for: (1) knowingly making false statements, unauthorized absences and fiscal irregularities; and (2) Employee neglected the essential duties and responsibilities of his position

when he failed to hand-scan upon entering and exiting the facility.[2] To support its assertions, Agency indicated that on August 20, 2016, Employee's supervisor, William Boberg, sent a memorandum entitled "Material Handler Expectations" to all Material Handlers, which was meant to clarify performance standards and expectations.[3] In that memorandum, the hand scanning policy was included and the requirement that all material handlers hand scan in and out of the facility. Agency asserts that a hand scan audit conducted August 1, 2016, through November 4, 2016, showed that Employee had only scanned ten (10) times in that three (3) month period.[4] Further, Agency contends that following an investigation for a separate event, Employee was found to have left for lunch on November 7, 2016, and never returned, but entered in an eight (8) hour workday in his timesheet. Later, on November 9, 2016, Agency argues that Employee emailed his supervisor indicating he would be late to work, but never showed up, but entered a full eight (8) hours in his timesheet. Agency cites that Employee was charged with AWOL for the two (2) November 2016 incidents.[5]

Agency cites that on December 15, 2016, it issued an Advanced Written Notice of Proposed Suspension to Employee, to which Employee submitted a response on January 3, 2017. On February 21, 2017, Agency issued its final notice, suspending Employee from service. On May 3, 2017, Agency issued a revised final notice. Employee served the thirty day suspension from February 21, 2017, through April 3, 2017.

With regard to the issuance of the Final Notice, Agency cites that it issued its first Final Notice on February 21, 2017. Agency contends that it received Employee's response to the Advance Notice on January 4, 2017, and thus as a result, pursuant to 6B DCMR §1623.6, it should have issued its Final Notice within 45 days of its receipt of Employee's response, which would have been February 21, 2017.[6] Agency notes that it sent the Final Notice to Employee on February 22, 2017. Agency also asserts that it issued a subsequent Revised Final Notice date May 3, 2017, to correct the first notice, which did not include information regarding Employee's right to appeal his suspension to OEA. Agency avers that the while the February 22, 2017 Final Notice was a day late and did not include the notice of appeal rights to OEA, its May 3, 2017 Revised Notice did include that information, and as a result, Employee had a full and fair opportunity to appeal his matter to OEA. Agency contends that Employee has faced no prejudice based on its error in its issuance of the Final Notices, and that these errors amount to "harmless procedural error."[7] Agency maintains that Employee's due process rights were not violated and as a result do not constitute reversible error.

Employee's Position

Employee argues that Agency did not have cause to suspend him for thirty (30) days. Employee asserts that he did not engage in any misconduct or neglect his duties, and that Agency failed to consider all substantial evidence in this matter.[8] Employee avers that he was subject to harassment and was singled out by his supervisor. Employee asserts that he never falsified time and

[2] Agency's Answer at Pages 1-2 (July 19, 2017).
[3] *Id.* at Page 2.
[4] *Id.* at Page 2.
[5] *Id.* at Page 3.
[6] Agency cites that Employee's response was received on January 4, 2017. Thus, 45 days from that date would have been February 18, 2017, but that was a Saturday, so the deadline for the final notice would have been the next business day, February 21, 2017, because Monday, February 20, 2017 was President's Day holiday.
[7] Agency's Supplemental Brief at Pages 2-3 (July 27, 2018).
[8] Employee's Prehearing Statement at Page 1 (January 8, 2018).

that he did not refuse to comply with hand scanning.[9] Further, Employee argues that Agency did not consider all of the *Douglas* factors when administering the adverse action against him.

Employee argues that Agency failed to comply with District of Columbia regulations in its issuance of the Final Notice. Employee argues that Agency in accordance with 6B DCMR §1623.6 (b), "that the final decision should be issued within 45 days of the latter of (b) the agency's receipt of employee's response."[10] Employee cites that he received the first final notice on February 22, 2017, which was over 45 days after Agency received his response. Further, Employee states that he served the thirty (30) day suspension between February 21, 2017, and April 3, 2017. Employee asserts that on May 3, 2017, he received Agency's Revised Final Notice, after he had already served the thirty day suspension based on the February 22, 2017 Final Notice. Employee argues that this was not harmless error, and that Agency failed to provide OEA rules in the first notice and as a result, the May 3, 2017 notice was issued 120 days after Employee's response to Agency's Advanced Written notice.[11] Employee avers that the language of 6B DCMR 1623.6 states that the final decision "shall" be completed within 45 days of the latter of the receipt of Employee's response and that this language is mandatory in nature. Employee argues that Agency's failure to provide him information regarding his appeal rights to OEA caused him to lose thirty days of wages before he was provided due process.[12] Employee avers that Agency's administration of this instant adverse action was not in compliance with applicable regulations, and as a result, should be reversed.[13]

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee was employed by Agency as Materials Handler.[14] In a Final Written Notice dated May 3, 2017, Employee was notified of Agency's decision to suspend him without pay for thirty days (30) days for violation of DPM §1605.4(e),(m),(b)(3) and (4), (c), (f)(2), and (3), to include failure or refusal to follow instructions, neglect of duty, failure to meet performance standards, false statements/records, fiscal irregularities, attendance-related offenses and violation of DYRS Employee Policies."[15] The effective dates of the suspension were February 21, 2017, through April 3, 2017.

ANALYSIS

Whether Agency Followed All Applicable Regulations

A seminal issue of this matter rests in Agency's administration of the instant adverse action, specifically its issuance of the final notice in this matter. Here, Agency issued a notice dated February 21, 2017[16], ("February Notice"), levying a 30-day suspension against Employee for the above-mentioned charges. In that February Notice, Agency failed to include the OEA Rules and Appeal Rights as required by 6B DCMR 1623.5(b). Agency issued a Revised Final Notice dated May 3, 2017, in which it included the OEA Appeal Rights and Rules. During this time, Employee

[9] Employee's Brief at Page 3 (April 19, 2018).
[10] *Id.* at Page 5.
[11] Employee's Supplemental Brief (July 30, 2018).
[12] *Id.*
[13] Employee also argued that he was on administrative leave for over 90 days before receiving the final notice. Agency avers that this involved a separate matter unrelated to the instant adverse action. For the purposes of this decision, I will not address the issue given the circumstances with regard to Agency's final notice.
[14] Employee's Petition for Appeal (June 2, 2017).
[15] *Id.*
[16] This notice was received by Employee on February 22, 2017.

completed a thirty (30) day suspension between February 21, 2017 and April 3, 2017. Employee filed his Petition to Appeal at OEA on June 2, 2017. Employee argues that Agency's failure to adhere to the provisions of 6B DCMR §§ 1623 and 1614 did not afford him appropriate due process, and that the adverse action should be reversed. Agency argues that the issue with the Final Notice is harmless procedural error and should not warrant a reversal of the adverse action.

The undersigned disagrees with Agency's assertion. The applicable rule is explicit and mandatory in its language with regard to the administration of the final notice in accordance with levying an adverse action. 6B DCMR § 1623.4 (b)(1) and (2) state in pertinent part, that each final agency decision "***shall*** be accompanied by (1) a copy of the rules of procedure for the Office of Employee Appeals; and (2) an OEA appeal form" (emphasis added). Further, 6B DCMR §1623.6 (b) cites that a final agency decision ***shall*** be completed within the latter of *agency's receipt of employee's response to the advanced notice* (emphasis added). Here, Agency issued the February Notice on February 22, 2017, approximately 46 days after its receipt of Employee's response to its advance notice on January 4, 2017. However, this February Notice did not contain the OEA appeal rights as required. Agency then issued a Revised Final Notice on May 3, 2017, nearly 120 days after its receipt of Employee's response. Agency argues that this issue amounts to harmless procedural error under OEA Rule 631.3, and cites that while its first notice was one (1) day late pursuant to the code, that it did send a revised notice that informed Employee of his appeal rights.[17] Additionally, Agency argues that because Employee has filed an appeal OEA, his due process rights have not been violated. The undersigned disagrees. I find that Agency's arguments with regard to harmless error do not dismiss the mandatory nature of the applicable regulatory provisions.

As a result, I find that Agency's arguments with regard to harmless error are misguided. Because Agency's February Notice failed to contain the required OEA appeal rights, I find that it was not a valid final notice pursuant to the applicable regulatory requirements. Further, the issuance of the Revised Notice on May 3, 2017, was *well* over the mandatory 45 day time line specified in 6B DCMR § 1623.6(b). Consequently, I find that Agency's argument that Employee's due process rights were not affected because he still filed at OEA, does not dismiss Agency's responsibility to adhere to all applicable laws rules and regulations in its administration of the instant adverse action. Further, the undersigned finds that Employee did not have an opportunity to assert his appeal rights until *after* he had already served a thirty (30) day suspension pursuant to the invalid final notice issued in February 2017. OEA has consistently held that an Agency is required to include OEA appeal rights in its final notice pursuant to OEA Rule 605.1.[18] Additionally, the DPM §1614.1[19] also requires agencies to include the OEA appeal rights with its final notice, and OEA has held that this is

[17] Agency's Supplemental Brief at Page 4 (July 27, 2018).
[18] *Margaret Rebello v. District of Columbia Public Schools*, OEA Matter No. 2401-0202-04, *Opinion and Order on Petition for Review* (June 27, 2008).
[19] DPM §1614.1 provides that: The employee shall be given a notice of final decision in writing, dated and signed by the deciding official, informing him or her of all of the following:

(a) Which of the reasons in the notice of proposed corrective or adverse action have been sustained and which have not been sustained, or which of the reasons have been dismissed with or without prejudice;
(b) Whether the penalty proposed in the notice is sustained, reduced, or dismissed with or without prejudice;
(c) When the final decision results in a corrective action, the employee's right to grieve the decision as provided in § 1617;
(d) When the final decision results in an adverse action, the right to appeal to the Office of Employee Appeals as provided in § 1618. The notice shall have attached to it a copy of the OEA appeal form; and
(e) The effective date of the action.

mandatory in nature.[20] Consequently, I find that Agency did not comply with all applicable laws rules and regulations in its administration of the instant adverse action.

CONCLUSION

The undersigned finds that Agency has failed to follow the appropriate applicable regulations in its administration of the instant adverse action against Employee. Accordingly, I will not address whether Agency, in administering this adverse action had cause to do so or any other issues raised by the parties during the course of this appeal. Agency's actions were not in compliance with the applicable rules and regulations and as a result, the undersigned finds that Agency's actions were not harmless error and were in violation of the mandatory regulatory provisions.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of suspending Employee from service for thirty (30) days is **REVERSED**; and
2. Agency shall reimburse Employee all back-pay and benefits lost as a result of the suspension; and
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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Michelle R. Harris, Esq.
Administrative Judge

[20] *Joe Jones v. DCPS Department of Transportation*, OEA Matter No. 1601-0001-10, *Opinion and Order on Petition for Review* (February 5, 2013).