THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
EMPLOYEE[1], Employee	OEA Matter No. 1601-0052-22
v.	Date of Issuance: April 12, 2023
D.C. DEPARTMENT OF TRANSPORTATION, Agency	MICHELLE R. HARRIS, ESQ. Senior Administrative Judge

Joseph Davis, Employee Representative
Kathleen Miskovsky Black, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On May 10, 2022, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Department of Transportation's ("DDOT" or "Agency") decision to suspend him from service for twenty (20) days effective January 31, 2020. On May 12, 2022, OEA sent a letter requiring Agency submit its Answer to Employee's Petition for Appeal by June 12, 2022. Agency filed its Answer on June 10, 2022. Following an unsuccessful attempt at mediation, I was assigned this matter on August 2, 2022. On August 3, 2022, I issued an Order Scheduling a Prehearing Conference for September 15, 2022. Prehearing statements were due on or before September 9, 2022. Agency submitted its Prehearing Statement as prescribed. During the September 15 Prehearing Conference, Employee's representative indicated that he had not received the August 3, 2022 Order and requested additional time to prepare and engage in discovery. Accordingly, I issued an Order on September 15, 2022, rescheduling the Prehearing Conference to October 13, 2022, and required Prehearing Statements be submitted on or before October 7, 2022.

During the October 13, 2022 Prehearing Conference, I determined that an Evidentiary Hearing was warranted in this matter. Accordingly, on October 13, 2022, I issued an Order Convening an Evidentiary Hearing for December 7, 2022. That Order also required the parties to submit briefs addressing whether Agency violated the "90-Day Rule" under DPM §1602.3. Agency's brief was due on November 7, 2022, Employee's brief was due on November 28, 2022, and Agency had the option to

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

submit a Sur-Reply brief by December 9, 2022. Both parties submitted their respective briefs as prescribed.[2]

During the Evidentiary Hearing held via WebEx on December 7, 2022, both parties presented testimonial and documentary evidence. Following the Evidentiary Hearing and the receipt of the transcript in this matter, I issued an Order on December 22, 2022, requiring both parties to submit their written closing arguments on or before January 31, 2023. Both parties have complied with the December 22, 2022, Order. The record is now closed.

JURISDICTION

The 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 and followed all applicable laws, rules and regulations in the administration of the adverse action; and
2. If so, whether the twenty (20) day suspension was the appropriate penalty under the circumstances.
3. Whether Agency violated the "90-Day" rule in its administration of the adverse action pursuant to DPM § 1602.3.

BURDEN OF PROOF

OEA Rule § 631.1, 6-B District of Columbia Municipal Regulations ("DCMR") Ch. 600, et seq (December 27, 2021) states:

> The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.[3]

OEA Rule § 631.2 *id.* states:

> For appeals filed under § 604.1, 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 TESTIMONY

On December 7, 2022, an Evidentiary Hearing was held virtually before this Office through WebEx. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of

[2] It was later determined that Employee's representative had mailed the brief to OEA and sent copies to Agency's representative via email. However, due to postal service issues, that copy did not arrive at OEA. A hard copy was hand delivered to OEA on March 14, 2023 and that date is reflected/referred to for the record.
[3] OEA Rule § 699.1.

the proceeding. Both Employee and Agency presented testimonial and documentary evidence during the Evidentiary Hearing to support their positions.

Agency's Case-In-Chief

Zhong "Mark" Tan ("Tan") – Tr. Pgs. 14 – 40.

Tan is an Urban Forester at DDOT and has held this position for one year and 10 months. He testified that he uses a DDOT vehicle on a daily basis. Tan explained that he was familiar with the events in this matter but wasn't directly involved. Tr. 16. Tan cited that in August 2021, he got a note on his car because he had parked too close to someone else. Tan testified that he did not know who wrote the note, but that it said, "Do it one more time and I'll wait on it." Tan said it was not something he reported at the time because he didn't know who wrote the note and it was just a note that he got. Tan explained that he sometimes ran into Employee in the garage and there were comments made, not about Tan specifically, but comments made about other Urban Forester employees parking in Employee's parking spot. Tan explained that Employee's statements were "general", and that Employee also said that he had been to jail/prison and that they did not know who they were messing with/stop parking in his spot. Tan identified Agency's Exhibit 2 as the note that was left on his car and cited that it was left on August 2, 2021. Tan testified that Employee was not in the vicinity when he found the note on his car. Tr. 22. Tan further testified that at a later time, he saw Employee in the DDOT headquarters, though he could not recall the exact time. Tan explained that it occurred when another Urban Forestry truck was parked in Employee's parking spot and that Employee was a "little bit upset about it." Tan testified that he had "probably less than five" interactions with Employee. Tan further testified that he thought that Employee's interactions were meant to be "intimidating" and that he didn't think "it was meant to be personally threatening, but he was definitely meant, to like, tell your friends to watch out." Tr. 24.

On cross examination, Tan testified that he did not immediately report the note he found on his car but put it in a group chat with his team because it was upsetting and he did not know who left the note. Tr. 26. Tan testified that there were supervisors in that group chat, including Duff McCully. Tan also testified that when he was next to Employee while they were going to the fourth floor, he felt uncomfortable because "[Employee]" seemed really upset, and that Tan thought "he was looking for someone to confront." Tr. 29. Tan testified that he was not aware of any restrictions against Employee being in the area where he was. Tan also recalled that in this instance, Employee mentioned he was going to try to talk to a security guard or he was trying to figure out where the Department of Urban Forestry was. When asked why he did not express this information in his interview, Tan cited he did not remember if Agency asked him about what Employee's intentions were. Tr. 38. Tan testified that on that day when he encountered Employee, he did not "feel that he was personally threatening me."

Janet Lee Miller ("Miller) Tr. 42 – 56

Miller currently works at Agency as an Urban Forester and has been with the District government for 16 years. She uses a DDOT vehicle daily as a part of her daily work duties and parks that vehicle in the DDOT garage. Miller testified that she has always parked in the DDOT garage, though she's only been at the 250 M Street SE location for a little over a year, nearly two years. Miller explained that in 2021, the general conditions of the parking garage at 250 M Street SE where that people got assigned spaces, but that they changed regularly. Miller testified that this causes a crowded and chaotic situation in the parking garage. Miller said that one morning in September 2021, there was a vehicle blocking hers. Miller testified that when she went to her truck, she could not get out, so she just went upstairs and spent time doing some office work. Tr. 46. She came down later, and the truck was still there, so she went to

find "Shannon Jones[4]" who she identified was with facilities and handled parking assignments. Miller explained that Shannon told her that the truck could be moved. When they went back to the garage, both Miller and Shaun McKim (co-worker) were blocked. Miller testified that two men came down as well and that one said they were upset that someone had parked in their space. She said she told that person that they needed to talk to Shannon about the parking issue. Miller identified Employee as the person whose truck was blocking hers in. After this exchange, Employee moved his truck, and she did not have any further interactions with Employee after this time.

On cross examination, Miller testified that the parking situation at 250 M Street SE was confusing, and that there were those who had their spaces displaced due to construction. Miller explained that the protocol in place was to try and find an empty space and not to block anyone, but Miller noted that not all cars fit in the spaces, as they were different sizes. Miller also testified that generally, where cars were parked on Friday were in the same space on Monday, but not always. She cited that sometimes other people needed to use or borrow another person's truck. Miller also explained that when she noticed her car blocked in, it was around 6:30am or 7am, and that she checked again around 8am or 8:30am and that when she finally came back down it was before noon. Tr. 55. On redirect examination, Miller testified that after she went and found Shannon Jones, that she went back down to the garage to wait for the vehicle to be moved and that she did not see Shannon Jones after that.

Shaun McKim ("McKim) Tr. Pgs. 59 – 75

McKim was hired in August 2013 as an Urban Forester and helps run the Urban Wood Program. He uses a DDOT vehicle approximately four (4) days a week. McKim explained that the parking conditions at 250 M Street SE were that Shannon [Jones] had Urban Forestry employees parking on the third floor. They would go down and retrieve keys from the Traka Box on the P1 level. McKim explained that the Traka box was the system used to get assigned keys, so you know who has the keys. Tr. 62. McKim testified that in the summer of 2021, parking was a challenge. He said that they had assigned spaces, but that if visitors or others came to the building or parked in the wrong spot, it was "just a cascading failure where you are going to park." Tr. 62. McKim testified that he had interactions with Employee. McKim explained that he had to borrow Daniel Just's vehicle because he could not use his own. McKim said he "bumped into" Janet Miller and they both noticed that both their vehicles had been blocked in by another vehicle. McKim noted that he thought it was odd, but "figured somebody just forgot their lunch or their computer and was just running back upstairs to grab whatever it was…" Tr. 63. After approximately ten minutes, McKim told Miller that he was going to go and check the Traka system to see if he could find the keys and move the vehicle. He said that Miller said she was going to look for Shannon.

He did not find the keys but came back down and said that Shannon said someone was supposed to come and move the vehicle. McKim testified that Employee came down and was upset that someone had parked in his spot. McKim said that Employee thought he was Daniel Just, and he told Employee that he was not Just, and that Employee seemed "satisfied" with that. Tr. 65. Employee moved the vehicle, but McKim said he stopped his car again and Employee came to him and called him "Jack Daniels" (Daniel Just). McKim said he told Employee again that he was not Daniel Just, and then Employee got back in his vehicle and that was the end of it. McKim noted that the parking issues currently at the 250 M Street SE, station are not as bad as they were because they got rid of assigned spaces. But there are still

[4] Later identified by Agency's representative as "Shannon Jackson" on Page 56 of the transcript. However, the undersigned has noted that from Agency's Answer and subsequent witness testimony, that the person referred to is Shannon Jones. As a result, the undersigned will reference "Shannon Jones".

issues for bigger vehicles to park in spaces. Shannon Jones told them to just park on P1 level and that she would find others to move it when there are no spaces available.

On cross examination, McKim reiterated that currently there are still parking issues based on vehicle size and that Shannon Jones will move vehicles as needed. McKim testified that Daniel Just knew he had borrowed his car because he called him. McKim said at the time of the incident with Employee, that he could tell he was upset, but that he just seemed to be having a bad day. Tr. 72. McKim did not feel threatened or intimidated by Employee's behavior. McKim could not recall whether Employee had used profanity on the day of the incident. McKim testified that he believed Employee's reference to Jack Daniels was because he did not know who Daniel Just was. McKim also iterated that Employee never forced him to stop his car when he was finally backing out on the day of the incident, but that another vehicle was "backing out of a space." On redirect, McKim reiterated that it was Employee who eventually came down to move the vehicle that was blocking him.

Harris Cummings ("Cummings") Tr. Pg 78 – 89.

Cummings has been with Agency since February 16, 2021. Cummings is a field inspector for the public space areas. Tr. 79. Cummings stated that his official title is Construction Control Representative, but that he is a Field Inspector. Cummings testified that the conditions at the parking garage at 250 M Street SE were "kind of all over the place." Tr. 81. Cummings explained that on September 13, 2021, Shannon asked him to move a vehicle shortly after he arrived at work. When he went to get the keys out of the "box" they were not there. He went to see the vehicle that was blocking and said there was already someone there with the vehicle – "the person who normally drives that vehicle" and it was blocking two other vehicles in. Tr. 82. Cummings testified that Employee was very upset that people had parked in his spot. Cummings said Employee said "he was kind of tired of them parking in his spot; he was going to break their jaws if it kept happening again." Tr. 83. Employee moved the vehicle. The next day, Cummings saw Employee again, and Employee was looking for Shannon and told him he was tired of people parking in his spot. Cummings opined that Employee was "pissed", just "angry overall that people were parking in his spot or area." Tr. 84.

On cross-examination, Cummings testified that September 13, 2021, was a Monday and that barring traffic, most of the time he got to work between 7am and 7:30am. Cummings explained that in his interview, he described Employee as aggressive toward the individuals blocking his car because Employee was angry, his voiced was raised and he was kind of shaking. Tr. 85. Cummings testified that Employee never threatened any individual person, but that he made the comments toward the Urban Forestry Department. On redirect, Cummings explained that he felt Employee threatened was the department of Urban Forestry. Cummings testified that Urban Forestry "…typically, they will park all over the place. They don't stay in their parking area at all. And that who was parking in his spot." Tr. 88.

Wayne Rodell Palmer ("Palmer") – Tr. 90 – 105.

Palmer is a Safety Tech, commonly known as a crossing guard and has been with Agency for approximately five and a half years. Palmer testified that in September 2021, he worked with Shannon Jones. They moved from 55 M Street to 250 M Street SE. At that time, they were setting up drivers and vehicles for parking spots in the 250 M Street SE parking garage. Palmer explained that on that day, he was standing in the lobby when a gentleman came up yelling for "Shannon Jones." He said the man said, "somebody's in my parking space…somebody got my space and I need to move the car." Palmer expressed that the man was in a "rage, a hot rage to the point where [Palmer] was thinking that if he finds Shannon, then he may do something to her." Tr. 92. Palmer said he told the man he didn't know where

she was. Palmer said the gentleman went to the elevators, and that he tried to reach Shannon on his cell phone to let her know this man was looking for her, but he was not able to reach her.

Palmer explained that he helps Shannon Jones with Facilities, moving furniture cubicle and the like and still assists her in that capacity currently. Palmer later identified the "gentleman" as Employee. Tr. 95. However, Palmer testified that if he saw Employee today, he would not know him, because he was a new employee at that time. He does not know who he is, but "know that his conduct and actions was definitely over the top." Tr. 96. Palmer reiterated that he tried to reach Shannon to tell her about Employee because of the way he was acting. Palmer did not have any other personal interactions with Employee and does not know him personally at all. Tr. 98.

On cross-examination, Palmer testified that he did not know Employee personally, and learned who he was after the situation. Palmer explained that when he described Employee as being a "hot rage," he meant that his behavior was aggressive such that he thought Shannon may be in danger. Tr. 99. Palmer said he did not alert security, and that they were sitting at the security desk. He does not know what action security took after he left. Tr. 100. Palmer said that during the time of the move to 250 M Street SE, there were a number of vehicles that were parked improperly and or might be in the wrong space. Palmer said in an interview that he talked about other employees who had "cussed Shannon out." Tr. 103. On redirect, Palmer testified that on the day of his interaction with Employee, they were in the lobby and everyone, including security that was seated at the desk in the lobby witnessed it.

Steve Messam ("Messam") Tr. 109 – 148

Messam works at Agency as a supervisory human resources ("HR") specialist and has been there for about nine (9) years. His position is under the Administrative Services Division ("ASD"). Messam became aware of circumstances of this situation when the manager of the Public Space Inspectors/Public Space Regulation division ("PSI") contacted their office for assistance on how to address the matter. Tr. 111. Messam testified that the circumstances surrounded allegations that an employee had mad threatening language toward another employee in reference to unauthorized use of vehicles. Messam explained that the vehicle was blocking in another government vehicle. Tr. 112. Messam further testified that the ASD worked alongside the manager to provide guidance for looking into the matter and conducting an investigation to determine the merits of what transpired. Messam said members of his office along with colleagues in the Office of Risk Management conducted the investigation. Messam asserted that the investigation commenced around September 15, 2023.

Messam averred that once they received the allegations, they sought statements from witnesses and those who might have been engaged. They also collected relevant documents and went about scheduling interviews to ascertain what transpired. Tr. 114. Messam recalled that the first interview may have started around September 20th or 21st of 2021. Upon review of exhibits, Messam noted that the last interview was completed on October 12, 2021, and that interview was with Employee. Messam testified that along with interviewing witnesses and collection documents, they also review the Workplace Violence Policy, review of emails and other materials. Tr. 117. At the conclusion of the investigation, they determined that there was "enough information and enough credibility to determine that a disciplinary action was warranted for the allegations that were made." Tr. 118. Messam testified that they concluded that Employee had violated DPM 16 Section 1605.4a and 1607(a)(15) – "assaulting, fighting, threatening, attempting to inflict or inflicting bodily harm while on District property." Tr. 118-119. Messam explained that this conclusion was largely based upon the statements received from Harris Cummings. Messam noted that Cummings had said Employee made threatening language to him while on an elevator. Tr. 119. Messam confirmed that they also concluded Employee violated DPM 1605.4 (d)

and 1607.2 (d)(2) – "deliberate or malicious refusal to comply with rules, regulations, written procedures or supervisory instructions." Messam testified that the basis of this conclusion was that TRAKA box keys were not returned by Employee and that he had kept them over the weekend as opposed to following the rules to return them." Tr. 120-121. Messam said this was confirmed by the TRAKA parking command and "Mr. Harris" who oversees the vehicles keys in the TRAKA box usage and that he noted the key had not been returned. Tr. 121. Messam noted that the SOP for the company is that the keys must be returned to the TRAKA box as required by vehicle authorization brief. Tr. 123. Messam further testified that the Employee's failure to return the keys, proved that the SOP had not been adhered to.

Messam testified that they also concluded that Employee had violated DPM 1605.4 and 1607.2 (a)(13) – "use of a District-owned or leased vehicle such as a car, truck, van, bus, aircraft, boat or other motor vehicle for use other than official purposes." The basis of this conclusion was that they believed that "the vehicle that was identified in [Employee's] possession that he had procured for the day had been intentionally placed in a position to block the vehicle that was in the same space that he said was his space." Tr. 126. Messam explained that this behavior is not something the Agency condones for vehicle use. Messam said the proposed adverse action was a 20-day suspension and that the notice of the action was done February 22, 2022. Messam recalled that the final action notice was around mid-April. Upon review of exhibits, Messam noted that the date was April 7, 2022. Tr. 129.

On cross-examination, Messam testified that Charge 1 was based on Harris Cummings' testimony. He explained that they collectively looked at the situation including Cummings' statement for which they based their conclusion. Messam cited that "Mr. Cummings had the most, I guess, extreme of it all, but it was more of a collective viewpoint of looking at everything in totality." Tr. 132. Messam explained that the weight they gave the statements was based on the interviews of others as well, including Mr. McKim and a lady he could not recall, but thought her first name was Janet. Tr. 133. Messam found that these two individuals were able to corroborate each statement. Messam explained that when they reviewed the materials, they found Employee presented himself in a threatening way. Messam testified that he did not know why security had not reported this incident or whether they played any role/witnessed the incident at that moment. Tr. 136. Regarding Charge 2 and the failure to return the keys to the TRAKA box, Messam noted that he could not recall why an electronic record of the TRAKA box was not a part of the final action. He could not recall whether it was included and that he recalled that the person in charge of overseeing the TRAKA box noted that they were not there. Tr. 138.

Messam testified that he thought that was the basis of the issue because they weren't able to find the keys to the vehicle so it could be moved. Messam said he could not answer whether on the morning of September 13th if Employee had checked out the keys that morning and that was why they weren't there. Messam said signing off on SOPs vary by unit. Messam could not recall whether any other employees had failed to return their keys to the TRAKA box. Messam testified that if an employee forgot their keys and it wasn't intentional, then the manager would confront them and advise them to be mindful to return the keys. Tr. 141. Messam testified that there are weekend shifts that use vehicles, and that it could be possible that a vehicle was used over the weekend. Messam testified that none of those he interviewed said they saw the vehicle blocking other vehicles over the weekend. Tr. 144. Messam cited that there were challenges with the parking due to construction and other space issues. Messam further testified that he was made aware of the incident around September 13, 2021. Messam thought that the original outreach was on September 13, 2021, and that Employee was placed on administrative leave on September 16, 2021. Messam noted that the matter was brought to his attention by Stacey Collins, Chief of the Division. Tr. 146.

On redirect, Messam explained that ASD does not rely solely on employee opinions, but review the totality of what transpired. Messam also noted that even if Employee had not blocked the vehicles over the weekend, that blocking on September 13, 2021, would have still constituted improper use of the vehicle.

Employee's Case-in Chief

Employee Tr. Pages 153 – 177

Employee testified that he did not leave a note on Mark Tan's car. Employee further testified that he did not deliberately park his car to block two vehicles on September 10, 2021, such that they would be blocked on September 13, 2021. Employee explained that he did not do it deliberately but could not find another space. Tr. 154. Employee said Ms. Shannon is the vehicle coordinator and that he spoke to her about his parking situation prior to the incident. Employee explained that he asked Shannon why others parked in the space assigned to him and if he could park in someone else's spot if he didn't see another space. Employee stated that Shannon told him he could not park in another assigned spot and told him there were two vacant spots. Employee cited that those two spots were taken, and that Shannon said she did not want people parking vehicles outside the building. Tr. 155. Employee said that there had been two incidents where vehicles parked outside of the building had been sideswiped, so that's why he thought she didn't want them parking outside the building. Employee explained that when he came in that Friday, there were no spaces so he parked there because it was the weekend. He got back that Friday evening somewhere between 4:30pm and 4:45pm.

Employee explained that he didn't really know Cummings, but that he was a man who worked with Shannon. He met him in the elevator on September 13, 2021, and Cummings asked him if that was his vehicle. Employee said he told Cummings 'yes'; it was and that he had to park there because there was nowhere else to park and vacant spaces were taken. He also told Cummings that he was going down to get his key out of the TRAKA box. Employee maintains that Cummings was standing right beside him when he got his key out of the box. Tr. 158. Employee said there are times where vehicles are borrowed by others for reasons, including if a regularly assigned car was not available or otherwise, and that there is no way of knowing who used the car. He said that if the car was not in the same spot, then you would call "Ms. Courtney" to find out if it's been moved. Employee maintained that he placed his key in the TRAKA box on Friday and retrieved them Monday morning, September 13th. Employee said that he typically gets to work around 7am, but spends approximately an hour upstairs getting permits and maps needed to work. Employee testified that he did not tell Cummings that he was going to break someone's jaw. He said he asked Cummings whether Shannon had a chance to email Agency about the parking issues.

Employee stated that his vehicle cannot fit in all spots. Employee reiterated that he did not threaten to break anyone's jaw and did not take his keys with him over the weekend. Employee explained that he was upset that someone kept parking in his spot. He first went to Ms. Shannon and asked her to resolve it because it was a recurring issue. Tr. 164. Employee did not yell when he was looking for Shannon and stated that he only asked what floor she was on, because he wasn't sure. Employee said security was present at the front desk when he did this. Tr. 165. Security did not say anything to him, did not tell him to calm down or otherwise.

On cross examination, Employee testified that he parked the vehicle the way he did because there were no more spaces. Employee said that he did not intentionally block these two cars, but just that his vehicle is longer because he has a pickup. Tr. 168. Employee iterated that he told Shannon a couple of

times that the Urban Forestry division was parking in his space. Employee testified that on the morning of September 13th, he did not intentionally leave his car, but that when he got to work he went upstairs to clock in and talk with his supervisor. Employee said he returned his keys to the TRAKA box, and he wanted to know why there wasn't a log of it. Employee said that day, he came down the elevator and a gentleman asked him "is that your truck outside." Employee said that he told this man that he was going down to get his keys out of the box right now and that he retrieved the keys with the man standing right beside him. Tr. 170. Employee said that when he went down, two Urban Forestry division employees were there and asked why he was blocking their vehicles. He said he told them he wasn't really blocking and that there was no other spaces. Employee said after this, he asked one of the UFD employees if that was his car, and the man told him no. Employee did not recall ever going up to the Urban Forestry floor. He maintained that he only told the one person from UFD to please tell their colleagues not to park in the assigned parking lot.

On redirect, Employee testified that he did not intend to block two vehicles and that he only parked that way because no other spaces were available. Employee also maintained that he never threatened other employees or left a note on their vehicle, nor did he threaten to break anyone's jaw. Employee further noted that he did not intentionally prevent anyone from doing work that day.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Employee works for Agency as a Construction Control Representative. On April 7, 2022, Agency issued a Final Notice suspending Employee from service for twenty (20) calendar days for the following causes of action[5]: **(1) DPM §§ 1605.4(a) and 1607.2(a)(15) – "Conduct prejudicial to the District of Columbia Government**: Assault, fighting, attempting to inflict or inflicting bodily harm while on District property or while on duty; **(2) DPM §§ 1605.4(d) and 1607.2 (d)(2) - Failure to Follow Instructions**: Deliberate or malicious refusal to comply with rules, regulations, written procedures and proper supervisory instructions; and **(3) DPM §§ 1605.4(a) and 1607.2 (a)(13) – Conduct prejudicial to District of Columbia Government:** Use of (or authorizing the use of) District owned or leased vehicles such as cars, vans, trucks, buses, aircraft, boats or any other motor vehicle for use other than official purposes. Employee's suspension was effective April 11, 2022, through May 2, 2022.

ANALYSIS[6]

Summary of Agency's Position

Agency asserts that it had cause to suspend Employee for twenty (20) days without pay, and that it followed all appropriate laws, rules and regulations in administering the disciplinary action against Employee. Following an incident on September 13, 2021, Employee was charged with three (3) causes of action.[7] Agency avers that Employee left a threatening note on another employee's vehicle and that he made threats in the presence of other employees. Additionally, Agency argues that Employee misused government vehicles by blocking other vehicles in the Agency parking lot and failed to turn in keys to the vehicle to the TRAKA system as required. As a result, Agency asserts that it has cause to suspend

[5] An Advanced Written Notice was issued February 22, 2022, then was subsequently re-issued on February 23, 2022, to cite to calendar days for the suspension. *See*. Agency's Answer at Exhibit 3, Final Notice.

[6] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See. Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

[7] Charges previously cited to.

Employee for 20 days and that it did so in accordance with all applicable laws rules and regulations. Further, Agency avers that it did not violate the 90 Day Rule pursuant to DPM § 1602.3 in its administration of the instant action.

Summary of Employee's Position

Employee denies the charges for which he was disciplined in this matter. Employee avers that Agency has presented insufficient proof to meet its burden and did not have cause to suspend him from service for twenty (20) days. Further, Employee asserts that Agency failed to adhere to the 90 Day Rule pursuant to DPM§1602.3, in that it commenced the adverse action five (5) days late from the date the 90 Day Rule triggered. Employee avers that the 90 Day Rule was triggered the day Agency placed Employee on Administrative Leave and not the date of the completion of interviews in the investigation of this matter. Employee avers that Agency's placement of Employee on Administrative Leave prior to the investigation clearly evinces that Agency "knew or should have known" of the actions for which Employee was charged.

Whether Agency had cause for Adverse Action

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or *suspension for 10 days or more* (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. *(Emphasis added).*

Additionally, DPM § 1601.7 provides that "[e]ach agency head and personnel authority has the obligation to, and shall ensure that corrective and adverse actions are only taken when an employee does not meet or violates established performance or conduct standards, consistent with this chapter." Pursuant to OEA Rule § 631.2, 6-B District of Columbia Municipal Regulations ("DCMR") Ch. 600, et seq (December 27, 2021)**,** Agency has the burden of proof by a preponderance of the evidence, that the proposed disciplinary action was taken for cause. Employee was suspended from service for twenty (20) days pursuant to three (3) charges: **(*1) DPM §§ 1605.4(a) and 1607.2(a)(15) – "Conduct prejudicial to the District of Columbia Government**: Assault, fighting, attempting to inflict or inflicting bodily harm while on District property or while on duty;* ***(2) DPM §§ 1605.4(d) and 1607.2 (d)(2) - Failure to Follow Instructions**: Deliberate of malicious refusal to comply with rules, regulations, written procedures and proper supervisory instructions; and* ***(3) DPM §§ 1605.4(a) and 1607.2 (a)(13) – Conduct prejudicial to District of Columbia Government:*** *Use of (or authorizing the use of) District owned or leased vehicles such as cars, vans, trucks, buses, aircraft, boats or any other motor vehicle for use other than official purposes.*

DPM § 1607.2(a)(15) – "Conduct prejudicial to the District Government: Assault, fighting, attempting to inflict or inflicting bodily harm while on District property or while on duty.

In the instant matter, Employee was charged pursuant to 1607.2(a)(15) for making threats to other employees. To sustain this charge, Agency averred that Employee left a threatening note on another employee's car, and also made threatening statements to other employees. Employee denied leaving a note, and also denied making threats. In the instant matter, Agency relied upon its interviews with Employee and other employees involved in this matter. Most of those persons identified testified in the Evidentiary Hearing in this matter. Of particular note, the undersigned finds that all employees testified regarding the challenges with parking at the 250 M Street SE parking area. Mr. Tan testified that a note was left on his car after he parked in a spot. This note read "Do this again, I wait on it" Mr. Tan said he did not know who wrote the note at the time, thus he did not report it, but placed a picture of it in a group chat with his Urban Forestry (UF) coworkers. Mr. Tan testified that he had five (5) or less interactions with Employee. Tan testified that he did not take Employee's actions as "personally threatening, but more so intimidating to others to "watch out." Janet Miller and Shaun McKim were two employees whose cars were blocked by Employee's truck. Miller testified that Employee eventually came down and moved the car, and that he just seemed to be somewhat upset. She had no other interaction with Employee. McKim stated that he was using another employee's vehicle, one belonging to Daniel Just. During the time that they were waiting for the car to be moved, McKim interacted with Employee. McKim said Employee seemed upset, but more so in the sense of having a bad day. McKim testified that he did not feel threatened or intimidated by Employee. McKim also testified that when they were in the process of moving the cars, that Employee stopped again and asked him if he was "Jack Daniels" but that he took that he meant Daniel Just. McKim stated that he did not believe Employee purposely stopped again, but that they were stopped because another car was backing out.

Agency also presented testimony from Harris Cummings. Cummings testified that he was assisting in getting keys and was with Employee in an elevator when Employee said someone had parked in his spot and that he said something to the effect that he would "break some jaws." Cummings testified that he felt Employee was "just angry overall that people kept parking in his spot." Cummings testified that Employee never threatened any individual but made comments about the Urban Forestry Department. He noted that Employee's voice was raised and that he was kind of shaking during this time. Agency also provided testimony from Wayne Palmer. Palmer was a crossing guard who engaged with Employee only once. He said he witnessed Employee coming into the building looking for Shannon Jones. Palmer said that Employee's behavior was like he was in a "rage." Palmer said he was concerned and tried to reach Jones to warn her that Employee was looking for her. Palmer stated that security was at the front desk, and that they did not take any action to stop Employee or otherwise.

Employee testified that he never threatened anyone and that he did not leave the note on Tan's car. Employee acknowledged that he was frustrated with the parking situation, and that he did look for Jones, but that he did not make threats or otherwise. Employee also testified that he did not say he would break anyone's jaws or otherwise. Employee maintained that he entered the building looking for Shannon Jones, but that he was not yelling or acting out. Regarding the blocked cars, Employee maintained that he did not intentionally block cars. He said he asked McKim if he was the owner of the car, but that he did not do so to be a threat.

Consistent with the rulings of the D.C. Court of Appeals, OEA has held that to sustain a charge of threats, that the threats (words and actions) would lead a reasonable person to believe that he or she was in danger of physical harm.[8] Further, in the context of the workplace environment, considerations

[8] *See. Employee v. District of Columbia Department of Transportation*, OEA Matter 1601-0067-17 (June 25, 2018). That AJ cited the following:

regarding co-workers and threats, invoke analyses based on the *Metz* standard regarding what actions the reasonable person (co-workers and/or other employees in this instance) *who heard the statements actually did*.[9] Those considerations include whether the persons hearing the threat took action, for example, calling the police or otherwise. In review of the instant matter, there were several instances where Agency asserted that Employee made threats against employees. With regard to the note left on Mr. Tan's car, Mr. Tan did not report the note initially, citing he did not know who wrote it. Further, Mr. Tan also stated that he did not take the other interactions he had with Employee as personally threatening. In review of that situation under the *Metz* standard, the undersigned first finds that Agency has failed to prove that Employee was the author of the note. Further, Tan's actions in terms of the *Metz* reasonable person standard described above, do not suggest that Tan was in fear of bodily harm from Employee.

Regarding the incidents involving Janet Miller and Shaun McKim, both employees had limited interaction with Employee and neither cited any fear or threat of bodily harm from Employee. At most, both noted that Employee seem upset and or frustrated with the parking situation. Neither of them reported Employee to security or otherwise. Harris Cummings testified that Employee made a comment about "breaking jaws" in the elevator ride they were on together. Cummings cited that Employee did not make an individual threat, but that his comments were collectively directed to Urban Forestry Department. Having had the opportunity to hear Cummings' testimony, it is clear that Cummings felt no personal threat of bodily harm from Employee's statements. Further, Cummings did not report the elevator incident to security, but shared it with Shannon Jones. Further, during his testimony, Cummings opined that Employee was just overall upset. While Employee denies having said this, in lieu of the reasonable person standard, the undersigned would find that Cummings felt no threat of personal harm or injury, nor did he think that Employee would harm others at this junction.

Mr. Wayne Palmer witnessed Employee in what he described as a "rage" while looking for Shannon Jones. Palmer noted that he feared that Employee would harm Jones because he was in a "rage." Palmer also testified that he tried to call Jones to warn her. Palmer did not engage with the security present in the building where this occurred, nor did he ask security to intervene, call the police or anyone else other than Shannon Jones at that time. The undersigned would note that Shannon Jones was not presented as a witness to provide testimony in this matter, though the record reflects emails and other correspondence from her to Agency personnel regarding Employee's actions etc.

In review of the totality of the testimony and evidence provided, the undersigned finds that Agency has failed to meet its burden of proof for charge. The record is clear that Employee was upset about the ongoing parking issues at the site, however in consideration of the reasonable person standard of the consideration of threats, I find that the record does not reflect that Employee sought to cause bodily

---

> "In *Postell v. United States*, 282 A.2d 551, 553 (D.C. 1971), the Court defined "threat" as "words…of such a nature as to convey a menace or fear of bodily harm to the ordinary hearer." In *Campbell v. United States*, 450 A.2d 428, 431 (D.C. 1972), the Court identified the elements needed to establish a prima facie case of the offense: The essential elements of the offense of threats to do bodily harm are: that the defendant uttered words to another person; that the words were of such a nature as to convey fear of serious bodily harm or injury to the ordinary hearer; that the defendant intended to utter the words which constituted the threat. In *Clark v. United States*, 755 A2d 1026, 1031 (D.C. 2000), the Court added the importance of the context in which the words were said in determining if a threat to do bodily harm was made: Words cannot always be read in the abstract and often acquire significant meaning from context, facial expression, tone, stress, posture, inflection, and like manifestations or the speaker and the factual circumstances of their delivery**. In the employment context, the Court, in *Metz v. Department of Treasury*, 780 F.2d 1001 (Fed. Cir. 1986), noted the importance of the reaction of the employer and co-workers to the words used, applying the "reasonable person" standard, stating that the Court would consider: what reasonable persons who heard the statements actually did. For instance, a listener who reacted by calling police after hearing a statement is more likely to have heard a threat than a listener who did nothing." (Emphasis added).**

[9] *Id. See*. *Metz v. Department of Treasury*, 780 F.2d 1001 (Fed. Cir. 1986).

harm or injury to any person. Further, regarding the note, Agency has failed to prove that Employee authored and put that note on Tan's car. The undersigned finds that Agency considered the *Douglas* Factors[10] in assessing this charge; in particular – mitigating factors, here unusual job tensions. Based on the record and the testimony provided from witnesses at the Evidentiary Hearing in this matter, the parking situation at the Agency site (250 M Street SE), was disorganized and chaotic at the time of the incident for which Employee was charged. Further, it remained somewhat of a challenging situation for all employees as of the date of the Evidentiary Hearing. At the time of the incidents (September 2021) for which Employee was charged, parking spaces were not available for all employees who were required to park there and the limitations against parking outside of the specified areas. Agency noted in its *Douglas* Factor considerations that this was a problem but cited that Employee's behavior was an unwarranted response. That considered, the record is clear that Employee exhibited frustration and was upset about parking situation. However, the undersigned finds that in consideration of the reasonable person standard regarding the charges related to threats, I find that Agency has not met its burden of proof. For all these reasons, the undersigned finds that this charge against Employee cannot be sustained.

DPM §§ 1605.4(d) and 1607.2 (d)(2) - Failure to Follow Instructions: Deliberate of malicious refusal to comply with rules, regulations, written procedures and proper supervisory instructions.

To support this charge, Agency avers that Employee deliberately refused to follow instructions because he did not return the government vehicle keys to the TRAKA box as required. Agency asserts that Employee did this purposely in order to block vehicles who had parked in his space. Employee denies any deliberate action in this regard. Employee asserts that he parked where he did on that Friday, because there were no other spaces available due to the parking situation. Further, Employee cited that he was told on previous occasions that he would just have to find a space, and this was difficult, because his assigned vehicle was a truck. Employee also avers that he did return the keys to the TRAKA box as required. Regarding this charge, I find that Agency has failed to provide substantial evidence to prove that Employee deliberately failed to place the keys back in the TRAKA box. The record is void of any direct evidence of the TRAKA system records regarding the events in question. Agency relied upon the determination of Steve Messam in this matter, and he noted in his testimony that he did not see the TRAKA reports but relied upon someone named "Mr. Harris" who noted that the keys were not returned as required.

---

[10] *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 it's 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.

Further, Messam testified that he was not able to determine whether Employee had returned the keys to the TRAKA system on Friday and retrieved them early that next Monday morning when they were searching for the keys. It is of note that Employee testified that on the Monday morning, that he was accompanied by another employee to the TRAKA box where he retrieved the keys and moved the card. The undersigned finds it confounding that the Agency failed to consider or review the TRAKA records in its administration of the instant action. Further, Agency failed provide the TRAKA box records in this instant matter, and considering the primary purpose of that system is to provide detailed records of the keys and who checks those in and out each day for government use, the undersigned finds that Agency has failed to meet its burden of proof for this charge. Therefore, I find that the charge of deliberate or malicious refusal to follow instructions cannot be sustained.

DPM §§ 1605.4(a) and 1607.2 (a)(13) – Conduct prejudicial to District of Columbia Government: Use of (or authorizing the use of) District owned or leased vehicles such as cars, vans, trucks, buses, aircraft, boats or any other motor vehicle for use other than official purposes.

For the same reasons previously noted regarding the charge of failure to follow instructions, I find that Agency has also failed to meet its burden of proof regarding misuse of government vehicle. Here again, Agency did not provide any information specifically noting that Employee purposely or maliciously blocked the vehicles or that he deliberately failed to put the keys in the TRAKA box as required. Without the TRAKA box records detailing the specific movement of the keys, I find that Agency cannot prove these actions. Further, the record is clear that the parking at the Agency location was disorganized at best, and chaotic at worst. It is of note that Agency's witness, Janet Miller, testified that sometimes vehicles were parked and blocked other cars due to the limited parking options as many were displaced by construction or otherwise. Further, all of those who testified noted the issue with parking and finding spaces, thus I find it reasonable that Employee parked wherever he could to leave the vehicle in and around the appropriate parking area. Thus, I find that Agency has failed to show that Employee made a deliberate attempt such that it constituted misuse of a government vehicle. Accordingly, I find that this charge cannot be sustained.

90 Day Rule – DPM § 1602.3

Employee asserts that Agency failed to adhere to the "90 Day Rule" pursuant to DPM § 1602.3. Specifically, Employee avers that Agency did not commence the instant adverse action within the 90 days required by this statute. Employee contends that the 90 Day Rule requires the "clock to trigger" when an agency knows or should have known about the misconduct for which an employee may be charged. Here, Employee argues that when Agency placed Employee on Administrative Leave pending an investigation on September 16, 2021, that the 90 Day Rule clock commenced.[11] Employee disagrees with Agency's assertion that the clock was triggered on October 12, 2021, following Agency's completion of interviews. Employee asserts that because Agency already put Employee on "administrative leave prior to the initiation of any investigation" that it presents a "distinct characteristic" in the instant matter. Employee argues that Agency's placement of Employee on administrative leave "demonstrates that Agency had prerequisite knowledge of the alleged behavior sufficient enough to place Employee on leave for the alleged behavior prior to even investigating it."[12] Further, Employee notes that if Agency didn't have this knowledge, then there would have been no reason to place Employee on administrative leave or conduct a subsequent investigation.[13] Employee notes that "while there is no distinct standard for what constitutes when an Agency knows or should know about an alleged conduct, case law on the whole suggests that

[11] Employee's Brief March 14, 2023. *It should be noted that Employee's Brief was mailed to this Office prior, but it failed to arrive due to what is believed to be a postal service issue.
[12] *Id.*
[13] *Id.*

this is the date on which an Agency has become aware of the alleged conduct of an individual Employee, and depending on the context of those actions, is able to determine if such conduct qualifies as a violation."[14] Employee further asserts that "considering Agency was aware of the alleged conduct as well as the potential severity on September 15, 2021, Agency's adverse action that was initiated on February 22, 2022, was improper because it directly violated the 90-day rule for adverse action…"[15] Additionally, Employee provides that Agency's date of initiation, "improperly extended the time period by approximately five (5) business days."[16]

Agency avers that it did not violate the 90 Day Rule in its administration of the instant action. Agency asserts that it initiated the action within the required timeframe in accordance with the rule and as required by case law in this matter. Specifically, Agency avers that it initiated the instant action by issuing its Advance written notice within 90 business Days of its completion of the interview in this process, on October 12, 2021, and that in doing so, it adhered to the 90 Day Rule.[17] Further, Agency asserts that its action to place Employee on administrative leave and then conduct an investigation were consistent with procedures found in the matter of *DC Fire and Emergency Services v DC Off Of Emp Appeals*.[18] Agency asserts that the actions that took place occurred between August and September 2021.[19] Agency maintains that it placed Employee on administrative leave on September 16, 2021 pending an investigation, which concluded on October 12, 2021. Agency asserts that "[t]his matter was complex, spanned several discrete incidents and involved numerous witnesses. Agency could not have reasonably known of Employee's behavior before conducting interviews with Employee and all relevant witnesses. Therefore. the appropriate date that Agency "knew or could have known" of Employee's behavior was the day the last interview was conducted. i.e. October 12, 2021."[20] Agency also avers that the "totality of the circumstances" similar to the OEA Board's decision in *Employee v. Department of Youth Rehabilitation Services*[21] is applicable in this matter. Agency acknowledges that the facts of that matter are substantially different, but notes that the Board's holding regarding the need for an agency to have "sufficient time to determine the exact nature of Employee's behavior" is applicable. Wherefore, Agency argues that it needed to conduct an investigation regarding the charges and following that, made the determination that the actions warranted discipline. As a result, Agency maintains it did not violate the 90 Day Rule in its administration of the instant action.

The District Personnel Manual ("DPM") §1602.3 (a) 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." The OEA Board has held that the legislative intent of the 90-Day Rule provision found in DPM §1602.3 (a) is 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."[22] The Board noted that prior to this revision, the "courts have ruled on matters pertaining to the ninety-day rule as it related to D.C. Code § 5-1031…[t]his statutory language is only applicable to those employed by the Metropolitan Police Department or the D.C. Fire and Emergency Medical Service agencies."[23] That noted, the Board further held that while the intent for the 1602.3 (a) provision was not "spelled out in the DPM, it is reasonable to believe that the intent was

---

[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] Agency's Sur Reply Brief (December 9, 2022).
[18] 986 A.2d 425.
[19] Agency's Brief (November 7, 2022).
[20] *Id*. at Page 8.
[21] *Employee v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0037-20, *Opinion and Order on Petition for Review*. (February 24, 2022).
[22] *Keith Bickford v Department of General Service*, OEA Matter No.1601-0053-17 *Opinion and Order on Petition for Review* (January 14, 2020).
[23] *Id.*

similar to that provided by the D.C. Council when establishing the language of the ninety-day rule." The Board referenced a D.C. Court of Appeals decision[24] wherein, the Court found that "the deadline was intended to bring certainty to employees of an adverse action that may otherwise linger indefinitely."[25] The Board has also held that this provision of the DPM 1602.3(a) like its counterpart in found in D.C. Code §5-1031, are mandatory in nature.[26] In the instant matter, Agency avers that the 90 Day "triggered" in this matter after it completed its investigation into this matter, which was October 12, 2021. Agency avers that it had to take time to investigate the issues that occurred in August and September. Agency asserts that it was then that it knew about the conduct regarding the instant adverse action. Employee argues that Employee on Administrative Leave. As such, Employee asserts that Agency' Advanced Notice issued on February 23, 2022, was five (5) days after the 90 business days required by DPM § 1602.3. In assessing when an agency 'knew or should have known" about conduct, the D.C. Court of Appeals has held that while "knowledge of the conduct does not have to be a high degree of certainty to trigger the counting, it nonetheless should be a level of certainty above prediction."[27]

Here, Agency asserts it could not have known until it completed its investigation and interviewed Employee, which occurred on October 12, 2021. However, Agency placed Employee on Administrative Leave prior to any issuance of an Advance Notice of Proposed action in this matter.[28] Thus, I find that when Agency placed Employee on Administrative Leave, its knowledge of the conduct was at a degree of certainty to trigger the counting. Agency's placement of Employee on leave supports the fact that its knowledge of Employee's conduct was at a level above prediction. While Agency cites that their decision to investigate the matter after placing Employee on administrative leave is similar to a matter involving the D.C. Department of Fire and Medical Emergency Services (DCFEMS), the undersigned would note that this matter is different from that of the cited DC FEMS matter. In that matter, a patient had died, thus warranting different circumstances regarding investigation and otherwise. Further, DPM §§ 1618 and 1619, focus on the timing of the issuance of an Advance Notice and Administrative Leave.[29] In that regard, I find that Agency's failed to adhere to those provisions, as it placed Employee on Administrative Leave *prior* to the issuance of an Advance Notice of Proposed Adverse Action. For these reasons, I find that the "trigger" date for this action was the date Agency placed Employee on Administrative Leave, September 16, 2021, and not the date it completed its investigation on October 12, 2021. Accordingly, I further find that Agency did not follow the 90 Day Rule as required in DPM §1602.3 in its administration of the instant action. This stated, because I have found that Agency has failed to meet its burden of proof regarding the causes of action in this matter, I conclude that the 90 Day Rule application is moot. Thus, I will not assess whether Agency's actions constituted harmless error with regard to the 90 Day Rule, since I have found there was no cause for action in this matter.

---

[24] *Id.* citing to *District of Columbia Fire and Medical Services Department v D.C. Office of Employee Appeals*, 986 A.2d 419,425 (2010).
[25] *Id.* The Board also cited the Court of Appeals as noting that 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."
[26] *Id.* at Pages 9-10.
[27] *D.C. Fire and Emergency Medical Services Department v DC Office of Employee Appeals,* 986 A.2d 419, 421 (DC 2010).
[28] DPM §1618.1 – 1618.3, governs the process of notice of corrective actions. Additionally, DPM §1619.1 provides guidance regarding Administrative Leave. Of note, that provision provides that: "***Following the issuance of a notice of proposed corrective or adverse action pursuant to § 1618 of this chapte***r, an agency head, at his or her discretion, may place the employee on administrative leave pending a final determination in accordance with this section. (Emphasis added)." This provision provides that administrative leave follows a notice of proposed or corrective action. In the instant matter, Agency placed Employee on leave prior to an investigation into the matter and prior to the issuance of a notice of proposed action.
[29] *Id.*

Whether the Penalty was Appropriate

The undersigned finds that Agency has not met its burden to establish cause for adverse action in this matter. Consequently, for the reasons outlined in this decision regarding Agency's failure to meet the burden of proof for cause in this matter, the undersigned finds the charges cannot be sustained and that the penalty of the suspension for twenty (20) days was not appropriate.

ORDER

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

1. Agency's action of suspending Employee from service for twenty (20) days is **REVERSED**.
2. Agency shall reimburse Employee all back pay and benefits lost as a result of the suspension.
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:

/s/ Michelle R. Harris
MICHELLE R. HARRIS, ESQ.
Senior Administrative Judge