THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
SHOLANDA MILLER,	)	
Employee	)	OEA Matter No. 1601-0325-10-R15
	)	
v.	)	Date of Issuance: May 6, 2016
	)	
METROPOLITAN POLICE DEPARTMENT,	)	
Agency	)	Eric T. Robinson, Esq.
	)	Senior Administrative Judge
	)	

Marc Wilhite, Esq., Employee Representative
Frank McDougald, Esq., Agency Representative

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL HISTORY

On June 16, 2010, Sholanda Miller ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the Metropolitan Police Department's ("MPD" or "the Agency") action of removing her from service. Prior to her removal, Employee had worked for the MPD for seven years and her last position of record was Officer. I was initially assigned this matter on or about July 10, 2012. Thereafter, I ordered the parties to appear for a Prehearing Conference. At the conference, I determined that an evidentiary hearing was unwarranted. Accordingly, on September 28, 2012, I issued an Order wherein the parties were required to address the merits of this matter in legal briefs. Both parties complied with this order. After reviewing the parties submissions, I issued an Initial Decision ("ID") on this matter on December 10, 2013. Thereafter, Employee filed a Petition for Review with the Board of the OEA ("The Board"). On April 14, 2015, the Board issued an Opinion and Order ("O&O") on Petition for Review in this matter. As part of the ID, I was tasked with deciding the following three issues:

1. Whether the Agency, in removing Employee from service, violated D.C Official Code § 5-1031 et al.

2. Whether the Agency, in removing Employee from service, violated the "55 day rule" in accordance with Article 12 Section 6 of the Collective Bargaining Agreement by and between the parties.

3. Whether the Agency is prevented from removing Employee from service due to the proposed 15-day suspension, which Employee had accepted as appropriate punishment.

In the ID, I found all three of the preceding issues in the negative. As a result, I upheld Agency's action. In its O&O, the Board agreed with the ID, in part. More specifically, the Board agreed that the Agency did not violate D.C. Official Code § 5-1031 and the Board agreed that the Agency was not precluded from removing Employee from service instead of imposing a 15-day suspension. However, the Board opted to remand the matter back to the undersigned so that I could provide further analysis and review with respect as to whether Agency violated the 55-day rule.[1] Thereafter, the Undersigned held a Status Conference during which I provided the parties with a briefing schedule so that they could address the issues raised in the O&O. The parties complied. After reviewing the documents of record, I have determined that no further proceedings are warranted. The record is now closed.

JURISDICTION

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

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."

ISSUE

Whether MPD, in removing Employee from service, violated the "55 day rule" as provided for in Article 12 Section 6 of the Collective Bargaining Agreement by and between the parties.

[1] *See* Article 12 § 6 of the Collective Bargaining Agreement between MPD and the Fraternal Order of Police ("Union").

STATEMENT OF THE CHARGES

On November 23, 2009, Employee was served with a Notice of Proposed Adverse Action through which MPD sought to suspend her form service for fifteen days. She was charged as follows:

Charge No. 1:	Violation of General Order 120.21, Attachment A, Part A-14, which states, "Neglect of duty to which assigned, or required by rules and regulations adopted by the Department."
Specification No. 1:	In that, on February 3, 2008, during a telephone conversation with your boyfriend, Eric Shorts, he admitted having thrown a brick at an automobile, shattering the windshield and causing the driver to crash into someone's yard. The context of this phone conversation was obtained as a result of an authorized Metropolitan Police Department (MPD) – Federal Bureau of Investigation (FBI) wiretap. As a police officer, you failed to report, investigate, or ensure that a MPD member was notified to investigate the alleged criminal conduct.
Charge No. 2:	Violation of General Order 120.21, Attachment A, Part A-25, which reads, "Any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and the performance of the force."
Specification No. 1:	Your behavior, having been brought to the attention of the MPD by another law enforcement entity, has brought discredit to the Department.

According to the record, Employee did not respond to this charge in tacit acceptance of the then penalty proposed by MPD. However, prior to her serving her suspension, Employee was served with an Amendment to the Notice of Proposed Adverse Action in which she was charged with additional acts of misconduct and recommended for termination. The additional charges and specifications are as follows:

Charge No. 3:	Violation of General Order 120.21, Attachment A, Part A-15, which provides, "Compromising a felony or any other unlawful act, or to participate in, assent

to, aid, or assist any person suspected of a crime to escape full judicial examination by **failing to give known facts, or reasonable causes of suspicion**, or withdrawing any information relative to the charge or suspicion from the proper judicial authorities; or in any manner to receive any money, property, favor, or other compensation from, or on account of, any person arrested, or subject to arrest, for any crime or supposed crime; or **to permit any such person to go at large without due effort to secure an investigation of such supposed crime**.

Specification No. 1: On December 7, 2007, you received information indicating potential knowledge of a Homicide, which in part contained, "They already killed one guy." As a police officer you failed to report, investigate, or ensure that a MPD member was notified to investigate the veracity or benefit of this information to assist in solving a murder investigation.

Specification No. 2: On December 7, 2007, you received information indicating potential information on subjects involved in violent acts, which in part contained, "They gonna kill ya. If you all don't want to kill them. You all better leave them alone." As a police officer you failed to report, investigate, or ensure that a MPD member was notified to investigate the veracity or benefit of this information to assist in solving a murder investigation.

Specification No. 3: In that on December 10, 2007, you received information indicating Theft, Receiving Stolen Property and/or other crimes (possibly Burglary), which in part was documented by agents of the F.B.I. as "E.S. says he (U/M) just stole a rack of pocketbooks. Like he a regular pocketbook stealer. U/M tells ES that my thing. Miller is still on phone." You later engaged in conversations on the type and value of the pocketbooks, without any attempt or indication to investigate their origin or any follow up on the indications of subject illegally obtaining and reselling such property. *Id. (emphasis in original).*

Moreover, MPD also elected to add two (2) additional specifications to the original

Charge No. 2, Prejudicial Conduct:

Specification No. 2: On December 7, 2007, in information obtained during a Federal Bureau of Investigation wiretap of your conversations with an individual later indicted for Conspiracy to Possess with Intent to Distribute Heroin, indicating you released information on MPD, enforcement operations. The target of the investigation stated in part, " … you told me about the last one. I was prepared for it."

Specification No. 3: During the course of a F.B. I. investigation you were recorded conversing with the target of that investigation indicating knowledge of his past criminal history, suspicious and questionable activities indicating criminal conduct and failed to question, report, or verify any of this conduct. This misconduct is further specified by General Order 201.36, Metropolitan Police Department Sworn Law Enforcement Officer Code of Ethics, Part III, which states, "I will never act officiously or permit personal feelings, prejudices, political beliefs, aspirations, animosities, or friendships to influence my decisions. **With no compromise for crime and with relentless prosecution of criminals**, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities. I recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of the police service." *Id*. (emphasis in original).

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

The following findings of facts, analysis and conclusions of law are based on the documentary evidence as presented by the parties during the course of the Employee's appeal process with this Office.

According to the documents of record, Employee met Eric Shorts in May 2007, who had been released from jail a month earlier in April 2007, and they began a romantic relationship. Eventually, Employee provided Mr. Shorts with a key to her residence and periodically Mr. Shorts stayed there.

On December 1, 2008, Captain Kimberly Chisley-Missouri, of the Internal Affairs Division ("IAD"), received information regarding an ongoing criminal investigation that the Federal Bureau of Investigation ("FBI") Safe Streets Task Force was conducting regarding Eric Shorts, a suspected drug dealer. The investigation determined that Employee had a romantic relationship with Mr. Shorts. On December 2, 2008, IAD Agents Ronnie Murphy and Diana Rodriquez met with FBI Special Agent William Grover and MPD Sergeant Tyrone Dodson, who were detailed to the FBI Safe Streets Task Force. At the meeting, information was disclosed regarding Mr. Shorts' criminal activities involving major drug distribution in the Clay Terrace Public Housing complex. Special Agent Grover advised that as a result of the ongoing criminal investigation, an authorized wiretap was obtained and that numerous telephone conversations had been recorded of Mr. Shorts, and that the monitored calls occurred between November 2007 and July 2008. During this time period, numerous conversations occurred between Employee and Mr. Shorts and in some of those conversations, Mr. Shorts conveyed to Employee information related to his receipt of stolen property and an automobile accident caused when he threw a brick at a moving vehicle which crashed after it was struck.

On March 5, 2009, members of the Safe Streets Task Force responded to the home of Employee in an attempt to locate Mr. Shorts. Employee permitted the members to enter her residence and advised them that Mr. Shorts was in a bedroom. Mr. Shorts was arrested without incident. Sergeant Dodson advised IAD of the arrest of Mr. Shorts at the residence of Employee. As a result of Mr. Shorts' arrest, Employee's police powers were revoked and she was placed in a non-contact duty status. A preliminary report was prepared and Incident Summary (IS) # 09-00113 was assigned to the matter. On March 9, 2009, Employee responded to the Washington Field Office of the FBI and at that time, she was interviewed by Special Agent Rodney Crawford regarding her knowledge of Mr. Shorts' criminal activities.

On March 30, 2009, IAD received a report from the FBI regarding their interview of Employee. On April 2, 2009, a request for an extension of time to complete the investigation of the Employee was submitted by the investigation officer, Agent Rodriguez. On April 21, 2009, Sergeant Dodson advised Agent Rodriguez that Officer Joe Tridico was a possible witness who could corroborate allegations of misconduct related to Employee and Mr. Shorts. On April 28, 2009, Assistant United States Attorney ("AUSA") Steve Durham was apprised by Agent Rodriguez of the information she had gathered in conducting the investigation of Employee. AUSA Durham identified additional information that Agent Rodriguez should attempt to obtain and include in the investigative package that she was preparing for his review. On July 3, 2009, Agent Rodriguez received the transcript of excerpts from the authorized wire tap telephone conversations between Employee and Mr. Shorts. On July 20, 2009, AUSA Durham, after reviewing the investigative package, issued a letter of declination indicating that the United States Attorney's Office would not be pursuing criminal charges against Employee.

On November 23, 2009, Employee was served with a Notice of Proposed Adverse Action (Notice) in which she was advised that the Department proposed to suspend her for fifteen days for acts of misconduct. In the Notice, Employee was advised of the charges and specifications and given the opportunity to respond to the Notice within fifteen days. Employee did not respond to the Notice. On February 1, 2010, Employee was served with an Amendment to Notice of Proposed Adverse Action ("Amended Notice") in which she was charged with

additional acts of misconduct and recommended for termination. In the Amended Notice, Employee was advised that she had a right to a hearing if she elected. Employee elected not to have a hearing and the matter was decided based upon the record. On April 13, 2010, Employee was served with a Final Notice of Adverse Action ("Final Notice") advising her that she had been found guilty of the charges and specifications set forth in the Amended Notice and that she would be removed effective May 21, 2010.

In the ID, in pertinent part, I made the following finding:

> Taking into consideration D.C. Official Code § 5-1031 (b), I find that the 90-day period for commencing an adverse action did not commence until July 21, 2009, the day after the July 20, 2009 declination from the United States Attorney for the District of Columbia was issued. From March 5, 2009 through July 20, 2009, the Agency was conducting a criminal investigation regarding Employee. Following the issuance of the official declination, Agency considered the matter administratively and, after interviewing Employee on July 21, 2009, issued her the November 23, 2009 Notice, 86 business days after the criminal investigation concluded with the issuance of the declination letter. I thus find that the Agency did not violate the 90-day rule when it issued the November 23, 2009 Notice to Employee. [2]

Employee's position with respect to this is that since the Undersigned used the date of November 23, 2009, in order to calculate the number of days to determine if the Agency complied with D.C. Official Code § 5-1031, that using this same date provides infallible evidence that MPD violated Article 12 Section 6 of the Collective Bargaining Agreement. The relevant section of the CBA states:

Article 12 (Discipline)

Section 6 ***The employee shall be given a written decision and the reasons therefore no later than fifty-five (55) days after the date the charges are preferred or the date the employee elects to have a departmental hearing…***

Title V, Section 502, of the Omnibus Public Safety Agency Reform Amendment Act of 2004, D.C. Official Code § 5-1031[3] (2005 Supp.), states the following:

> Commencement of corrective or adverse action.
>
> (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

[2] *Sholanda Miller v. MPD,* OEA Matter No. 1601-0325-10 Initial Decision at 4 -5 (December 10, 2013).
[3] This statute will be referred to as the "90-day rule".

> 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**. (**Emphasis added)**.
>
> (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 Attorney General, 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.

Employee also alleges that Agency's action violates the CBA in that Employee was not given the requisite number of days from receipt of the Amended Notice in order to adequately respond to the new charges as outlined in the Amended Notice. More specifically, Employee contends that she only had six days to respond.

Agency counters that the proper date for purposes of calculating the 55-day rule is February 1, 2010, which is the date when the Employee was served with the Amended Notice. Agency notes that:

> Employee did not elect to have an evidentiary hearing. Therefore, under Article 12, Section 6 (the 55-day rule), Employee was entitled to a written decision within fifty-five business days after the date she was "notified in writing of the charges. . . ." Notably absent from the language in the 55-day rule is the word "first" or "initially" before the word "notified." Thus, the 55-day rule relates to the notice which includes the charges an employee has to defend.[4]

Using this date, MPD contends that it complied with the 55-day rule by issuing a decision in this matter on April 13, 2010, which is 50 business days after receipt of the Amended notice. Agency also argues that calculation of days for purposes of the 90-day rule[5] and the 55-day rule[6] are separate and distinct given the instant circumstances. Lastly, Agency contends that there is no law, rule, CBA article or regulation precluding it from amending a proposed adverse action prior to its implementation. It further notes that the additional charges levied against Employee were a result of further analysis of the information that had been gathered as part of the investigation into Employee and her erstwhile boyfriend Mr. Shorts.

The undersigned notes that MPD is correct in its assertion in that there is nothing to prevent it from amending a proposed action prior to it either being decided upon or implemented. There is nothing in the record that would indicate that Employee herein served (or was scheduled

[4] Agency Brief on Remand at 5 (September 4, 2015).
[5] D.C. Official Code § 5-1031 *et al.*
[6] Article 12 Section 6 of the Collective Bargaining Agreement.

to serve) her fifteen day suspension as indicated in the Notice. Rather, in a successful effort to comply with 90-day rule, Agency timely tendered the Notice informing Employee of its intent to impose an adverse action. I find that the 90-day rule, by its plain meaning[7], requires an agency to put the Employee on notice that said employee is being subjected to an adverse action due to some act(s) that the agency knew or should have known occurred with the past 90 business days (barring any criminal investigation which would toll this deadline). In relevant contrast, I further find that the 55-day rule requires MPD to make a decision on what punishment, if any, will be meted out to an employee that has been duly informed of what he/she has to defend against. In other words, the 90-day rule requires a subject agency to provide notice of a proposed action, while the 55-day rule requires the MPD to provide written notice of what its final decision in that matter will be.

In the matter at hand, I incorporate by reference my reasoning from the ID, and note that MPD complied with the 90-day rule when it presented the Notice to Employee on November 23, 2009. I also find that MPD was within its right to amend the adverse action that Employee would be subjected to prior to imposing the previously proffered sanction of a fifteen day suspension. Employee correctly notes that if MPD had tried to include the distinct portions of the Amended Notice in a separate adverse action that it would be committing administrative double jeopardy.[8] This augments Agency's reasoning as to why it added additional charges and specifications for its proposed action in the Amended notice dated February 1, 2010. It did this realizing that Employee's conduct was subject to additional punishment that would, when seen in the light of day, tarnish its reputation as a paramilitary agency tasked with enforcing the laws of the District of Columbia.

It is worth noting that Employee, while subject to additional charges and sanctions, was also afforded additional time and another opportunity to contest Agency's action in a departmental hearing. I further find that whatever harm that Employee may have had to endure, was non-existent or at the most, *de minimis*. On April 13, 2010, Employee was notified in writing that she was being terminated. Given the instant circumstances, I further find that the correct date for determining compliance with the 55-day rule is February 1, 2010, when Employee was served with the Amended notice. In coming to this determination I note that Employee was unable to provide an established law, rule, CBA article or regulation that would preclude MPD from amending a proposed action prior to its implementation or decision. Given as much, I find that Agency's action of amending the notice was permissible. I conclude that Employee has failed to proffer any credible evidence that would indicate that her removal was improperly conducted and implemented. Once again, I find that Agency has proven that the penalty of removal was proper; therefore, the removal is upheld. I further find that Employee's

[7] The Court of Appeals has held that when the language of a statute is clear and unambiguous, courts must give effect to its plain meaning. *See, e.g., Office of People's Counsel v. Public Service Comm'n*, 477 A.2d 1079, 1083 (D.C. 1984). Moreover, an agency's interpretation of that language is "binding unless it is plainly erroneous or inconsistent with the enabling statute." *Providence Hosp. v. District of Columbia Dept. of Employment Services*, 855 A.2d 1108, 1111 (D.C. 2004) (citation omitted).

[8] *See* Brief of Employee on Remand at 16 (June 19, 2015).

other ancillary arguments are best characterized as a grievances and outside of the OEA's jurisdiction to adjudicate.[9]

ORDER

It is hereby ORDERED that Agency's action of removing Employee from service is UPHELD.

FOR THE OFFICE:

_____
ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE

[9] Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.