THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0005-21
[redacted]	
Employee	
	Date of Issuance: June 24, 2022
v.	
	ARIEN P. CANNON, ESQ.
D.C. DEPARTMENT OF GENERAL SERVICES,	Administrative Judge
Agency	

C. Vaugh Adams, Esq., Agency Representative
Greg J. Melus, Esq., Employee Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on December 7, 2020. Pursuant to a letter issued by OEA on January 12, 2021, Agency's Answer was due on or before February 11, 2021. Agency filed its Answer on March 30, 2021, along with a Motion for Extension of Time. I was assigned this matter on October 1, 2021.

A prehearing conference was convened in this matter on November 18, 2021. On November 12, 2021, Employee filed a Motion for Dismissal for Harmful Procedural Error, or in the Alternative, a Motion on Violation of the 90-Day Rule. This motion was treated as a motion for summary disposition. A Post Prehearing Conference Order was issued on November 22, 2021, which afforded Employee the opportunity to supplement his motion for summary disposition. Employee submitted his supplement on December 20, 2021. Agency submitted its Opposition to Employee's motion for summary disposition on January 20, 2022.[1] The record is now closed.

JURISDICTION

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

[1] This filing was captioned, "Agency Opposition to Motion to Reverse Agency Decision."

ISSUES

1. Whether Agency violated District Personnel Manual ("DPM") § 1602.3, known as the 90-day rule, when it initiated adverse action against Employee.

2. Whether Agency violated DPM § 1623.6, known as the 45-day rule, when it issued its final decision to terminate Employee.

BURDEN OF PROOF

OEA Rule 628.2 ,59 DCR 2129 (March 16, 2012), provides an employee shall have the burden of proof as to issues establishing jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.[2]

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Agency initiated the instant adverse action against Employee on August 12, 2020, when it issued a Proposed Separation notice ("Proposed Notice"). This proposed notice was issued by Deputy Chief Morena Lyde-Lancaster. Agency issued a Final Agency Decision on Separation on October 30, 2020, which effectively terminated Employee's employment on the same date. Employee's termination was based on two charges: (1) Conduct Prejudicial to the District Government—Unethical or improper use of official authority or credentials; and (2) Neglect of Duty—Failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position.

In particular, Agency maintains that Employee, who served as a Lieutenant with its Protective Services Division ("PSD"), contacted Kimberly Hughes ("Hughes") on July 3, 2019, and instructed her to grant key card access to Tiffany Hill ("Hill"), a former District employee/contractor.[3] Agency further asserts that Employee knew that Hill was no longer an employee and/or contractor with the District government. On December 4, 2019, information of possible improper badge access by Hill was brought to the attention of Deputy Chief Morena Lyde-Lancaster, who commenced an investigation into who authorized badge access for Hill. Hill's badge access was disabled on this same day. Hill was a former contract security officer assigned to the Department of Consumer and Regulatory Affairs ("DCRA") and had previously been issued an access badge for that purpose. In June 2019, Hill's badge access expired automatically. In July 2019, Agency asserts that Employee contacted Hughes, a contractor within its Protective Services Division, and instructed her to reactive Hill's badge. Agency maintains that in January 2020, it "verified" and "confirmed" that Hill had not been a contract security guard since 2017 and was ineligible to have an all-access badge in 2019. Based on Employee's apparent instructions to Hughes to activate Hill's access badge, Agency elected to terminate Employee based on these allegations.

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[2] *Order on Jurisdiction* (December 17, 2021).
[3] *See,* Supplement to Employee's Motion to Reverse Agency's Decision, Exhibit 2 (December 20, 2021).

Employee filed a Motion for Dismissal with OEA on November 12, 2021, seeking to reverse his termination based on a violation of the 90-day rule. As previously noted, this filing is being treated as a motion for summary disposition. Employee filed a supplement to this motion on December 20, 2021, following a prehearing conference. Employee contends that Agency violated DPM § 1602.3, known as the 90-day rule, when it "knew or should have known" of the conduct supporting adverse action against Employee prior to 90 days before initiating adverse action. Agency's charges are based on allegations that Employee improperly authorized key card access to an individual who was no longer a District employee or contractor, despite having knowledge of such.

90-Day Rule

DPM § 1602.3 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. However, due to the COVID-19 pandemic, Mayor Bowser issued Mayor's Order 2020-045, declaring a Public Health State of Emergency on March 11, 2020. Section II (F) of this Order provided instructions to the District of Columbia Human Resources ("DCHR") agency to issue policies related to workplace protection, employee responsibilities, flexibilities, among other things. As a result of Mayor's Order 2020-045, DCHR promulgated an Emergency Issuance effective March 29, 2020, which suspended the 90-day deadline for adverse actions.[4] This Issuance expired on June 2, 2020. The relevant portion of this issuance provides:

> If an employee faces corrective or adverse actions as part of the progressive discipline process located in 6-B DCMR § 1600 *et seq.*, employees are entitled to certain rights. Specifically, 6-B DCMR §1602.3 (a) states that a corrective or adverse action must be initiated no more than 90 business days after an agency knew or should have known about the performance or conduct supporting the action.
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> However, during the COVID-19 emergency, the 90-business day limit is suspended. No days during the emergency shall be considered business days for purpose of 6-B DCMR § 1602.3(a). This suspension is necessary to avoid the diversion of critical resources to administrative investigations, and the practical challenges involved in investigating and taking corrective or adverse action while many employees are working remotely.

Agency contends that the anchor date for the purposes of calculating the 90-day deadline began January 9, 2020. This is the date that Agency asserts Employee's "misconduct was verified."[5] Employee contends that Agency had knowledge of the allegations at least in December

[4] *See,* DCHR Issuance, I-2020-8 (https://edpm.dc.gov/issuances/human-resources-guidance-covid-19-emergency-superseded2/#header8, Section on Workforce Management).
[5] Agency Opposition to Motion to Reverse Agency Decision at 3 (January 20, 2022).

2018.[6] Employee bases this date off an email that was sent on December 3, 2019, from Gilbert Davidson, an employee at the D.C. Department of Consumer and Regulatory Affairs ("DCRA"), to Adaria Vaugh, an Agency/DGS employee. In this email, Davidson asserts that they "had this issue last year and was under the impression it had been handled."[7] As such, Employee contends that Agency knew of the issue at least one year prior, as early as December 2018.

I find that Agency's argument that January 9, 2020, is the anchor date in which the 90-day clock began to run is flawed because the standard is not when an agency is able to verify misconduct. Rather, it is a "knew or should have known" standard. Employee's argument that December 2018 is the anchor date for beginning the 90-day clock is also flawed given that the knowledge of a DCRA employee (Davidson) cannot be imputed on DGS. Furthermore, while Davidson identifies an issue regarding an individual who improperly had key card access to a District government building, he does not identify a specific DGS employee involved in any wrongdoing. Thus, the December 3, 2019 email cannot serve as the basis for the date Agency "knew or should have known" of the allegations of misconduct against Employee. As an alternative anchor date, Employee asserts that December 4, 2019, is the latest plausible anchor date for the 90-day clock to begin. I agree with this alternative date proposed by Employee.

I find that Agency "knew or should have known" of the conduct supporting the adverse action against Employee no later than December 4, 2019. This is the date that Agency's Deputy Chief, Morena Lancaster, was provided a memorandum from Kimberly Hughes, which informed that Employee instructed Hughes to grant access to a key card associated with Officer Hill, who was no longer a District employee or contractor. Deputy Chief Lancaster initiated the adverse action against Employee on August 12, 2020. Deputy Chief Lancaster's knowledge of Employee's conduct set forth in the December 4, 2019, memorandum is imputed on Agency and the Proposed Separation issued by Lancaster evinces her managerial role with Agency.

A reading of Mayor's Order 2020-045, along with DCHR's Issuance I-2020-8, provides that the 90-day time frame set forth in 6-B DCMR § 1602.3(a) be suspended and tolled, effective March 29, 2020, through June 2, 2020—for a total of 45 business days. Here, I find that the anchor date—the first date in which Agency "knew or should have known" of the misconduct that served as a basis for adverse action—began on **December 4, 2019**, when Agency's Deputy Chief Lancaster received a memorandum from Hughes implicating Employee. Agency did not initiate an adverse action against Employee until August 12, 2020. I find that the timeline in calculating the 90-day clock in the instant case is as follows:

December 4, 2019—August 12, 2020: 173 business days

March 29, 2020—June 2, 2020: 45 business days tolled pursuant to DCHR Issuance I-2020-8.

Thus, 173 business days passed between December 4, 2019, and August 12, 2020. However, the 90-day clock was tolled from March 29, 2020, through June 2, 2020, for a total of

[6] *See* Supplement to Employee's Motion to Reverse Agency's Decision, pp. 5-6 (December 20, 2021).
[7] Supplement to Employee's Motion to Reverse Agency Decision, Exhibit 1 (December 20, 2021).

45 business days. Accordingly, I find that 128 business days passed—excluding the 45 days tolled pursuant to DCHR Issuance I-2020-8—between the time Agency "knew or should have known" of Employee's misconduct until it initiated adverse action on August 12, 2020. Accordingly, I find that Agency violated the 90-day rule when it issued an adverse action against Employee. This Office has consistently held that the 90-day deadline is viewed as mandatory, and a violation is grounds for reversal.[8]

Assuming *arguendo*, that the anchor date proposed by Agency, January 9, 2020, is utilized in calculating the 90-day time frame, Agency would still be in violation of the 90-day rule. Between January 9, 2020, and August 12, 2020, 143 business days elapsed. The 45 business days tolled between March 29, 2020, and June 2, 2020, would reduce the applicable days elapsed to 98 business days, still in violation of 6-B DCMR § 1602.3(a). Accordingly, Employee's motion for summary disposition is granted on these grounds for violation of the 90-day rule.

45-Day Rule

Employee also contends that Agency violated DPM § 1623.6, which provides that the final decision shall be completed within forty-five (45) days of the latter of: (a) the expiration of the employee's time to respond; (b) the agency's receipt of the employee's response (if any); (c) the completion of the hearing officer's report and recommendation, if applicable; or (d) a date agreed to by the employee. Employee maintains that the applicable date here is September 3, 2020, the date Agency was served with his written reply to the proposed adverse action,.[9] Employee further asserts that there was no hearing officer's report and recommendation, nor any agreement to extend the deadline by which Agency was required to issue a Final Agency Decision. Therefore, Employee contends that Agency's deadline to serve the Employee was no later than 45 days after September 3, 2020, or October 18, 2020.

Agency contends, contrary to Employee's assertions, that a Hearing Officer's Report and Recommendation was issued in this matter on September 21, 2020.[10] The Final Decision was dated October 30, 2020, within the 45-day timeframe set forth in DPM § 1623.6. However, Agency acknowledges that because of the pandemic and its 100% telework posture at the time, its ability to physically mail the final agency decision was impacted. Nonetheless, Agency's HR Manager, Shawn Winslow, personally went into the office and mailed the package to Employee's address of record via U.S. Postal service on November 10, 2020, 50 days after the Hearing Officer's Report was issued. The package was returned on November 14, 2020, after Employee declined to accept the delivery. Employee's counsel obtained an electronic copy of Agency's final decision via email on December 1, 2020, after contact with Mr. Winslow. While there may have been a delay and discrepancies as to when Employee was informed of Agency's final decision to terminate his employ, I do not find that Employee was prejudiced by the delay.

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[8] *See e.g. D.C. Fire and Medical Services Dept. v. D.C. Office of Employee Appeals*, 986 A.2d 419 (2010); *See Employee v. D.C. Dept. of Youth Rehabilitation Service*, OEA Matter No. 1601-0037-20, Opinion and Order on Petition for Review at 9 (February 24, 2022); *Keith Bickford v. D.C. Dept. of General Services*, OEA Matter No. 1601-0053-17, Opinion and Order on Petition for Review at 7 (January 14, 2020).
[9] *See* Supplement to Employee's Motion to Reverse Agency Decision, Exhibit 4 (December 20, 2021).
[10] *See* Agency Answer, Exhibits, p. 81 of 138 (March 30, 2021).

The OEA Board recently addressed the 45-day Rule in *Quamina v. D.C. Dept. of Youth Rehabilitation Services*, OEA Matter No. 1601-0055-17, Opinion and Order on Petition for Review, pp. 11-13 (April 9, 2019). In *Quamina*, the Board held that the forty-five-day time limit established by 6B DCMR § 1623.6 is directory, not mandatory in nature. It relied on the D.C. Court of Appeals' analysis in *Teamsters Local Union 1714 v. Pub. Employee Relations Bd*., 579 A.2d 706, 710 (D.C. 1990). Unlike a mandatory provision, a directory provision requires a balancing test to determine whether "any prejudice to a party caused by agency delay is outweighed by the interest of another party or the public in allowing the agency to act after the statutory time period has elapsed."[11]

The facts in this matter warrant an invocation of a harmless error review. In determining whether Agency has committed a procedural offense as to warrant the reversal of its adverse action, OEA's Board has adopted a two-prong analysis: (1) whether Agency's error caused substantial harm or prejudice to Employee's rights; and (2) whether such error significantly affected Agency's final decision to terminate Employee. OEA Rule 631.3 provides the following with respect to the harmless error test:

> Notwithstanding any other provision of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless.
>
> Harmless error shall mean: Error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action.

With respect to the first prong, I find that Employee's rights were not harmed or prejudiced by the delay in Agency issuing its final decision on termination. Agency's delay did not cause Employee to miss any deadlines for filing his Petition for Appeal with this Office. Regarding the second prong, I further find that this error did not significantly affect Agency's final decision to terminate Employee. Despite Employee's contention that a violation of the 45-day rule weakened his case, I find this delay was harmless error. As such, Agency's violation of the 45-Day Rule does not warrant a basis for reversal. Notwithstanding my finding regarding the 45-Day Rule, Agency's violation of the mandatory 90-Day Rule warrants reversal of Employee's termination.

[11] *Quamina v. D.C. Dept. of Youth Rehabilitation Services*, OEA Matter No. 1601-0055-17, Opinion and Order on Petition for Review at 12 (April 9, 2019) (citing *JGB Property v. D.C. Office of Human Rights*, 364 A.2d 1183 (D.C. 1976); and *Brown v. D.C. Public Relations Board*, 19 A.3d 351 (D.C. 2011)).

ORDER

Accordingly, it is hereby **ORDERED** that:

1. Agency's termination of Employee is **REVERSED**;
2. Agency shall reinstate Employee to the same or comparable position prior to his termination;
3. Agency shall immediately reimburse Employee all back-pay and benefits lost as a result of his removal; and
4. Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

/s/ Arien P. Cannon
ARIEN P. CANNON, ESQ.
Administrative Judge