THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
NELSON VALDES,	)	
Employee	)	
	)	
v.	)	OEA Matter No. 1601-0009-04
	)	
	)	Date of Issuance: September 16, 2009
D.C. METROPOLITAN POLICE DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Nelson Valdes ("Employee") worked as a detective with the D.C. Metropolitan Police Department ("Agency"). According to Agency, Employee engaged in criminal activity between June 29, 1999 and March 31, 2001.[1] Consequently, he was terminated. Employee received a notice of proposed adverse action on April 3, 2003. On April 9, 2003, Employee requested a departmental hearing of the matter; the hearing was scheduled for June 17, 2003. On June 3, 2003, Employee requested a continuance of the

[1] Employee was arrested and charged with distributing cocaine and three counts of bribery, with the lesser included charge of receiving gratuities.

hearing.[2] The new hearing date was then scheduled for September 30, 2003. However, on September 1, 2003, Employee sent a letter to Agency withdrawing his previously submitted request for a departmental hearing.[3] As a result, Agency issued its final notice of adverse action on September 16, 2003. After appealing the decision to the Chief of Police and having his appeal denied, Employee then filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on November 12, 2003.

Initially, Employee argued that the charges against him were unfounded and not supported by substantial evidence. Accordingly, he requested that he be reinstated as a law enforcement officer. It was later that Employee amended his argument to include Agency's failure to process his disciplinary action in a timely manner. He contended that his termination should be set aside because Agency failed to adhere to Article 12, Section 6 of the collective bargaining agreement, which provided that he should have received written notice of Agency's decision no later than 55 days after he was notified of the charges or after he requested the department hearing.[4]

Agency opposed this argument and claimed that when Employee first requested a continuance of the departmental hearing, he waived the application of the 55-day rule. It argued that Employee's June 3, 2003 letter explicitly waived the 55-day rule in exchange

[2] The notice provided that because of his request for a continuance, Employee "waive[d] application of the '55-day rule' in accordance with Article 12, section 6(a) of the collective bargaining agreement between the Metropolitan Police Department and the Fraternal Order of Police/Metropolitan Police Department Labor Committee."
[3] *Agency's Response to Employee's Petition for Appeal*, Tab D (January 9, 2004). The letter stated that Employee would provide a written opposition to the proposed termination on or before the September 30, 2003 hearing date.
[4] *Employee's Brief on Whether Agency Violated the 55-day Rule*, p. 2 (July 14, 2006).

for having the matter continued so that his attorney could properly review the case. Agency provided that Employee should not be allowed to benefit from the continuance only to renege on the agreement he reached with the department. Moreover, it stated that Employee failed to raise the 55-day rule argument during the departmental proceedings, and, therefore, he did not preserve the right to raise it before OEA.[5]

On May 25, 2007, the Administrative Judge ("AJ") issued her Initial Decision.[6] She found that Employee distributed cocaine and relied on the audio recordings used by the FBI undercover agent to support her finding. Similarly, she held that Agency's decision to remove Employee was warranted because he received gratuities for obtaining information through a government database. The AJ thought that it was inappropriate for Employee to accept money for information that he retrieved from a confidential Agency database.

Furthermore, she agreed with Agency's argument that even if he was not criminally convicted, Employee's removal was appropriate. She relied on General Order Series 1202, Number 1, Part I-B-7 which provides that "conduct unbecoming an officer [includes] . . . any criminal offense . . . in which the member . . . is deemed to have been involved in the commission of any act which would constitute a crime whether or not a court record reflects a conviction." The AJ reasoned that although Employee was acquitted in criminal court of the charge of distributing cocaine and his conviction of

[5] *Agency's Opposition to Employee's Appeal*, p. 2-5 (August 16, 2006).

[6] Before the AJ issued her Initial Decision in this case, she issued an order addressing the 55-day rule. She found that Employee requested a continuance on the 55th day after requesting the hearing. The AJ found that the timing was significant. She also considered Employee's intent to still be heard on this matter at the Agency level by filing a written opposition by the agreed upon hearing date of September 30, 2003. The AJ held that under the circumstances, Agency did not violate the 55-day rule.

accepting gratuities was overturned, he disregarded the responsibilities entrusted to him as a detective. She also found that his involvement in distributing drugs and his violation of misusing Agency's confidential database, were inconsistent with Agency's mission and a violation of the laws that he was sworn to uphold. Therefore, she upheld Agency's action removing Employee.[7]

Employee filed a Petition for Review on June 29, 2007. He argued that his termination should be rescinded because Agency failed to comply with the collective bargaining agreement which required it to issue a written decision within 55 days of his request for a departmental hearing. Employee contended that Agency should have issued its final notice of adverse action by June 3, 2003. However, he did not receive it until September 17, 2003. Therefore, he requested that the Initial Decision be reversed.[8]

Agency disagreed, and on August 22, 2007, it filed its Opposition to the Petition for Review. Agency, again, asserted that Employee failed to preserve his right to contest that it violated the 55-day rule because he did not present this argument in his appeal to the Chief of Police. Moreover, it provided that Employee explicitly waived the 55-day rule in his initial request for a continuance. Agency further argued that the 55-day rule was automatically tolled during the continuance period agreed to by the parties. As a result, Agency requested that the Board uphold its decision to remove Employee.[9]

Article 12, Section 6(a) of the collective bargaining agreement between the Government of the District of Columbia Metropolitan Police Department and the

[7] *Initial Decision,* p. 5-7 (May 25, 2007).
[8] *Petition for Review,* p. 5-6 (June 29, 2007).
[9] *Agency's Opposition to Employee's Petition for Review,* p. 4-9 (August 22, 2007).

Fraternal Order of Police provides that:

> [t]he employee shall be given a written decision and the reasons therefore no later than fifty-five (55) days after the date the employee is notified in writing of the charges or the date the employee elects to have a departmental hearing, where applicable, except that:
>
> (a) when an employee requests and is granted a postponement or continuance of a scheduled hearing, the fifty-five (55) day time limit shall be extended by the length of the delay or continuance, as well as the number of days consumed by the hearing.

Article 12, section 6 offers two triggers for Agency to provide a written decision to Employee within 55 days. The first requires no action from an employee. It provides that Agency shall issue the written decision 55 days after an employee is notified of the charges against him. The second trigger occurs if an employee requests a departmental hearing. If they do, then Agency's decision should be issued 55 days after such request is made.

In this case, Employee requested a departmental hearing on April 9, 2003. This meant that Agency had until June 3, 2003 to issue its written decision (55 days after April 9, 2003). However, before a decision could be issued, Employee requested a continuance triggering subsection (a) of Article 12, section 6.[10] Subsection (a) of the article provides that if a continuance is granted, then the 55 day time limit is extended by the length of the delay. Both parties agreed that the new departmental hearing would take place on September 30, 2003. However, on September 1, 2003, Employee elected to withdraw his

[10] Employee requested the continuance so that his attorney could ". . . take [the] necessary measures to ensure [Employee's] proper representation. . . ." *Agency's Opposition to Employee's Appeal,* Attachment #2 (August 16, 2006).

request for a hearing. Unfortunately, the collective bargaining agreement does not address what should occur if Employee withdraws his request for a hearing. Therefore, in the absence of any guiding language, we are left to determine if Agency issued its written decision within a reasonable time after Employee withdrew his request for a hearing.

When Employee withdrew his request for a departmental hearing, Article 12, section 6(a) pertaining to such hearing requests no longer applies to this matter. Consequently, we are left to apply the first part of the article which provides that "the employee shall be given a written decision and the reasons therefore no later than fifty-five (55) days after the date the employee is notified in writing of the charges . . . ." Before the withdrawal occured, Agency was operating under the premise that its written decision would be due after the September 30th hearing.[11] Once Employee withdrew his request for the departmental hearing, Agency acted quickly to issue its decision. Agency's final written decision was issued on September 16, 2003, which was 15 days after Employee's withdrawal request and 14 days before Employee's own deadline to respond in opposition his termination. Under the circumstances, we believe that 15 days was reasonable for Agency to issue its decision.

Employee can not be allowed to prevail on the argument that Agency violated the 55-day rule after he benefitted from a continuance; decided on a whim to withdraw his request; and continued to rely on September 30th as the due date for his opposition

[11] Like Agency, Employee continued to rely on the September 30th date. In his letter withdrawing the matter for departmental hearing, he stated that he would provide his written opposition to his termination by September 30, 2003. *Agency's Response to Employee's Petition for Appeal*, Tab D (January 9, 2004).

statement. He can not invoke the rule when it's convenient for him, and then use it against Agency after he withdrew his request. This is not the purpose of the 55-day rule, and we cannot allow it to be misused in this manner.[12] Accordingly, we deny Employee's Petition for Review.

[12] Although we agree with Agency that Employee should not be allowed to misuse the 55-day rule, we do not agree that Employee failed to preserve his right to contest that it violated the 55-day rule because he did not present this argument in his appeal to the Chief of Police. This Board previously held in *Adamson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0041-04, Opinion and Order on Petition for Review (September 3, 2008), ___ D.C. Reg. ___ ( ), that violation of the 55-day rule is an absolute bar to the finalization of an adverse action. Thus, the rule is equivalent to a lack of jurisdiction claim which can be raised at any time. Accordingly, Employee did not fail to preserve his right to contest the issue before the AJ. Although Employee can assert that Agency violated the 55-day rule at any stage in the appeal, we still disagree with his argument that Agency violated the rule.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED.**

FOR THE BOARD:

_____
Sherri Beatty-Arthur, Chair

_____
Barbara D. Morgan

_____
Richard F. Johns

_____
Hilary Cairns

_____
Clarence Labor, Jr.

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.