

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Widmon Butler)	OEA Matter No. 1601-0049-15R21
Employee)	
)	
v.)	Date of Issuance: March 18, 2021
)	
Metropolitan Police Department)	JOSEPH E. LIM, ESQ.
Agency)	Senior Administrative Judge
_____)	
David Branch, Esq., Employee Representative)	
Frank McDougald, Esq., Agency Representative)	

INITIAL DECISION ON REMAND¹

PROCEDURAL BACKGROUND

On March 6, 2015, Widmon Butler (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the Metropolitan Police Department’s (“MPD” or “Agency”) decision to terminate him from his position as a Civilian Claims Specialist,² effective February 6, 2015. Following an Agency investigation, Employee was charged with “[a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: Misfeasance, and outside employment or private business activity or any direct or indirect financial interest that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities.”

After the parties declined mediation, this matter was assigned to the undersigned Administrative Judge (“AJ”) on May 27, 2015. After several continuances requested by the parties for medical reasons, I held an Evidentiary Hearing on September 2, 2016. On November 30, 2016, I issued an Initial Decision (“ID”) upholding Agency’s termination of Employee’s employment for misfeasance. Employee appealed, and on November 7, 2017, the OEA Board denied Employee’s Petition for Review after finding that the ID was supported by substantial evidence.

Employee then appealed to the District of Columbia Superior Court on November 28, 2017. On October 17, 2018, the D.C. Superior Court upheld the ID and denied Employee’s Petition for

¹ This decision was issued during the District of Columbia’s Covid-19 State of Emergency.

² In his appeal form, Employee describes his position as Human Resource Specialist/Claims Examiner.

Review.³ Employee appealed to the District of Columbia Court of Appeals. On October 29, 2020, the Court of Appeals upheld the ID on the merits, but remanded the matter back to OEA for further consideration of the timeliness issue.⁴ It noted that both the OEA Board and the D.C. Superior Court had different dates for when the 90-day period started. Notably, their dates also differed from those in my ID. For this reason, I held an Evidentiary Hearing virtually on February 2, 2021, via WebEx due to the Covid-19 operational status.⁵ 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 violated D.C. Official Code § 5-1031 (a) (2004), otherwise known as the "90-day rule" in terminating Employee.
2. If so, whether Agency's action of terminating Employee from service should be upheld.

BACKGROUND

Parties' Allegations

Employee accuses Agency of violating D.C. Official Code § 5-1031(a), which requires Agency to initiate an adverse action against a sworn member of the police force no later than 90 days from the date Agency "knew or should have known of the act or occurrence allegedly constituting cause." Employee argues that this violation of the 90-day rule renders his termination improper. MPD contends that it did act within the 90-day period and asserts that Employee, a DS-12 Civilian Claims Specialist, deserved the loss of his job for abusing his position to access his private client's medical records through Medical Services Division's ("MSD") electronic medical records system without proper authorization. It also asserts that Employee's actions constituted outside employment that interfered with his officially assigned duties and responsibilities.

SUMMARY OF TESTIMONY AND OTHER EVIDENCE⁶

Paulette Woodson ("Woodson") testified (February 2, 2021, Tr. p. 6 - 85) as follows.

Captain Woodson, a Sergeant in the Internal Affairs Division ("IAD") during the relevant period who investigated the charges against Employee, testified that IAD does both criminal and administrative investigations. As the investigator, depending on the facts that she uncovers, she makes the determination as to the characterization of the potential charges against the suspect

³ *Widmon Butler v. Metropolitan Police Department*, Case No. 2017 CA 007843 (D.C. Super. Ct. October 17, 2018).

⁴ *Butler v. Metropolitan Police Department, et. al.*, Case No. 18-CV-1238 (D.C. Ct. of Appeals October 29, 2020)

⁵ Due to the District of Columbia's Covid-19 State of Emergency, the Evidentiary Hearing was held virtually via WebEx.

⁶ For a more coherent and seamless discussion of testimony, the relevant testimonies and exhibits of 2016 and 2021 are combined and summarized.

employee. If she determines it as administrative, then she draws up an investigative summary sheet. However, if she determines that criminal charges are warranted, she then refers it to the United States Attorney's Office for a criminal review. She described Employee's actions as time and attendance fraud as well as a HIPAA⁷ violation.

Woodson testified that her investigation indicated that Employee was working on Josephine Jackson's worker's compensation claim during his official tour of duty. On September 13, 2013, Agency assigned Case Number IS#13-002588 to Employee's file.⁸ Woodson testified that she received Employee's file for investigation sometime between September 13, 2013, and September 16, 2013. She indicated that was also when she began a criminal investigation of the matter.⁹ Woodson then clarified that it was probably September 16, 2013, when she began her criminal investigation since that was the date the IS#13-002588 was assigned to her.¹⁰ She also explained that she was off during the time period and did not get back to work until Monday, September 16, 2013.

Woodson's investigation revealed that the Director of MPD Human Resources, Diana Haines-Walton, received an MPD email from Employee stating that he represented Ms. Jackson in her worker compensation claim. Because Haines believed Employee's representation represented a conflict of interest, she notified the IAD and upper management.

On September 18, 2013, Woodson referred the matter to Jean Sexton of the United States Attorney's Office for criminal prosecution. On October 1, 2013, Woodson also sent a copy of the matter to Brigette Tillman, another prosecutor in the United States Attorney's Office.¹¹ However, the U.S. Attorney declined to prosecute on June 2, 2014. This cleared the way for Agency to proceed further as an administrative matter. After Woodson left the division, Agent Tracey Malcolm took over the investigation.

FINDINGS OF FACTS

Based on the credible and undisputed February 2, 2021, testimony of Woodson, coupled with my prior Findings of Fact derived from the September 2, 2016, Evidentiary Hearing, I make the following Findings of Fact:

1. As a Civilian Claims Specialist in the Agency's Medical Services Branch ("MSB"), part of Employee's job duties was to review medical files using Agency's electronic medical records system.

⁷ HIPAA is the Health Insurance Portability and Accountability Act of 1996. The main purpose of this federal statute was to help consumers maintain their insurance coverage, but it also includes privacy and security standards to protect the confidentiality and integrity of individually identifiable health information. Source: Whatishippaa.org.

⁸ IS stands for Incident Summary.

⁹ February 2, 2021, Tr. p. 45.

¹⁰ February 2, 2021, Tr. p. 47, 57, and 78.

¹¹ February 2, 2021, Tr. p. 61.

2. On July 22, 2013, Employee used his Agency log-in and password to check the existence of his client Ms. Josephine Jackson's medical records without authorization from his superiors. Employee, a lawyer, had agreed to represent Jackson in his private law practice.
3. Employee was authorized to use Agency's electronic medical records system to access medical records of uniformed personnel (police officers) but had no authority to access medical information of non-uniformed personnel such as Ms. Jackson.
4. On September 12, 2013, the D.C. Office of Risk Management brought Employee's actions to the attention of Agency.
5. On the same day, September 12, 2013, Agency generated an Incident Summary number, IS#13-002588, for Employee's case.
6. Because September 12, 2013, a Thursday, occurred before a weekend, the investigator assigned to the matter by Agency, Ms. Woodson, did not receive the file until Monday, September 16, 2013, the day she reported back to duty.
7. Once Woodson read the preliminary information on IS#13-002588 on September 16, 2013, she thought that the matter had criminal undertones but decided to dig further to ascertain its status. Based on Woodson's testimony, September 16, 2013, was the date Agency began its criminal investigation of Employee.
8. On September 18, 2013, Woodson went to the Police and Fire Clinic to obtain more information on Employee's conduct.
9. On or after October 1, 2013, Agency referred the matter to the United States Attorney's Office ("USAO") for criminal investigation.¹²
10. On December 3, 2013, Agency initiated its own investigation with an interview of Lieutenant Gregory Stroud by the Internal Affairs Division (IAD).¹³
11. On June 2, 2014, the United States Attorney's Office sent a Letter of Declination to Agency, indicating that they had declined to pursue criminal charges and signaled Agency that it may proceed with its administrative action.¹⁴
12. On September 25, 2014, Agency's Internal Affairs Division ("IAD") submitted its final investigative report on Employee to its Assistant Chief of Police.¹⁵
13. On October 6, 2014, Agency sent to Employee his advance notice of adverse action charging him with "any on-duty or employment related act or omission that interferes with

¹² Undated letter from Agency's Internal Affairs Division to Public Corruption Section, U.S. Attorney's Office.

¹³ Final Investigative Report Concerning an Allegation Misconduct by Civilian Widmon Butler, Corporate Support Bureau, Medical Services Branch, IS# 13-002588, IAD# 13-260, dated September 25, 2014.

¹⁴ Agency Exhibit, Attachment 7.

¹⁵ Metropolitan Police Department's Answer to the Petition. Agency Tab 1.

the efficiency and integrity of government operations: Misfeasance: dishonesty, unauthorized use of government resources; using or authorizing the use of government resources for other than official business” and “...outside employment or private business activity or any direct or indirect financial interest that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities.”¹⁶

14. On December 5, 2014, Agency issued Employee a Notice of Adverse Action Hearing Officer’s Decision.¹⁷
15. On February 5, 2015, Agency issued its Notice of Final Decision, sustaining the charges and terminated Employee effective the next day.¹⁸
16. Employee was terminated effective February 6, 2015.
17. On March 9, 2015, Employee sent a request for reconsideration to the Chief of Police, who denied the appeal on March 20, 2015.¹⁹

ANALYSIS AND CONCLUSIONS OF LAW

Whether Agency violated D.C. Official Code § 5-1031 (a) (2004), otherwise known as the "90-day rule" in suspending Employee.

§ 5-1031. Commencement of corrective or adverse action states as follows:

(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 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.

(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 Corporation Counsel, 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.

¹⁶ *Id.* Agency Tab 2.

¹⁷ *Id.* Agency Tab 3.

¹⁸ *Id.* Agency Tab 4.

¹⁹ *Id.* Agency Tab 5 and 6.

For purposes of the 90-day rule, MPD has notice of the act or occurrence allegedly constituting cause on the date that it generates an internal investigation system tracking number (“IS number”).²⁰ Here, it is undisputed that MPD generated IS number IS#13-002588 on September 12, 2013. Thus, the 90-day clock starts to run on this date. Because it was before the weekend and Agency’s assigned investigator, Ms. Woodson, did not get back to work until Monday, September 16, 2013, her investigation did not start until that date. Woodson’s testimony clearly states that there was no investigation prior to her receiving the matter. Woodson testified that as soon as she read the investigative summary sheet contained in the IS#13-002588 report, she immediately discerned that Employee’s acts as described were criminal in nature.²¹ But in order to solidify her suspicions, she began a criminal investigation immediately. Because there are two working days from September 13, 2013, to September 16, 2013, two days had lapsed at that point. Based on D.C. Official Code § 5-1031(b), the 90-day clock began to be tolled on September 16, 2013.

By October 1, 2013, Woodson’s investigation had convinced her to refer the matter to the Office of the United States Attorney for the District of Columbia for criminal investigation and possible prosecution. Months later on June 2, 2014, the United States Attorney’s Office sent a Letter of Declination to Agency. The United States Attorney’s Office had decided not to press criminal charges against Employee. Thus, the 90-day period was tolled without question from September 16, 2013, to June 2, 2014.

At this point, criminal charges against Employee were precluded, thus any further investigation by MPD was administrative in nature.²² While the 90-day statute allows criminal investigation by the Office of Corporation Counsel (currently known as the Office of the Attorney General) or by the Office of Police Complaints, no evidence was presented regarding any investigation conducted by these two agencies.²³ Furthermore, in the June 2, 2014, letter in which the USAO declines to prosecute, it also states “[a]ccordingly, this matter is referred to you for whatever administrative action you deem appropriate.”²⁴ Based on D.C. Official Code § 5-1031(b), the 90-day clock began to tick again after the criminal investigation was completed by the United States Attorney’s Office. During this period, Agency’s IAD’s own investigation was still ongoing and did not conclude until September 25, 2014, the date IAD issued its investigative report.

There are 88 working days from June 2, 2014, the date Agency was informed by the USAO that it had declined to criminally prosecute Employee, to October 6, 2014, the date that Agency gave Employee his advance notice of adverse action. Adding the two working days from Thursday, September 12, 2013, to Monday, September 16, 2013, before the 90-day period was

²⁰ See D.C. Code § 5-1031(a-1)(2).

²¹ February 2, 2021, Tr. p. 13-14.

²² Relying on the holding in *Jordan (District of Columbia v. D.C. Office of Employee Appeals*, 883 A.2d 124 (D.C. 2005)) and *Thomas-Bullock (D.C. Metropolitan Police Department v. D.C. Office of Employee Appeals*, OEA Matter No. 1601-0039-17 (April 30, 2018)) that the conclusion of a criminal investigation must involve an action taken by an entity with prosecutorial authority – meaning the authority of a prosecutorial body to review evidence, and to either charge an individual with the commission of a criminal offense, or decide that the charges should not be filed.

²³ In any case, because Employee was not a police officer but a civilian employee, the Office of Police Complaints had no authority to investigate him.

²⁴ Agency Exhibit, Attachment 7.

tolled to the 88 working days after the 90-day clock began ticking again adds up to 90 days, which is exactly within the 90-day period.

As set forth above, Agency commenced adverse action against Employee by serving him with a fifteen (15) day advance written notice of proposed removal on October 6, 2014, still within the ninety-day period mandated by the 90-day rule. After carefully reviewing the record and the arguments of the parties, the Administrative Judge concludes that the Agency initiated the adverse action in a timely manner.

If so, whether Agency's action of terminating Employee from service should be upheld.

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, District Personnel Manual ("DPM") § 1603.2 provides that disciplinary action against an employee may only be taken for cause.

Under DPM §1603.(f)(6),²⁵ the definition of "cause" includes any on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: Misfeasance, and outside employment or private business activity or any direct or indirect financial interest that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities. According to the record, Agency's decision to terminate Employee was based on these charges.

In my November 30, 2016, ID, I had found that Employee's conduct of accessing Agency's electronic records system without approval for his private law practice constitutes an on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations and such actions constitute cause for adverse action. These findings have been upheld by each reviewing body: OEA Board, D.C. Superior Court, and the D.C. Court of Appeals.

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).²⁶ According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency. In the instant case, I find that Agency has met its burden of proof for the charge of "[a]ny on-duty act or employment-related act

²⁵ See also D.C. Mun. Reg. tit. 16 § 1603(f)(6).

²⁶ See also *Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

or omission that interfered with the efficiency and integrity of government operations to include: Misfeasance”, and as such, Agency can rely on these charges in disciplining Employee.

On the procedural front, I have also found that Agency had complied with the 90-day rule as stated in D.C. Official Code § 5-1031(a). Based on these findings, I conclude that the termination of Employee’s employment should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency’s disciplinary action of terminating Employee as a Claims Specialist is **UPHELD**.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge