

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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In the Matter of: )  
)  
JAMELL STALLINGS, )  
Employee )  
)  
v. )  
)  
METROPOLITAN )  
POLICE DEPARTMENT, )  
Agency )  
\_\_\_\_\_)

OEA Matter No.: 1601-0072-14

Date of Issuance: January 24, 2017

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Jamell Stallings (“Employee”) worked as a Detective with the Metropolitan Police Department (“Agency”). On August 2, 2012, Maryland Assistant State’s Attorney, Renee Joy, notified Agency’s Internal Affairs Division that Employee was indicted by a Grand Jury in the Circuit Court for Prince George’s County on seventeen criminal charges. Employee was charged with six counts of Identity Fraud, five counts of Theft Over \$500, one count of Forgery, one count of Create/Forge/Utter/Counterfeit, one count of Utter Forge Check/Counterfeit, one count of Theft of Property with a value at least \$10,000, one count of Aggregated Theft, and one count of Knowing Use of a Document with a Forged, False, or Counterfeit Signature.

On February 15, 2013, Employee was criminally convicted of twelve of the seventeen charges. On December 5, 2013, Agency issued a Notice of Proposed Adverse Action, charging Employee with violating General Order (“GO”) Series 120.21, Attachment A, Part A-7, for being involved in the commission of an act which would constitute a crime, whether or not a

court record reflects a conviction. On May 20, 2013, Agency served Employee with an Amended Notice of Proposed Adverse Action. The amended notice modified the charge to “conviction of any member of the force in any court of competent jurisdiction of any criminal or quasi-criminal offense, or any offense in which the member either pleads guilty, receives a verdict of guilty, or a conviction following a plea of *nolo contendere*.” On February 19, 2014, Agency issued its Final Notice of Adverse Action, sustaining the amended charge against Employee. The effective date of her termination was March 28, 2014.<sup>1</sup>

Employee filed an Amended Petition for Appeal with the Office of Employee Appeals (“OEA”) on April 25, 2014. She argued that Agency’s termination action was arbitrary and capricious, and it violated her procedural due process rights. Specifically, Employee asserted that Agency violated D.C. Official Code § 5-1031, commonly referred to as the “ninety-day rule,” when it failed to initiate an adverse action against her in a timely manner. Employee, therefore, requested that her termination be reversed and that she be reinstated with back pay and benefits.<sup>2</sup>

Agency filed an Answer to the Petition for Review on May 22, 2014. It denied that Employee’s termination was arbitrary and unsupported by substantial evidence. Agency further denied that it violated the ninety-day rule and requested that OEA conduct an oral hearing in the matter.<sup>3</sup>

The case was assigned to an OEA Administrative Judge (“AJ”) in August of 2014. On March 27, 2015, the AJ held a Status Conference to assess the parties’ arguments. The parties were subsequently ordered to submit written briefs that addressed whether Employee’s termination was appropriate under the circumstances, and whether Agency violated D.C. Official

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<sup>1</sup> *Agency Answer to Petition for Appeal* (May 22, 2014).

<sup>2</sup> *Amended Petition for Appeal* (April 25, 2014).

<sup>3</sup> *Agency Answer to Petition for Appeal* (May 22, 2014).

Code § 5-1031 by commencing its termination action against Employee beyond the ninety-day time period.<sup>4</sup>

In its brief, Agency claimed that termination was the appropriate penalty because it was undisputed that Employee was found guilty of several criminal charges in the Circuit Court for Prince George's County, Maryland in February of 2013. Agency also contended that it properly considered the relevant factors established in *Douglas v. Veterans Administration*, 5 M.S.B.P. 313 (1981) when selecting the appropriate penalty.<sup>5</sup> With respect to the ninety-day rule, it stated that it complied with D.C. Code § 5-1031 by issuing a Notice of Proposed Adverse Action within ninety days of the date that it had notice of the act or occurrence allegedly constituting cause. According to Agency, the charge, conviction of any member in any court or any offense in which the member receives a verdict of guilty, occurred on February 15, 2013, when Employee was found guilty of twelve criminal charges. It opined that the adverse action was commenced on

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<sup>4</sup> *Post-Status Conference Order* (March 27, 2015).

<sup>5</sup> 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 its 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.

May 20, 2013, when Employee was served the Amended Notice of Proposed Removal. Because it levied charges against Employee less than ninety days from the date on which she was criminally convicted, Agency believed that it did not violate D.C. Code § 5-1031. Consequently, it requested that the AJ uphold Employee's termination.<sup>6</sup>

In her brief, Employee argued that Agency first became aware of the allegations against her on January 23, 2012, when Detective Chaffee of the Prince George's Police Department Financial Crimes Unit informed Agency that she was being investigated for theft, identity fraud, and forgery. Thus, she identified January 23, 2012 as the "proper anchor date" for calculating the ninety-day time period. Employee also asserted that the ninety-day period was not eligible to be tolled under D.C. Code § 5-1031(b) because the matter concerned an investigation in Maryland, not the District of Columbia. She opined that the ninetieth business day for initiating an adverse action was May 31, 2012. Therefore, Employee contended that the ninety-day rule was violated because Agency did not serve its Notice of Proposed Adverse Action until December 5, 2012, well beyond the statutory time limit.

Regarding the penalty of termination, Employee contended that her due process rights were violated when Agency completed an analysis of the *Douglas* factors prior to reaching a finding of guilt. She relied on the holding in *Douglas*, wherein the Merit Systems Protection Board held that the determination of an appropriate penalty is appropriate "once the alleged conduct and its requisite general relationship to the efficiency of service have been established." Employee, therefore, believed that including an analysis of the *Douglas* factors in the Notice of Proposed Adverse Action was premature and highly prejudicial.<sup>7</sup>

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<sup>6</sup> *Agency Brief* (May 6, 2015).

<sup>7</sup> *Employee Brief* (June 12, 2015).

The AJ issued an Initial Decision on August 12, 2015. Regarding the ninety-day rule, the AJ found that Agency initiated its termination action against Employee within the required time period provided in D.C. Code § 5-1031. He reasoned that it was apparent that Agency's Internal Affairs Division did not have all of the pertinent information when it first commenced an investigation into Employee's alleged misconduct and rendered a finding of "insufficient facts" on May 11, 2012. According to the AJ, Employee's indictment and conviction triggered separate causes of action for purposes of the ninety-day rule. He stated that the time period for commencing an adverse action under D.C. Code § 5-1031 began on February 15, 2013; the day Employee was criminally convicted. Since Agency issued its Amended Proposed Notice of Adverse Action on May 20, 2013, the AJ stated that there was no ninety-day rule violation in this case.

With respect to the penalty, the AJ held that Agency acted within the Table of Offenses and Penalties Guide (GO 120.21, Attachment A); within the Table of Appropriate Penalties provided in D.C. Municipal Regulation ("DCMR") § 1619.1(1); and offered a thorough analysis of the *Douglas* factors, in selecting the appropriate penalty. Since GO 120.21 and the Table of Appropriate Penalties provide that removal is appropriate for a first time offense of a criminal conviction, the AJ concluded that Agency acted within its managerial discretion. Consequently, he determined that Employee's termination should be upheld.<sup>8</sup>

Employee disagreed and filed a Petition for Review with OEA's Board on September 16, 2015. She states that the Initial Decision was based on an erroneous interpretation of D.C. Code § 5-1031 and reiterates her previous arguments concerning Agency's incorrect interpretation of the ninety-day rule. Employee further argues that the AJ failed to address her concerns pertinent

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<sup>8</sup> *Initial Decision* (August 12, 2015).

to Agency's inclusion of the *Douglas* factors in its advance notice of termination. Accordingly, she requests that the Initial Decision be reversed.<sup>9</sup>

In response to the Petition for Review, Agency states that the AJ's interpretation of D.C. Code § 5-1031 was correct. It also submits that the AJ adequately addressed, and rejected, Employee's argument concerning the application of the *Douglas* factors. Thus, Agency contends that the Initial Decision should be affirmed.<sup>10</sup>

#### Ninety-day rule

D.C. Official Code § 5-1031 provides the following regarding the 90-day rule:

- (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.

In this case, Financial Crimes Detective, Vincent Tucci, reported Employee's alleged misconduct to MPD's Internal Affairs Division ("IAD") Agent Sylvan Aliteri on January 23, 2012. On January 24, 2012, Agency Aliteri initiated an administrative investigation into Employee's alleged misconduct. On May 11, 2012, Aliteri issued a Final Investigative Report Concerning Allegations of Misconduct by Detective Jamell Greene-Stallings of the Criminal

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<sup>9</sup> *Petition for Review* (September 16, 2015).

<sup>10</sup> *Agency Answer to Petition for Review* (November 4, 2015).

Investigations Division.<sup>11</sup> The final report provided that “...it is the finding of this investigation that there is currently a lack of evidence to sustain an allegation of misconduct on the part of [Employee].”<sup>12</sup>

Agency subsequently issued Employee a Notice of Proposed Adverse Action on December 5, 2012, charging her with violating General Order Series 120.21, for being involved in the commission of any act which would constitute a crime, whether or not a court record reflects a conviction.<sup>13</sup> The charge was based on Employee’s August 2, 2012 indictment before a Grand Jury in the Circuit Court for Prince George’s County, Maryland. However, Agency subsequently amended the charges by way of its May 20, 2013 Amended Notice of Proposed Adverse Action.<sup>14</sup> The amended notice modified the charge to read “conviction of any member of the force in any court of competent jurisdiction or any criminal or quasi-criminal offense....” According to the notice, the basis for cause was Employee’s criminal conviction on charges of identity fraud, theft, and forgery.

Here, the AJ held that in accordance with D.C. Official Code § 5-1031(a), the 90-day period for commencing the adverse action began on February 15, 2013, the date of Employee’s criminal conviction. He reasoned that Employee’s conviction triggered a separate and distinct cause of action from her criminal indictment. However, this Board has determined that the AJ has failed to provide a sufficient legal basis for this conclusion.

Historically, OEA has held that an adverse action is deemed to have commenced when an employee is formally notified of the proposed adverse action. Here, it is clear from the record that Agency was initially aware of Employee’s indictment in January of 2012. However, Agency

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<sup>11</sup> *Agency Answer to Petition for Appeal*, Tab 4 (May 22, 2014).

<sup>12</sup> *Id.*

<sup>13</sup> *Agency Answer to Petition for Appeal*, Tab 2 (May 22, 2014).

<sup>14</sup> *Id.* at Tab 3.

later amended its Notice of Proposed Adverse Action to include a different charge for the same underlying conduct. The Initial Decision fails to provide a legal basis for an agency's ability to impose one adverse action charge and later impose another charge for the same incident. Agency provided no case law or regulations to support its Amended Notice in this matter. It is also unclear whether the AJ's interpretation of the ninety-day rule was consistent with the legislative history of D.C. Code § 5-1031. The AJ provided no analysis of these material issues, and there is simply not enough evidence in the record to adequately determine if there was a ninety-day rule violation. Thus, we are unable to determine if the Initial Decision was based on substantial evidence.

#### Douglas Factors

Next, Employee contends that the AJ failed to address her concern that Agency violated her due process rights when it completed an analysis of the *Douglas* factors prior to issuing its Final Notice of Adverse Action. According to Employee, including an analysis of the *Douglas* factors in the Notice of Propose Adverse Action was premature and highly prejudicial.<sup>15</sup> Agency believes that the AJ adequately addressed Employee's argument in his Initial Decision.

In this case, the AJ highlighted the holding in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985) in determining whether Employee's termination was within the range allowed by law, regulation, and any applicable Table of Penalties. In his analysis, the AJ concluded that Agency acted reasonably when selected the penalty to impose upon Employee.<sup>16</sup> However, the Initial Decision failed to address whether Agency's inclusion of an analysis of the *Douglas* factors in its Advance Notice of Proposed Removal was prejudicial and/or constituted a harmful

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<sup>15</sup> *Petition for Review* at 20.

<sup>16</sup> *Initial Decision* at 5.



error. Based on the foregoing, we must remand this case to the AJ to consider the aforementioned issues.

**ORDER**

It is hereby **ORDERED** that Employee's Petition for Review is **GRANTED** and the Initial Decision is **REMANDED** to the Administrative Judge for further consideration.

FOR THE BOARD:

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Sheree L. Price, Interim Chair

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Vera M. Abbott

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Patricia Hobson Wilson

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P. Victoria Williams

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.