THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ADHAM NUMAIR-EL Employee,	OEA Matter No.: 1601-0027-18
	Date of Issuance: December 3, 2019
METROPOLITAN POLICE DEPARTMENT, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Adham Numair-El ("Employee") worked as a Police Officer with the Metropolitan Police Department ("Agency"). On March 10, 2017, Agency issued a Notice of Proposed Adverse Action charging Employee with being "involved in the commission of any act which would constitute a crime, whether or not a court record reflects a conviction" and "conduct prejudicial to the reputation of good order of the police force." The charges were based on Employee's failure to have any federal tax withholdings deducted from his salary from February 28, 2010 through January 10, 2012 and because he allegedly used the PeopleSoft system to claim an exemption from federal tax withholdings based on his representation that he was of Native American heritage.[1]

[1] PeopleSoft is a corporation that provides human resource management systems utilized by District government employees.

Agency's Trial Board held an administrative hearing on June 13, 2017. The Trial Board found Employee guilty of both charges and recommended that he be terminated. On August 1, 2017, Agency issued its Final Notice of Adverse Action, sustaining the charges against Employee. On August 15, 2017, Employee filed an appeal with the Chief of Police. On January 5, 2018, the Chief of Police sustained the charges against Employee and denied his appeal. The effective date of Employee's termination was September 29, 2017.

On February 1, 2018, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") challenging Agency's termination action. He argued that Agency violated D.C. Official Code § 5-1031 (commonly referred to as the 90-day rule) which requires agencies to initiate adverse action proceedings against employees within a specified time period. Employee asserted that he did not change his federal tax exemption status in PeopleSoft. Additionally, he contended that other officers were charged with similar offenses but were not terminated as a result. Therefore, he requested that Agency rescind its termination action.[2] Agency filed a response to Employee's appeal on March 5, 2018. It denied Employee's claims and requested an oral hearing.[3]

The matter was assigned to an OEA Administrative Judge ("AJ") on May 2, 2018. The AJ held a pre-hearing conference on July, 12, 2018 to assess the parties' arguments. During the prehearing conference, the AJ determined that a *de novo* evidentiary hearing before OEA was unwarranted based on the Collective Bargaining Agreement ("CBA") between Agency and the Fraternal Order of Police ("Union") and the holding in *Elton Pinkard v. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002). Accordingly, the AJ directed the parties to submit briefs addressing the aforementioned issues.[4]

In his brief, Employee argued that someone from the Office of the Chief Technology Officer ("OCTO") changed his federal tax exemptions from "99" to "Exempt" without his knowledge in July of

[2] *Petition for Appeal* (February 1, 2018).
[3] *Agency's Answer to Petition for Appeal* (March 5, 2018)
[4] *Post-Conference Order* (July 12, 2018).

2010. Employee explained that at that time, he was under the impression that the Internal Revenue Service ("IRS") had honored a Native American Treaty and the tax documentation that he submitted in August of 2010. He also contended that Agency violated the 90-day rule. According to Employee, February 15, 2011 – the date on which Internal Affairs Division ("IAD") Agent James McGuire ("Agent McGuire") received letter of declination from the U.S. Attorney's Office ("USAO") – marked the day Agency was required to initiate administrative charges related to the allegations of tax evasion. Employee explained that June 15, 2011, was the last date that Agency could initiate its termination action under D.C. Official Code § 5-1031. Thus, he believed that Agency's March 10, 2017 Advance Notice of Termination was untimely. He provided that the Trial Board's findings during the June 13, 2017 hearing were not supported by substantial evidence; that the Trial Board did not adequately consider the *Douglas* factors in selecting the appropriate penalty; and that the Trial Board's conduct during the hearing violated his due process rights.[5] As a result, Employee requested that he be reinstated with back pay and benefits.[6]

[5] In *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), the Merit Systems Protection Board, this Office's federal counterpart, set forth factors that are relevant for consideration in determining the appropriateness of a penalty. Though not exclusive, the factors include the following:

1. The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or 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.
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 the 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;

In response, Agency asserted that the Trial Board's findings regarding the charges of "commission of an act which would constitute a crime" and "prejudicial conduct" were supported by substantial evidence. It explained that Employee admitted that he received notice from the IRS that he was not tax exempt on November 25, 2011 but did not resume having taxes withheld from his paycheck until February of 2012. According to Agency, Employee engaged in conduct that was criminal and violated IRS Revised Rule 2006-20.[7] It further opined that it did not violate the 90-day rule when it initiated the current adverse action. Lastly, Agency submitted that it did not commit any harmful procedural error and that terminating Employee was the appropriate penalty. Consequently, Agency believed that its termination action should be upheld.[8]

The AJ issued an Initial Decision on December 6, 2018. He held that the D.C. Court of Appeals in *Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002), limited OEA to determining whether Agency's removal action was supported by substantial evidence; whether Agency committed a harmful procedural error; and whether Employee's termination was in accordance with the law and applicable regulations. With respect to the substantial evidence requirement, the AJ held that Employee initially blamed OCTO for changing his tax exemption status from "99" to "Exempt," leading Employee to believe that the IRS had honored his Native American status change. However, the AJ noted that Employee later contradicted himself when he admitted to changing his tax status himself. After reviewing the record and the arguments presented by the parties, the AJ concluded that Agency's Trial

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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.

[6] *Employee's Brief* (August 23, 2018).
[7] The rule provides that "[t]his revenue ruling emphasizes to taxpayers, promoters, and return preparers that there is no right to exemption from federal income tax for Native Americans under an unspecified 'Native American Treaty.' Any return position based on an unspecified [treaty] has no merit and is frivolous."
[8] *Agency's Brief* (August 30, 2018).

Board met its burden of proof in establishing the charges and specifications against Employee. The AJ disagreed with Employee's argument that the Trial Board was not actively engaged during the hearing because it asked relevant questions and raised pertinent concerns to resolve the pending issues. Additionally, the AJ determined that Agency's internal investigation, coupled with witness testimony provided during the hearing, supported a finding that Employee's termination was proper, and that Agency did not abuse its discretion in conducting an analysis of the *Douglas* factors.[9]

Regarding whether the Agency committed a harmful procedural error, the AJ highlighted D.C. Official Code § 5-1031, which requires an agency to initiate an adverse action no later than ninety days from the date agency knew or should have known of the act or occurrence allegedly constituting cause. According to the AJ, Agency complied with the 90-day rule because it first became aware of Employee's alleged misconduct November 30, 2016 when Agency received an August 5, 2016 letter from the Department of Justice ("DOJ") Tax Division. The AJ explained that IAD Agent Sylvan Altieri then created a corresponding Incident Summary ("IS") # 16-003915 to denote the beginning of his investigation. While the letter only provided that the investigation related to Employee was being closed, the AJ noted that the document included a "snapshot" of Employee's PeopleSoft account which reflected that he made changes related to the withholding of federal income taxes. In addition, he determined that Agent Altieri initiated an investigation into Employee's conduct on December 1, 2016 and Agency issued its Advance Notice of Termination to Employee on March 10, 2017, prior to the expiration of the 90-day statutory period. Accordingly, the AJ held that Agency did not violate D.C. Official Code § 5-1031; therefore, it did not commit a harmful procedural error. Lastly, the AJ found that Agency properly considered the *Douglas* factors prior to removing Employee. As a result, he

[9] *Initial Decision* (December 6, 2018).

concluded that Employee's termination was taken in accordance with all applicable laws and regulations. Consequently, Agency's termination action was upheld.[10]

Employee filed a Petition for Review with OEA's Board on January 10, 2019. He argues that the AJ's decision was based on an erroneous interpretation of D.C. Official Code § 5-1031 because Agency became aware of Employee's alleged tax issues when Agent McGuire learned of Employee's attempt to change his name on September 22, 2010. Employee asserts that the AJ erred when he applied the 2015 version of the 90-day rule, instead of the 2004 version, because the previous version of the 90-day rule was still in effect in 2010. In the alternative, he suggests that Agency's issuance of the Advance Notice of Termination was untimely under both the 2004 and the revised 2015 version of D.C. Official Code § 5-1031. Additionally, he contends that the AJ's conclusion that Employee's conduct was both criminal and prejudicial to the Department is not supported by substantial evidence. Employee posits that the AJ failed to adequately address his concerns regarding the Trial Bard's erroneous interpretation of the *Douglas* factors because its analysis demonstrates that termination was an excessive and inappropriate penalty. Consequently, he requests that this Board grant his Petition for Review.[11]

Agency filed its Response to Employee's Petition for Review on February 14, 2019. It argues that it did not violate D.C. Official Code § 5-1031 and that the evidence clearly shows that Agency was not made aware of Employee's misconduct until November 30, 2016, and not in 2010 as Employee suggests. It explains that the 2010 investigation focused on whether Employee legally changed his name, not whether Employee illegally claimed tax-exempt status on his federal taxes. Agency further reasons that Employee's submission of a name change form to Human Resources would not have alerted Agency to any potential misconduct related to Employee's tax withholdings. Further, Agency contends that the Trial Board's and the AJ's findings were supported by substantial evidence in the record. Lastly, Agency

[10] *Id.*
[11] *Petition for Review* (January 10, 2019).

opines that the AJ properly addressed Employee's concerns regarding the *Douglas* factors and that the AJ correctly determined that Agency did not abuse its managerial discretion in selecting the appropriate penalty. Therefore, it and requests that the Board uphold the Initial Decision.[12]

Substantial Evidence

On Petition for Review, this Board is tasked with determining whether the AJ's findings of fact and conclusions of law are based on substantial evidence in the record. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987) found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. For the reasons discussed below, this Board finds that the AJ's conclusions are not supported by substantial evidence in the record.

90-Day Rule

Employee first argues that the AJ should have utilized the 2004 version of D.C. Official Code § 5-1301, not the amended 2015 version, in determining whether Agency violated the 90-day rule. Under the prior version of D.C. Official Code § 5-1301, 51 D.C. Reg. 9404 (September 30, 2004), the ninety-day period for commencing adverse actions was only tolled if the alleged misconduct was the subject of a criminal investigation by a law enforcement agency in the District of Columbia. The 2004 version of the statute provided the following:

> (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

[12] *Agency's Response to Petition for Review* (February 14, 2019).

> 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.

However, D.C. Official Code § 5-1031 was amended effective March 7, 2015. The current statute expands the tolling provision to include criminal investigations by any law enforcement agency within the United States. Subsection (b) of § 5-1031 states the following with respect to the 90-day rule:

> (b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department or any law enforcement agency with jurisdiction within the United States, the Office of the United States Attorney for the District of Columbia, or the Office of the Attorney General, or is the subject of an investigation by the Office of the Inspector General, the Office of the District of Columbia Auditor, or the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) or (a-1) of this section shall be tolled until the conclusion of the investigation.

It is well-settled that the 90-day deadline is a mandatory, rather than directory provision. Therefore, any violation of the statute by an agency would result in a reversal of the adverse action.[13] The only exception to this rule lies within subsection (b) of the 2004 and the 2015 versions of D.C. Official Code § 5-1031, as both provide a tolling exception pending the conclusion of certain criminal investigations. For the reasons discussed herein, this Board finds that AJ incorrectly concluded that the amended 2015 version of D.C. Official Code § 5-1031 applies in this case because Agency knew or

[13] *McHugh v. Department of Human Services*, OEA Matter No. 1601-0012-95 (November 20, 1995); *Ross v. Department of Human Services*, OEA Matter No. 1601-0338-94 (May 15, 1995); *Robert L. King v. D.C. Housing Authority*, OEA Matter No. 1601-0062-98 (May 24, 2000); *Velerie Jones-Coe v. Department of Human Services*, OEA Matter No. 1601-0088-99 (June 7, 2002); *Curtis Adamson v. Metropolitan Police Department*, OEA Matter No. 1601-0041-04 (February 14, 2006); and *Sherman Lankford v. Metropolitan Police Department*, OEA Matter No. 1601-0147-06 (March 26, 2007).

should have known of the act or occurrence allegedly constituting cause as early as 2010, when the previous version of the 90-day rule remained in effect.

Regarding when an agency knew or should have known of the act or occurrence allegedly constituting cause, in *D.C. Fire & Med. Servs. Dep't v. D.C. Office of Employee Appeals*, 986 A.2d 419, 425 (D.C. 2010), the D.C. Court of Appeals stated that "[g]enerally[,] an investigation is a comprehensive effort to clarify or better understand circumstances surrounding an incident or series of incidents. The Court rejected the agency's argument that only knowledge with a high degree of certainty triggers the 90-day clock. Additionally, the Court noted that the 2004 version of the 90-day rule closely tracked the language of a prior statute—commonly referred to as the 45-day rule.[14] The Court explained that the deadline was intended to bring "certainty" to employees over whose heads a potential adverse action might otherwise linger indefinitely.[15]

In *Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0289-97, *Opinion and Order on Petition for Review* (January 25, 2010), the OEA Board agreed with the AJ's assessment that the formerly applicable 45-day rule was triggered when Agency was given "sufficient awareness of the matters underlying the charges against Employee to decide whether or not to commence an adverse action." Moreover, an agency may be placed on notice of an employee's alleged misconduct on multiple dates over time. In *Stanton v. Metropolitan Police Department*, OEA Matter No. 1601-0152-09, *Opinion and Order on Petition for Review* (July 16, 2012), the employee was charged with being "involved in an act which constituted a crime whether or not a court record reflects a conviction;" "conduct unbecoming of an officer;" and "any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force." The charges stemmed from the employee being involved in a car accident while off duty. In examining the 2004 version of the 90-day rule, the OEA Board noted

[14] *D.C. Fire & Med. Servs. Dep't* at 424. *See also* D.C. Council, Report on Bill 15-194 at 14 (Dec. 9, 2003).
[15] *Id*.

that the agency had four distinct dates in which they were placed on notice of the incident which allegedly constituted cause for adverse action—on June 21, 2006, when the alleged event was reported; on July 6, 2006, when Employee's police powers were revoked; in October 2006, when MPD concluded its preliminary investigation; and on October 10, 2007, when Employee was acquitted of the criminal charges. As discussed below, this Board finds that Agency was had sufficient awareness of the matters underlying the current charges prior to 2016—first beginning in September of 2010 and continuing until 2012.

September 2010

In this case, Employee faces the following charges and specifications as it relates to allegations of tax fraud and/or tax evasion:

> Charge No. 1: Violation of General Order Series 120.21 Attachment A, Part A-7, which provides in part, "...: or 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. Members who are accused of criminal or quasi-criminal offenses shall promptly report or have reported their involvement to their commanding officers."
>
> Specification No. 1: In that, on or about February 28, 2010, and continuing to January 10, 2012, you had no Federal Withholding Tax deducted from your Metropolitan Police Department salary, nor did you pay Federal Tax at the time it was due.
>
> Charge No. 2: Violation of General Order Series 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 performance of the force."
>
> Specification No. 1: In that, on or about February 28, 2010, you used the Peoplesoft system to claim exemption from Federal Withholding Taxes. Your claim of exemption from

> Federal Withholding Taxes based on your Native American heritage was fraudulent. You knowingly filed an invalid exemption claim.

Agency argues that it was not placed on notice of Employee's alleged misconduct in 2010 because the 2010 IAD investigation focused on whether Employee legally changed his name but did not address any alleged misconduct related to Employee's withholding of federal taxes. However, the record does not support Agency's contention. Employee was initially investigated for misconduct based on a September 22, 2010 conversation wherein Agent McGuire was in the Human Resources Management Division Office when he overheard another officer, Ava Cole, speaking about two Agency employees who were attempting to change their names based on a claim of being of Native American heritage.[16] Agent McGuire asked Officer Cole if he could review the paperwork that Employee submitted because it sounded suspicious. On September 22, 2010, both Agent McGuire and Agency's Human Resources Department received several documents from Ava Cole, which included an *International Law Affidavit for Private Aboriginal Indigenous American Nationality* and Employee's IRS W-8 BEN form entitled "Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding." The International Law Affidavit reflected Employee's representation that he is of Native American heritage and states that "I am certified ministerial ambassador of my indigenous Government, faith and spiritual practices. *I have no tax liability* from any corporate agencies due to my status. (emphasis added)."[17] The W-8 BEN form clearly stated Employee's proclamation that he was eligible to be exempt from federal taxes based on his claim that he is Native American.

After reviewing the documents, Agency's then-Commander, Christopher LoJacono, instructed Agent McGuire to revoke Employee's police powers during an IAD picnic on September 23, 2010. Agent McGuire subsequently generated IS # 10-003812 and initiated an IAD investigation because he

[16] *Investigative Report Concerning an Allegation of Misconduct Against Officer Joseph Gibson of the Fifth District* (May 25, 2011).
[17] *Id*.

considered Employee's act of changing his name to be criminal in nature. Agency McGuire subsequently presented the case to Assistant U.S. Attorney, Steve Durham, for possible prosecution on October 7, 2010, but the USAO declined to prosecute Employee on February 15, 2011. Employee was also administratively charged with prejudicial conduct and making untruthful statements because of the manner in which he changed his name. However, Employee was acquitted of both charges after Agency held a Trial Board hearing on December 19, 2011.[18]

Agency cannot now reasonably argue that its primary investigation into Employee in September of 2010 was solely limited to his name change without acknowledging that it reviewed and considered documents related to Employee's alleged improper withholding of federal taxes in its initial investigation. In a January 15, 2015 deposition, Agency McGuire testified that he was initially concerned with the W-8 BEN form because Employee was a resident of the state of Maryland but claiming to be a resident of Aboriginal lands. During his deposition, Agent McGuire testified to the following regarding Employee's tax documents:

> Q: And why is that a concern?
>
> A: Because first the concern is [that] he's not even to fill this document out and submit it. Secondly, he's a resident of the state of Maryland. Aboriginal lands—and then thirdly he says because of the aboriginal lands, he's not—zero withholding. But I get it, you pay taxes at the end of the year, but then all this writing in there. Again, taking the totality of it. But we start at 'do not use this citizen if you are not a U.S. citizen. That's where is all started with this document, when I read it.[19]

Based on the above, this Board finds that Agency was placed on sufficient notice during its first IAD investigation that Employee was not only attempting to change his name but was also claiming tax-exempt status based on his claim of Native American heritage. Employee's W-8 BEN form and the

[18] *Agency Answer to Petition for Appeal*, Tab 11, Final Notice of Adverse Action (February 3, 2012). *See also* Change of Duty Status for Officer Adham Numair-El *ne'* Joseph Gibson, of the Fifth District (February 2, 2012).
[19] *Deposition of James McGuire*, January 15, 2015.

International Law Affidavit clearly reflect that Employee was purporting to be exempt from the payment of federal taxes. As such, we find that Agency was placed on notice of Employee's alleged misconduct concerning the non-payment of federal taxes as early as September 22, 2010, when IAD and Human Resources received Employee's tax forms which reflected his claim of tax-exempt status.

March 2011

Agency was again placed on notice of Employee's claim of tax-exempt status on March 15, 2011, when Agent McGuire conducted a recorded interview with Employee regarding his name change and to clarify the documents that were submitted as part of IS No. 10-003812. During the interview, Employee discussed several forms with Agent McGuire, including the Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding. Employee stated that he used the form "because when you change your nationality and you [interface] with the IRS[,] you have to put the reason why it changed on the document." Employee explained that he wrote "0% tax withholding" on the form; that it was not an attempt to avoid paying taxes; and that an "Upper Marlboro" minister told him he had to submit the form.[20] Agent McGuire proceeded to interview Employee again on March 18, 2011 and May 13, 2011 regarding his name change and the tax documents. Again, the record supports a finding that Employee continued to claim to be exempt from the payment of federal taxes in March of 2011, and IAD was not only aware of his actions, but continued to investigate Employee's alleged misconduct by way of IS # 10-003812. Agency could have amended its Notice of Proposed Adverse Action at this juncture to include allegations of tax fraud or tax evasion. As a result, Agency was placed on notice of Employee's misconduct in this matter on March 15, 2011.

August 2012

Agency continued to be aware of Employee's failure to pay federal taxes in August of 2012. On August 21, 2012, August 22, 2012, and August 23, 2012, Agent McGuire was a part of several email

[20] *IAD Report of Investigation*, IS #10-3812 (March 15, 2011).

chains that included IRS Special Agent, Gary Shapley ("Shapley"), and D.C. Human Resources employee, Trey Perkins ("Perkins"). The subjects of the email chain were "W4 Audit Table Request" and "Exempt Confirmation."[21] In the emails, Shapley, Perkins, and Agent McGuire discuss both Employee's and another police officer's W4 forms (Employee's Withholding Allowance Certificate), as well as screen shots wherein Employee possibly changed his tax deduction allowances via PeopleSoft. Additionally, in one discussion, Agent McGuire informs Shapley that "…I think there was a time when [Employee] was not paying any taxes."[22]

Agency McGuire opened another investigation into Employee in September of 2012 - IS #12-000431 - after being informed that a Federal Grand Jury was being convened in the state of Maryland. Before proceeding with the investigation, Agent McGuire received a Grand Jury Secrecy Rule letter 6(e) from the U.S. Attorney's Office for the State of Maryland which informed him that none of the information related to the investigation of Employee in the state of Maryland would be provided to him. As a result, Agency McGuire closed the investigation IS #12-000431 because of insufficient facts.

However, it should also be noted that in 2012, Agency appeared to engage in the practice of closing administrative investigations that were subject to grand jury inquiries due to "insufficient facts," then opening a new investigation based on the same underlying conduct, in order to prevent a violation of the 90-day rule. Agent Alteiri, who conducted the 2016 investigation into Employee's conduct, testified to the following during the June 13, 2017 Trial Board hearing:

> Q: Once you learned of Agent McGuire's investigation dated 2011, did you see similar conduct between your investigation and Agent McGuire's investigation?
>
> A: No, sir, I didn't. Because with Agent McGuire's investigation, can I explain it? It might be lengthy….
>
> Q: We're all here.

[21] *Employee Brief*, Tab A (August 23, 2018).
[22] *Id*.

A: …[A] while ago when there were some changes as far as the department, with the 90-day rule with cases, if you had a case in the state of Maryland or the state of Virginia or anywhere else outside D.C.[,] there was a strict 90-day rule governing their case, be it criminal or administrative.

So, at the time, when McGuire got that case, the practice was…there's a grand jury going on. They're not going to tell you anything because it's secret.

They don't want you interviewing their witnesses or anything because then you're getting sort of a double shadow investigation going on. So, what we did back then is if the grand jury was going to over the 90-day time limit…we would say insufficient facts. And that's what McGuire did….

Q: I'm sorry, you say what?

A: Insufficient facts.

Q: Oh.

A: …In the 2012 [sic] one, what [McGuire] did is make insufficient facts to preserve the 90-day rule. So, he didn't do any investigating at all. I mean, I knew it was a tax issue simply because I had knowledge that, because of another officer investigated who was named in McGuire's case. I knew there was a tax issue, but I didn't know what it was….

Q: Is it your testimony…that the 2012 [sic] case that…McGuire did, that he did an insufficient facts because of 90 days—that is what the 2016 declination letter—is that same case, going on all this time?

A: …Once a…declination letter was issued…depending on what the allegations were, the department would then draw new IS numbers based on now having knowledge of what the case was about.

So, that's been done in the past, yes sir. So, that's what we did this time also.

In light of the aforementioned testimony, it is reasonable to conclude that Agency McGuire's act of closing the IS #12-000431 investigation because of insufficient facts, based on the same underlying conduct that had previously been the subject of the 2010 investigation, was to prevent a violation of the 90-day rule. This Board nonetheless finds that in 2012, Agency continued to be aware of Employee's alleged misconduct which formed the basis of the instant appeal. Further, Agency was not precluded from proceeding with an administrative investigation after receiving the Grand Jury Secrecy letter.

November 2016

On November 30, 2016, IAD agent, Altieri, received a letter issued on August 5, 2016, from the DOJ Tax Division, stating that the "tax grand jury investigation of Joseph Gibson, a.k.a. Adham Numair El, in the District of Maryland had been closed." The letter offered no description of the investigated criminal activity but included a "snapshot" of Employee's Peoplesoft account showing the request for federal tax exemption. A review of Employee's pay stubs from February 28, 2010 to January 10, 2012 led IAD Agent Altieri to suspect that Employee improperly had federal taxes withheld from his earnings. This prompted a third investigation—IS# 16-003915—which resulted in Agency issuing a March 10, 2017 Advance Written Notice of Termination based on charges of "the commission of any act which would constitute a crime, whether or not a court record reflects a conviction" and " conduct prejudicial to the reputation and good order of the police force." It is undisputed that Agency was aware of Employee's alleged misconduct in November of 2016. However, this Board notes that Agency's 2016 investigation into Employee's alleged tax fraud/evasion was initiated after receiving a "snapshot" of his PeopleSoft account and a copy of Employee's paystubs. This information was readily available to Agency in 2012, and the Maryland grand jury investigation

into Employee's tax issues did not preclude Agency from levying administrative charges against him at the time based on this information.

Harmful Procedural Error

OEA Rule 631.3 provides that: "[n]otwithstanding any other provisions 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 an 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 action." It is this Board's position that Agency could not show harmless error or that Employee's rights were not prejudiced because the issuance of its March 10, 2017 Advance Written Notice of Termination constituted a gross violation of the 90-day rule.

In this case, Agency was placed on notice of the conduct allegedly forming the basis of the current appeal on at least four occasions—September 22, 2010, when Agency received Employee's W-8 BEN and the International Law Affidavit; in March of 2010, when MPD conducted its preliminary investigation; in 2012, when IAD opened and closed its second investigation by way of IS #12-000431; and on November 30, 2016, when IAD Agent McGuire received the letter from the DOJ Tax Division stating that the tax grand jury investigation into Employee had been closed. As previously stated, pursuant to the holding in *Jordan,* Agency only needed to have sufficient awareness of the matters underlying the current charges against Employee to decide whether to initiate an adverse action. Under the holding in *D.C. Fire & Med. Servs. Dep't v. D.C. Office of Employee Appeals*, 986 A.2d 419, 425 (D.C. 2010), Agency was not required to demonstrate a high degree of certainty regarding Employee's alleged misconduct in order for the ninety-day clock to be triggered. Thus, Agency knew, or should have known, of Employee's alleged attempt to avoid a tax liability as early as 2010 and continuing in

2011 and 2012. The information Agency used as a basis to initiate its third investigation in 2016 was also readily available in 2012.

For the sake of argument, this Board will utilize 2012 as the year in which Agency knew or should have known of Employee's alleged misconduct. In 2012, the 2004 version of D.C. Official Code § 5-1031 was the applicable provision because the 2015 version of the statute was not in effect at the time. Therefore, the tolling provision provided in D.C. Official Code § 5-1301(b) (2004) would have been inapplicable in 2012 because the acts allegedly constituting cause were not the subject of a criminal investigation by Agency, the Office of the United States Attorney for the District of Columbia, the Office of the Attorney General for the District of Columbia, or the Office of Police Complaints.

Accordingly, Agency violated the 90-day rule because the issuance of its March 10, 2017 Advance Written Notice of Termination was more than ninety business days from either September 22, 2010, March of 2010, or August and September of 2012. Agency has essentially terminated Employee in 2017 for alleged misconduct that occurred in 2010. It initiated three separate investigations into Employee, over the course of seven years, for the same underlying conduct stemming from his attempt to change his name, which Employee has done successfully. Additionally, the evidence supports a finding that Agency closed its second investigation into Employee's conduct for "insufficient facts" to purposely avoid a violation of the 90-day rule. This Board finds Agency's actions to be repugnant to the legislative purpose of the rule, which is to "bring certainty to employees over whose heads a potential adverse action might otherwise linger indefinitely."[23] Given the mandatory nature of the 90-day deadline, Agency's violation of such must result in the reversal of its termination action.

[23] *D.C. Fire & Med. Servs. Dep't* at 424. *See also* D.C. Council, Report on Bill 15-194 at 14 (Dec. 9, 2003).

Conclusion

Based on the foregoing, we find that the AJ's conclusion that Agency complied with the 90-day rule was not based on substantial evidence. Agency was placed on notice that Employee failed to pay his federal taxes based on his claim of being Native American as early as September 22, 2010, in March of 2020, continuing in 2012, and on November 30, 2016. Under D.C. Official Code § 5-1301(b) (2004), Agency's issuance of its March 10, 2017 Advance Written Notice of Termination was more than ninety business days from the first date when Agency knew or should have known of the act or occurrence allegedly constituting cause. Because the 90-day provision is mandatory, a violation of the statute must result in the reversal of Agency's action. As such, we are inclined to grant Employee's Petition for Review. Consequently, the Initial Decision must be reversed.

ORDER

Accordingly, it is hereby ordered that Employee's Petition for Review is **GRANTED.** The Initial Decision is **REVERSED.** Agency is ordered to reinstate Employee to his previous or a comparable position, with pack-pay and benefits lost as a result of his removal. Agency is further required to file with this Office, documents evidencing compliance with the terms of this Order, no later than thirty calendar days from the date on which this decision becomes final.

FOR THE BOARD:

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Clarence Labor, Chair

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Patricia Hobson Wilson

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Jelani Freeman

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Peter Rosenstein

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Dionna Maria Lewis

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.