THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
EMPLOYEE,	OEA Matter No. 1601-0004-22
	Date of Issuance: April 3, 2023
v.	
	JOSEPH E. LIM, ESQ.
D.C. PUBLIC SCHOOLS,	Senior Administrative Judge
Agency	

David Branch, Esq., Employee Representative
Lynette Collins, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On October 13, 2021, Employee, a Director of Security, ED 105, at the D.C. Public Schools' ("Agency" or "DCPS") Office of Chief Operating Officer, filed a Petition for Appeal with the Office of Employee Appeals ("OEA") contesting DCPS's final decision terminating him from his position effective October 1, 2021. Agency accused Employee of poor work performance. OEA requested Agency's response on October 19, 2021, and Agency submitted its response on November 12, 2021. After an unsuccessful attempt at mediation, this matter was initially assigned to Administrative Judge ("AJ") Arien Cannon on January 19, 2022. Thereafter, this matter was reassigned to the undersigned Senior Administrative Judge on April 5, 2022.

Agency filed a Motion to Dismiss, alleging that Employee had a non-tenure position and thus, OEA had no jurisdiction over his appeal. Employee responded with a Motion for Summary Reversal. Subsequently, the parties submitted their responses and counter-responses. On May 14, 2022, I issued an Order on Jurisdiction denying Employee's Motion for Summary Reversal holding that this Office has jurisdiction over his appeal. Agency subsequently withdrew its Motion to Dismiss on May 16, 2022.

On June 16, 2022, I held a Prehearing Conference wherein I determined an Evidentiary Hearing was necessary. The Evidentiary Hearing was held on August 17, 2022. The parties submitted their closing arguments on or before October 26, 2022. 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 had cause to discipline Employee for failure to meet established performance standards pursuant to DPM § 1605.4(m); and

2) Whether Agency's failure to provide Employee with an evaluation within the preceding 6 (six) months of Employee's termination as per D.C. Code § 1-608.01a(b)(2)(C)(ii) warrants a reversal of Agency's adverse action.

SUMMARY OF TESTIMONY

Laura Cochrun ("Cochrun") Tr. 18-50.

Cochrun worked as the Director of Operations Strategy for the Office of the Chief Operating Officer at D.C. Public Schools ("Agency"). She provided support to the Chief Operating Officer ("COO") and all their direct reports. Cochrun stated that Employee was part of the COO's direct report. Cochrun testified that she routinely worked with Employee on projects and assignments. A common project they worked on was council briefings and preparation. She explained that Agency would have hearings with the D.C. City Council and work on materials to prepare leadership for council hearings.

Cochrun testified that she provided Employee with due dates for security related projects. Employee would not meet those deadlines causing Cochrun to complete the projects herself. She also testified that on several occasions, she would request information from Employee, and not receive it. When the task was not received, Cochrun questioned Employee verbally or via email during their weekly senior leadership meetings. Employee's lack of productivity created more work for Cochrun and required her to contact other employees for assistance. Cochrun stated that Employee was less dependable compared to other employees. Cochrun stated that she was not involved with Employee's Personal Improvement Plan ("PIP"), nor did she have direct involvement with the decision to termination Employee. Moreover, she testified that she was not his direct supervisor or within his chain of command.

Keerthana Hogirala ("Hogirala") Tr. 51-70.

Hogirala worked as a Coordinator of Operations with Agency and as such, she required input from Employee. For instance, she would request updates for council requests, budget or procurement planning submissions, and strategy planning for their division. She also requested Employee's security related data for special projects such as the cognitive operations plan ("COOP plan"). Hogirala testified that the COOP plan is the continuity operations plan, a

standard across any organization, not just Agency. She explained that it was Employee's responsibility to manage Agency's security needs during a crisis.

Hogirala noted that Employee's assignments were often incomplete, untimely, or not formatted per the instructions provided and she would have to make grammatical edits. Because a lot of the information was incorrect, Hogirala rewrote or corrected the missing information. She expressed how this negatively impacted her own assigned duties because she was responsible for the work of one team. Hogirala testified that she was not Employee's supervisor, and she was not involved in placing him on a PIP or his termination.

Ricky Brown ("Brown") Tr. 71-94.

Brown worked as the Senior Director of Security for Agency. Previously, he worked as the Director of Contract Security and Training for one year and four months. Brown stated that he worked with Employee in the School Operations and Programs division. He served as support to Employee and in turn, Employee served as the Executive Director. Brown further explained that his role was to provide support on matters related to budget and special projects.

As it related to special projects, Brown testified that he was very clear with Employee on the timelines and deadlines for submitting information. He stated that Employee missed deadlines to provide information, or the information was not provided in the way it was anticipated to be delivered. Brown explained that Employee was responsible for identifying the areas where a revamp of the policies and procedures were needed. When Brown received information from Employee, he noted that the quality of information received was not the best. Sometimes information would be missing, or misspellings would occur. Brown asserted that Agency strived to provide quality content. Thus, it was critical that the information was accurate because they are considered subject matter experts who were responsible for setting policy and guidance. Ultimately, Brown's role was impacted by Employee's lack of productivity because workload projects either fell on him or Employee's team.

Patrick Davis ("Davis") Tr. 95-159.

Davis was the Chief Operating Officer ("COO") for Agency. He testified that Employee reported to him for two (2) years when he was the COO. During this time, Davis witnessed Employee's lack of productivity. Davis stated that Employee's work did not meet the expectations for someone in his position. Moreover, Employee failed to produce quality work. Davis highlighted how important this position was, referring to school shootings across the country.

According to Davis, Employee was not able to run a department, team, and be self-sufficient to meet critical deadlines and high-quality work product. Additionally, Employee lacked the execution of preparing schools for emergency response. Davis explained that a key part of Employee's job was to make sure that schools had protocols in place for weather related emergencies; and emergency drills, such as fire drills or for an active shooter. After an audit was

conducted, Agency found that many schools were unprepared and ultimately it was Employee's responsibility to ensure that schools were prepared. Additionally, preparing school during the summer was a significant part of operations and Employee's responsibility. During this time, the chancellor and cabinet are briefed on school readiness, including weapons abatement contracts and planning readiness.

Davis's team worked with other teams to rework pertinent information because Employee failed to submit required information or did not provide quality work product. Further, Employee failed to renew the contract for weapons abatement. Davis explained that in secondary schools, students are required to go through a scanner and x-ray machine. When the machine was broken, Agency did not have anyone to maintain or repair the machines prior to school opening since the contract had lapsed.

Davis recalled a time of an unfortunate passing of a student at Ballou High School. Employee was the main point of contact to provide the necessary information of camera locations, surveillance footage, etc. However, Employee did not provide the requested information to the investigators, so Davis was brought on at the last minute for assistance. In turn, Davis scrambled to retrieve and submit the necessary information requested. He later learned that because of Employee's failings, Agency missed both the interim and final deadlines.

Davis testified that Employee was placed on a Performance Improvement Plan ("PIP"). He stated that Employee did not meet all of the requirements after the PIP concluded. Because of this, Davis recommended termination. However, it was at the beginning of Covid-19 and Agency decided that there would be no terminations during the COVID period. During the moratorium, Davis actively monitored Employee and he was forced to shift some of the emergency operations planning to other employees. This removed some of the responsibility from Employee and increased the responsibility of the school operations team who were on-site to conduct the field verifications. Davis expressed that it was important that he maintain a safe environment.

Davis would often hear complaints from Employee's team about Employee not being responsive or dependable. He explained that because their job is twenty-four hours, seven days a week he would have to step in and cover for Employee to make sure the job was completed. When Employee failed to provide certain information that only he could provide, it made Agency seem unprepared, and this was not always timely relayed to Davis.

Davis testified that he would have weekly or biweekly check-ins with Employee to discuss his work. These meetings would typically occur over a thirty-minute period. Davis explained that the discussion of the meetings was documented on the PIP and other forms. Davis could not recall if he issued Employee a performance evaluation in 2020 or 2021. However, he had issued performance evaluations during Employee's tenure with Agency.

Donielle Powe ("Powe") Tr. 162-169.

Powe worked as a contractor for Agency. Specifically, she was the Deputy Chief of Labor Management, Employee Relations ("LMER") team. Powe testified that she and Employee were colleagues and she processed Employee's termination. She explained that when a supervisor made requests for central office employees to be separated from their position, the request is made through the LMER team. Then the information is reviewed, and a determination is made on whether or not an employee is terminated. Powe testified that the grounds for Employee's termination was pursuant to violation of 5E District of Columbia Municipal Regulations ("DCMR") sections 1401.2(a)(c)(1). She explained that Chancellor Ferebee signed the termination as the final decision maker for office employees in higher profile positions.

Employee Tr. 170-242.

Employee worked for Agency from July 2014 until September of 2021. He worked as the Executive Director of school security. His responsibilities included supervision of the school security team, which included police patrol unity, emergency planning and guidance, physical security, and contract administration. Employee oversaw all of Agency's programs and ensured that the schools were protected, that equipment was working, and that Agency's policies were aligned with what DCPS and Metropolitan Police Department ("MPD") wanted in terms of safety.

Employee testified that after Davis became his supervisor, they met twice, and he was subsequently placed on a PIP. He admitted that he was surprised by Davis' testimony because he had not spent much time with him, and they had not discussed any of Employee's shortcomings. Further, they had not set any goals for the coming school year. After reviewing what was requested in the PIP, Employee testified that he had completed most of the requirements. After the PIP was completed, Employee did not receive feedback from Davis. However, they did work together to address some issues of budgeting in terms of replacement of x-ray machines, metal detectors, and the visitor management system that Agency was trying to implement.

Employee testified that he had two employees who reported to him. When those employees left Agency, the positions were vacant and unfilled for over a year. Because of the vacancies, Employee was tasked with completing his workload and that of the two former employees.

According to Employee, Davis cancelled approximately thirty-five of their weekly meetings. As it related to the incident of the student at Ballou High School, Employee asserted that the cameras were functioning, and he did not miss two deadlines as alleged by Davis. Further, Employee contested the contents of the termination letter, contending that there was an email thread between himself, Allen, and the Office of General Council ("OGC")

In Employee Exhibit 14, Employee reviewed a notice from the Child Fatality Review Committee ("CFRC") providing information that would be reviewed and discussed at the May 20, 2021, CFRC meeting. He stated that none of the information in the notice indicated that he

missed any deadline. As it related to the charge of Employee failing to secure a maintenance contract for repair of abatement machines, Employee testified that he did not have involvement in funding once a contract was prepared. His only involvement regarding equipment was to talk about specific requirements and he and his team inputted technical language which was sent to the coordinating team for processing.

Employee addressed the termination charge that alleged his failure to ensure that Agency had accounts set up in MASterMind. He testified that MASterMind is an alarm system network that is connected to the fire and intrusion alarms. It is set by the office of facilities within Agency. Employee further explained that facilities work closely with the Department of General Services ("DGS"), Office of the Chief Technology Officer ("OCTO"), and Johnson JCI, Incorporated, the company that manufactured MASterMind. The issue with the system was not the security portion, but the wiring and technical issue that needed to be remedied by DGS engineers. Employee recalled another issue that Agency needed to address. He explained that more bandwidth was needed to be purchased—all issues he claimed were unrelated to school security.

As it related to the issue of failure to have a plan to replace school security camera servers when they malfunctioned, Employee testified that in 2019, a plan was provided, which included detailed reports and spreadsheets created when the machines were down. He claimed that the issue was the cost of fixing the machines and Agency did not have funds to cover the repairs. Moreover, the list of projects provided to Davis in 2019 were still waiting to be fixed in 2021. Thus, he had to pick and choose which schools had been down the longest to be repaired.

Employee recalled a memorandum that provided that it would exceed one million dollars in cost to have the cameras fixed. Further, he claimed that there was one hundred thousand dollars available for replacement of parts and camera lenses. Employee admitted that he received a sub-award in the amount of seventy-five thousand dollars. It was his responsibility to ensure that the contracts were in place for the purchase of equipment.

Andrea Allen ("Allen") Tr. 244-255.

Allen worked as the Director of Student and Attendance at Agency. She was also a member of CFRC. She recalled the incident that involved a student at Ballou High School. It was Allen's understanding that Employee was the point of contact to obtain information. She testified that Employee was responsive when she requested information. Allen stated that Employee only provided some of the information but could not recall the information that was not provided. She looped in OGC because the CFRC meeting was near, and she still had not acquired all the information needed. After multiple failed attempts of reaching out to Employee to obtain the information, Allen ultimately had to postpone the meeting.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Whether Agency had cause to discipline Employee for failure to meet established performance standards pursuant to DPM § 1605.4(m):

Employee was a Director of Security at the Office of Chief Operating Officer, ED 105 in DCPS.[1] Employee was hired on May 24, 2016, as a Director of Security effective May 15, 2016. The offer letter informed him that pursuant to the Public Education Personnel Reform Act of 2008, his appointment is without tenure to the DC Public Schools.[2] The letter also reveals that Employee was informed that this was a full-time position subject to a one-year probationary period. As a Director of Security, Employee was not a union member and he worked in the DCPS central office.

Following a poor performance review in December 2019, Employee was issued a Performance Improvement Plan ("PIP").[3] The PIP rating period was from December 4, 2019, to January 4, 2020. The PIP enumerated Employee's performance deficiencies, action plan and the desired results to be achieved. Although Agency determined that Employee continued to exhibit unsatisfactory work performance, it paused any adverse action due to the work environment restrictions imposed by the Covid pandemic.

Thus, despite the fact that Agency gave a PIP to Employee in 2019, its continued dissatisfaction with his performance did not result in disciplinary action. It was not until almost two years later, that Agency's continued dissatisfaction with Employee's work performance that it decided to terminate his employment. This time, they did not rely on any PIP, but instead decided to remove Employee based on cause as defined by the DCMR.

On September 1, 2021, Chief Operating Officer Patrick Davis sent a memo to Deputy Chief Donielle Powe requesting Employee's termination with an outline of all Employee's performance deficiencies.[4] On September 17, 2021, Agency emailed Employee its Notice of Termination with an effective date of October 1, 2021.[5] It stated the grounds for termination as under 5E DCMR §1400.2(a) Inefficiency; 5E DCMR §1400.2(c) Incompetence; and 5E DCMR §1400.2(l) Lack of Dependability. Thus, Agency decided to terminate Employee based on continuing performance issues and not due to the failure of his PIP.

Director of Operations Cochran testified that Employee failed to provide critical security updates and metrics for her D.C. Council briefs, necessitating her having to do Employee's job. Both Cochran and Hogilara also stated that Employee failed to meet deadlines or failed to provide needed info, causing others to do Employee's job. Senior Director of Security Brown testified that Employee's work was subpar and often resulted in missed deadlines, necessitating others to pick up the slack.

COO Davis complained that Employee did not run his team or department properly and failed to prepare Agency's schools for emergencies with fire drills, school shooting response

1 Employee Motion for Summary Reversal, Exhibit A (Employee's Standard Form 50).
2 DCPS Motion to Dismiss, Exhibit 1.
3 Employee's Petition for Appeal, Exhibit 1.
4 Agency Exhibit Tab 9.
5 Agency Exhibit Tab 10.

plans, and other dangers. He stated that Employee failed to renew the contract for maintaining the schools' metal detection machines, thereby leaving some schools inadequately protected against dangerous weapons such as firearms and knives. Employee also failed to assist in the investigation of the death of a Ballou High School student. Student and Attendance Director Allen elaborated on Employee's lack of cooperation in the investigation.

Davis averred that despite counseling and instituting a performance improvement plan, Employee continued to exhibit a lack of work planning. He added that Employee often did less than the bare minimum of his job requirements as Executive Director and was incompetent at memo writing, spreadsheet completion, data and contract management. Management and Employee's own team lacked confidence in Employee. Powe stated that because of Employee's high position, DCPS Chancellor Ferebee himself reviewed and approved Employee's termination.

Employee blamed Agency's lack of finances for his failure to renew the contract for maintaining DCPS metal detectors. He complained that his Supervisor Davis failed to properly implement his PIP in that they did not meet often enough. Employee also denied any work deficiencies on his part, as he ascribed them to factors beyond his control.

Despite testimony touching on a PIP administered to Employee almost two years before, Agency's adverse action was premised on his continued poor work performance after the PIP and not on the PIP. The specifications on Employee's Notice of Termination centered on Employee's work deficiencies that continued from 2020 to 2021.[6] Based on the evidence presented at the hearing, I find Agency's witnesses to be more credible than Employee. I therefore find that Agency met its burden of proving all its specifications on the charges of inefficiency, incompetence, and lack of dependability. I therefore find that Agency had cause for adverse action against Employee.

Whether Agency's failure to provide Employee with an evaluation within the preceding six (6) months of Employee's termination as per D.C. Code § 1-608.01a(b)(2)(C)(ii) warrants a reversal of Agency's adverse action.

The Public Education Personnel Reform Act of 2008, D.C. Code § 1-608.0l a (b) (2) (C) (i) and (ii), states:

> (C)(i) A person employed within the Educational Service in DCPS, or the Office of the State Superintendent of Education who is not an Excluded Employee, shall be probationary employee for one year from his or her date of hire ("probationary period") and may be terminated without notice of evaluation.
>
> (ii) Following the probationary period, *an employee may be terminated, at the discretion of the Mayor, provided, that the employee has been provided a 15-day separation notice and has had at least one evaluation within the preceding 6*

6 Agency Exhibit Tab 10. Notice of Termination dated September 17, 2021.

months, a minimum of 30 days prior to the issuance of the separation notice.
(Emphasis added).

Accordingly, an employee serving under the Education Service with DCPS that is not an "Excluded Employee," may be terminated after the completion of their probationary period, provided that certain conditions are met under D.C. Code § 1-608.0la(b)(2)(C)(i) and (ii). Employee argues that he could have been terminated from service with the Agency with or without cause, *only* if certain conditions were met, namely: (1) the employee was given a notice of separation at least fifteen days to an effective termination date; and (2) the employee was subjected to at least one evaluation within the preceding six months, with a minimum of thirty days prior to the separation notice being issued. *See* D.C. Code § 1-608.0la(b)(2)(C)(ii).

Instead, Employee was given notice on September 17, 2021, that his termination would become effective on October 1, 2021. Employee concedes that while his notice adheres to the fifteen-day requirement under D.C. Code § 1-608.0la(b)(2)(C)(ii), Agency failed to provide one (1) evaluation within the preceding six months of Employee's termination was completed. Employee was not an "Excluded Employee", and the Agency was required to provide him with a performance review within the preceding six months of his termination. Agency failed to provide any evidence to show that it provided Employee with a performance review within the six months preceding his effective termination on October 1, 2021. Based on the evidence, I find that Agency committed error in its failure to provide Employee this performance review. Thus, the issue is whether Agency's failure to provide this performance review constitutes harmful or harmless error.

Agency argues that as an Educational Employee,[7] Employee was terminated under Title 5, Chapter 14 of the DCMR, and therefore a 6-month evaluation under the D.C. Code was not required. Agency cites Chapter 5 of the DCMR as the relevant and appropriate table of penalties that applies to Employee. DCMR Chapter 5E, §1400.1 and §1400.3 states that:

§1400.1 – The following adverse actions shall be subject to the rules and procedures set forth in this chapter: (a) Dismissal; (b) Suspension; and (c) Demotion for cause.[8]

§1400.3 – The provisions of §§1400 and 1401 shall apply to all employees of the Board of Education of the District of Columbia.[9]

Agency argues that since Employee was employed under the Board of Education, Title 5, Chapter 14 is applicable as the appropriate vehicle for adverse actions. Agency argues that Employee's termination under Title 5, Chapter 14 was an Adverse Action that did not require the 6-month performance evaluation per D.C. Code. Agency states that Employee was terminated under 5E DCMR §1400.2(a) Inefficiency; 5E DCMR §1400.2(c) Incompetence; and 5E DCMR §1400.2(l) Lack of Dependability, each of which constitutes cause for adverse action.[10] Agency points out that DCMR Chapter 5E §1400.3, §1400.4, and §1402.1 outlines the requirements for

7 Agency brief (Oct. 24, 2022) Appendix D(a) Employee's DCPS Standard Form 50, Notice of Personnel Action.
8 *Id*. Appendix A(b) 5E DCMR §1400.1.
9 *Id*. Appendix A(c) 5E DCMR §1400.3.
10 *Id*. Appendix A(d) 5E DCMR §1401.2.

adverse action as follows:

§1400.3 – An employee who is the subject of an adverse action shall be given notice of the ground(s) on which the adverse action is based.

§1401.4 – The notice shall contain the reasons and basis for the ground(s) of the adverse action in sufficient detail to reasonably inform the employee of the specific grounds and reasons for the adverse action.

§1402.1 – The Superintendent of Schools or the Superintendent's designee may affect the dismissal, suspension, or demotion for cause of any employee under his or her authority.

Agency points out that it has adhered to all the requirements under Chapter 14 and reiterates that the D.C. Code requirement for a 6-month evaluation prior to termination does not apply. Agency goes on to argue that the D.C. Code does not apply, and thus there was no error in processing Employee's termination under the DCMR. Alternatively, Agency argues that it used its managerial discretion to discipline Employee under the DCMR as opposed to the D.C. Code.

Agency does not dispute that at the time Employee was terminated, Employee's position as Director of Security was not excluded and was within the Educational Service. Further, Employee completed his probationary period around May 2017. Thus, I find that Employee was a permanent employee in an Educational Service position during the time of his termination.[11]

Agency would have this Office believe that since it terminated Employee based on cause (Inefficiency; 5E DCMR §1400.2(c) Incompetence; and Lack of Dependability) as defined in the DCMR and not on the basis of D.C. Code § 1-608.0l, it can ignore the D.C. Code's requirements for terminating an employee in the Educational Service. What Agency fails to address is why this Office should ignore a statute in favor of a mere regulation. The D.C. Code permits Agency to forego its 15-day separation notice and 6-month evaluation requirement before termination only in instances where the employee is convicted of a felony, certain crimes, material misrepresentation on an employment application or document, a violation of law, gross insubordination, misfeasance, or malfeasance.[12] I find that these exceptions do not apply in this instance as no evidence for any of those exceptions was presented in this matter.

While Agency terminated Employee for cause, the D.C. Code allows Educational Service employees to be terminated at will, so long as its notice and evaluation requirements are met. Since the evidence presented shows that Employee did not receive the mandatory evaluation within six (6) months of his termination, the next question is whether D.C. Code § 1-608.0la(b)(2)(C)(ii) directive is mandatory or directory.

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11 *Supra*, Agency brief (Oct. 24, 2022) Appendix D(a) Employee's DCPS Standard Form 50, Notice of Personnel Action.

12 D.C. Code § 1-608.0l (D) (i) to (v).

In *Thomas v. Barry,* 729 F.2d 1469 (D.C. Cir. 1984), the District of Columbia Circuit Court held that "[t]he general rule is that '[a] statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period *and* specifies a consequence for failure to comply with the provision."[17] Likewise, in *Metro. Police Dep't. v. Pub. Employee Relations Bd.,* No. 92- 29, 1993 WL 761156 (D.C. Super. Ct. Aug. 9, 1993), the D.C. Superior Court stated that "the phraseology used in a statute can create a mandatory limit on a government's authority to act," noting that the statute at issue which addressed an agency's ability to commence adverse actions against employees contained both mandatory language and a consequence for noncompliance.[18] The D.C. Court of Appeals has also affirmed this holding in *District of Columbia Department of Health v. D.C. Office of Employee Appeals and Stanback*, 273 A.3d 871 (2022), that "where there are provisions regulating the duties of public officers and specifying the time for their performance provide directory rather than mandatory timelines, at least where the provisions do not assign any consequences to the officer's noncompliance."

Again, in *Teamsters Local Union 1714 v. Pub. Employee Relations Bd.*, 579 A.2d 706, 710 (D.C. 1990), the D.C. Court of Appeals held that ("[t]he general rule is that '[a] statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period *and* specifies a consequence for failure to comply with the provision. In *Watkins v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0093-10, *Opinion and Order on Petition for Review* (January 25, 2010), OEA adopted the reasoning provided in *Teamsters* when examining a forty-five-day regulation which also addressed the time limit in which an agency was required to issue a final decision in cases of summary removal. The Board in *Watkins* noted that the personnel regulation regarding the forty-five-day rule did not specify a consequence for the agency's failure to comply; therefore, the regulation was construed to be directory in nature.[13] 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."[14]

In this matter, D.C. Code § 1-608.0l a (b) (2) (C) (i) and (ii) does not specify any consequence for its noncompliance. Thus, I find that the aforementioned Code provision regarding a performance evaluation is directory, not mandatory. Nonetheless, the evidence shows that Agency's failure to provide an evaluation within six (6) months of Employee's termination is a procedural error. The next issue is whether this failure is harmless error or not.

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13 In distinguishing mandatory statutory language from directory language, the Board in *Watkins* highlighted the holding in *Metropolitan Police Department v. Public Employee Relations Board*, 1993 WL 761156 (D.C. Super. Ct. August 9, 1993), wherein the Court found statutory language mandatory, not directory, where it provided that no adverse action shall be commenced 45 days after an agency knew or should have known of the act constituting the charge.

14 *See 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).

Harmless Error

While it is clear from the record that Agency violated the abovementioned statutory requirement pertaining to the termination of an Educational Service employee, this Office must next determine whether Agency's procedural error was harmless. 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." [15]

Accordingly, an agency's violation of a statutory procedural requirement does not necessarily invalidate the agency's adverse action.[16] Thus, the facts in this matter warrant the 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 will apply a two-prong analysis: whether Agency's error caused substantial harm or prejudice to Employee's rights *and* whether such error significantly affected Agency's final decision to terminate Employee.[17] (emphasis added). Even if there was substantial evidence to support the finding of prejudice to Employee's rights, the harmless error analysis would fail on the grounds that Agency's error would have significantly affected its final decision to terminate Employee. As the OEA Board held in *Employee v. Department of Youth Rehabilitation Services,* there must be a showing that the error was likely to have caused Agency to reach a different conclusion from the one it reached.[18]

Here, D.C. Code § 1-608.0l a (b) (2) (C) (i) and (ii) provides a clear directive in terminating an employee in the Educational Service, but it does not offer a consequence for failing to strictly adhere to the statute. As this Board held in *Watkins*, "[i]t is likely that the purpose of 45-day limit was to shorten the time in which an employee is faced with the uncertainty about when they may be subjected to removal." However, the Court in *Teamsters* noted the designation of a time limit cannot be considered a limitation of an agency's power to act. As a result, Agency's procedural delay did not preclude it from terminating Employee.

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15 See 59 DCR 2129 (March 16, 2012). While OEA had changed its rules effective December 27, 2021, the 2012 rules apply in this matter since Employee filed his appeal on October 13, 2021.

16 *See Diaz v. Department of the Air Force*, 63 F.3d 1107 (Fed. Cir. 1995).

17 *Employee v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0055-17, *Opinion and Order on Petition for Review* (April 9, 2019).

18 *Employee v. Department of Youth Rehabilitation Services,* OEA Matter No. 1601-0055-17, *Opinion and Order on Petition for Review,* p. 10 (April 9, 2019)(citing to *Harding v. Office of Employee Appeals,* 887 A.2d 33 (D.C. 2005); *Santos v. Department of Navy,* 58 M.S.P.R. 694 (September 23, 1993); and *Mathis v. Department of State,* No. AT-0432-14-0867-1-I, 2014 WL 6616619 (Nov. 18, 2014) (M.S.P.B. November 18, 2014)).

In this matter, Employee is alleged to have committed several serious derelictions in his work performance, including failing to supply critical security data; failing to ensure that Agency's public schools had approved emergency response plans; failing to secure a maintenance contract for school weapons abatement machines and security cameras; failing to meet time and quality performance standards; and failing to produce requested materials to the Medical Examiner's Child Fatality Review Committee in a student's death investigation. Based on the evidence presented, I find that Employee's poor work performance had jeopardized the safety and security of Agency's school population, its students, and staff. When weighed against the prejudice to Employee, it is clear that the public interest in adjudicating this matter on its merits outweighs Agency's single procedural error.

Continuing on the harmless error analysis, we next look at whether Agency's error would have significantly affected its final decision to terminate Employee. As the OEA Board held in *Employee,* there must be a showing that the error was likely to have caused Agency to reach a different conclusion from the one it reached.[19]

In this matter, the record shows that Agency terminated Employee's employment under Title 5, Chapter 14 as an Adverse Action that did not require the 6-month performance evaluation per the D.C. Code. Agency has maintained that Employee was terminated under 5E DCMR §1400.2(a) Inefficiency; 5E DCMR §1400.2(c) Incompetence; and 5E DCMR §1400.2(l) Lack of Dependability, each of which constitutes cause for adverse action. Thus, I find that even without the directory evaluation under the D.C. Code, Agency would and did terminate Employee's employment. Therefore, I find that Agency's procedural error of not providing a performance evaluation within six (6) months of Employee's termination does not warrant an outright reversal of Agency's adverse action. I also find that Agency had cause for Employee's removal.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of removing Employee is UPHELD.

FOR THE OFFICE: *s/Joseph Lim*
JOSEPH E. LIM, Esq.
Senior Administrative Judge

19 *Employee v. Department of Youth Rehabilitation Services,* OEA Matter No. 1601-0055-17, *Opinion and Order on Petition for Review,* p. 10 (April 9, 2019)(citing to *Harding v. Office of Employee Appeals,* 887 A.2d 33 (D.C. 2005); *Santos v. Department of Navy,* 58 M.S.P.R. 694 (September 23, 1993); and *Mathis v. Department of State,* No. AT-0432-14-0867-1-I, 2014 WL 6616619 (Nov. 18, 2014) (M.S.P.B. November 18, 2014)).