THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0072-14R17
JAMELL STALLINGS, Employee	
	Date of Issuance: June 29, 2017
v.	
METROPOLITAN POLICE DEPARTMENT, Agency	
	Arien P. Cannon, Esq. Administrative Judge

Marc Wilhite, Esq., Employee Representative
Jhumur Razzaque, Esq., Agency Representative

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 12, 2015, the undersigned issued an Initial Decision upholding the Metropolitan Police Department's ("Agency" or "MPD") decision to remove Employee from her position as a Detective. Employee filed a Petition for Review with the OEA Board on September 16, 2015, asserting that the Initial Decision ("ID") was based on an erroneous interpretation of D.C. Code § 5-1031 (2004) and failed to address concerns pertinent to Agency's inclusion of the *Douglas* factors in its Proposed Notice of Adverse Action ("Proposed Notice").

On January 24, 2017, the OEA Board issued an Opinion and Order remanding this matter to the undersigned. The Opinion and Order held that the Initial Decision "did not provide a legal basis for an agency's ability to impose one adverse action charge and later impose another charge for the same incident." The Board also determined that the Initial Decision was not clear as to whether the undersigned's interpretation of the ninety-day rule was consistent with the legislative history of D.C. Code § 5-1031. Lastly, the Board held that the Initial Decision did not address whether Agency's inclusion of an analysis of the *Douglas* factors in its Proposed Notice was prejudicial and/or constituted a harmful error. Based on the foregoing, the Board remanded this matter for further consideration of the aforementioned issues.

A Status Conference was convened on March 22, 2017, to address the issues on remand. Following the Status Conference, a briefing schedule was set. Both parties have submitted their briefs accordingly. The record is now closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

1. Whether Agency has the ability to impose one adverse action charge and later impose another charge for the same incident.

2. Whether the interpretation of the ninety-day ("90-day Rule") rule in the Initial Decision was consistent with the legislative history (intent) of D.C. Code § 5-1031.

3. Whether Agency's inclusion of an analysis of the *Douglas* factors in its Advance Notice of Proposed Removal was prejudicial and/or constituted harmful error.

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Undisputed facts

1. Employee was removed from her position as a Detective with MPD, effective March 28, 2014.

2. Agency first learned of allegations of misconduct against Employee on January 24, 2012, when it was made aware by a Detective with the Prince George's County, Maryland Police Department.

3. At this juncture, MPD opened its own Internal Affairs investigation of the allegations made against Employee.

4. Because of the parallel criminal investigation being pursued in Prince George's County against Employee, MPD's internal affairs investigator was unable to speak with Employee or the victim relating to the allegations against Employee.

5. As a result, Agency closed its investigation and found that it lacked evidence at the time to sustain an allegation of misconduct on the part of Employee.

6. The investigation concluded on May 11, 2012, with a finding of "insufficient facts."[1]

[1] Agency's Answer, Tab 4 (May 22, 2014).

7. Subsequently, Employee was charged on August 2, 2012, by indictment, before a Grand Jury in the Circuit Court for Prince George's County, Maryland, on several counts of identity fraud, theft, and forgery.

8. As a result of the criminal indictment, Agency served Employee a Proposed Notice of Adverse Action on December 5, 2012. [2]

9. Employee was found guilty on February 15, 2013, on twelve (12) of the seventeen (17) charges against her.

10. As a result of this conviction, Agency issued an Amended Notice of Proposed Adverse Action ("Amended Proposed Notice") on May 20, 2013.

11. Employee submitted a response to the Amended Proposed Notice on January 22, 2014.

12. Agency issued the Final Notice of Adverse Action on February 19, 2014. Employee's removal was effective on March 28, 2014.

Whether Agency has the ability to impose one adverse action charge and later impose another charge for the same incident.

In *Lawton v. Department of Veterans Affairs*, 53 M.S.P.R. 153 (1992)[3], the MSPB held that there was no law, rule or regulation prohibiting an agency from amending a notice of proposed removal by deleting some charges and adding others.[4] This is precisely what occurred in the instant case. Once Employee was criminally indicted in Maryland, Agency commenced an adverse action and formally notified Employee of the adverse action by issuing a Notice of Proposed Adverse Action on December 5, 2012. Employee was subsequently convicted of twelve (12) of the charges set forth in the criminal indictment. As a result, Agency issued an Amended Proposed Notice on May 20, 2013, which amended the original charge of misconduct pertaining to the indictment, and updated the charge to reflect the conviction.[5]

Although the charge Agency initially relied upon was updated in an amended notice of proposed removal, the recommended penalty remained the same—removal. This Office has held that an agency is within its right to amend a charge prior to imposing its final decision regarding an adverse action.[6] While the Opinion and Order on Petition for Review in this matter captions the issue as, "whether Agency has the ability to impose one adverse action charge and later impose another charge for the same incident," the issue is really whether Agency has the ability to issue a proposed notice of removal and subsequently amend the proposed notice for the same

[2] Agency's Answer, Tab 2 (May 22, 2014).
[3] *See also Fickie v. Department of Army*, 86 M.S.P.R. 525 (2000).
[4] Although decisions from the Merit Systems Protection Board ("MSPB") are not binding on OEA, this Office has historically relied on its decisions for guidance. *See Sholanda Miller v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0325-10R15, Opinion and Order on Remand, at 8 (June 6, 2017).
[5] Of importance is the fact that Employee was also afforded the opportunity to respond to the amended charges which she addressed, through her attorney, on January 22, 2014. *See* Agency Answer, Tab 4 (May 22, 2014)
[6] *Miller v. Metropolitan Police Department*, OEA Matter No. 1601-0325-10-R15, Initial Decision on Remand, at 9 (May 6, 2016).

incident. As discussed above, the precedent of this Office and the guidance set forth by the MSPB make clear that an agency has the right to amend a proposed notice to more accurately reflect the misconduct charges against an employee.

Whether the interpretation of the 90-day Rule rule in the Initial Decision was consistent with the legislative history (intent) of D.C. Code § 5-1031 ("90-day Rule").

D.C. Code § 5-1031 has been amended a number of times over the years. The last amendment provides that the "Metropolitan Police Department has notice of the act or occurrence allegedly constituting cause on the date that the Metropolitan Police Department generates an internal investigation system tracking number for the act or occurrence."[7]

The precise issue regarding what constitutes an "act or occurrence," for purposes of the 90-day rule, appears to be an issue of first impression before this Office. It is evident that the issue regarding when the 90-day period begins to run for an "act or occurrence" is murky, and the lack of clarity still persists in the unique set of facts in the instant case. Because of the confusion regarding the 90-day rule, the District of Columbia Council enacted D.C. Law 20-173 (Act 20-499), "Metropolitan Police Department Commencement of Discipline and Command Staff Appointment Act of 2014." This Bill, in part, was intended "to clarify when the time period begins running" for purposes of the 90-day rule. The text of the Legislative Bill states, with respect to subsection (a) of D.C. Code § 1031:

> Sec. 101. Section 502 of the Omnibus Public Safety Agency Reform Amendment Act of 2004, effective September 30, 2004 (D.C. Law 15-194; D.C. Official Code § 5-1031), is amended as follows:
>
> (a) Subsection (a) is amended by striking the phrase "or the Metropolitan Police Department" wherever it appears.
>
> (b) A new subsection (a-1) is added to read as follows:
> (a-1)(1) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause.
>
> (2) For the purposes of paragraph (1) of this subsection, the *Metropolitan Police Department has notice of the act or occurrence allegedly constituting cause on the date that the Metropolitan Police Department generates an internal*

[7] *See* 2013 Washington D.C. Legislative Bill No. 1014, Title I.

> *investigation system tracking number for the act or occurrence*. (emphasis added).

It is noted that this amended version of D.C. Code § 5-1031 took effect after the Notice of Proposed Adverse Action and the Amended Notice of Proposed Adverse Action were issued to Employee in the instant case. However, this amendment provides clarity on the legislative intent of the Council in regards to the 90-day rule not only in its current form, but also previous versions of the 90-day rule.

The version of the 90-day Rule that is applicable is the instant case (D.C. Code § 5-1031 (2004)) provides, in pertinent part:

> (a-1)(1)…[N]o corrective or adverse action against any sworn member or civilian employee of the…Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that 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 the Attorney General, 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.

Here, Agency was first made aware of the allegations against Employee by Detective Tammy Chaffee of the Prince George's County, Maryland Police Department on January 23, 2012. Subsequently, on January 24, 2012, an investigation system tracking number was generated by MPD's Internal Affairs Division ("IAD"), (Incident Summary ("IS) No. 12-000211 and IAD No. 12-0097) for the allegations against Employee. Because of the parallel criminal investigation being pursued in Prince George's County against Employee, Agency was unable to conduct a thorough internal administrative investigation, prompting Agency to close its investigation with a finding of "insufficient facts."[8]

After Agency concluded that it had insufficient facts regarding the allegations of misconduct against Employee, she was subsequently criminally indicted. When Agency learned of Employee's August 2, 2012, criminal indictment, a *new IS number* was generated. Thus, when Agency concluded its own internal investigation (IAD No. 12-0097) regarding the mere allegations (at the time) against Employee, this constituted an "act or occurrence" under the 90-day rule. Based on IAD case number 12-0097, Agency elected not to initiate an adverse action

[8] Agency's Answer, Tab 4 (May 22, 2014).

based on the mere allegations of misconduct and ended its investigation due to insufficient facts to sustain charges of misconduct. When a *new* Internal Affair case number (IS No. 12-001806 and IAD No. 12-139) was generated once Employee was criminally indicted, this constituted a separate and distinct "act or occurrence" under the 90-day rule as set forth in the Legislative Bill, D.C. Law 20-173 (Act 20-499).

Although the underlying facts of this case give rise to different times where misconduct may have occurred, Agency only elected to take adverse action when the allegations were substantiated, first through an indictment and subsequently through a conviction. Agency elected not to initiate an adverse action based on the mere allegations at a point in time when it was unable to conduct its own internal investigation given the parallel investigation occurring in Maryland.

The misconduct Agency was initially relying upon in taking adverse action was the indictment, as demonstrated by the IS Number, and not the underlying allegations being made against Employee. In relying on the misconduct of the indictment, Agency issued its original Notice of Proposed Removal of Adverse Action on December 5, 2012. Given the legislative intent as discussed in the Legislative Bill for D.C. Law 20-173 (Act 20-499), Agency had notice of the "act or occurrence," on the date that an internal investigation system tracking number was generated. Here, the first "act or occurrence" was when Agency first learned of the allegations against Employee in January 2012. When Agency first learned of the allegations, it opened an IAD case to investigate. Based on the evidence that Agency had at the time, it found that it lacked evidence to sustain the allegations of any misconduct on the part of Employee. When Employee was criminally indicted in Prince George's County, Maryland on August 2, 2012, Agency opened a new IAD case based on the indictment as a separate action of misconduct. This new internal investigation was assigned a different case number (IS No. 12-001806, IAD No. 12-139) than the previous case number that was associated with the investigation Agency conducted when it was first made aware of the allegations against Employee.

Based on the two different case numbers, and the legislative intent set forth in D.C. Law 20-173 (Act 20-499), it can reasonably be interpreted that there were two different "acts or occurrences" that occurred in the instant case: (1) when Agency was made aware of the allegations of misconduct and (2) the criminal indictment. Agency chose not to initiate adverse action based on the allegations, but decided to initiate an adverse action once Employee was criminally indicted. As discussed above, Agency was within its authority to amend the proposed notice of adverse action when Employee was subsequently convicted. Thus, the interpretation of the ninety-day rule in the Initial Decision was consistent with the legislative intent of D.C. Code § 5-1031 (2004).

Whether Agency's inclusion of an analysis of the *Douglas* factors in its Advance Notice of Proposed Removal was prejudicial and/or constituted harmful error.

Employee asserts that the inclusion of an analysis addressing the *Douglas* factors in the Advance Notice of Proposed Removal was prejudicial and/or constituted harmful error. Employee further argues that the inclusion of a *Douglas* factors analysis prior to reaching a final finding of guilt violated her due process rights.

The Merit Systems Protection Board has held to the contrary. Specifically, in *Lopes v. Department of the Navy*, 116 M.S.P.R. 470 (2011), the MSPB held that "[w]hen an agency intends to rely on aggravating factors…as the basis for the imposition of a penalty, such factors should be included in the advance written notice of adverse action so that the employee will have a fair opportunity to respond to those factors…" prior to a final agency decision.[9] Additionally, the Federal Circuit, which has appellate review over the MSPB, has held that, "for an agency to rely on matters affecting the penalty it imposes without including those matters in the proposal notice [Advance Notice of Proposed Removal]" is a procedural error.[10]

Here, in the original Notice of Proposed Adverse Action, issued on December 5, 2012, Agency included an analysis of the *Douglas* factors. Eight of the factors analyzed in the original proposed notice were considered to be aggravating factors by the Agency. Although a *Douglas* factor analysis was set forth in the Advance Notice of Proposed Removal—that notice was just that, a proposal. This proposal was issued by Michael Eldridge, Inspector/Director of Agency's Disciplinary Review Branch. The inclusion of a *Douglas* factor analysis in the proposed notice afforded Employee the opportunity to respond to the factors which Agency found to be aggravating in making its recommendation to remove Employee. Employee responded to the proposed notice on January 22, 2014. It is evident that Agency did not determine Employee was guilty of the allegations of misconduct at the time it issued its proposed notice. It simply cited the charge it was relying upon in levying charges against Employee, the reasons for the proposed action, and an analysis of the *Douglas* factors to support the recommended penalty.

The Director of Agency's Human Resource Division, Diana Haines-Walton, who was the deciding official in this matter, issued the subsequent final notice making the ultimate decision to terminate Employee. Nothing in the record indicates that she was prejudiced by the *Douglas* factor analysis in the advance notice. There is also no indication in the record that the deciding official felt compelled to adopt the recommendation in the proposed notice. As such, I find that inclusion of a *Douglas* factors analysis in the Proposed Notice of Adverse Action was not prejudicial nor did it constitute harmful error.

New evidence

In Employee's Brief on Remand, she asserts that there is new evidence relating to her conviction at issue in this case.[11] Specifically, on September 16, 2015, in response to a Motion for Reconsideration filed by Employee, the Circuit Court for Prince George's County, Maryland ruled that "[t]he guilty conviction dated 2-25-13 is hereby stricken…" The Court further stated in its ruling that Employee was to remain on probation under certain conditions.[12] To further consider this argument would call for the undersigned to reopen the record and go beyond the

[9] *See also Douglas v. Veterans Administration*, 5 MSPB 313 (1981) (stating that aggravating factors on which the agency intends to rely for imposition of an enhanced penalty, such as a prior disciplinary record, should be included in the advance notice of charges so that the employee will have a fair opportunity to respond to those alleged factors before agency reaches its final decision.)
[10] *Ward v. U.S. Postal Service*, 634 F.3d 1274 (Fed. Cir. 2011).
[11] Employee's Brief on Remand, p. 25 (May 31, 2017).
[12] *Id*., Exhibit 4.

scope of the issues on remand set forth in the OEA Board's Opinion and Order. Thus, the undersigned will not address the new evidence presented after the Board's Opinion and Order specifically identified the issues to address on remand.

ORDER

Accordingly, based on the aforementioned, it is hereby **ORDERED** that Agency's removal of Employee from her position as a Detective is **UPHELD**.

FOR THE OFFICE:

_____
Arien P. Cannon, Esq.
Administrative Judge