THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
SHERMAN LANKFORD,	)	
Employee	)	
	)	OEA Matter No.: 1601-0147-06
v.	)	
	)	Date of Issuance: July 30, 2010
D.C. METROPOLITAN POLICE DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER

ON

PETITION FOR REVIEW

Sherman Lankford ("Employee") was appointed to the Metropolitan Police Department ("Agency") on March 18, 1985. Employee obtained the rank of Lieutenant prior to his removal. On July 26, 2005, Employee was at a crime scene and allegedly failed to properly maintain and secure evidence, specifically, a pair of binoculars that he removed from a vehicle that had been seized. On July 27, 2005, Agency commenced an investigation of the incident, which resulted in Employee being administratively charged with committing misconduct. Agency issued a Notice of Proposed Adverse Action to

Employee on March 2, 2006 pursuant to General Order 1202.1. This order requires an Administrative Services Officer to decide the case and issue a Final Notice of Adverse Action to the affected employee within forty five (45) days (hereinafter the "45-day Rule") of the member's receipt of the proposed notice, unless extended by the employee personally or through the applicable agreement.[1] On May 4, 2006, Agency held a hearing before a three member Adverse Action Panel, which recommended that Employee should be terminated. Agency served its Final Notice of Adverse Action on Employee on July 20, 2006, terminating him effective September 1, 2006. The Final Notice of Adverse Action was therefore served on Employee one hundred and forty (140) days after the date of the Notice of Proposed Adverse Action and seventy-seven (77) days after the Panel hearing.

On August 30, 2007, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). The Administrative Judge ("AJ") held a pre-hearing conference on January 17, 2007, but did not hold a hearing on the merits of the case. The AJ closed the record after the parties submitted their final briefs on the issues and decided in favor of Employee. In an Initial Decision issued on March 26, 2007, the AJ held that the Agency violated its own 45-day Rule by failing to issue a Final Notice of Adverse Action within the prescribed period. The AJ further ordered that the Agency's removal of Employee should be reversed and that Employee was entitled to be repaid all compensation and benefits of which he was deprived as a result of the adverse action.

Agency then filed a Petition for Review on May 24, 2007. Agency argued that the Initial Decision was based on an erroneous interpretation of General Order 1202.1.

[1] *Agency's Brief*, Attachment 1 (February 20, 2007).

Agency's primary argument was that the 45-day Rule was inapplicable in this matter because according to Agency, the time limit is a requirement for "commencing" an action and not a time limit for issuing a decision. Lastly, Agency that the time limit in which Agency was required to make a decision in an adverse action was directory rather than mandatory. In an Opinion and Order issued on November 13, 2008, this Board agreed with the Initial Decision and held that Agency's failure to issue a final decision on Employee's adverse action within 45 days rendered Agency's action invalid.

Agency disagreed with this Office's Opinion and Order on Petition for Review and filed an appeal in D.C. Superior Court. On March 16, 2010, the Honorable Judge Maurice A. Ross remanded this matter back to this Board for further explanation of the legal principles on which we relied in issuing our November 13, 2008 opinion. The Court noted that this Board mischaracterized Agency's argument in its Petition for Review. Specifically, the Board failed to address Agency's argument that D.C. Code § 1.617.3 should control the interpretation of General Order 1201.1 and not D.C. Code § 1-617(b-1)(1). Both repealed statutes address what is commonly referred to as the "45-day rule."

Agency's General Order 1202.1 Part 1 H states:

> "Members shall be given a written decision and the reasons therefore within forty-five (45) days of the date that charges are preferred, except when extended by the member personally or by contract, or when hearings are held, by the chairperson in the interest of "due process."

Former D.C. Code § 1-617(b-1)(1)(1992) (repealed 1998) provides that: "Except as provided in paragraph (2) of this subsection, no corrective or adverse action shall be commenced pursuant to this section more than 45 days, not including Saturdays,

Sundays, or legal holidays, after the date the agency knew or should have known of the act or occurrence allegedly constituting cause as that that term is defined in subsection (d) of this section." D.C. Code § 1.617.3 (1987) (repealed 1998) also addresses the 45-day rule. Section (a)(1) states that: "An individual in the Career and Education Services against whom an adverse action is recommended in accordance with this subchapter is entitled to reasons, in writing, and to…[a] written decision on the answer within 45 calendar days of the date that charges are preferred."

Moreover, section 1604.38 of the District of Columbia Personnel Manual provides:

> The [disciplinary] decision shall be rendered no more than forty-five (45) days from the date of delivery of the notice of proposed corrective or adverse action; provided that the period may be extended when the employee does the following: (a) Requests and is granted an extension of the time allotted for answering the notice of proposed action; or (b) Agrees to an extension of time requested by the agency.

After reviewing the record and applicable case law, this Board finds that D.C. Code § 1.617.3 (1987) is more analogous to MPD's General Order than D.C. Code § 1-617(b-1)(1)(1992). Similar to former D.C. Code §1.617.3, the General Order refers to the time period in which Agency was required to *issue* a decision, not the time period in which Agency was required to *commence* an adverse action against an employee (emphasis added). We will therefore re-evaluate Agency's arguments based on this finding. Under the General Order, Agency was required to issue a decision regarding Employee's adverse action within 45 days of his hearing. Agency did not issue a final decision until 77 days after the hearing date.

Agency's primary argument is that the forty five (45) day time period during which it was required to issue a decision should be directory rather than mandatory. When evaluating D.C. Code §1.617.3, this Office has previously held that an agency's failure to render a written decision within 45 days of the date that the charges were preferred did not necessarily warrant a reversal of the agency's adverse actions. Agency cites decisions in the cases of *Byron A. Scott. v. Dep't of Housing and Community Development*[2], *Employee v. Agency*[3], and *Metropolitan Police Department v. Public Employee Relations Board* in support of its argument.[4] In each of these cases, the failure of an agency to adhere to a 45 day rule or provision did not render the action against the employee invalid. As a general rule, 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. [5] In this case, Agency's General Order did not specify a consequence for its failure to render a decision within 45 days of levying charges against an employee. This Board therefore construes the General Order to be directory, rather than mandatory.

Although Agency's General Order is directory, further inquiry into the facts of the case is needed to determine whether Employee suffered any prejudice as a result of Agency's delay. Courts or interpreting agencies must, where appropriate, also engage in a "balancing test to determine whether any prejudice to a party caused by agency delay is outweighed by the interests of another party or the public in allowing the agency to act

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[2] OEA Matter No. 1601-0078-91 (August 21, 1992), 41 D.C. Reg. 4227 (June 24, 1994).
[3] OEA Docket No. 1601-0207-81, 32 D.C. Reg. 4396.
[4] MP 92-29, (D.C. Sup. Ct. Aug. 5, 1993), 122 DWLR 29 (January 6, 1994).
[5] *JBG Properties Inc. v. District of Columbia Office of Human Rights*, 364 A.2d 1183, 1185 (D.C.1976); *Thomas v. Barry*, 234 U.S.App.D.C. 378, 379 n. 5, 729 F.2d 1469, 1470 n. 5 (1984).

after the statutory time period has elapsed."[6] In *Teamsters Local Union 1714 v. Public Employee's Relations Board*, the D.C. Court of Appeals held that non-compliance with a 45-day rule did not mean *per se* invalidation of agency action, but rather that the agency must be permitted to demonstrate "that its delay did not substantially prejudice the complaining party."[7] Where an agency violates procedural regulations and the error has the natural effect of prejudicing substantial rights, the burden of showing the outcome was unaffected rests upon the party seeking to sustain it against the error.[8]

Agency's failure to issue a final decision regarding Employee's termination within the 45 day prescribed time period does not necessarily render the adverse action invalid; however, the Initial Decision did not address the issue of whether Agency's delay substantially prejudiced Employee. This Board will therefore remand this matter back to the Administrative Judge to engage in findings of fact regarding the impact of the delay and whether Employee suffered any prejudice as a result of Agency's failure to act. Based on the foregoing we are compelled to remand this matter to the Administrative Judge for proceedings consistent with this opinion.

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[6] *See Wisconsin Avenue Nursing Home v. District of Columbia Comm'n on Human Rights,* 527 A.2d 282, 285 (D.C.1987); *JBG Properties, supra,* 364 A.2d at 1186.
[7] 579 A. 2d 706 (D.C. 1990) (quoting *Vann v. District of Columbia Board of Funeral Directors,* 441 A.2d 246, 248 (D.C.1982).
[8] *EEOC v. Air Guide Corp*., 395 F.Supp. 600, 604 (S.D.Fla.1975); Note, Violations by Agencies of Their Own Regulations, 87 Harv.L.Rev. 629, 634-35 n.25 (1974).

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **GRANTED** and **REMANDED** to the Administrative Judge for proceedings consistent with this opinion.

FOR THE BOARD:

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Clarence, Labor, Jr., Chair

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Barbara D. Morgan

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Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after the formal notice of the decision or order sought to be reviewed.