THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Alice Lee,	)	OEA Matter No. 1601-0087-15
Employee	)	
	)	Date of Issuance: March 15, 2017
v.	)	
	)	Joseph E. Lim, Esq.
Metropolitan Police Department,	)	Senior Administrative Judge
Agency	)	

Ted Williams, Esq., Employee Representative
Onyebuchim Chinwah, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 29, 2014, the Metropolitan Police Department ("Agency" or "MPD") issued a Notice of Proposed Adverse Action ("Proposed Notice" or "Proposed Action Notice") to remove Police Officer Alice Lee ("Employee") from her position with the Metropolitan Police Department. On November 19, 2014, an Adverse Action Panel ("Panel") was convened for an evidentiary hearing to hear evidence, make findings of fact, and determine conclusions of law. The Adverse Action Panel found Employee guilty on all charges and recommended ten (10) to thirty (30) day suspension on each of the charges. However, on January 5, 2015, in its Final Notice of Adverse Action ("Final Notice" or "Final Action Notice"), Agency found that Employee's guilt on all counts warranted Employee's suspension for seventy (70) days.

On January 14, 2015, Employee appealed the Final Notice to Police Chief Cathy Lanier. Using her authority under General Order 120.21, Chief Lanier on February 5, 2015, remanded the case to a new Panel.

The second Panel convened on March 17, 2015, and held a second evidentiary hearing. The Panel found Employee guilty on all charges and recommended termination as the penalty for the charges. On Employee's issue that Agency violated the 90-Day Rule, the Panel found that because this case displayed criminal overtones, the "90 Day Clock" did not commence until the United States Attorney's Office submitted their letter of declination dated April 25, 2014.[1]

On or about April 23, 2015, Agency served Employee its second Final Notice of Adverse Action. The Notice informed Employee that her removal will be effective on July 10, 2015.

[1] Employee Tab 8, 2nd Adverse Action Panel Findings of Fact and Conclusions of Law. March 17, 2015.

On June 11, 2015, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting Agency's action of terminating her from her position as a Police Officer. Agency filed its response to Employee's Petition for Appeal on August 12, 2015.

This case was assigned to me on November 4, 2015. After discussion with the parties, I determined that this matter would be adjudicated based on the standard outlined in *Elton Pinkard v. D.C. Metropolitan Police Department*.[2] Accordingly, the parties were provided with a briefing schedule to address the merits of this matter and respond to the opposing parties' arguments. As of the date of this Order, both parties have complied with the briefing schedule and all of the required documents have been submitted. 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 the Adverse Action Panel's decision was supported by substantial evidence.
2) Whether there was harmful procedural error in that Agency violated D.C. Official Code § 5-1031 (a) (2004), otherwise known as the "90-day rule" in removing Employee.
3) Whether Agency's action was done in accordance with applicable laws or regulations.

FINDINGS OF FACT[3]

1. On October 25, 2013, Employee, a seven year veteran of the police department, attended roll call at the Second District Police Station conducted by Sergeant Kenneth Johnson ("Johnson").

2. Johnson informed Employee that she would be assigned a footbeat with a rookie officer, Brandon Jimenez, as her partner.

3. Employee informed Johnson that she was not going to take a footbeat and that if he ordered her to take the assignment, she was going on sick call stating that she had hurt her ankle. Ten MPD officers heard Employee make those statements.[4]

4. Before leaving the station to start her assignment, Employee drafted two official MPD reports describing a fall and injury that had not yet occurred.[5]

5. She emailed the first — an Injury or Illness Report (PD 42)[6] — to Sergeant Michael Lawrence, another roll call sergeant, at 3:13 pm; it stated that while on foot patrol, she

[2] 801 A.2d 86 (D.C. 2002).
[3] Based on the undisputed statement of facts in the parties' submissions, official documents submitted, and the Panels' findings of fact.
[4] Agency Record (AR) at Tab 1, p. 17.
[5] *Id.*, at Tab 2.
[6] A police department form used to document and report an on-duty injury.

suffered injuries to her ankle and knee after' tripping and falling. Employee filled out the form PD 42 prior to taking her assignment, however she did not sign the form.[7]

6. At 3:18 pm, Employee emailed the second — a completed Complaint/Witness Statement (PD 119) — to Officer Brandon Jimenez, asking him to adopt it as his own; it stated that on that day, Officer Jimenez saw Employee trip, fall, and complain about ankle pain.[8]

7. Employee and Officer Jimenez reported to their footbeat assignment. At around 4:30 pm, while Officer Jimenez and Employee were responding to their foot beat assignment, Officer Jimenez heard a thump, turned around to see where it came from, and saw Employee sitting on the ground.[9]

8. Employee alleges that she did fall and injure herself.[10]

9. Employee was transported by ambulance to the Police-Fire Clinic where she was treated and released.[11]

10. Later that same day, Sergeant Lawrence submitted an Incident Summary (IS) Sheet reporting Employee's conduct and charging her with malingering.[12]

11. That same day, MPD's Office of Internal Affairs (IAD) received notice of Employee's malingering on or about October 31, 2013, and launched a criminal investigation.[13]

12. On November 20, 2013, Agency determined that Employee suffered an on-duty injury based on Employee's allegation of tripping and sustaining a painful injury.[14]

13. Employee used 80 hours of sick leave and collected $2,610.30 in tax-exempt wages.[15]

14. The U.S. Attorney's Office (USAO) was also notified on November 5, 2013, and investigated the matter, but declined to prosecute Employee on April 25, 2014.[16]

15. On August 27, 2014, Agency's IAD finished its own investigation and issued its final investigative report to the Assistant Chief of Police of the Internal Affairs Bureau.[17]

16. On August 29, 2014, Employee was served with a Notice of Proposed Adverse Action

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[7] *See* Employee's Petition for Review, Attachment 1.
[8] AR Attachment 3.
[9] AR Attachment 14.
[10] AR Attachment 66.
[11] *See* Employee's Petition for Review, Attachment 2.
[12] AR Attachment 1. Agency defines "Malingering" as faking an injury or illness to avoid work.
[13] AR Attachment 2, and November 19, 2014, transcript, p. 88 & p. 96. March 17, 2015, transcript, p. 123.
[14] *See* Employee's Petition for Review, Attachment 3.
[15] AR Attachments 8 and 67.
[16] AR Attachment 68.
[17] Aug. 27, 2014, Memo to Assistant Chief of Police, Internal Affairs Bureau, titled, "Final Investigation Related to the Alleged Misconduct by Officer Alice Lee, Second District, IS #13003051, IAD #13-303.

concerning her actions at roll call and thereafter.[18] The charges and specifications were as follows:

> Charge No. 1: Violation of General Order Series 120.21, Attachment A, part A-17 "Fraud in securing Appointment, falsification of official records or reports."
>
> Specification No. 1: In that, or October 25, 2013, you completed a PD 42 documenting an injury to your knee and ankle prior to leaving the station and prior to any actual injury occurring. You then forwarded the completed PD 42 to Sergeant Michael Lawrence for review and approval. You did this knowing you had not been injured.
>
> Specification No. 2: In that, on October 25, 2013, you completed a PD 119, which you then forward to Officer Brandon Jimenez. The PD 119 contained false statements regarding you being injured and you requested that Officer Jimenez adopt it as his own statement. You did this while serving as Officer Jimenez's Field Training Officer.
>
> Charge No. 2: Violation of General Order Series 120.21, Attachment A, Part A-25, which provides, "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."
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> Specification No.1: In that on October 25, 2013, while in roll call you expressed your displeasure with your assignment. You then engaged in a pattern of behavior designed to deceive officials of the Metropolitan Police Department and to defraud the District of Columbia by claiming a false injury.
>
> Charge No. 3: Violation of General Order 120.21, Part VIII, Attachment A-16, which states, "failure to obey orders or directives issued by the Chief of Police."
>
> Specification No. 1: In that, or October 25, 2013, while on duty you attended roll call at the Second District. During the roll call, after you were given your assignment you stated, "fuck that." By your own admission you used the word "fuck" twice during roll call. This misconduct is further specified in General Order 201.26, Part V, Section C-3, which states in part, "All Members shall: refrain from harsh, violent coarse, profane, sarcastic, or insolent language. Members shall not use

[18] *See* Employee's Petition for Review, Attachment 4.

> terms or resort to name-calling, which might be interpreted as derogatory, disrespectful, or offensive to the dignity of any person."
>
> Charge No.4: Violation of General Order Series 120.21, Attachment A, Part A-5, which states, "willfully disobeying orders, or insubordination."
>
> Specification No. 1: In that, or October 25, 2013, after being given your assignment by Sergeant Kenneth Johnson you stated "fuck that, I 'm not doing no foot beat" or words to that effect. Your statement, in which you publically refused your assignment challenged Sergeant Johnson's authority to give assignments to officers in roll call.

17. Having determined that Employee engaged in misconduct, MPD weighed each of the relevant *Douglas Factors*[19] for consideration in determining the appropriateness of the penalty and proposed that Employee be terminated.

18. Subsequently, Employee elected to have an evidentiary hearing before an Adverse Action Panel.

19. On November 19, 2014, Employee appeared before an Adverse Action Panel to answer to the aforementioned charges and specifications. The Adverse Action Panel after hearing testimony and accepting evidence unanimously found Employee guilty of all charges and recommended to the Assistant Chief, Office of Human Resources (OHR) that Employee be suspended for seventy (70) days.[20]

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[19] *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3) the employee's past disciplinary record;
4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7) consistency of the penalty with any applicable agency table of penalties;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10) potential for the employee's rehabilitation;
11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[20] *See* Employee's Petition for Review, Attachment 5.

20. On January 5, 2015, Director Diane Haines-Walton of Human Resource Management Division, acting on behalf of the Assistant Chief, issued a Final Notice of Adverse Action informing Employee of her seventy (70) day suspension.[21]

21. On February 5, 2015, after an appeal by Employee to the Chief of Police, Police Chief Lanier exercised her discretion and remanded the case for a second Adverse Action Panel hearing.[22]

22. On February 10, 2015, Employee received an amended Notice of Proposed Adverse Action.[23] The charges and specifications listed, as well as the recommended penalty of termination,[24] were identical to those listed in the previous Notice of Proposed Adverse Action.[25]

23. On March 17, 2015 Employee appeared for a second time before a second Adverse Action Panel and was again unanimously found guilty of all charges and specifications, and Employee's termination was recommended.[26]

24. Agency accepted the Panel's recommendation and on April 23, 2015, a second Final Notice of Adverse Action was issued to Employee.[27] Employee's termination was to be effective July 10, 2015.

25. On May 1, 2015, Employee, facing termination, appealed her second Final Notice of Adverse Action to the Chief of Police.[28]

26. On May 21, 2015, the Chief of Police denied Employee's appeal.[29]

27. On June 11, 2015, Employee filed her appeal with the Office of Employee Appeals.

SUMMARY OF RELEVANT TESTIMONY

Agency argued that only the March 17, 2015, transcript should be considered while Employee argued that the earlier November 19, 2014, transcript should also be considered. The

[21] *See* Employee's Petition for Review, Attachment 6. AR Tab 5.
[22] *See* Employee's Petition for Review, Attachment 7. The parties do not dispute the Police Chief's legal right to order a second Adverse Action Panel to rehear the matter.
[23] AR at Tab 8.
[24] *Id.* at p. 4.
[25] *Id.* at pp. 1-2.
[26] *See* Employee's Petition for Review, Attachment 8.
[27] *See* Employee's Petition for Review, Attachment 9.
[28] AR Tab 11.
[29] AR Tab 12.

laws and regulations are silent on this issue. For a more comprehensive and firmer evidentiary footing, and because of the fact that both hearings involved the same issues, arose from the same set of facts, had the same witnesses and documentary evidence, I decided to consider both transcripts.

On November 19, 2014, and March 17, 2015, Agency held evidentiary hearings before an Adverse Action Panel. During these hearings, testimony and evidence was presented for consideration and adjudication relative to the instant matter. The following represents what the undersigned has determined to be the most relevant facts adduced from the findings of facts as well as the transcripts,[30] generated and reproduced as part of the evidentiary hearing held before the Panel.

Agent Michael Eames (November 19, 2014, Tr. 52-144 and March 17, 2015, Tr. 44-135.)

Agent Michael Eames ("Eames") worked in the MPD's Internal Affairs Division ("IAD") for five years. He investigated all office misconduct, corruption, criminal acts, and allegations within Agency. Eames stated that he was the lead investigator in Employee's case. He explained that Sergeant Kenneth Johnson ("Johnson") announced roll call on October 25, 2013, and Employee stated that she did not do foot beats, and stated that if she was given a foot beat assignment, she would purposely fall.

Eames stated that Employee was under criminal investigation from October 25, 2013, to April 25, 2014. He explained that on April 25, 2014, the United States ("U.S.") Attorney's Office reviewed the case and provided a letter of declination, stating that they would not prosecute Employee. Employee's case became limited to an administrative investigation.

Eames stated that the ninety-day rule was the number of days for an administrative investigation from inception to resolution. He provided that the ninety-day rule did not apply to a criminal investigation until a letter of declination was received. Eames provided that he received the letter of declination on April 25, 2014, from the U.S. Attorney's Office, and that is when the ninety day clock began for Employee. Eames stated that Johnson allowed the officers to vent during roll call so that they would be able to get their frustrations out before they began their assignments.

Eames explained that Section E of General Order 120.23 indicated serious misconduct and that the U.S. Attorney's Office had to be notified of criminal allegations within the next business day. However, Eames did not contact the U.S. Attorney's office the next business day, because he was not in violation of General Order 120.23. If he was to determine if a serious act of misconduct occurred, he would have to determine what events transpired and present the U.S. Attorney's Office with relevant information.

On cross-examination, Eames stated that the PD-42 was falsified by Employee. He explained that Employee told him that when she was on her assignment, she tripped and fell on a brick. Eames explained that Employee e-mailed the PD-42 to Officer Brandon Jimenez

[30] Transcript will be denoted herein as Tr. and the numbers following it are page numbers.

("Jimenez") while they were together during roll call. According to Eames, there were two PD-42's. One was forwarded to Jimenez and the pre-filled PD-42 was submitted to Sergeant Michael Lawrence ("Lawrence").

Eames stated that Employee admitted to all of the facts that were presented in the case. He explained that Employee told him that she received news that her father needed to have a double amputation and that she possibly had cancer. Eames testified that Employee said "my mind was not in the right place." November 19, 2014, *Tr. 125.*

On re-direct, Eames stated that on October 25, 2013, Employee was Jimenez's training officer and was the senior officer in charge. Eames explained that Employee could have been brought up on charges because she was insubordinate when she refused to take her assignment during roll call.

The term malingering was explained by Eames as anything related to an employee not reporting to work, being somewhere they were not allowed, or if an employee was involved in a situation they should not have been involved in. He provided that malingering could be attached to fraudulent misconduct, a falsification of an injury, or falsification of an official document.

Sergeant Michael Lawrence (November 19, 2014, Tr. 143-179 and March 17, 2015, Tr. 135-186.)

Sergeant Michael Lawrence ("Lawrence") of the Second District, worked for MPD as a Patrol Supervisor assigned to Patrol Service Area ("PSA") 207. Lawrence supervised the officers on patrol, directed their activities, and issued assignments to the officers during roll call. He explained that two roll calls were completed on October 25, 2013, and that Employee was in the afternoon roll call. He stated that Employee was assigned to a foot beat and was upset with her assignment. Lawrence provided that during roll call, Employee stated that she would rather call out sick than take the assignment. He testified that Employee said "fuck that, I'm going out, I'm not taking the assignment." March 17, 2015, Tr. 139. Lawrence explained that Employee was vocal in her dissatisfaction of the assignment that she received and that she repeatedly expressed that she was not going to take the assignment and continuously used profanity.

Lawrence stated that after roll call, Employee was in the report writing room and continued to announce that she was going to be out of work. He testified that in a joking manner, he told Employee to e-mail him the PD-42, a report where an on or off duty injury or illness was documented. He recalled receiving the PD-42 around 3:30 p.m., via e-mail prior to Employee leaving for her assignment. He explained that the document stated that Employee was walking down the sidewalk when she tripped and fell. However, he stated that Employee communicated via radio at approximately 4:30 p.m. that she was injured. Lawrence opined that Employee falsified her PD-42 and submitted it because she was upset. He admitted that he certified the PD-42 that Employee announced over the radio.

On cross-examination, Lawrence testified that he was the certifying official and received the e-mail prior to Employee's departure for her assignment. One hour and fifteen minutes after he received the e-mail, Employee called in her injury on the radio. Lawrence was the official to

respond to her injury. He explained that the signature of the PD-42 verified that the information contained in the document was accurate. Lawrence provided that Employee was a good officer who completed her work and stated that he never experienced her refusing to take an assignment during roll call.

On re-direct, Lawrence testified that malingering was not a criminal offense and that he did not conduct a criminal investigation on October 25, 2013. He was also unaware of anyone who conducted a criminal investigation of Employee's conduct.

On re-cross examination, Lawrence stated that he spoke to Employee about events that occurred on October 25, 2013. Lawrence explained that the initial e-mail for the first PD-42 was sent around 3:30 p.m and that Employee's injury occurred around 4:30 pm. The second PD-42 was completed shortly thereafter. Employee was not present when Johnson completed the front portion of the form. He explained that Employee was transported to the hospital and then went to the clinic. He admitted that he did not know if she should be allowed to return to work based on the allegations.

Lawrence opined that he had a good working relationship with Employee, that she was a hard worker, and that he never had any problems with her. Lawrence stated that Employee never requested time off to care for her sick family members, nor did she ask for extended leave. Tr. 184-185. He acknowledged that Employee's behavior was a result of her personal circumstances rather than her insubordination.

Officer Brandon Jimenez (November 19, 2014, Tr. 181-216 and March 17, 2015, Tr. 210-246.)

Officer Brandon Jimenez ("Jimenez") worked for Agency in the Second District for two years. He testified that after roll call, he went into the report writing room and Employee told him that he would have to write a PD-119, but Employee told Jimenez that she would write it instead. He explained that the PD-119 was filled out because Employee injured herself. After the form was filled out, Employee e-mailed it to Jimenez. He stated that he did not write the PD-119, submit an e-mail or witness Employee injure herself.

Jimenez stated that when he found out there was an investigation, he met with Eames who explained to him the nature of the investigation. He could not recall if he opened the email on October 25, 2013, or if Employee asked him to sign the PD-119. Jimenez testified that once he became aware of the false information, he brought it to his union representative's attention. He explained that he also submitted a second PD-119 to supplement the first PD-119. Jimenez did not recall if Employee used profanity, but he did remember that she was verbally loud.

After roll call, Jimenez and Employee proceeded to the report writing room. He explained that they checked their e-mails and he saw a PD-119 with his name on it. Jimenez stated that he did not witness Employee injure herself and explained that while on the foot beat, Employee told him to call for an ambulance. He testified that Employee was behind him when she fell and he could not remember what transpired while they were waiting for the ambulance to arrive. After Employee was in the ambulance, Jimenez explained that he continued his shift with a different officer. He admitted that Employee's actions made him question how Agency was

ran, because he believed that police academies pride themselves on their paramilitary structure and strict enforcement. It was strange to him to experience a roll call wherein a higher authority did not instruct her to settle down.

Sergeant Kenneth Johnson (November 19, 2014, Tr. 217-235 and March 17, 2015, Tr. 210-246.)

Kenneth Johnson ("Johnson") worked as a Sergeant in the Second District, PSA-123 for two and one-half years. On October 25, 2013, he was the roll call official who provided the police officers with their assignments. He testified that he gave Employee a foot beat assignment, and in turn, Employee was displeased and used profanity. He stated that it was not normal for an employee to have an outburst during roll call, but he did let the officers vent. He explained that Employee was not generally assigned to a foot beat, but because it was an all hands on deck weekend, the administrative office provided her with that assignment.

He recalled that Employee was upset about her assignment and that she was loud during roll call. He admitted that he allowed Employee to vent and get her frustration out before she began her work day. He did not believe her loud remarks were disrespectful, nor did he take it personally. Johnson provided that Employee's outburst was disruptive and stated that she vented her frustrations because of the assignment that she was given. He explained that Employee was always vocal and her disruption during roll call was insubordinate, but he took her actions with a grain of salt because he allowed the officers to vent. He stated that he would rather have officers vent during roll call, rather than being angry with citizens in public.

Officer Alice Lee ("Employee") (November 19, 2014, Tr. 235-269 and March 17, 2015, Tr.298-351.)

Employee worked at Agency as an officer for seven years. She worked for the 1-D Vice and then transitioned into the Narcotics Investigation Division. Employee transferred back to the 1-D Patrol to get certified to become a 2-D. She stated that she received awards from the Department of Justice for her participation with the Major Case Unit for Operation Storefront. Employee provided that she never received disciplinary action above seven hundred fifty, which meant that she did not go to court. Employee received the Meritorious Award issued by Agency for her work with the Narcotics Special Investigation Division with Major Case; she received an award from her UC work, which involved the arrest of forty-four defendants on drug and gun purchases and stolen items; she received an award with the Department of Justice, the U.S. Attorney's Office for national comparison of major cases and that was with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), Drug Enforcement Administration ("DEA"), Royal Canadian Mounted Police, and Interpol. Employee never faced a disciplinary action with Agency.

Employee admitted that she was disrespectful, inappropriate, and used profanity during roll call. She explained that she did not have the best year because she was informed that she had HPV-Grade 16 cancer cells, which led her to have fifty percent of her cervix removed. After her checkup, the physician informed her that they did not remove all of the cancer cells and she had to go back for a second procedure on October 4, 2013. Employee explained that prior to her medical procedures, she had other family hardships. Her grandfather suffered a stroke June,

2013, and was put on life support. She further explained that her family made the decision to remove her grandfather from life support in September. On October 24, 2013, she was informed that both of her father's legs would have to be amputated due to the failed medications and non-improvement of conservative treatments. Employee explained that it was difficult for her to break this news to her father because he did not speak English. Employee stated that her father has not had the surgery, but has had other health issues including congestive heart failure. If her father were to have the surgery it could kill him. Employee explained that she had to deliver the news to her father because their family spoke Taishanese, a rare dialect of Chinese and because her dialect was rare, they were unable to find a translator in the medical field. After the doctor's appointment, employee went to her parent's home and stayed until 4:00 a.m., barely receiving any sleep.

Employee stated that she was the sole care provider in her family. She explained that her family was very traditional and in Chinese culture, once a family member was married, they were no longer considered part of the family. Employee was the only child that was unmarried. Her father did not communicate with her other sisters who are married because in Chinese culture, once married, they become their husband's family.

Employee admitted that on October 25, 2013, she said during roll call "Fuck that. I'm not taking a foot beat."[31] She did not remember what she did that day due to her concern about her father. Employee could not explain why she submitted the PD-119 to Officer Jimenez or why she wrote up a PD-42. Employee stated that she only wanted to get through the day. She stated that if she wanted the PD-42 to be legitimate, she would have signed it. On re-direct, Employee admitted that she saved copy of a PD-42 but stated that she did not remember typing it up. Employee testified that she did not orchestrate a plan to injure herself, although she stated such during roll call.

Employee said that Sergeant Johnson and Sergeant Lawrence have a very relaxed roll call, and that there were occasions where profanity was used by them and herself. She stated that she mentioned her medical and family problems to Sergeant Lawrence in passing, so Sergeant Lawrence was aware of her diagnosis of HPV.

Employee recalled the events that led up to the injury and explained that she and Jimenez were walking in Georgetown when she tripped on a brick. She remembered that she asked Jimenez to call for an ambulance and an official. After her injury, Employee was treated by the medics. Employee could not provide an explanation of how she remembered this incident, and not what transpired during roll call. Employee testified that she injured her right ankle and received treatment for a sprained ankle. Employee explained that she originally sought counseling with her pastor, but consulted with Dr. Ament who recommended that Employee see a psychiatrist or psychologist that could treat her PTSD. Subsequently, she went to a psychiatrist who told her to see a psychologist to help her with her Post Traumatic Stress Disorder ("PTSD").

Employee provided that she was removed from full-duty status and was on limited duty for two to three weeks. She returned to full duty around November 12, 2013 until August 29,

[31] November 19, 2014, Tr. 242.

2014, the day she was removed from work. She acknowledged that what she did was horrendous, especially putting Jimenez in an unfair position. Employee asserted that she wanted to maintain her position with Agency. She provided that she loved her work and was ashamed of everything that she did on October 25, 2013. The reason Employee never took time off to be with her family during that difficult time was because she worked overtime, to pay for her parent's medical bills.

Captain Gerry Scott (November 19, 2014, Tr. 143-179 and March 17, 2015, Tr. 135-186.)

Gerry Scott ("Officer Scott") worked as an officer for Agency. He was assigned to the Second District with Employee. He never had a negative encounter with Employee. He testified that she completed her assignments and obligations for work. Scott provided that officers handled stress differently and was surprised by Employee's actions because she was a leveled person. Scott explained that he was surprised by the allegation against Employee because it was not in her character to conduct herself in that manner. He believed that Employee should be retained with Agency because she was a valuable asset to the police force.

Lieutenant Gary Durand (November 19, 2014, Tr. 280-287 and March 17, 2015, Tr. 278-288.)

Gary Durand ("Durand") worked with Employee for two years when he was lieutenant in the First District and maintained contact with her when he transferred out of the District. Durand provided that Employee was an excellent officer, conscientious, arrived to work on time, and was the first one on the scene. He never found her to be insubordinate or knew her to falsify documents. He did not believe that Employee should have mouthed off during roll call, but he has heard other people mouth off and nothing would be said or done. He has heard profanity used in the workplace by the Chief of Police and other officers and no action was enforced. He spoke highly of Employee's character and believed that she was legitimately hurt and not because of what she said during roll call. He testified that Employee's outburst was out of character and stated that although she vented and used profanity, she was not the first employee to do so during roll call.

On cross-examination, Durand did not believe that Employee intentionally hurt herself and said that she should be retained as an officer with Agency. Durant testified that there were other higher-ranking employees who had worse transgressions.

Durand did not recall or know another officer who has signed a PD-119 for an incident that did not occur. He explained that he has signed plenty of other documents, including PD-1633's, 251's and 252's that have been written by someone else. He has written more than a dozen investigations that required someone else's signature.

Sergeant Pablo Figueroa (November 19, 2014, Tr. 288-291 and March 17, 2015, Tr. 294-297.)

Pablo Figueroa ("Figueroa") was employed with Agency as a Sergeant. He met Employee in 2009, when she came to the Narcotics and Special Investigations Division to work cases. He stated that Employee came across as loud and outspoken, but nothing that would be considered detrimental. Figueroa admitted that Employee made a bad judgment call but

acknowledged that everyone has made mistakes and opined that she should be allowed to work for Agency. He explained that Employee never denied what she did, and was trustworthy, reliable, and that her integrity should not have been questioned.

Lieutenant Donald Samuel Craig (November 19, 2014, Tr. 292-294.)

Lieutenant Donald Samuel Craig ("Craig") worked for Agency, in the Second District for two and a half years. Craig explained that Employee was assigned to his PSA for the last two and a half years. He testified that Employee was a hardworking officer, carried out all of her duties, and he never received a complaint concerning Employee.

Doctor Aaron Ament (March 17, 2015, Tr. 248-270.)

Doctor Aaron Ament ("Dr. Ament") was Employee's psychiatrist. He performed an initial psychiatric evaluation on September 22, 2014, and diagnosed Employee with PTSD. Dr. Ament explained that anxiety and depression reduces the mind's ability to function at top level. Dr. Ament stated that he did not have ample time to delve into her medical condition in great detail. He described Employee as distressed because of her ailing father and having to deal with her cancer diagnosis. Dr. Ament stated that because Employee suffered from PTSD, she did not know what she was doing when she committed the actions that transpired on October 25, 2013.

Sergeant Arthur Kimball (March 17, 2015, Tr. 290-293.)

Sergeant Kimball ("Kimball") was assigned to the Third District with Agency. He has known Employee for five years and worked with her during overtime details. He provided that that she should not be terminated because it would have been a disservice to terminate a valuable asset. Kimball stated that he was aware of Employee's medical issue and her father's deteriorating health. He explained that Employee was the sole caretaker for her father and received little help from her siblings. According to Durand, Employee was forced to work a lot of overtime as a result of unforeseen bills, which caused her a great deal of stress.

November 19, 2014, Adverse Action Panel Findings

Agency's Adverse Action Panel's findings from the November 19, 2014 Evidentiary Hearing are as follows: Regarding Charge No. 1 (falsification of official records or reports), the Panel found that there was sufficient evidence to support a charge that Employee completed a PD 42 knowing she was not injured (Specification No. 1), and that Employee knowingly submitted a PD 42 containing false statements. Regarding Charge No. 2 (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, Employee expressed displeasure with her assignment, the Panel found that there was sufficient facts to support this charge. Regarding Charge No. 3 (failure to obey orders or directives issued by the Chief of Police), Specification No. 1, the Panel found that there was sufficient facts to support the charge of not refraining from the use of harsh, violent, coarse, profane, sarcastic, or insolent language when Employee use the word "fuck" twice during roll call. Regarding Charge No.4

(willfully disobeying orders, or insubordination), Specification No. 1, the Panel found that there was sufficient facts to support the allegation that on October 25, 2013, after being given her assignment by Sergeant Kenneth Johnson, Employee publically refused her assignment and challenged Sergeant Johnson's authority to give assignments to officers in roll call.

With regard to the guilty findings for all charges and its specifications, the Panel weighed the offenses according to the relevant *Douglas Factors*. The Panel concluded that the nature and seriousness of the offense; Employee's job level and type of employment; the notoriety of the offense and its impact upon the reputation of Agency; potential for rehabilitation, and the clarity with which Employee was on notice of any rules that were violated were aggravating factors.

The effect of the offense upon employee's ability to perform at a satisfactory level, potential for rehabilitation, and the effect on supervisor's confidence in Employee's ability to perform assigned duties, consistency of the penalty with any applicable agency table of penalties; consistency of the penalty with those imposed upon other employees for the same or similar offense; were held to be a neutral factors.

The Panel found that the mitigating factors included Employee's past discipline, work record, and mitigating circumstances. The Panel also assessed the adequacy and effectiveness of alternative sanctions to deter conduct in the future by Employee and other members of MPD.

After consideration of the *Douglas Factors*, the Panel reviewed and evaluated all witness testimony and all of the items admitted into evidence and considered reasonableness in rendering its opinion. The Panel also weighed heavily on Employee's character witnesses who stated that Employee was a good officer. Due to the nature of this misconduct and the totality of the ensuing court proceedings, the Panel found that Employee should be suspended, in lieu of the proposed discipline of termination, as an appropriate and effective sanction and deterrent. The Panel recommended that Employee's penalty would be suspension for seventy (70) days.

Agency First Final Decision

Subsequently, on January 5, 2015, Agency issued its Final Notice of Adverse Action in this matter. Upon consideration of the Panel's decision and a review of the record, Agency agreed with the Panel's findings and recommendation of a seventy day suspension. Dissatisfied with the reduced penalty, Employee appealed to the Chief of Police on February 5, 2015. Chief Lanier exercised her discretion and remanded the case for a second Adverse Action Panel hearing composed of different members to be held on March 17, 2015.

<u>March 17, 2015, Adverse Action Panel Findings</u>

With the same charges and essentially the same witnesses, the Adverse Action Panel's findings from the March 17, 2015 evidentiary hearing were again unanimous in finding Employee guilty of all charges and specifications. The Panel also extensively considered the *Douglas factors*, and recommended penalties as follows: Regarding Charge No. 1 (falsification of official records or reports), Specification No. 1, a 30-day suspension, and Specification No. 2, termination for Employee knowingly submitting a PD 42 containing false statements and requesting Officer Jimenez to adopt it as his own statement. Regarding Charge No. 2 (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, for Employee expressing displeasure with her assignment, the Panel recommended termination. Regarding Charge No. 3 (failure to obey orders or directives issued by the Chief of Police), Specification No. 1, the Panel recommended a three-day suspension for Employee's use of coarse or insolent language during roll call. Regarding Charge No. 4 (willfully disobeying orders, or insubordination), Specification No. 1, the Panel recommended a five-day suspension Employee's public refusal of her assignment during roll call. Overall, after considering Employee's administrative violations (falsification of official records or reports, prejudicial conduct, failure to follow orders and directives, insubordination) and their belief that Employee cannot be rehabilitated, the Panel recommended termination as the only appropriate penalty for Employee's misconduct.

Agency Second Final Decision

Again, Agency adopted the Panel's recommendations in its April 23, 2015, Final Notice of Adverse Action and affirmed the penalty of termination, which was originally proposed in the Notice of Proposed Adverse Action, dated August 29, 2014. Employee's employment was terminated on July 10, 2015.

Positions of the Parties

Agency's Argument

In its brief, Agency argues that only the March 17, 2015 hearing transcript, not the November 19, 2014, transcript, in reviewing this matter, as the Collective Bargaining Agreement between MPD and the Fraternal Order of Police/MPD Labor Committee requires basing appeals such as Employee's solely on the record established in the Panel hearing. Agency states that Employee here has appealed Agency's final decision. That decision was based solely on the Panel's recommendation following the March 17, 2015, hearing. That Panel based its recommendation on documentary evidence and oral evidence contained in the hearing transcript from the March 17, 2015, hearing and that the Panel relied on no other hearing transcript. Thus, OEA should rely only on the March 17, 2015, hearing transcript. Agency also disputes the applicability of the collateral estoppel doctrine to the March 17, 2015, Panel hearing, because the Panel is not an administrative agency.

Second, Agency states that the Panel's factual findings, legal conclusions, and final recommendation are reasonable and supported by substantial evidence.

Third, Agency states that the record shows no harmful procedural error. Agency disputes Employee's assertion that it violated the statutory 90-day rule finds no footing in the evidentiary record. Agency states that the 90-day rule was tolled by its criminal investigation of Employee's conduct. It describes Employee's conduct of Malingering as the criminal offense of fraud. Malingering is defined as "[f]eigning illness or disability to escape work, excite sympathy, or

gain compensation."),[32] which is comparable to the definition of criminal fraud in D.C. Official Code § 22-3221(a) ("A person commits the offense of fraud in the first degree if that person engages in a scheme or systematic course of conduct with intent to defraud or to obtain property of another by means of a false or fraudulent pretense, representation, or promise and thereby obtains property of another or causes another to lose property."). Agency argues further that, even if Agency missed the 90-Day Rule by four days, the delay is not a harmful procedural error, because the 90-Day Rule is directory, not mandatory, as a matter of law and the slight delay here is *de minimis*. Agency points out that the slight delay did not cause Employee any prejudice. Agency also dissents from Employee's assertion that the second Panel's weighing of the *Douglas* factors was arbitrary and capricious and inconsistent with the facts.

Lastly, Agency asserts that it terminated Employee in accordance with the law and all applicable regulations.

Employee's Argument

Employee argues that both the November 19, 2014, and March 17, 2015, Panel hearing transcripts must be considered.[33] Employee also states that Agency committed a harmful procedural error by violating D.C. Code § 5-1031 (90-day Rule). Lastly, Agency's action of terminating her was excessive, arbitrary, capricious, unsupported by substantial evidence, not in accordance with the law, and taken in violation of her procedural due process rights.[34]

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

This Office's review of this matter is limited pursuant to the D.C. Court of Appeals holding in *Elton Pinkard v. D.C. Metropolitan Police Department*,[35] that OEA has a limited role where a departmental hearing has been held. According to *Pinkard*, the D. C. Court of Appeals found that OEA generally has jurisdiction over employee appeals from final agency decisions involving adverse actions under the CMPA. The statute gives OEA broad discretion to decide its own procedures for handling such appeals and to conduct evidentiary hearings.[36] The Court of Appeals held that:

> "OEA may not substitute its judgment for that of an agency. Its review of the agency decision…is limited to a determination of whether it was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations. The OEA, as a reviewing authority, must generally defer to the agency's credibility determinations."

Additionally, the Court of Appeals found that OEA's broad power to establish its own

[32] Stedman's Medical Dictionary 1147 (28th ed. 2006).
[33] In his Petition for Appeal, Employee argues that only the November 19, 2014, transcript should be considered because of collateral estoppel. However, at the prehearing conference, Employee wanted both transcripts considered.
[34] Petition for Appeal (February 29, 2016).
[35] 801 A.2d 86 (D.C. 2002).
[36] *See* D.C. Code §§ 1-606.02(a)(2), 1-606.03(a),(c); 1-606.04 (2001).

appellate procedures is limited by Agency's collective bargaining agreement. Thus, pursuant to *Pinkard*, an Administrative Judge of this Office may not conduct a *de novo* hearing in an appeal before him/her, but must rather base his/her decision solely on the record below, when all of the following conditions are met:

> 1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
>
> 2. The employee has been subjected to an adverse action;
>
> 3. The employee is a member of a bargaining unit covered by a collective bargaining agreement;
>
> 4. The collective bargaining agreement contains language essentially the same as that found in *Pinkard*, *i.e.*: "[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [*i.e.*, Adverse Action Panel] has been held, any further appeal shall be based solely on the record established in the Departmental hearing"; and
>
> 5. At the agency level, Employee appeared before an Adverse Action Panel that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action being taken against Employee.

In this case, both parties are in agreement that Employee is a member of the Metropolitan Police Department and was the subject of an adverse action; MPD's collective bargaining agreement contains language similar to that found in *Pinkard*; and Employee appeared before an Adverse Action Panel, which held an evidentiary hearing. Based on the documents of records and the position of the parties as stated during the Prehearing Conference held in this matter, the undersigned finds that all of the aforementioned criteria are met in the instant matter. Thus pursuant to *Pinkard*, OEA may not substitute its judgment for that of Agency and the undersigned's review of Agency's decision is limited to the determination of whether the trial board's finding was supported by substantial evidence; whether there was harmful error; and whether the action taken was done in accordance with applicable law or regulations.

Whether the Adverse Action Panel's decision was supported by substantial evidence.

According to *Pinkard*, the undersigned must determine whether the Adverse Action Panel's findings were supported by substantial evidence.[37] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[38] Further, "[i]f the [Adverse Action Panel's] findings are supported by substantial evidence, [the undersiged] must accept them even if there is substantial evidence in the record to support contrary findings."[39] The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,*

[37] *See Pinkard*, 801 A.2d at 91.
[38] *Davis-Dodson v. D.C. Department of Employment Services*, 697 A.2d 1214, 1218 (D.C. 1997) (citing *Ferreira v. D.C. Department of Employment Services*, 667 A.2d 310, 312 (D.C. 1995)).
[39] *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).

527 A.2d 313 (D.C. 1987), held 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.

After reviewing the record and the arguments presented by the parties, the undersigned concludes that the Panel met its burden of substantial evidence. The undersigned finds that the parties had two full and fair opportunities to present testimonial and documentary evidence. Employee's Representative had the opportunity to present its full case to the Panel and was also able to cross examine witnesses and challenge evidence. Further, a review of the transcripts from the evidentiary hearings shows that the Panel was actively engaged at the hearings, asked relevant questions, and raised pertinent concerns to resolve pending issues. The Panel also made credibility determinations and the undersigned finds that there was sufficient evidence to support those determinations. Couple that with the fact that Employee admitted to her transgressions, there is more than enough substantial evidence to support the Panels' findings. Moreover, in reaching its conclusion, the Adverse Action Panels considered the *Douglas factors*.[40]

In conclusion, the undersigned notes that the Panel's decision to recommend that Employee's employment be terminated was properly based on their findings and conclusions from the evidentiary hearing(s). Thus, the undersigned finds that there was substantial evidence in the record to support the Panel's findings and recommended penalty.

Whether there was harmful procedural error.

Pursuant to *Pinkard* and OEA Rule 631. 3, the undersigned is required to make a finding of whether or not MPD committed harmful error. OEA Rule 631.3 provides, "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* (emphasis added). 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 the action."

Here, Employee is alleging that Agency violated D.C. Code Section 5-1031(a), which requires Agency to initiate an adverse action against a sworn member of the police force no later than 90 days from the date Agency "knew or should have known of the act or occurrence allegedly constituting cause." Employee argues that the matter should be dismissed because MPD failed to propose her termination in a timely manner, in that it failed to propose the adverse action within 90 days of when it knew or should have known of the charged conduct. MPD contends that it did act within the 90 day period, and that regardless, the error is harmless as the 90-day rule is directory, not mandatory.

D.C. Code § 5-1031. Commencement of corrective or adverse action states as follows:

> **(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 shall be commenced more than 90 days,

[40] *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981).

> not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department knew or should have known of the act or occurrence allegedly constituting cause.
>
> (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 investigation system tracking number for the act or occurrence.
>
> (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. (*Emphasis added*.)

Unfortunately, neither of the two Panel reports made a finding of fact regarding the issue of the ninety-day rule. Thus the undersigned had to examine the official documents and transcripts to adduce the relevant events that occurred in regards to this question.

Agency learned of Employee's misconduct on October 25, 2013, the day it happened. Lawrence did an incident summary sheet that same day, but in his testimony, he characterized his investigation as "…, I wasn't conducting a criminal investigation."[41]

Agent Eames of MPD's Internal Affairs Division, the investigator of Employee's case, testified at the November 19, 2014, hearing that he received Employee's case between October 31 and November 1, 2013. In addition, Eames testified that his criminal investigation did not start until he received the case.[42] His investigation culminated in his August 27, 2014, final investigative report to the Assistant Chief of Police of the Internal Affairs Bureau.[43]

Eames stated that on April 25, 2014, the United States Attorney's Office ("USAO") reviewed the case and provided a letter of declination, stating that they would not prosecute

[41] March 17, 2015, transcript, p. 164.
[42] November 19, 2014, transcript, p. 88 & p. 96. March 17, 2015, transcript, p. 123.
[43] Aug. 27, 2014, Memo to Assistant Chief of Police, Internal Affairs Bureau, titled, "Final Investigation Related to the Alleged Misconduct by Officer Alice Lee, Second District, IS #13003051, IAD #13-303.

Employee. Agency's investigator, Agent Eames, testified that after the USAO declined prosecution, then his own ensuing investigation was administrative, not criminal.[44]

Based on these undisputed facts and testimony by Agency's own witnesses, we can deduce that since Agency became aware of Employee's misdeeds on the day it started, then the 90-day clock started from October 25, 2013, a Friday, until the day of October 31, 2013, the day Agent Eames received Employee's case and started his criminal investigation. At this point, not including weekends and holidays, the clock started ticking on October 28, 2013, a Monday, until it was tolled on October 31, 2013, when Eames started his criminal investigation. Thus, at that point, three business days had lapsed.

After being notified by Eames on November 5, 2013, USAO started its own criminal investigation but then declined to prosecute Employee on April 25, 2014. From April 26, 2014 onwards, Agency's own investigation was characterized by its own investigator, Agent Eames, as administrative, not criminal, and thus this investigation does not toll the 90-day deadline.

Counting the days from April 26, 2014, (a Saturday and thus excluded) to August 29, 2014, the day Employee was served with a Notice of Proposed Adverse Action, and excluding holidays[45] and weekends, results in a total of eighty-eight (88) working days. Add the previous three days in October 2013 to the 88 days results in a final total of 91 working days. In other words, if Agency had served Employee's Proposed Notice on August 28 instead of August 29, 2014, then Agency would have been within the 90-day deadline.

Agency incorrectly states that even if they missed they ninety-day deadline, that the error is "*de minimis* and harmless" (See Agency's Brief, p. 12) when it stated that the D.C. Code § 5–1031 is directory, not mandatory. It is well-settled that the 90-day deadline is a mandatory, rather than a directory provision. [46] D.C. Code § 5–1031 is mandatory as it includes the word *shall* (emphasis added). D.C. Code § 5–1031 (a-1)(1) clearly states, "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."

Employee argues that Agency violated the ninety-day rule because she stated that the first Proposed Notice of Adverse Action was served on Employee ninety-four days after Agency knew of the act that occurred on October 25, 2013 (See Employee's Reply Brief, p. 8). However, according to § 5-1031(b) above, the ninety day deadline is tolled until the conclusion of the criminal investigation. The ninety-day rule commenced again on April 25, 2014, the date Agency received a letter of declination from the United States Attorney's Office, stating that

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[44] March 17, 2015, transcript, p. 47.

[45] Between April 26, 2014, and August 29, 2014, there were two holidays, the fourth Monday of May's Memorial Day, and July 4's Independence Day.

[46] *See D.C. Fire & Emergency Medical Services Dept., v. D.C. Office of Employee Appeals, Selena Walker*, No. 08-CV-1557 (D.C. Court of Appeals, Jan. 7, 2010); and *Dargan v. D.C. Office of Employee Appeals, D.C. Fire & Emergency Medical Services Dept.*, Case # 2015 CA 008873P(MPA) (D.C. Superior Ct. Feb. 7, 2017).

they decided to decline criminal prosecution of Employee. The ninety-day rule does not include weekends and/ or public holidays. Based upon the calculation duration, ninety days would be August 28, 2014. Agency issued its Notice of Proposed Adverse Action to Employee on August 29, 2014. I find that ninety-one business days have passed from the date that the letter of declination was issued to Agency's proposed action. Therefore, I further find that Agency violated the ninety-day rule, and I find that this is harmful procedural error and therefore Agency's action must be overturned.[47]

Whether Agency's action was done in accordance with applicable laws or regulations.

From the above analysis, I find that Agency failed to comply with D.C. Code § 5–1031. Therefore, Agency's action of termination was not done in accordance with all applicable laws and regulation and thus must be overturned.

ORDER

Based on the foregoing, it is **ORDERED** that:

1. Agency's action of removing Employees from service is **REVERSED**;
2. Agency shall reimburse Employee all back-pay, benefits lost as a result of her termination; and
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge

[47] *Abraham Evans v. Metropolitan Police Department*, OEA Matter No. 1601-0081-13, *Opinion and Order on Petition for Review* (September 13, 2016).