THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
EMPLOYEE[1],	
v.	OEA Matter No.: 1601-0081-13R16-R18-R22
METROPOLITAN POLICE DEPARTMENT, Agency	Date of Issuance: May 30, 2024

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Police Officer with the Metropolitan Police Department ("Agency"). On June 26, 2012, Agency issued a Notice of Proposed Adverse Action to Employee, charging him with engaging in unauthorized outside employment while on duty; accepting unauthorized gratuities while on duty; and willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Department Officer.[2] The charges stemmed from Employee's unauthorized receipt of cash in exchange for providing security for Calvert Woodley Liquor Store while on duty. On January 17, 2013, Agency held an Adverse Action Hearing regarding the charges and specifications against

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] *Agency Answer to Petition for Appeal*, Tab 2 (May 29, 2013).

Employee. On March 1, 2013, Agency issued a Final Notice of Adverse Action sustaining the charges against Employee. The effective date of his termination was April 19, 2013.[3]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on April 24, 2013. On April 6, 2015, the OEA Administrative Judge ("AJ") issued an Initial Decision overturning Agency's termination action. He ruled that Agency committed a harmful procedural error by violating D.C. Code § 5-1031, commonly referred to as the "90-day rule," because Employee's proposed notice was issued more than ninety days after Agency knew, or should have known, of the conduct allegedly constituting cause. Agency appealed the Initial Decision to the OEA Board, and on September 13, 2016, the Board remanded the matter to the AJ after finding that Agency did not violate the 90-day rule. The matter was also remanded so that the AJ could address whether the substantive charges levied against Employee were supported by substantial evidence.[4]

The AJ subsequently held a status conference to address the remanded issues on November 18, 2016. On December 9, 2016, Employee submitted a letter to OEA stating that he appealed the Board's decision to the Superior Court for the District of Columbia. As a result, on December 20, 2016, the AJ issued an Initial Decision on Remand, dismissing the matter as moot.[5] On October 3, 2017, Superior Court issued an order remanding the matter after the parties filed a Consent Motion to Remand Case to the D.C. Office of Employee Appeals.[6] The AJ then held a telephonic status conference on December 19, 2017, and ordered the parties to address whether the Adverse Action Panel's holdings were supported by substantial evidence; whether there was harmful procedural

[3] Employee filed an appeal with the Chief of Police on March 11, 2013. However, his appeal was denied March 22, 2013.
[4] *Employee v. Metropolitan Police Department*, OEA Matter No. 1601-0081-13, *Opinion and Order on Petition for Review* (September 13, 2016).
[5] *Initial Decision on Remand* (December 20, 2016).
[6] *Employee v. District of Columbia Office of Employee Appeals, et. al and Metropolitan Police Department*, Case No. 2016 CA 007680 P(MPA) (Super. Ct. October 3, 2017).

error; and whether Employee's termination was taken in accordance with all applicable laws and regulations.[7] On June 29, 2018, the AJ issued a Second Initial Decision on Remand, finding that Agency met its burden of proof in establishing that the charges against Employee were taken for cause.[8]

Employee filed an appeal of the Second Initial Decision on Remand with Superior Court on July 11, 2018. Specifically, he challenged the Board's September 13, 2016, ruling that Agency did not violate the 90-day rule. On December 2, 2019, Superior Court Judge Elizabeth Wingo affirmed the Second Initial Decision on Remand, "implicitly incorporating the decision in the September 13, 2016, Opinion and Order on Petition for Review."[9] Thereafter, Employee appealed to the District of Columbia Court of Appeals, which issued a Memorandum of Opinion and Judgment on June 10, 2022, vacating the Superior Court's judgment and remanding the matter to the OEA AJ for further proceedings. Before the Court were the following inquiries: (l) whether the charges against Employee were timely under the 90-day rule considering when the tolling period began; (2) whether the issue of timeliness was properly preserved for consideration on the merits; and (3) whether termination may be affirmed on an alternative ground for Charge No. 3 based on an untruthful statement made within 90-days of the commencement of discipline.

The Court declined to rule on any of the issues, noting that the matter could be decided on alternative grounds. First, it acknowledged Agency's forfeiture argument that Employee failed to raise the 90-day rule violation before the Adverse Action Panel, stating that the AJ appeared to have overlooked it. Second, as to the charge that Employee was untruthful when he was interviewed by Internal Affairs on February 22, 2012, five days after the USAO sent its declination

[7] *Post-Conference Order* (December 19, 2017).
[8] *Second Initial Decision on Remand* (June 29, 2018).
[9] *Employee v. District of Columbia Office of Employee Appeals, et. al.,* Case No. 2018 CA 004909 P(MPA) (D.C. Super. Ct. December 2, 2019).

letter, the Court held that OEA did not explain why Agency would have to rely on the tolling provision of § 5-1031(b) because it provided that the charge appeared timely under D.C. Code § 5-1031(a). Consequently, the matter was remanded to the AJ to identify when Employee's alleged misconduct became the subject of a criminal investigation and whether this appeal could be decided on alternative grounds.[10]

The AJ held status conferences on remand on June 29, 2022, and November 1, 2022. The parties were subsequently ordered to submit briefs on the issues identified by the Court of Appeals regarding the 90-day rule. The AJ issued a Third Initial Decision on Remand on September 25, 2023. First, he explained that on April 21, 2023, the District of Columbia Council repealed the 90-day provision previously encapsulated within D.C. Code § 5-1031 in accordance with the Comprehensive Policing and Justice Reform Amendment Act of 2022 ("Reform Act") and made the repeal retroactive to "any matter pending, before any court or adjudicatory body." The AJ noted that the repeal of the 90-day provision, specifically applicable to members of the Metropolitan Police Department, also retroactively applied to cases pending before OEA. He disagreed with Employee's argument that the Reform Act did not compel this Office to do anything because there is a presumption against statutory retroactivity based upon the inherent unfairness of imposing new burdens on people after the fact. Highlighting the holding in *Employee v. D.C. Metropolitan Police Department et. al*., Case No. 19-CV-1266 (D.C. 2023), the AJ provided that the Court of Appeals has made its position clear that the ninety-day provision related to retroactivity did not compel specific results under the old law, but rather directed courts to apply newly enacted legislation to pending civil cases. Since Employee's appeal was pending before OEA when the

[10] *Employee v. D.C. Office of Employee Appeals, et. al. & D.C. Metropolitan Police Department*, No. 19-CV-1223 (D.C. 2022). Employee filed a petition for rehearing with the Court of Appeals, which was denied in a September 8, 2022, Order.

Reform Act became law, the AJ concluded that Employee's argument that Agency violated the repealed provisions of the 90-day rule was no longer valid. Consequently, he upheld Agency's termination action.[11]

Employee filed a Petition for Review with the OEA Board on November 18, 2023. His sole argument is that it is unconstitutional to retroactively apply the Reform Act to his appeal that has been pending before OEA for over ten years because it violates the tenants of due process. Thus, Employee asks this Board to not ignore longstanding precedent and assess whether Agency violated D.C. Code § 5-1031 based on the law that existed when the alleged misconduct occurred. Because he maintains that Agency violated the 90-day rule, Employee request that Agency's termination action be overturned.[12]

In response, Agency contends that OEA is precluded from considering whether the Reform Act is constitutional. It further opines that the AJ properly applied binding precedent governing the retroactivity of the Reform Act's provisions related to the 90-day rule. Consequently, it requests that the Third Initial Decision on Remand be upheld.[13]

Substantial Evidence

According to OEA Rule 637.4(c), the Board may grant a Petition for Review when the AJ's findings are not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding.[14] Substantial evidence is defined as evidence

[11] *Third Initial Decision on Remand* (October 25, 2023).
[12] *Petition for Review* (November 18, 2023). Employee was previously represented by legal counsel before this Office, but is now *pro se*.
[13] *Agency Answer to Petition for Review* (December 13, 2023).
[14] Black's Law Dictionary, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

that a reasonable mind could accept as adequate to support a conclusion. For the reasons discussed herein, this Board finds that the Third Initial Decision on Remand is supported by substantial evidence.

Discussion

Employee's petition suggests that it was impermissible to retroactively apply the repeal of the 90-day rule to a matter that has been pending before OEA since 2013. He reasons that the retroactive application of a law is only constitutionally permissible if it does not violate due process rights, to include those previously afforded under D.C. Code § 5-1031. Therefore, it is Employee's position that the 90-day rule should be analyzed pursuant to the law that was applicable at the time of his alleged misconduct. Conversely, Agency submits that OEA, an administrative agency created by the District Council, cannot hold that a passed statute is unconstitutional or otherwise unlawful. It maintains that the Council unambiguously decided to retroactive repeal the 90-day rule.

D.C. Code § 5-1031(a-1), which previously outlined the 90-day rule for members of the Metropolitan Police Department, was repealed in 2023.[15] In its place, the Council enacted the Comprehensive Policing and Justice Reform Amendment Act of 2022, D.C. Law 24-345, § 117(a), 70 D.C. Reg. 953 (April 21, 2023). Section 301(b) of the Reform Act provides that Section 117 shall apply retroactively to any matter pending before any court or adjudicatory body. This means that the repeal of the 90-day provision applies retroactively to any matter pending before Superior Court, the D.C. Court of Appeals, or this Office.

Historically, courts have recognized a presumption against retroactivity, which "has been consistently explained by reference to the unfairness of imposing new burdens on persons after the

[15] D.C. Code § 5-1031 still applies to employees of the Fire and Emergency Medical Services Department.

fact.[16] In *Landgraf* v. *USI Film Products,* 511 U.S. 244 (1994), the United States Supreme Court made clear that this "traditional presumption" against retroactivity applies in the "absen[ce of] "clear congressional intent favoring such a result." However, in enacting the Reform Act, the D.C. Council has clearly indicated that its legislative reasoning was intended to "preclud[e] any arbitrator, adjudicator, administrative body, or court from modifying or reversing any disciplinary action – or affirming such a modification or reversal on appeal – on the basis of an agency's failure to comply with the deadlines set forth in D.C. Code § 5-1031."[17]

In *Thomsas-Bullock v. D.C. Metropolitan Police Department, et. al.*, Case No. 19-CV-1266 (D.C. (2023), the employee challenged D.C. Superior Court's order reversing OEA's conclusion that Agency violated D.C. Code § 5-1031 by issuing its advance notice of adverse action more than ninety days after it knew or should have known of the conduct allegedly constituting cause. The Court of Appeals disagreed with the employee's argument that the retroactive provision did not apply to her appeal. It noted that the fact that the Council has introduced new legislation to reinstate the 90-day rule was irrelevant to the application of the current law. The Court further provided that the provision did not compel "specific results under old law" but rather "direct[s] courts to apply newly enacted, outcome-altering legislation in pending civil cases, which the legislature may constitutionally do." Therefore, it affirmed Superior Court's decision to uphold the employee's termination as a result of Section 301(b) of the Reform Act because: (1) the Council repealed the 90-day rule provision, and (2) the repeal is retroactive to any matter pending before the Court.

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[16] *Holzsager v. D.C. Alcoholic Beverage Control Bd*., 979 A.2d 52 (D.C. 2009).
[17] Comprehensive Policing and Justice Reform Amendment Act of 2022, Report on Bill 24-320 before the Committee on the Judiciary and Public Safety, Council of the District of Columbia at 33 (Nov. 30, 2022).

Furthermore, the Court of Appeals in *Metropolitan Police Department v. Public Employee Relations Board*, 301 A.3d 714 (D.C. 2023), also addressed the retroactivity provision contained within the Reform Act related to the repeal of 90-day rule. The Court in this matter ruled that the Reform Act applied to any matter pending before any adjudicatory body, and thus, the 90-day rule repeal applied to the decision of the Public Employee Relations Board, which upheld an arbitration award reinstating a terminated police officer after the Department violated D.C. Code § 5-1031. It explained that the repeal of D.C. Code § 5-1031(a-1) did not violate the tenants of due process, as the appellants suggested. The Court went on to discuss that the retroactive application of the repeal undoubtedly "more fully effectuate[s] the Council's rational purpose…of increasing the accountability of the District's police officers, who hold 'critical positions of public trust,' by ensuring that a technical obstacle does not thwart the disciplinary process in cases that have not been finally adjudicated."[18]

Based on the foregoing, we must dismiss Employee's argument that it was legally impermissible to retroactively apply the Reform Act to his pending appeal. Section 301(b) of the Act retroactively repealed the 90-day rule for members of the Metropolitan Police Department. The Council has expressed its clear intent that Section 301(b) of the Reform Act be applied retroactively to any matter pending before any court or adjudicatory body, including those pending before OEA. The Court of Appeals has also ruled that the retroactive repeal of the 90-day rule does not violate the tenants of due process. Because this Board concludes that the repeal of the rule must be applied here, Employee's Petition for Review must be denied.

[18] *Metropolitan Police Department v. Public Employee Relations Board*, 301 A.3d 714 (D.C. 2023) at 724.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

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Clarence Labor, Jr., Chair

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Peter Rosenstein

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Dionna Maria Lewis

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Arrington L. Dixon

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.