THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0036-15
LESTER HINTON,	
Employee	
	Date of Issuance: September 29, 2016
v.	
D.C. FIRE AND EMERGENCY MEDICAL SERVICES,	
Agency	
	Arien P. Cannon, Esq.
	Administrative Judge

Donna Williams Rucker, Esq., Employee Representative
Frank McDougald, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Lester Hinton ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on January 22, 2015, challenging the District of Columbia Fire and Emergency Medical Services' ("Agency") decision to remove him from his position as a Heavy Mobile Equipment Mechanic. Employee's termination became effective at the close of business on December 27, 2014.[1] Agency filed its Answer on January 30, 2015.

I was assigned this matter on August 12, 2015. A Prehearing/Status Conference was convened on September 29, 2015. A Post Status Conference Order was issued October 5, 2015, which required the parties to submit Prehearing Statements providing a concise statement of the facts and the relevant rules, laws, or regulations in this matter. After a review of the Prehearing Statements and a further review of the record, it was determined that additional briefs were needed to address D.C. Code § 5-1031 (2004) (the "90 Day Rule"). Both parties submitted their briefs accordingly. Based on the filings by both parties, I determined that an evidentiary hearing was not warranted. The record is now closed.

[1] Petition for Appeal, Attachments (January 22, 2015).

JURISDICTION

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

ISSUES

1. Whether Agency violated D.C. Code § 5-1031 (2004) ("90-day rule"); and

2. Whether the penalty of removal was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.[2] "Preponderance of the evidence" shall mean:

> That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.[3]

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Employee was removed from his position as a Heavy Mobile Equipment Mechanic, effective December 27, 2014. Employee's removal stems from an inquiry by former Councilmember Tommy Wells in February 2013. The Councilmember sent a letter to the District of Columbia Office of Inspector General ("OIG") requesting an investigation of Agency's Fleet Management Division ("FMD") regarding overtime pay to its employees. The letter stated, in pertinent part:

> On February 20, 2013, the Fire and Emergency Medical Services Department ("FEMS") testified before me as part of the Committee on Judiciary and Public Safety's (Committee") annual performance oversight hearings. I write regarding information discussed and request that your office investigate this matter.
>
> During preparation for the Committee's annual performance oversight hearings on FEMS, I learned that 19 of the top 25 overtime earners were employees within the fleet management division. These employees alone earned in excess of $871,000 in Fiscal Year 2012…

[2] 59 DCR 2129 (March 16, 2012).
[3] OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

> As Chairperson, my primary concerns are with the high number of fleet management division employees earning overtime, the egregious amount of overtime earned by certain individuals, and the role of management. However, I am requesting your attention, because of this matter's potential for fraud. The top overtime earner is a "heavy mobile equipment mechanic" and receives an annual salary of $57,740.80. FEMS reported $97,852.65 in overtime earning—in addition to that salary—for a total salary of $155,593.45. FEMS later stated that this staffing level had been in place since October 2010 and that they anticipate the levels will remain the same for the remainder of the 2013 fiscal year.[4]

OIG issued its report on May 15, 2014, regarding its findings of overtime use within Agency's Fleet Management Division. On August 25, 2014, Agency served Employee with a Notice of Proposed Adverse action. Employee was issued the Final Agency Action on December 14, 2014, which advised him that he would be removed from his position, effective December 27, 2014. The causes cited for Employee's adverse action were as follows: (1) Violation of D.C. Code § 1-618.01, which states "Each employee, member of a board or commission, or public official of the District Government must at all times maintain a high level of ethical conduct in connection with the performance of official duties, and shall refrain from taking, ordering, or participating in any official action which would adversely affect the confidence of the public in the integrity of the District government;" (2) Any knowing or negligent material misrepresentation on other document given to a government agency[5]; and (3) Any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations; Specifically, Malfeasance, Misfeasance, and Neglect of Duty.[6]

The seminal question to be determined here is whether Agency violated the 90 day rule (D.C. Code § 5-1031 (2004)) when it initiated adverse action against Employee on August 25, 2014.

Agency's Position

Agency maintains that it did not violate the 90-day Rule. It points to the fact that the letter from former Councilmember Wells, which triggered the investigation of allegations regarding overtime abuse, was not addressed to Agency and avers that the record does not support that Agency was aware of any potential wrongdoing by Employee until the OIG report was issued on May 15, 2014.

Agency further asserts that pursuant to the letter from Councilmember Wells, OIG conducted an investigation, in which it was not a participant, and issued its report on May 15, 2014, along with a transmittal letter to Agency's then-Chief Ellerbe. The OIG investigation report concluded that Employee was paid for overtime hours he had not performed. On August

[4] Agency's Answer, Tab 1 (January 30, 2015).
[5] *See* District Personnel Maunaul (DPM) § 1603.3(h).
[6] *See* DPM § 1603.3(f)(6)(7)(3).

25, 2014, Agency commenced adverse action proceedings against Employee seventy (70) days from the time it knew of his misconduct. Thus, Agency maintains that it complied with the 90-day Rule.

In regards to the "should have known" aspect of the 90-day Rule, Agency argues that there is no evidence in the record that demonstrates that it should have known of Employee's misconduct prior to May 15, 2014, the day the OIG Report was issued. The OIG Report illustrates that Employee and his supervisor, Gregory Jackson, had an understanding/agreement regarding the payment of overtime hours not worked by Employee. Thus, Agency avers that when an employee and his or her direct supervisor have colluded for the purpose of allowing an employee to be paid overtime for hours not worked, management officials beyond the employee's immediate supervisor would not be aware of the hours of overtime improperly paid to the employee. As such, no one in a position to take disciplinary action within Agency could or should have known that Employee was being paid for overtime hours he did not work.

Employee's position

Employee maintains that Agency violated his procedural rights when it did not commence an adverse action against him within the 90-day Rule. Employee avers that Agency "knew or should have known" in 2012 about the allegations which formed the basis of his removal. Employee also asserts that based on Agency's responses to inquiries from Councilmember Wells, and the testimony it provided on February 20, 2013, at the annual performance hearing held by the Committee on Judiciary and Public Safety, that it knew or should have known about Employee's misconduct at that time. Furthermore, Employee asserts that Agency knew that the substantial amount of overtime paid in fiscal year ("FY") 2012, was of concern to Councilmember Wells.

Additionally, Employee argues that Agency knew, or should have known that OIG was conducting an investigation of its employees in the Fleet Management Division at the Councilman's request. He also contends that Agency did not have to, and should not have waited until OIG completed its investigation to conduct its own internal investigation, and Agency's failure to do so should not absolve it of the 90-day time limitation. Because Agency did not serve the Notice of Adverse Action until August 25, 2014, Employee assert that the action was untimely in accordance with D.C. Code § 5-1031(a) (2004).

Moreover, Employee asserts that Agency knew or should have known of the alleged misconduct when Foreman Gregory Jackson was approving overtime during Fiscal Year 2012, since he was the "eyes and ears" for Agency in regards to overtime worked during this time period. Although Foreman Jackson is now retired, Employee argues that Agency should not use Foreman Jackson as a scapegoat since he was a vital part of management when it comes to whether Agency "knew or should have known" about the issues regarding Employee's overtime pay.

Analysis

The facts in this matter are largely uncontroverted; rather, both parties center their arguments on whether the 90-day Rule was properly followed.

D.C. Code § 5-1031 (2004) ("90-day rule")[7] provides, in pertinent part:

> (a-1)(1)…[N]o 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, 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.
>
> (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, the allegations of overtime abuse by Employee and others within Agency's Fleet Management Division were brought to light in preparation for and during the February 20, 2013 performance and oversight hearing held by former Councilmember Wells' Committee on Judiciary and Public Safety. At the conclusion of this hearing, Councilmember Wells wrote a letter to OIG requesting that it look into the overtime hours being paid to employees within Agency's Fleet Management Division. This letter was in fact only addressed to OIG, and not Agency.

Employee's argument that Agency knew of Employee's misconduct in 2012 because Foreman Gregory Jackson was the "eyes and ears" in regards to overtime worked by employees within the Fleet Management Division must fail. Foreman Jackson acknowledged during OIG's investigation that despite knowing that Employee only worked six or seven hours, on occasions he allowed Employee to submit an overtime sheet for eight hours worked.[8] As such, Jackson became a participant in the misconduct. For purposes of the 90-day rule, Jackson cannot be considered an Agency official responsible for initiating an adverse action against Employee.

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[7] This section was amended, effective March 7, 2015, which now tolls the 90-day time period for when an adverse action must be commenced when the allegations constituting cause are subject to an investigation by the Office of Inspector General, and other entities with investigatory authority.

[8] *See* Agency Answer, Tab 2 (January 30, 2015).

Employee further argues that Agency "should have known" about the misconduct based on its own responses to Councilmember Wells' inquiries prior to the FY 2012 oversight hearing, and the testimony it provided at the hearing. This argument is deficient. As Agency points out, the payment of substantial overtime to employees within the FMD is not unusual. The substantial overtime incurred by FMD employees who serve as Heavy Mobile Equipment Mechanics is statutorily permitted. It is noted that some Agency employees who are eligible for overtime pay are subject to a limitation in overtime compensation. This limitation does not apply to Heavy Mobile Equipment Mechanic, the position held by Employee in the instant case.[9] Thus, the absence of a limitation of overtime pay for Heavy Mobile Equipment Mechanics suggests that the legislature recognized that these employees performed work for which substantial overtime could be incurred and exempted them from the limitations of overtime pay imposed on other Agency employees.

In January 2012, while Councilmember Phil Mendelson was Chair over the committee, he issued a letter ahead of the performance hearing for fiscal year 2011, seeking information regarding overtime pay of Agency employees.[10] Agency's response to this inquiry indicated that 19 of Agency's top 25 overtime earners were from the Fleet Management Division. The total base salary for these 19 employees totaled approximately $1,162,038.00, while the overtime pay of these 19 employees totaled approximately $586,269.[11] The record does not indicate that these numbers prompted Chairman Mendelson to direct any questions to Agency regarding the amount of overtime paid to FMD employees.

The following year, when former Councilmember Wells became Chair of the same committee, he also sent a letter ahead of the performance hearing for fiscal year 2012, dated January 18, 2013, seeking information regarding the top 25 overtime earners within Agency. Agency's response for fiscal year 2012 again indicated that 19 of Agency's top 25 overtime earners were in Agency's Fleet Management Division. The response indicates that the salary for the 19 FMD employees totaled approximately $1,158,268.00, while the overtime pay totaled $971,696.00.[12] Although the difference in overtime pay from FY '11 to FY '12 is nearly $400,000, I do not find that this increase alone meets the threshold that Agency "knew or should have known" of a specific employee's (in this case, Lester Hinton) misconduct as set forth in D.C. Code § 5-1031 (2004).

Employee also fails to address how Agency should have been able to identify him as one of the employees engaging in the abuse of overtime payment, despite there being eighteen (18) other top overtime earners within the Fleet Management Division who were of concern to Councilmember Wells. Employee argues that Agency should have initiated its own internal investigation regarding the overtime issues raised by Councilmember Wells. Though it may have been beneficial for Agency to conduct its own investigation, it is speculative to say what Agency's own internal investigation may have revealed. This speculation cannot meet the threshold that Agency "should have known" about Employee's misconduct, as set forth in D.C. Code § 5-1031 (2004).

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[9] *See* D.C. Code § 1-611.03(f)(4) (2016).
[10] Agency Reply Brief, Attachment 1 (April 11, 2016)
[11] *See* Agency's Reply Brief, Attachment 2 (April 11, 2016).
[12] *Id*., Attachment 4

To further counter Employee's argument that Agency should have initiated its own investigation, Agency points to the investigative techniques used by OIG, which would not have been available to Agency to conducts its own investigation. Specifically, it was only after Employee was confronted with the fact that his privately owned vehicle was shown to be at a location other than where it should have been if he had in fact been working the overtime hours he asserted in his timesheets. OIG was able to rely on the investigative technology of the Metropolitan Police Department's License Plate Reader Program, to locate Employee's private vehicle. Even if Agency had conducted its own investigation, it would not have had access to this investigative technology that was used by OIG to elicit an admission from Employee. Furthermore, even if Agency had initiated its own internal investigation of overtime abuse, it is not clear at what point Agency would have been able to identify Employee as an abuser of overtime. Thus, Employee's argument that Agency "should have known" about Employee's misconduct prior to the issuance of OIG's report is deficient. Accordingly, I find that Agency did not violate the 90-day rule in this matter.

Whether Agency had cause to take adverse action against Employee

During the course of the OIG investigation, Employee stated that he believed it was acceptable to claim eight (8) hours of overtime despite working only four (4) or six (6) hours of overtime because his supervisor, Foreman Jackson, told him it was ok to do so. Employee stated that Jackson allowed him to leave early and claim the full eight hours of overtime if he completed the work early. Employee also stated that Jackson routinely approved him for eight (8) hours of overtime hours even if he completed his work and left early.[13] Despite Employee ostensibly being told by his supervisor that he could claim overtime hours in which he did not in fact work, Employee cannot deny responsibility for his offenses. Employee's statements to OIG investigators establish cause to take adverse action for "any knowing or negligent material misrepresentation on other document given to a government agency[14];" and "any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations;" specifically, Malfeasance, Misfeasance, and Neglect of Duty.[15] Accordingly, based on the statements made by Employee in the OIG investigative report, I find that Agency had cause for adverse action

ORDER

Based on the aforementioned, it is hereby **ORDERED** that Agency's decision to remove Employee from his position is **UPHELD**.

FOR THE OFFICE:

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Arien P. Cannon, Esq.
Administrative Judge

[13] Agency Answer, Tab 2.
[14] *See* District Personnel Maunaul (DPM) § 1603.3(h).
[15] *See* DPM § 1603.3(f)(6)(7)(3).