THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	
	)	
v.	)	OEA Matter No.: 1601-0006-21
	)	
	)	Date of Issuance: March 7, 2024
UNIVERSITY OF THE DISTRICT OF COLUMBIA, Agency	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Police Officer with the University of the District of Columbia's ("Agency") Office of Public Safety and Emergency Management ("OPSEM"). On November 2, 2020, Agency issued a Notice of Proposed Adverse Action (Termination), charging Employee with willfully providing false, fraudulent, misleading or harmful statements; refusal or failure to give oral or written statements of testimony in connection with an injury; insubordination – willful and/or deliberate refusal to carry out orders; failure to comply with instructions; and unauthorized possession/inappropriate removal of University property or another person's personal property.

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.

The notice proposed Employee's termination based on his act of falsely filing a workers' compensation claim with the D.C. Public Sector Workers' Compensation Program ("PSWCP"). Specifically, Agency alleged that on June 7, 2020, Employee reported that he sustained an injury to his toe while patrolling Building #38 of the Architectural Research Institute ("ARI"). However, a subsequent investigation into Employee's claims revealed that he did not fracture his toe while on duty and that Employee's key badge card never accessed Building # 38 on June 7, 2020. According to Agency, Employee could not answer inquiries as to how he was able to access an unauthorized and inaccessible area where the injury allegedly occurred, and Agency never gave Employee a directive to access the ARI suite. Agency subsequently notified Employee that his official termination date was December 17, 2020.[2]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on December 17, 2020. In his appeal, Employee argued that he did not provide false information to Agency regarding the injury he allegedly sustained while on duty. He asserted that he was not insubordinate because he obeyed all orders and directives from supervising officers. Additionally, Employee stated that he never removed property from campus and that Agency failed to specify what items he was accused of improperly removing. According to Employee, Agency's proposed notice failed to consider that filing a workers' compensation claim would have resulted in a financial detriment and was not in his best interest. Employee also opined that his termination was retaliatory. He went on to explain that Agency violated the terms of the Collective Bargaining Agreement ("CBA") with the American Federation of State, County, and Municipal Employees District Council 20, Local 2087 ("Union" or "AFSCME)" by failing to provide him with a post-termination meeting. Finally, Employee submitted that Agency failed to consider the relevant

[2] *Agency's Notice of Proposed Adverse Action – Termination* (November 2, 2020).

Douglas[3] factors in selecting the imposed penalty. As a result, he asked that Agency's termination action be reversed.[4]

In its answer, Agency argued that Employee's appeal failed to state a claim upon which relief could be granted. It denied all allegations presented by Employee and maintained that the termination action was taken in accordance with all applicable federal and District laws, rules, and regulations. Additionally, Agency suggested that Employee's own acts or omissions were the proximate cause of the injury he allegedly sustained while on duty. Therefore, it requested that OEA dismiss Employee's appeal.[5]

An OEA Administrative Judge ("AJ") was assigned to the matter in May of 2021. The AJ held prehearing conferences on July 28, 2021, and January 13, 2022, after the parties engaged in extensive discovery efforts.[6] Thereafter, the parties filed a Joint Stipulation of Facts on March 8, 2022. During a June 23, 2022, status conference, the parties discussed holding an evidentiary hearing in December of 2022. However, on December 5, 2022, Employee filed a Consent Motion for Employee to File a Motion for Summary Disposition.[7] The motion requested that the parties

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[3] 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.

[4] *Petition for Appeal* (December 17, 2020).

[5] *Agency Answer to Petition for Appeal* (February 15, 2021).

[6] *See Second Order Convening a Telephone Prehearing Conference* (June 30, 2021) and *Third Order Convening a Telephone Prehearing Conference* (January 5, 2022).

[7] *Motion for Employee to File a Motion for Summary Disposition* (December 5, 2022).

be able to resolve dispositive procedural issues before proceeding to a hearing. The AJ granted Employee's motion on December 6, 2022, noting that "this may obviate the need for an evidentiary hearing."[8]

Employee's February 24, 2023, Motion for Summary Disposition contended that Agency violated Chapter 8B, Section 1502.3 of the D.C. Municipal Regulations ("DCMR") by failing to issue the notice of proposed termination within ninety calendar days after the date on which it knew or should have known of the alleged misconduct. According to Employee, since there was no pending criminal investigation into his conduct, the time period could not be tolled for purposes of § 1502.3. He asserted that the anchor date that Agency should have utilized in this case to calculate the ninety-day period was June 12, 2020 – the date that the workers' compensation claim was filed and the date on which a locksmith was hired to enter the disputed area to investigate Employee's claims. Therefore, Employee opined that Agency's November 2, 2020, advance notice was untimely and served as grounds for reversal of the adverse action.[9]

Employee further averred that Agency violated his due process rights when it refused to provide him with a post-termination meeting. He explained that Article 27, Section 9 of the CBA authorized a post-termination conference, which was originally scheduled by AFSCME. However, the Union cancelled the conference after Employee retained private counsel. Employee submitted that Agency failed to provide him with an opportunity to respond to the advance notice of termination after he obtained representation, which constituted a reversible error.[10]

Employee's motion also argued that Agency retaliated against him because he filed a complaint with the Office of the Inspector General ("OIG") against Hearing Officer and

[8] *Order on Consent Motion to File Motion for Summary Disposition* (December 6, 2022).
[9] *Employee's Motion for Summary Disposition* ("February 24, 2023).
[10] *Id*.

Administrative Operations Manager, Cetrina Smith ("Smith"). According to Employee, the OIG complaint was made regarding Smith's refusal to refer a ticket issued by him to the proper authorities. He noted that during discovery, Smith, who was responsible for drafting the Justification for Termination Memorandum, admitted that she was aware of the OIG complaint before she recommended termination as the appropriate penalty. Thus, Employee believed that he was engaged in a protected activity under the D.C. Human Rights Act ("DCHRA") and that there was a correlation between the filing of a complaint with OIG and the termination action.[11]

Employee also surmised that Smith had no authority to determine whether he filed a false workers' compensation claim, noting that PSWCP's denial of the claim never indicated that he filed a false report. As such, he believed that Agency, at a minimum, should have designated a neutral party to investigate his injury, considering the complaint that was filed against Smith. Finally, Employee submitted that Agency failed to conduct a proper evaluation of the *Douglas* factors, which constituted a harmful error. Consequently, he requested that Agency's termination action be summarily reversed.[12]

In response, Agency asserted that Employee's termination was appropriate because the Office of Risk Management's ("ORM")[13] Notice of Determination concluded that Employee was not injured at the location and the time identified in his statements and because he was not acting within the scope of employment at the time of the purported injury. It assessed that ORM's findings directly conflicted with Employee's certifications on the workers' compensation form. Therefore, Agency reasoned that its internal investigation, in addition to ORM's denial of compensation, supported the conclusion that Employee filed a false claim for compensation. Agency also

[11] *Id*.
[12] *Id*.
[13] ORM is responsible for processing claims filed under the PSWCP.

explained that the Table of Penalties for Disciplinary and Adverse Actions provided that a first offense of willfully providing false, fraudulent, misleading or harmful statements, actions or omissions of information carried a penalty up to, and including, removal. It further asserted that a full assessment of the *Douglas* factors was conducted to determine the appropriate penalty, noting that Employee's mere disagreement with the assessment did not serve as a basis for reversal of the termination action.[14]

As it related to 8B DCMR § 1502.3, Agency argued that it proposed Employee's termination within ninety days of its determination that he filed a false workers' compensation claim. It disagreed with Employee's contention that the anchor date for purposes of the 90-day rule was June 12, 2020, because the investigation into his misconduct was not complete until August 6, 2020, when ORM provided Agency with written notice of its conclusion that Employee was not acting within the scope of his employment at the time of the alleged injury. Thus, Agency submitted that the date on which it knew or should have known of the conduct allegedly constituting cause was August 6, 2020. It further contended that under § 1502.3, it was required to issue a notice of proposed adverse action no later than November 4, 2020. Notice to Employee was issued on November 2, 2020, which did not violate the 90-day rule. Additionally, it maintained that 8B DCMR, Section 1502 fails to provide a consequence if an agency fails to act within ninety days, thereby rendering the regulation discretionary, rather than mandatory. Agency alternatively suggested that even if it violated the ninety-day time limit under § 1502.3, it was a harmless error.[15]

Regarding Employee's arguments relative to due process violations, Agency provided that the CBA with AFSME did not require a post-termination meeting. It clarified that the post-termination meeting set forth in the CBA is within the discretion of the Union and, if held, is a

[14] *Agency's Answer to Employee's Motion for Summary Disposition* (May 13, 2023).
[15] *Id*.

meeting between the Vice President of Human Resources (or designee) and the Union President (or designee). As a result, Agency submitted that Employee also had no absolute right to a post-termination meeting with his private counsel. It further contended that Employee was afforded post-deprivation due process rights because he had the option to appeal to OEA or to file a grievance as directed under the CBA.[16]

Finally, Agency insisted that Employee's termination was not an act of retaliation. It asserted that Employee's complaint to OIG did not constitute protected activity under the DCHRA. Alternatively, it stated that even if Employee's conduct was protected, OEA lacks jurisdiction to adjudicate his claims because the Office of Human Rights was the proper agency to review violations of the DCHRA. Agency also averred that Employee could not establish a causal connection for purposes of a retaliation claim since there was a seven-month gap between the alleged protected activity and Employee's termination. As a result, it opined that Employee was not entitled to summary disposition and asked that the AJ deny the motion.[17]

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[16] *Id.*

[17] *Id.* Employee filed a reply brief on July 5, 2023. He reiterated his previous position that Agency violated 8B DCMR § 1502.3 and that June 12, 2020, was the anchor date that should have been utilized to determine whether there was a 90-day rule violation. Employee explained that Agency should have known of the acts allegedly constituting cause on June 12, 2020, because both Smith and ORM Claims Examiner, Katherine Harris ("Harris"), exchanged emails on that date expressing concerns that Employee's injury was not sustained at home, as he originally represented. Furthermore, he contended that applicable case law demanded that the 90-day rule be applied as mandatory and submitted that Agency was time barred because it failed to issue the proposed termination notice in a timely manner. Employee also disagreed with Agency's arguments relative to due process, stating that his failed request to meet with management about the proposed termination denied him a meaningful opportunity to challenge the charges. Moreover, he opined that the tenants of due process required Agency to afford him an opportunity to respond to the charges, whether it was outlined in the CBA or not. Employee also stated that a reversal of his termination was warranted because Agency's proposed notice failed to list with particularity the specific charges forming the basis of the termination action. With respect retaliation, Employee represented that: (1) an OIG complaint alleging a violation of D.C. Code § 2-1402.11(a) was filed; (2) Agency instituted a termination action against him; and (3) there existed a causal connection between the OIG complaint and the termination action. According to Employee, Agency's argument that there was a seventh-month gap between the OIG complaint and issuance of the proposed notice was belied by case law which provides that when there is a perceived long delay between the protected activity and the adverse action, the factfinder may consider whether it was the employer's first opportunity to retaliate. Lastly, he maintained that Agency erred by failing to include an assessment of the *Douglas* factors in the Notice of Proposed Adverse Action or the Final Notice of Adverse Action. Consequently, Employee again requested that his motion be granted. *Employee's Reply* (July 5, 2023).

The AJ issued an Initial Decision on September 18, 2023. First, he held that Agency met its burden of proof with respect to the charges levied against Employee. The AJ explained that Employee was insubordinate when he failed to submit reports required of a campus police officer, which also evidenced a failure to comply with Agency instructions and policies. According to the AJ, Employee also failed to cooperate with an official investigation when he did not respond to a request for additional information from Agency's Director of Compliance and Risk Management about his workers' compensation claim. Additionally, he held that Employee filed a fraudulent compensation claim because his claim was for a non-compensable injury that did not occur during the course of employment. As a result, the AJ concluded that Employee was guilty of misrepresentation, falsification, or concealment of material facts or records in connection with an official matter, in addition to knowingly and willfully reporting false or misleading information or purposefully omitting material facts, to any supervisor. However, the AJ ruled that Agency did not meet its burden of proof in establishing the specification of unauthorized removal of property of others since it could not specify what property was removed by Employee.[18]

The AJ ruled that Agency did not violate D.C. Code § 5-1031, which provides that, absent a tolling exception, corrective or adverse actions must be commenced within ninety days after an agency knew or should have known of the act or occurrence allegedly constituting cause. According to the AJ, Agency did not know that Employee possibly filed a false compensation claim until August 6, 2020, when ORM issued its Notice of Determination finding that Employee was not injured during the scope of employment. He clarified that while the PSWCP issued its notice denying Employee's compensation claim on July 24, 2020, Agency was not provided with its findings until after it requested such on August 4, 2020, and again on August 6, 2020.

[18] *Initial Decision* (September 18, 2023).

Consequently, because Agency's November 2, 2020, Notice of Proposed Adverse Action was issued within ninety days after the date on which Agency knew of the conduct allegedly constituting cause, the AJ concluded that there was no violation of D.C. Code § 5-1031.[19]

Concerning Employee's arguments related to due process, the AJ assessed that Employee could not now argue before OEA that he was entitled to a post-termination conference since it was his union who scheduled the meeting, but subsequently cancelled it. Moreover, he concluded that Agency complied with the notice requirements of District Personnel Manual ("DPM") § 1618.2, which provides that advance written notices of proposed adverse actions must include the type of proposed adverse action; the nature of the action; the specific performance or conduct at issue; how the employee's performance fails to meet appropriate standards; and the name and contact information of the deciding official or anticipated hearing officer. The AJ also held that Agency complied with DPM § 1618.3, which affords employees the right to review any material upon which the proposed action is based; prepare a written response to the notice; and the right to an administrative review in the case of removal. Consequently, he ruled that Employee was properly apprised of the charges levied against him and was afforded a meaningful opportunity to respond.[20]

As it related to Employee's claims of retaliation, the AJ ruled that there was insufficient evidence in the record to support a finding that he was engaged in a protected activity by opposing unlawful employment practices under the DCHRA. Thus, he found Employee's argument that he was terminated in retaliation for filing a complaint with OIG to be without merit. The AJ further concluded that Agency performed a reasonable assessment of the relevant *Douglas* factors. Lastly, he held that termination was a permissible penalty under the Table of Illustrative Actions. As a

[19] *Id*.
[20] *Id*.

result, the AJ concluded that the adverse action was taken for cause and that termination was an appropriate penalty under the circumstances.[21]

Employee disagreed with the AJ's findings and filed a Petition for Review with the OEA Board on October 23, 2023. He argues that the Initial Decision was not ripe for issuance because he moved for summary disposition under OEA Rule 618.1 based on procedural and due process arguments, not substantive arguments. According to Employee, if after reviewing his motion, the AJ determined *sua sponte* Agency's position merited summary disposition, he was required to provide notice and give Employee an opportunity to provide arguments in response to Agency's claims. Therefore, he asserts that the AJ erred because there are several material issues of fact in dispute; Agency is not entitled to a decision as a matter of law; and the Petition for Appeal clearly states a claim upon which relief can be granted.[22]

Employee also claims that the AJ erred in concluding that Agency did not violate the 90-day rule. In support thereof, he notes that the AJ improperly utilized D.C. Code § 5-1031 in his analysis, instead of applying the ninety-day rule provided in 8B DCMR § 1502.3, which applies to University of the District of Columbia police officers. Employee reiterates his previous argument that Agency should have known of the conduct allegedly constituting cause as early as June 12, 2020, when Smith expressed concerns that Employee possibly committed workers' compensation fraud. He also opines that the ninety-day period specified in 8B DCMR § 1502.3 is a mandatory provision and contends that Agency's violation of such constitutes a reversible error.[23]

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[21] *Id.*
[22] *Petition for Review* (October 23, 2023).
[23] *Id*.

Regarding due process, Employee asserts that the AJ applied the incorrect regulations to his analysis, namely DPM Section 1618, which outlines what is required to be contained in an agency's advance notice of proposed adverse action. Instead, he submits that the AJ should have determined whether Agency's advance notice complied with 8B DCMR § 1500 *et seq*., which applies to employees of the Board of Trustees of the University of the District of Columbia. Employee, therefore, maintains that Agency violated his due process rights because the advance notice failed to comply with the applicable regulations. In light of the above, Employe requests that the Board reverse the termination action. Alternatively, he asks that matter be remanded to the AJ for adjudication of the substantive merits. [24]

In its response, Agency argues that the issuance of the Initial Decision was appropriate because Employee's Motion for Summary Judgment was not solely limited to alleged procedural violations. It highlights that Employee's motion contained arguments relative to retaliation and whether he actually committed workers' compensation fraud. Thus, it reasons that Employee was not entitled to an evidentiary hearing since he had an opportunity to address, and reply to, the substantive arguments at issue in this matter.[25]

Next, Agency maintains that there is substantial evidence in the record to support a finding that Employee's termination was proper. It contends that the record reflects that Employee was not injured at the location and time identified in his statements and that he was not acting within the scope of employment at the time of the injury. Consequently, Agency opines that its investigation, in conjunction with ORM's determination, demonstrates that Employee filed a false workers' compensation claim. Additionally, it posits that managerial discretion was properly

[24] *Id*.
[25] *Agency's Answer to Petition for Review* (December 19, 2023).

invoked in selecting the penalty, noting that termination was warranted based on an analysis of the *Douglas* factors and the Table of Penalties for Disciplinary and Adverse Actions.[26]

Concerning the 90-day rule, Agency concedes that the AJ erroneously utilized D.C. Code § 5-1031, instead of 8B DCMR § 1502.3(a). However, it highlights that the AJ's conclusions regarding whether Agency violated the ninety-day period for commencing adverse actions is the same under both the Code and the regulations. Agency agrees with the AJ's identification of August 6, 2020, as the proper anchor date for purposes of calculating the ninety-day time period. Thus, it believes that the issuance of the advance notice of termination was timely. Alternatively, Agency states that even if it did not comply with 8B DCMR § 1502.3, the error was harmless. Lastly, it posits that Employee's arguments that he was denied due process should be rejected outright because he is raising them for the first time on Petition for Review. Consequently, Agency asks that Employee's petition be denied.[27]

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.[28] Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.

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[26] *Id*.
[27] *Id*.
[28] 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).

Summary Disposition

Employee argues that the AJ ran afoul of OEA Rule 618 by granting summary disposition to Agency. He avers that the Initial Decision was not ripe for issuance since there are material issues of fact in dispute that cannot be decided on the record alone. Additionally, Employee opines that the AJ erred by failing to provide him with notice to submit additional evidence prior to rendering a decision on the merits of the appeal. According to Employee, the AJ should have denied his motion for summary judgment by way of order, prior to issuing an Initial Decision. As it relates to summary disposition, OEA Rule 618 states the following:

> 618.1 The Administrative Judge may, after notifying the parties and giving them an opportunity to submit additional evidence or legal argument, render a summary disposition of the matter without further proceedings if, upon examination of the record in an appeal, it appears that:
>
> (a) There are no material and genuine issues of fact;
> (b) A party is entitled to a decision as a matter of law; or
> (c) The appeal fails to state a claim upon which relief can be granted
>
> 618.2 An Administrative Judge may render a summary disposition either *sua sponte*, after notice under § 618.1, or upon motion of a party.

We do not believe that record in its current state is sufficient to determine whether Employee's termination was proper. There are outstanding material issues of fact which must be reconciled through additional fact finding; therefore, this matter was not ripe for summary disposition pursuant to OEA Rule 618. Employee's December 5, 2022, Consent Motion to File a Motion for Summary Disposition indicated that "the parties engaged in extensive discovery and at the present time appear to be at the crossroads of either moving directly into an evidentiary hearing or addressing dispositive motions."[29] The motion further stated that Agency consented to

[29] *Consent Motion for Employee to File a Motion for Summary Disposition* (December 5, 2022).

Employee's ability to file a motion for summary disposition prior to proceeding to a hearing on the merits and that the contemplated filing would include procedural arguments that should be heard and decided prior to conducting an evidentiary hearing.[30] Further, Employee's Reply Brief to Motion for Summary Judgment stated the following:

> "As an initial matter, in response to the Employee's Motion for Summary Disposition on procedural and due process grounds, the Agency attempts to confuse the Court by providing detailed substantive arguments…The Employee's [motion] does not reach the merits. As such, the Agency's argument outlining the merit for its discipline is non-responsive to the Employee's filing, and therefore will not be addressed herein."[31]

After reviewing Employee's and Agency's submissions, the AJ determined that the matter could be decided based on the documents of record, but he did not notify the parties of his intent to do so or afford them an opportunity to submit additional evidence in accordance with OEA Rule 618.1. Employee's Motion for Summary Disposition clearly indicated that he sought to first address dispositive issues, including the 90-day rule and alleged procedural violations, prior proceeding to an evidentiary hearing. Employee's Petition for Appeal maintains that Agency's termination action was not supported by cause; he was truthful and cooperative in all his communications with investigators; he never requested workers' compensation; he obeyed all orders from his supervising officers and followed Agency policy; and Agency failed to specify what items Employee was accused of improperly removing. Because Employee's arguments constitute material issues of fact, we cannot reasonably deduce that the AJ's findings are based on substantial evidence. Consequently, the matter must be remanded to fully develop the administrative record.

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[30] *Id*.
[31] *Employee's Reply Brief Motion for Summary Disposition* at p. 1.

Cause

This Board further finds that the AJ conclusions with respect to the substantive charges are not supported by substantial evidence. Agency's November 2, 2020, Notice of Proposed Adverse Action provided the following as a basis for Employee's termination:

> 1. Willfully providing of false, fraudulent, misleading, or harmful statements, action, or omissions of information involving self, another employee, student or visitor for personal gain.
>
> 2. Refusal or failure to give oral or written statements of testimony in connection with an inquiry, investigation, etc. to include failure to cooperate with any management inquiry.
>
> 3. Insubordination: willful and/or deliberate refusal to carry out orders, directions, assignments, instructions, etc. to include failure to cooperate with any management inquiry.
>
> 4. Failure to comply with instructions, policies, procedures, or work standards.
>
> 5. Unauthorized possession, inappropriate removal of University property or another person's personal property.

In his decision, the AJ stated that Agency's termination action was taken pursuant to 6B DCMR § 1605.4(b)(2) – misrepresentation, falsification, or concealment of material facts in connection with an official matter – and 6B DCMR § 1605.4(b)(4) – knowingly and willfully reporting false or misleading information to any supervisor. He further concluded that the penalty was selected based on the Table of Illustrative Actions found in 6B DCMR § 1607.2(b)(2). The record reflects that Agency management discussed these regulations internally via an August 26, 2020, email; however, none of the charging documents to Employee rely on Chapter 6B of the DCMR as a basis for imposing discipline.[32] Instead, Chapter 8B, Section 1500.1 of the regulations establishes a progressive approach for addressing employee performance and conduct deficiencies at the

[32] *Agency's Opposition to Employee's Motion for Summary Judgment*, Tab 53 (May 18, 2023).

University of the District of Columbia. Pursuant to § 1500.2, the provisions of Chapter 8 apply to all University employees, except for faculty to the extent that their terms and conditions of employment regarding discipline are covered by a labor agreement; employees serving in a probationary period; employees serving in temporary, at-will or time-limited appointments; and the University Administration. Employee's position as an officer was not subject to an exception covered by § 1500.2; therefore, any disciplinary matters taken against him were required to be analyzed under 8B DCMR § 1500 *et seq*.

Additionally, while not exhaustive, 8B DCMR § 1503 enumerates conduct and performance deficiencies for University employees which constitute cause and warrant disciplinary action. This Board notes that Agency also relied on its own Table of Penalties for Disciplinary and Adverse Actions as a basis for imposing the penalty of termination, which differs from the Table of Illustrative Actions found in 6B DCMR § 1607.[33] The AJ should have relied on Chapter 8B and the corresponding Table of Penalties in determining whether Agency met its burden of proof for all five specifications contained in the Advance Notice of Proposed Adverse Action. His failure to do so renders this Board unable to determine whether Employee's termination is supported by the record. Consequently, the AJ's error of law warrants the remand of this matter for further consideration.

Retaliation

The parties also disagree as to whether Employee's termination was retaliatory because he filed a complaint with OIG in March of 2020. In *Vogel v. District of Columbia Office of Planning*, 944 A.2d 456 (D.C. 2008), the Court of Appeals held that in order to establish a claim of retaliation, the employee must show the following: (1) he or she engaged in a protected activity by opposing

[33] *Id*. at Tab 58. *See also Employee v. University of the District of Columbia*, OEA Matter No. 1601-0043-22 (June 16, 2023).

or complaining about employment practices that are unlawful under the DCHRA; (2) their employer took an adverse personal action against them; and (3) there existed a causal connection between the protected activity and the adverse personnel action. While the AJ held that Employee failed to offer any supporting evidence, the parties were not provided with an opportunity to develop the record as to his claim.

Employee's Motion for Summary Disposition raised the issue of retaliation with specificity, stating that his termination was directly related to his protected act of filing a complaint with OIG. According to Employee, the hearing officer who was responsible for drafting the Justification for Termination Memorandum, admitted that she was aware of the OIG complaint before she recommended termination as the appropriate penalty. In response, Agency asserted that Employee could not have been retaliated against because his activity was not protected under the DCHRA. The AJ failed to provide a sufficient legal basis for finding why Employee's argument failed the three-prong test provided in *Vogel* other than his conclusory statement that Employee's arguments lacked support. This Board does not believe that the AJ's analysis adequately addressed Employee's position. Since the AJ's findings are not supported by the record in its current state, additional fact finding and analysis must be conducted on this issue.

90-Day Rule

The AJ ruled that Agency did not violate D.C. Code § 5-1031 since the proposed adverse action notice was issued within ninety days after it knew, or should have known, of Employee's conduct allegedly constituting cause. Historically, courts have ruled on matters pertaining to the 90-day rule as it related to D.C. Code § 5-1031.[34] However, this statutory language is only applicable to those employed by the D.C. Fire and Emergency Medical Services Department and

[34] *See Employee v. University of the District of Columbia*, OEA Matter No. 1601-0043-22 (June 16, 2023).

not police officers within the employ of the University of the District of Columbia.[35] As previously stated, Chapter 8B, Section 1500 of the DCMR applies to disciplinary procedures taken against campus police officers. As it relates to the 90-day rule, Section 1502.3 of the regulations provides the following:

> (a) A disciplinary action must be commenced no more than ninety (90) days after the agency or personnel authority knew or should have known of the performance or conduct supporting the action;
>
> (b) When there is an investigation involving facts or circumstances germane to the performance or conduct supporting a disciplinary action, the time limit established in paragraph (a) will be delayed or suspended pending:
>
> (1) Any criminal investigation by the Metropolitan Police Department or any other 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
>
> (2) Any investigation by the Office of the Inspector General, the Office of the District of Columbia Auditor, the Office of Police Complaints, or the University Office of the General Counsel.
>
> (c) The time limits imposed in paragraph (a) may be suspended by the Vice President of Human Resources or designee for good cause and will be suspended pending any related investigation by the Board of Ethics and Government Accountability.

While the Initial Decision referenced Agency's argument that it notified Employee of his proposed termination within the ninety-day period set forth in § 1502.3, the AJ ultimately ruled that it did not violate D.C. Code § 5-1031. This Board acknowledges that both provisions require an agency to commence adverse actions against employees within ninety days; however, unlike D.C. Code § 5-1031, 8B DCMR § 1502.3(c) contains a mechanism for suspending the time period for issuing

[35] The District of Columbia Council has since repealed the 90-day provision previously encompassed within D.C. Code § 5-1031 for members of the Metropolitan Police Department. See Section 301(b) of the Comprehensive Policing and Justice Reform Amendment Act of 2022 ("CPJRA"), D.C. Law 24-345, § 117(a), 70 D.C. Reg. 953 (April 21, 2023). § 5-1031 still applies to employees of the Fire and Emergency Medical Services Department.

advance notices if good cause is established. Additionally, the AJ has not made a finding as to whether the language of § 1503.2 is mandatory or directory. Because the AJ's conclusions regarding the 90-day rule are predicated upon the erroneous application of D.C. Code § 5-1031, this Board cannot determine if Agency committed a reversible error. As a result, we must remand the matter for the AJ to perform an analysis of the rule as it pertains to Chapter 8B DCMR § 1502.3.

Due Process

Employee argues that the AJ erred by relying on the incorrect regulations in determining whether Agency afforded him with adequate due process. Specifically, he asserts that Agency violated 8B DCMR § 1508.3 by failing to include certain information in the proposed notice; § 1508.7 by failing to advise Employee that he had fifteen days to prepare a written response; and § 1511.5 by failing to issue a Final Administrative Decision. Agency, on the other hand, contends that Employee's contentions must be outright denied because he is raising these arguments for the first time on appeal before the Board. Since the AJ addressed the issue of notice, but failed to apply the correct personnel regulations, this Board finds that the matter must be remanded for further findings.

In the Initial Decision, the AJ relied on the protections enumerated in Chapter 16, Section 1618 of the DPM, as a basis for analyzing whether Agency provided Employee with adequate due process.[36] While Chapter 16 of the DPM applies to many government employees, it does not apply

[36] DPM § 1618 outlines what must be included in an agency's advance notice of proposed adverse action. Under DPM § 1618.2, the advance written notice must inform the employee of the following: (a) The type of proposed action (corrective, adverse, or enforced leave); (b) The nature of the proposed action (days of suspension or enforced leave, reduction in grade, reassignment, or removal); (c) The specific performance or conduct at issue; (d) How the employee's performance or conduct fails to meet appropriate standards; and (e) The name and contact information of the anticipated deciding official, or if a removal action, the anticipated hearing officer for the administrative review. Moreover, § 1618.3 provides that "[i]n addition to the information outlined in § 1618.2 the notice shall advise the employee of his or her right to: (a) Review any material upon which the proposed action is based; (b) Prepare a written

to Employee's position as an officer with the University of the District of Columbia. Pursuant to 6B DCMR § 1600.2, Chapter 16 applies to all District government employees except the following: "(d) [e]mployees of the Board of Trustees of the University of the District of Columbia." As previously noted, Chapter 8, Section 1500 *et seq*. applies Employee's position as a police officer. Therefore, the AJ must address whether the procedural notice requirements found in Section 1500 were satisfied and/or whether the language of the CBA between Agency and Employee's union controls what was required to be included in the proposed notice, any written response, and the final notice. Since the AJ applied the incorrect regulations, his ruling on this issue cannot be supported by substantial evidence. Therefore, the matter must be remanded for the AJ to determine whether Agency committed a procedural error based on the application of the correct regulations.

Disqualification and Recusal

Employee requests the assignment of a different Administrative Judge should the Board remand the matter for further adjudication, asserting that the presiding AJ's actions demonstrated clear bias. The issue of disqualification or recusal of judges has been addressed by the D.C. Court of Appeals. In *In re M.C.*, 8 A.3d 1215 (D.C. 2010), the Court held that the standard for determining whether recusal of a judge is required, is an objective one, where an observer could reasonably doubt the judge's ability to act impartially. The Court reasoned that recusal is required if an objective, disinterested observer, fully informed of the facts underlying the grounds on which recusal was sought, would entertain a significant doubt that justice would be done in the case.

Furthermore, the Court in *Gibson v. U.S.*, 792 A.2d 1059 (D.C. 2002), found that there need not be a finding of actual bias or prejudice in order to find a violation; rather, it need only to

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response to the notice, as provided for § 1621; (c) Representation by an attorney or other representative; and (d) An administrative review in the case of a removal."

be concluded that the facts might reasonably cause an objective observer to question the judge's impartiality. In *Gillum v. U.S.*, 613 A.2d 366 (D.C. 1992), the Court held that to be legally sufficient, the allegation of bias must include facts that (1) are material and stated with particularity; (2) if true, would convince a reasonable person that bias exists; and (3) show that bias is personal as opposed to judicial in nature.[37] Lastly, in *York v. U.S.*, 785 A.2d 651 (D.C. 2001), the Court ruled that because the disqualification of a judge may disrupt and delay the judicial process, affidavits of bias are strictly scrutinized for form, timeliness, and sufficiency."

In reviewing the record, this Board can find no basis for finding that a reasonable observer would question the AJ's impartiality on this appeal thus far. Employee has failed to expound upon how the AJ rulings demonstrated bias in a material manner or with particularity. There is also no evidence in the record to support a conclusion that any alleged bias on the AJ's part was personal as opposed to judicial in nature. Moreover, Employee offers no supporting legal arguments or affidavits in support of his position. Consequently, we can find no compelling reason for finding that the AJ should be removed from further adjudicating this appeal.

Conclusion

Based on the foregoing, this Board finds that the Initial Decision was not based on substantial evidence. This matter must be remanded for the AJ to issue determine whether Agency met its burden of proof regarding the five specifications outlined in its advance notice based on Chapter 8B of the DCMR.[38] The AJ must also develop the administrative record regarding Employee's retaliation claims. Additionally, the AJ made an error of law by failing to apply Chapter 8B of the DCMR as it related to the 90-day rule and Employee's due process arguments.

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[37] *See In re Bell*, 373 A.2d 232, 234 (D.C.1977)); *See also Gregory v. United States*, 393 A.2d 132 (D.C.1978).
[38] On remand, the AJ should also explain how the University of the District of Columbia, as an independent District agency, licenses its officers through the Metropolitan Police Department.

Finally, we find no basis for ordering the assignment of an alternate OEA Administrative Judge to this appeal. Therefore, the matter is hereby remanded to the AJ for proceedings consistent with this order.

ORDER

Accordingly, it is hereby **ORDERED** that this matter is **REMANDED** to the Administrative Judge for proceedings consistent with this order.

FOR THE BOARD:

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Clarence Labor, Jr., Chair

_____
Peter Rosenstein

_____
Dionna Maria Lewis

_____
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.