THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE,[1]	)	OEA Matter No. 1601-0077-22
	)	
v.	)	Date of Issuance: July 28, 2023
	)	
DISTRICT OF COLUMBIA	)	
RETIREMENT BOARD,	)	MONICA DOHNJI, ESQ.
Agency	)	SENIOR ADMINISTRATIVE JUDGE
	)	

Donna Williams Rucker, Esq., Employee Representative
Miguel Eaton, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 15, 2022, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Retirement Board's ("DCRB" or "Agency") decision to terminate her from her position as a General Counsel and Ethics Counselor, effective July 15, 2022. Employee was charged with the following: (1) False Statements/Records Misrepresentation, falsification or concealment of material facts or records in connection with an official matter;[2] (2) False Statements/Records: knowingly and willfully reporting false or misleading information or purposely omitting material facts, to any superior;[3] and (3) Neglect of Duty – failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position.[4] On August 15, 2022, OEA issued a Request for Agency's Answer to Employee's Petition for Appeal. Agency submitted its Answer to Employee's Petition for Appeal on September 13, 2022.

Following an unsuccessful attempt in mediation, this matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on December 2, 2022. A Status/Prehearing Conference was held in this matter on February 15, 2023. Both parties were present for the scheduled Status/Prehearing Conference. Thereafter, I issued a Post Status/Prehearing Conference Order on February 17, 2023, requiring the parties to submit written briefs addressing the issues raised at the

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] 6-B District of Columbia Municipal Regulation ("DCMR") §1607(b)(2).
[3] 6-B DCMR §1607(b)(4).
[4] 6-B DCMR §1607(e).

Status/Prehearing Conference. Both parties submitted their respective briefs as required. Thereafter, on April 26, 2023, Employee filed a Motion for Leave to file a Sur-Reply.[5] Subsequently, Agency filed an Opposition to Employee's Motion for Leave to File a Sur-Reply.[6] After considering the parties' arguments as presented in their submissions to this Office, I have decided that because Agency violated the "90-day rule" as discussed below, an Evidentiary Hearing to address any factual disputes is not required. The record is now closed.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule § 631.1, 6-B District of Columbia Municipal Regulations ("DCMR") Ch. 600, et seq (December 27, 2021) states:

> The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.[7]

ISSUE(S)

Whether Agency violated the "90-day rule"[8] in the instant matter.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

According to the record, Employee was hired by DCRB, an Independent Agency on September 8, 2008, as Agency's General Counsel and Ethics Counsel, Career Service. Employee's direct supervisor was Agency's Executive Director, Gianpero Balestrieri ("ED Balestrieri"). Employee also had a duty to advise Agency's Board of Trustees. On September 27, 2021, Employee filed a complaint with the Office of the Inspector General ("OIG") noting that Agency's Executive Director, ED Balestrieri, who joined Agency on September 7, 2021, owned, and worked as a managing partner for a brokerage company that invested Agency's funds. Employee alleged that ED Balestrieri's involvement with the brokerage company might represent a conflict of interest with Agency's investment operations.[9]

Subsequently, on September 28, 2021, Kimberly Woods ("Ms. Woods"), Director of Risk and Compliance Investments, met with ED Balestrieri, and Betty Ann Kane ("Ms. Kane"), former Interim Executive Director, to make a whistleblower disclosure about a potential conflict of interest

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[5] Employee emailed a courtesy copy of her Motion to the undersigned and opposing counsel on April 21, 2023.
[6] Employee's Motion is hereby **DENIED**.
[7] OEA Rule § 699.1.
[8] District Personnel Manual ("DPM") § 1602.3(a) and 6-B DCMR § 1602.3(a).
[9] Petition for Appeal at Exhibit 5.

involving an outside DCRB Investment Consultant and a DCRB Investment manager.[10] Ms. Woods also alleged that her immediate supervisor, Employee, had information regarding potentially inappropriate contact between DCRB's former Executive Director, Sheila Morgan-Johnson ("Ms. Morgan-Johnson") and the same investment manager with which DCRB had millions of dollars invested in. Ms. Woods further alleged that Employee had failed to inform anyone at DCRB about these potentially inappropriate contacts. Following the meeting, Agency retained Mr. James Loots ("Mr. Loots"), an attorney with the Law Offices of James M. Loots PC, to conduct an independent investigation into the matter and Employee was placed on administrative leave effective October 4, 2021.[11] Mr. Loots conducted an interview with Employee on December 20, 2021, and he issued his investigative report ("Loots Report") on March 8, 2022. Thereafter, Agency issued a Notice of Proposed Removal, along with the Proposing Official's Rationale Worksheet to Employee on April 28, 2022.[12] This matter was referred to a Hearing Officer who issued his Report and Recommendation on June 14, 2022, supporting Agency's decision to terminate Employee.[13] Subsequently, on July 11, 2022, Agency issued a notice of Final Agency Decision – Removal, terminating Employee effective July 15, 2022.[14]

Agency's Position

In its submissions to this Office, Agency asserts that it had cause to terminate Employee for (1) False Statements/Records Misrepresentation, falsification or concealment of material facts or records in connection with an official matter; (2) False Statements/Records: knowingly and willfully reporting false or misleading information or purposely omitting material facts, to any superior; and (3) Neglect of Duty – failing to carry out official duties or responsibilities as would be expected of a reasonable person in the same position. Agency argues that it terminated Employee because she knew about potential misconduct by the then executive director and an outside investment manager, and she failed to investigate the matter or inform Agency of the potential misconduct. Instead, she reported the matter to the SEC. Agency states that Employee was also aware that another DCRB employee reported the allegations to the D.C. OIG, and she was aware that Agency continued to do business with the outside investment manager, yet she deliberately concealed the alleged misconduct from Agency or any of its Trustees.[15]

Agency denies that its proposed removal of Employee was untimely and in violation of 6-B DCMR § 1602.3(a) ("90-day rule"). Agency admits that the 90-day rule was enacted to prevent employees' misdeeds from hanging over their head indefinitely. However, it asserts that employers must have an opportunity to investigate allegations and take actions based on factual knowledge or reasonable inferences. Agency highlights that Courts and OEA rely on the totality of the circumstances in determining when an Agency knew or should have known of the alleged

[10] *Id*. at Exhibit 6. *See also* Agency's Answer to Petition for Appeal at pg. 4. (September 13, 2022).
[11] *Id*.
[12] *Id*. at Tab 4.
[13] *Id*. at Tab 9.
[14] *Id*. at Tab 10.
[15] *Id*.

misconduct.[16] Agency asserts that it knew of the alleged misconduct on March 8, 2022, when it received the Loots Report.[17]

Agency acknowledged placing Employee on administrative leave on October 4, 2021, after its meeting with Ms. Woods, on September 28, 2021. However, Agency maintains that although Ms. Woods' allegations against Employee were serious, the allegations were not supported by documentation, and came from an employee that ED Balestrieri just met. Agency avers that these allegations alone did not provide it with the level of knowledge necessary to initiate a corrective or adverse action against Employee in good faith, without investigating. Hence, it placed Employee on administrative leave on October 4, 2021, and retained Mr. Loots to investigate the matter. Agency reiterates that the 90-day clock started on March 8, 2022, when it received the Loots Report, and because the Notice of Proposed Removal was issued on April 28, 2022, it did not violate the 90-day rule as it commenced adverse action against Employee within 90 business days from when it knew or should have known of the alleged misconduct. Agency further asserts that the penalty of removal was within the range of penalties for all three (3) causes of actions.[18]

Employee's Position

Employee asserts that pursuant to 6-B DCMR § 1602.3(a), Agency's actions were in error procedurally and as a matter of law. Employee highlights that pursuant to 6-B DCMR § 1602.3(a), a corrective or adverse action shall commence no more than ninety (90) business days after Agency or personnel authority knew or should have known of the conduct supporting the action. Employee states that Agency knew or should have known of the alleged misconduct on October 4, 2021, when it placed her on administrative leave, and more than 90 business days passed before Agency issued the Notice of Proposed Removal on April 28, 2022. Employee further notes that based on Agency's admission, Agency knew or should have known of the alleged misconduct on September 28, 2021, when ED Balestrieri, and Ms. Kane, all Agency officials were first informed of the alleged misconduct supporting the adverse action during their meeting with Ms. Woods. Yet Agency waited until April 28, 2022, more than 90 business days to issue the Notice of Proposed Removal.[19]

Employee contends that because the current matter does not involve any criminal investigation by the Metropolitan Police Department ("MPD") or any other agency as identified under District Personnel Manual ("DPM") § 1602.3, Agency's termination of Employee violated the ninety (90) day rule.[20] Citing to case law, Employee provides that the anchor date in which the 90-day clock began to run was September 28,2021, "because the standard is not when an agency is able to verify misconduct. Rather, it is a 'knew or should have known' standard."[21]

In addition, Employee avers that she did not withhold material from the Board, nor did she act knowingly, willfully, or purposefully. She maintains that she acted as a reasonable person would in her position. Employee asserts that Agency did not meet its burden of proof with regards to the

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[16] Citing to *Employee v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0037-20 at 8-13 (February 24, 2022).
[17] *Id*. *See also.* Agency's Post Status/Prehearing Conference Brief (March 9, 2023).
[18] *Id*.
[19] Petition for Appeal, *supra*. *See also* Employee Post Status/Prehearing Conference Brief (March 30, 2023).
[20] *Id*.
[21] See *Employee v. D.C. Department of General Services*, OEA Matter No. l60l-0005-21, Initial Decision at 4 (June 24, 2022).

three (3) causes of actions levied against her. Employee explains that Agency relied heavily on the Loots Report in this matter. Employee argues that Mr. Loots was not an impartial investigator, and he was not empowered under the D.C. Code of Conduct to investigate potential ethical misconduct by a District government employee. Employee cites that Agency proposed the most severe form of discipline despite her stellar performance history, disregarding 6-B DCMR §§1605 and 1610, which mandate progressive discipline. She further argues that removal was retaliatory and in violation of the Whistleblower Protection Act pursuant to D.C. Code § 1-615.51 et seq.[22]

Analysis[23]

90-Day Rule

At issue here is whether Agency, in administering the instant adverse action, adhered to applicable provisions of law, specifically 6-B DCMR § 1602.3(a).[24] Employee avers that Agency violated the 90-Day rule in the administration of this action. Specifically, Employee maintains that Agency knew or should had known of the alleged misconducts levied against Employee, and that supported the adverse action on September 28, 2021, when ED Balestrieri and Ms. Kane met with Ms. Woods who informed Agency of Employee's alleged misconduct. As a result, Agency's Notice of Proposed Removal issued on April 28, 2022, violates the 90-Day Rule in accordance with DC Code and the DCMR. Agency on the other hand avers that it did not violate this rule. Agency argues that its action was commenced following its receipt of the Loots' Report on March 8, 2022, and it timely issued the Notice of Proposed Removal within 90 business days.

6-B DCMR §1602.3(a) provides that a "corrective or adverse action shall be commenced no more than ninety (90) business days after the agency or personnel authority knew or should have known of the performance or conduct supporting the action." The OEA Board has held that the legislative intent of the 90-Day Rule provision found in DPM §1602.3(a) is to "establish a disciplinary system that included inter alia, that agencies provide prior written notice of the grounds on which the action is proposed to be taken."[25] The Board noted that prior to this revision, the "courts have ruled on matters pertaining to the ninety-day rule as it related to D.C. Code § 5-1031...[t]his statutory language is only applicable to those employed by the Metropolitan Police Department or the D.C. Fire and Emergency Medical Service agencies."[26] That noted, the Board further held that while the intent for the 1602.3 (a) provision was not "spelled out in the DPM, it is reasonable to believe that the intent was similar to that provided by the D.C. Council when establishing the language of the ninety-day rule." The Board referenced a D.C. Court of Appeals decision[27] wherein the Court found that "the deadline was intended to bring certainty to employees of an adverse action

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[22] Petition for Appeal, *supra*. *See also* Employee Post Status/Prehearing Conference Brief (March 30, 2023).
[23] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. See *Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").
[24] 6-B DCMR 1602.3 and DPM 1602.3 will be used interchangeably throughout this decision.
[25] *Keith Bickford v Department of General Service*, OEA Matter No.1601-0053-17, Opinion and Order on Petition for Review (January 14, 2020).
[26] *Id*.
[27] *Id*. citing to *District of Columbia Fire and Medical Services Department v D.C. Office of Employee Appeals*, 986 A.2d 419,425 (2010).

that may otherwise linger indefinitely."[28] The Board has also held that this provision of the DPM 1602.3(a) like its counterpart found in D.C. Code §5-1031, are mandatory in nature.[29]

Here, I find that Agency knew of the actions that supported the current adverse action on September 28, 2021, during the meeting between Ms. Woods, Ms. Kane and ED Balestrieri, and not after it received the Loots Report on March 8, 2022. Therefore, I further find that Agency's assertion that it only knew of the misconduct after it received the Loots Report is flawed. Agency argues that because the allegations made against Employee on September 28, 2021, were not supported by documentation, Agency was not provided with the level of knowledge necessary to initiate an adverse action against Employee in good faith, without investigating. I also find this argument to be flawed.[30] Pursuant to 6-B DCMR §1602.3(a), the standard for when the 90-day time limit begins is not when an agency is able to verify misconduct, but when the agency "knew or should have known" of the misconduct.[31] The District of Columbia Superior Court in *Widmon Butler v. Metropolitan Police Department et al.*,[32] cited to a quoted language from *Medical Services Department v. D.C. Office of Employee Appeals*[33] that "[t]he history of the ninety-day rule counsels against [the] view that only knowledge with a high degree of certainty starts the statute's clock." Based on this reasoning, I find that Agency knew enough about the alleged misconduct from the September 28, 2021, meeting, and the October 1, 2021, letter, that it felt compelled to place Employee on administrative leave on October 4, 2021.

Further, Employee was notified on October 4, 2021, that she would be placed on administrative leave pending an internal investigation. I find that this hung over her head and subjected her to the uncertainty of potential discipline. Citing to *Employee v. Department of Youth Rehabilitation Services, supra*, Agency notes that Courts and OEA rely on the totality of the circumstances in determining when an Agency knew or should have known of the alleged misconduct. Agency explains that an agency need not initiate adverse action proceedings based on a single concern expressed by a sole employee without any evidentiary proof or facts. Employee on the other hand notes that "similar to the determination made in *Employee v. Department of Youth Rehabilitation Services,* the Agency's argument that it "could not (and should not) have known about [Employee's] inappropriate conduct until March 8, 2022, when it received the report of the independent counsel, Mr. Loots...that verified the previously unsupported and unverified allegation" is disingenuous because it relied on the allegations as reported during the September 28, 2021 meeting among Ms. Woods, ED Balestrieri, and Ms. Kane to both place [Employee] on administrative leave on October 4, 2021 and later terminate her on July 11, 2022."

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[28] *Id*. The Board also cited the Court of Appeals as noting that the "D.C. Council, in establishing the ninety-day rule, was motivated by the exorbitant amount of time that the [adverse action] process was taking, such that...employees had to wait months or even years to see the conclusion of an investigation against them."
[29] *Id*. at pgs. 9-10.
[30] In a letter dated October 21, 2021, from Mr. Loots to Employee, Mr. Loots referenced an October 1, 2021, document submitted to ED Balestrieri, by Ms. Woods' attorney. Specifically, Mr. Loots noted that he had been retained by Agency to investigate the allegation made by Ms. Woods that Employee in her official capacity was aware of unethical conduct by another DCRB employee but failed to disclose the misconduct to Agency. These are the same allegations that support the current adverse action. *See* Employee's Employee Post Status/Prehearing Conference Brief, *supra*, at Exhibit L.
[31] *Employee v. D.C. Department of General Services*, OEA Matter No. 1601-0005-21(June 24, 2022).
[32] Case No. 2017 CA 007843 P(MPA)(October 15, 2018).
[33] 986 A.2d 419, 425 (D.C. 2010).

I find that the current matter is distinguishable from *Employee v. Department of Youth Rehabilitation Services*, in that, while this employee continued his misconduct up to and through the date that the Agency initiated discipline, here, the alleged misconduct against Employee had already occurred when it was brought to Agency's attention on September 28, 2021. Thus, Agency did not have to wait to see if Employee would comply with any directive before commencing the adverse action. Further, upon learning of the alleged misconduct, Agency immediately placed the current Employee on administrative leave pending an investigation into the matter, whereas the employee in *Employee v. Department of Youth Rehabilitation Services* was not notified of any formal investigation or placed on administrative leave pending a formal investigation.

I further find that Agency had 90 business days from when it knew of the alleged misconduct to thoroughly investigate, verify and commence the instant adverse action. Mr. Loots interviewed Employee on December 20, 2021, which was within the 90-day period, and he took 53 business days to issue his report on March 8, 2022. I also find that this was an exorbitant amount of time to investigate and issue a 19-page report. According to the record, Agency issued the Notice of Proposed Removal to Employee on April 28, 2022, this is 145 business days from September 28, 2021, when ED Balestrieri, and Ms. Kane met with Ms. Woods who informed Agency of Employee's alleged misconduct that supported the instant adverse action. Agency placed Employee on administrative leave on October 4, 2021, pending an internal review into the alleged misconduct.

Employee further asserts that October 4, 2021, is a plausible anchor date for the 90-day clock to begin. Assuming *arguendo* that Agency was not made aware of the alleged misconduct during the September 28, 2021, meeting, I agree that October 4, 2021, is a plausible anchor date for the 90-day clock to begin. The fact that ED Balestrieri issued a letter on October 4, 2021, noting that Employee would be placed on administrative leave pending an internal review into the misconduct that support the current adverse action proves that Agency knew of the alleged misconduct, thereby starting the 90-day clock. Agency issued a Notice of Proposed Removal on April 28, 2022. Assuming *arguendo*, October 4, 2021, to April 28, 2022, is 141 business days from when Agency knew of the alleged misconduct, which is also more than the required 90-business days time limit.

Additionally, 6-B DCMR §1602.3(b) highlights that, the 90-day time limit to commence an adverse action can only be tolled if there is a criminal investigation by the MPD, any other law enforcement agency with jurisdiction within the United States, the Office of the United States Attorney for the District of Columbia, the Office of the Attorney General, the Office of the Inspector General, the Office of the District of Columbia Auditor, or the Office of Police Complaints. The current matter does not involve a criminal matter; thus, it was not subject to investigation by one of the above law enforcement agencies. Additionally, Mr. Loots is not employed by any of these agencies. Therefore, his investigation into Employee's alleged misconduct was not subject to the tolling of the 90-day time limit pursuant to 6-B DCMR §1602.3(b).

6-B DCMR §1602.3(c) further provides that "[e]xcept in matters involving employees of the Metropolitan Police Department and Fire and Emergency Medical Services Department, the time limit imposed in paragraph (a) *may be suspended by the personnel authority for good cause and shall be suspended pending any related investigation by the Board of Ethics and Government Accountability*." (Emphasis added). In the current matter, I find that Agency did not provide cause to suspend the 90-day time limit as the record is void of any such information. Moreover, the record is also void of any related investigation pending before the Board of Ethics and Government Accountability. Consequently, I find that Agency's internal investigation into the alleged misconduct

supporting the current adverse action did not toll the 90-day time limit. I further find that the timeline in calculating the 90-day clock in the instant case is as follows: **September 28, 2021 (when Agency knew or should have known of the alleged misconduct supporting the current adverse action) —April 28, 2022 (Agency issued Notice of Proposed Removal): 145 business days**. Accordingly, I find that Agency violated the 90-day rule when it issued the current adverse action against Employee. This Office has consistently held that the 90-day deadline is viewed as mandatory, and a violation of this provision is grounds for reversal.[34]

CONCLUSION

The undersigned finds that Agency has failed to follow the appropriate applicable regulations in its administration of the instant adverse action against Employee. Accordingly, I will not address whether Agency, in administering this adverse action had cause to do so or any other issues raised by the parties during the course of this appeal. I conclude that Agency's actions were not in compliance with the applicable rules and regulations and as a result, the undersigned finds that Agency's actions were in violation of the mandatory regulatory provisions. Wherefore, I further find that Employee's removal should be reversed.

ORDER

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

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

FOR THE OFFICE:

/s/ *Monica N. Dohnji*
MONICA DOHNJI, Esq.
Senior Administrative Judge

[34] *See e.g. D.C. Fire and Medical Services Dept. v. D.C. Office of Employee Appeals*, 986 A.2d 419 (2010); *See Employee v. D.C. Dept. of Youth Rehabilitation Service*, OEA Matter No. 1601-0037-20, Opinion and Order on Petition for Review at 9 (February 24, 2022); *Keith Bickford v. D.C. Dept. of General Services*, OEA Matter No. 1601-0053-17, Opinion and Order on Petition for Review at 7 (January 14, 2020).