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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
KEITH BICKFORD,)	
Employee)	OEA Matter No. 1601-0053-17
)	
v.)	Date of Issuance: January 14, 2020
)	
DEPARTMENT OF GENERAL)	
SERVICES,)	
Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Keith Bickford (“Employee”) worked as a Supervisory Special Police Officer with the Department of General Services (“Agency”). On April 24, 2017, Agency issued a Notice of Final Decision on Proposed Removal. The notice provided that Employee was being removed under District Personnel Manual (“DPM”) §§ 1605.4(a)(4) and 1605.4(e) for “off duty conduct that adversely affects the employee’s job performance or trustworthiness, or adversely affects the employing agency’s mission or has an otherwise identifiable nexus to the employee’s position; any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty (failure to carry out assigned tasks and careless and negligent work habits); (repeatedly taking the agency vehicle outside of the service area and, repeatedly, to non-District government addresses)(59 occurrences; of the 59, at least 20 of the

occasions Sgt. Bickford was on his scheduled days off; on at least 3 occasions Sgt. Bickford had the government vehicle parked at his residence while he was utilizing annual and/or sick leave).”

The effective date of Employee’s removal was April 28, 2017.¹

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on May 26, 2017. He argued that he was improperly removed from Agency because the proposal for removal was issued more than ninety business days after the agency became aware of the alleged misconduct; accordingly, Agency violated DPM § 1602.3(a). He also explained that pursuant to DPM § 1614.3(c), Agency violated his due process rights by interfering with the hearing officer’s independence. He explained that the hearing officer failed to submit his recommendation within thirty days. Additionally, Employee provided that the deciding official failed offer any explanation for his decision and the official failed to consider Employee’s written response. Further, Employee asserted that Agency improperly applied the *Douglas* factors; the final decision was not issued within forty-five days of the completion of the hearing officer’s report; and the final decision was not properly served on Employee. Therefore, Employee requested that he be reinstated to his position; that he receive back pay and benefits lost as a result of the termination; that the action be removed from his personnel file; and that he receive reimbursement of attorney’s fees.²

Agency filed an Answer to the Petition for Appeal on June 30, 2017. It denied Employee’s allegations that the proposed removal was untimely. It argued that pursuant to DPM § 1602.3(c), it received a sixty-day extension of time to conduct its investigation.³ Additionally, Agency explained that Employee’s assertion of timeliness is undermined because he suffered no harm

¹ *Petition for Appeal*, p. 1 and 13 (May 26, 2017).

²² *Id.* at 7-8.

³ Agency provided that D.C. Human Resources (“DCHR”) determined that good cause existed for the requested extension based upon the complexity of data that Agency’s HR had to assess to determine Employee’s various locations.

during the investigation. Agency explained that Employee worked full time during the investigation and was placed on administrative leave with pay from the date of his advance notice to the date of his removal. Agency noted that the assigned hearing officer recommended that the proposed removal could not be substantiated because he erroneously believed that it was untimely based on the ninety-day rule established under DPM § 1602.3(a). However, Agency's director sustained the proposed removal and reasoned that it followed the DPM and appropriately considered the *Douglas* factors. Accordingly, Agency requested that Employee's appeal be dismissed.⁴

Employee filed a Motion for Summary Disposition on November 30, 2017. He argued that Agency violated DPM § 1602.3 by failing to issue the notice of proposed removal within ninety business days from when Agency knew or should have known of his alleged misconduct.⁵ Agency filed its opposition on December 18, 2017. It contended that the DPM regulations are directory, not mandatory. Additionally, it asserted that it did not violate the ninety-business day provision of DPM § 1602.3(a); thus, this cannot serve as a foundation for summary disposition.⁶

On June 6, 2019, the AJ issued her Initial Decision. She determined that the issue was whether Agency violated DPM § 1602.3(a) by issuing its notice of proposed notice two days beyond the deadline pursuant to that provision. She reasoned that to answer that question, the first issue to be resolved was whether the word "shall" in DPM § 1602.3(a) is directory or mandatory. Ultimately, she held that the term "shall" is mandatory based on her analysis of the language of the regulation. Additionally, the AJ found that Agency was not entitled to an extension of the ninety-day deadline because it failed to submit its request within a timely manner. She determined

⁴ *Agency's Answer*, p. 3-7 (June 30, 2017).

⁵ *Petitioner's Motion for Summary Disposition*, p. 6-11 (November 30, 2017).

⁶ *Respondent Department of General Services' Memorandum in Opposition to Motion for Summary Disposition*, p. 9-11 (December 18, 2017).

that Agency failed to meet the mandatory requirement, absent good cause, for its delay in requesting the extension two days after the October 4, 2016 deadline. Furthermore, the AJ provided that Agency had sufficient information to issue the proposed notice in a timely manner. She explained that Agency represented that it began preparing the proposed notice of removal on October 3, 2016, one day before the deadline. As a result, the AJ granted Employee's Motion for Summary Disposition. Accordingly, she reversed Agency's adverse action and ordered that Employee be reinstated to her position and reimbursed all back pay and benefits.⁷

On July 5, 2019, Agency filed its Petition for Review. It maintains that the ninety-day deadline in DPM § 1602.3(a) is directory. Agency claims that the AJ's analysis failed to follow the guidelines outlined in *Teamsters Local Union 1714 v. Public Employees Relations Board*, 579 A.2d 706, 710 (D.C. 1990), to determine whether a regulation is directory or mandatory because she failed to analyze the express language of the regulation. It asserts that DPM § 1602.3 has no penalty for non-compliance, and its failure to meet the deadline by two days does not provide a legal basis for reversal of its removal action because it was *de minimus*. Agency also argues that the AJ erred in determining that it was not entitled to an extension granted by DCHR. It contends that there is no language in DPM §1602.3(c) that requires that it submit a request for a suspension before the elapse of ninety days. Therefore, Agency requests that the Board grant its petition and reverse the Initial Decision.⁸

Employee filed his response to Agency's Petition for Review on August 9, 2019. He argues that Agency's petition should be denied because the AJ correctly determined that the ninety-day rule provided in DPM § 1602.3 is mandatory. He argues that he does not need to show actual harm or prejudice cause by Agency's non-compliance of a mandatory deadline. Employee further

⁷ *Initial Decision*, p. 7-10 (June 6, 2019).

⁸ *Petition for Review of Initial Decision*, p. 8-16 (July 5, 2019).

contends that DPM § 1602.3(c) only permits DCHR to suspend the ninety-day deadline. However, it asserts that Agency should be prohibited from inappropriately attempting to extend the deadline retroactively. Accordingly, he requests that Agency's petition be denied.⁹

Ninety-Day Rule

Agency relied on the following DPM regulation to remove Employee:

1602.3 Corrective and adverse actions taken against employees are subject to the following limitations:

- a. 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;
- b. When there is an investigation involving facts or circumstances germane to the performance or conduct supporting a corrective or adverse action, the time limit established in paragraph (a) shall be tolled pending 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, pending any investigation by the Office of the Inspector General, the Office of the District of Columbia Auditor, or the Office of Police Complaints.
- c. Except 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.¹⁰

This case is an issue of first impression for OEA; there have been no appeals to OEA from a District government agency that utilized this newly-issued DPM regulation. However, the

⁹ *Employee Keith Bickford's Answer to Petition for Review of Initial Decision*, p. 5-15 (August 9, 2019).

¹⁰ In her Initial Decision, the AJ seemed to suggest that she was relying on the May 12, 2017 version of this regulation. However, the effective date of Employee's removal was April 28, 2017. Because she was removed prior to the effective date of the May 12, 2017 regulation, the appropriate regulation is the February 25, 2016 DPM version. Fortunately, the 2016 and 2017 versions of DPM 1602 are the same; thus, there was no err committed by the AJ.

applicability of the ninety-day rule has been thoroughly litigated at OEA, the Superior Court for the District of Columbia, and the D.C. Court of Appeals.

Historically, the courts have ruled on matters pertaining to the ninety-day rule as it related to D.C. Official Code § 5-1031.¹¹ This statutory language is only applicable to those employed by the Metropolitan Police Department or D.C. Fire and Emergency Medical Services agencies. In 2016, the ninety-day rule was established in the form of a regulation to apply to other District Government agencies. According to the comments provided in the 2016 regulation, the “rules implemented the new discipline and grievances provision pursuant to D.C. Official Code § 1-616.51 et seq.”¹² D.C. Official Code § 1-616.51 provided that the District government sought “a radical redesign of the adverse and corrective action system[,] by replacing it with more positive approaches toward employee discipline[,] is critical to achieving organizational effectiveness.” To achieve its goal, the Mayor, Board of Education, and the Board of Trustees of the University of the District of Columbia issued rules and regulations 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. This was the intent for the newly revised DPM § 1602 regulation.

To that end, this Board believes that although the regulatory intent of the ninety-day rule

¹¹ The relevant sections of D.C. Official Code § 5-1031 provide the following:

(a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department knew or should have known of the act or occurrence allegedly constituting cause.

(a-1)(1) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause.

(b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department or any law enforcement agency with jurisdiction within the United States, the Office of the United States Attorney for the District of Columbia, or the Office of the Attorney General, or is the subject of an investigation by the Office of the Inspector General, the Office of the District of Columbia Auditor, or the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) or (a-1) of this section shall be tolled until the conclusion of the investigation.

¹² 63 DCR 001265, DPM Transmittal No. 227 (February 5, 2016).

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 statutory language of the ninety-day rule. The D.C. Court of Appeals ruled in *District of Columbia Fire and Medical Services Department v. D.C. Office of Employee Appeals*, 986 A.2d 419, 425 (2010), that the goal of 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.’” The Court found that the deadline was intended to bring certainty to employees of an adverse action that may otherwise linger indefinitely.

As Employee provides, the language in the D.C. Official Code § 5-1031(a)-(b) and DPM § 1602.3(a) is sufficiently the same. D.C. Official Code § 5-1031(a)-(b) provides that . . . no corrective or adverse action . . . shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the [Agency] knew or should have known of the act or occurrence allegedly constituting cause.” DPM § 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.” Consequently, this Board agrees with the AJ’s assessment that there is a logical assumption that an agency is barred from issuing a notice of adverse action, if it was not done by the mandated ninety-day deadline of when the agency knew or should have known of Employee’s conduct.

The record reflects that Agency knew of the conduct supporting its adverse action on May 26, 2016. This is evidenced by Agency’s May 26, 2016 memorandum which informed Employee

that it served as official notification that he was the subject of a pending investigation.¹³ As a result, Agency had ninety business days from May 26, 2016, to issue its notice of proposed adverse action. Ninety business days from May 26, 2016 was October 4, 2016. However, Agency did not issue its notice of proposed removal notice until October 6, 2016.¹⁴ This was two days past the ninety-day deadline. The Superior Court in *Metropolitan Police Department v. The District of Columbia Office of Employee Appeals, et al.*, Case No. 2012 CA 006793 P(MPA) upheld OEA's decision that even one day past the ninety-day deadline was a violation that warranted the adverse action being overturned. This matter is no different. The AJ correctly held that Agency violated DPM § 1602.3(a).

Additionally, this Board must note that even Agency's hearing officer in this case provided that Agency could not substantiate cause for the adverse action against Employee because it failed to act with ninety business days. In a February 21, 2017 email, the hearing officer provided that the date Agency knew of the offense was May 10, 2016. This date is earlier than that used by the AJ and the Board in this matter. However, the hearing officer provided that Agency's proposed removal notice was not issued until October 6, 2016, which (according to his calculations) was eighteen days past the ninety-day deadline. As a result, the hearing officer recommended that Employee be reinstated.¹⁵

Mandatory versus Directory Application

Agency argues in its Petition for Review that DPM § 1602 is directory, and not mandatory in nature because it does not impose a penalty for non-compliance. It relied heavily on the OEA Board decision issued in *Lakeba Watkins v. Department of Youth Rehabilitation Services*, OEA

¹³*Petitioner's Motion for Summary Disposition*, Exhibit A (November 30, 2017).

¹⁴*Agency's Answer*, Tab 1 (June 30, 2017).

¹⁵*Id.*, Tab #4.

Matter No. 1601-0093-07, *Opinion and Order on Petition for Review* (January 25, 2010). This Board believes that Agency's argument is misplaced for several reasons. First, the *Watkins* decision was written six years before this version of DPM § 1602.3(a) went into effect. Additionally, the Board in *Watkins* analyzed the matter based on DPM § 1614.3, which involved final decisions of summary removals. Moreover, the OEA Board and the Superior Court for the District of Columbia have written several decisions within recent years which held that the ninety-day rule is indeed mandatory.

As Agency does in the current matter, several agencies in the past have argued that the ninety-day rule is directory and not mandatory because there is no penalty imposed for non-compliance. However, in *Anita Staton v. Metropolitan Police Department*, OEA Matter No. 1601-0152-09, *Opinion and Order on Petition for Review* (July 16, 2012), the OEA Board held that "if there is any discrepancy as to the mandatory nature of the 90-day rule provision, *District of Columbia Fire and Emergency Medical Services Department v. District of Columbia Office of Employee Appeals*, 986 A.2d 419 (D.C. 2010), puts it to rest by affirming the OEA decision to reverse that adverse action because Agency took action after 90 days of when it knew or should have known of the incident constituting cause."¹⁶ Moreover, the Superior Court for the District of Columbia upheld OEA's ruling in *Staton* and held that "OEA correctly determined that MPD failed to comply . . . when it issued . . . a Notice of Proposed Adverse Action more than 90 days after the conclusion of the criminal investigation of [Employee's] alleged misconduct."¹⁷

Additionally, in *Alice Lee v. Metropolitan Police Department*, OEA Matter No. 1601-0087-15 (March 15, 2017), the OEA Administrative Judge held that the agency in that matter

¹⁶ See p. 8.

¹⁷ *Metropolitan Police Department v. The District of Columbia Office of Employee Appeals, et al.*, Case No. 2012 CA 006793 P(MPA).

incorrectly provided that missing the ninety-day deadline is *de minimus* and harmless. The AJ ruled that “it is well-settled that the 90-day deadline is a mandatory, rather than a directory provision.” The AJ found that Agency issued its notice ninety-one days after the deadline and overturned its action. On appeal, the Superior Court held that it “gives deference to legal conclusions that are a reasonable interpretation by the agency construing a statute it administers. In the circumstances presented here, OEA’s ruling was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁸

Moreover, in *Sholanda Miller v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0325-10, *Opinion and Order on Petition for Review* (April 14, 2015); *Abraham Evans v. Metropolitan Police Department*, OEA Matter No. 1601-0081-13, *Opinion and Order on Petition for Review* (September 13, 2016); and *Widmon Butler v. Metropolitan Police Department*, OEA Matter No. 1601-0049-15, *Opinion and Order on Petition for Review* (November 7, 2017), the OEA Board held that “. . . the ninety-day deadline is a mandatory, rather than directory provision. Therefore, any violation of the statute by an agency would result in a reversal of the adverse action.” In its ruling on appeal of the *Miller* case, the Superior Court held that “the 90-day rule is a notice rule. It *requires* MPD to notify an employee of proposed action. . . . (emphasis added).”¹⁹ In *Butler*, the Superior Court cited to the Board’s quoted language that the provision is mandatory. Although it did not directly address the quoted language, the Court did uphold OEA’s ruling.²⁰ Thus, there are several cases that contradict Agency’s argument that the ninety-day rule is discretionary.

¹⁸ *Metropolitan Police Department v. District of Columbia Office of Employee Appeals*, Case No. 2017 CA 003525 P(MPA)(February 13, 2018).

¹⁹ *Sholanda Miller v. District of Columbia Office of Employee Appeals, et al.*, Case No. 2017 CA 004500 P(MPA)(October 30, 2018).

²⁰ *Widmon Butler v. Metropolitan Police Department, et al.*, Case No. 2017 CA 007843 P(MPA)(October 15, 2018).

Suspension of the Ninety-Day Rule

Agency also argues that the AJ erred in determining that the it was not entitled to an extension of the ninety-day rule granted by DCHR. It asserts that DPM §1602.3(c) permits it to extend the ninety-day deadline for good cause shown.²¹ This Board does not agree with Agency's assessment. The time limit in 1602.3(a) is ninety days. However, Agency submitted its request for a good cause extension *after* the ninety-day deadline provided in DPM §1602.3(a)(emphasis added). Moreover, the regulation provides that the ninety-day deadline may be *suspended* for good cause (emphasis added). The regulation does not provide that the ninety-day period could be *extended*, which is what Agency is attempting to do (emphasis added).

Agency contends that there is no language in DPM § 1602.3(c) that requires that it submit a request for a suspension before the elapse of ninety days. Agency opines that even if the deadline was missed, it was tolled due to its ongoing investigation.²² Agency's argument lacks merit. DPM §1602.3(c) provides that “. . . the time limit imposed in paragraph (a) may be suspended by the personnel authority for good cause. . . .” It is inherent in the plain language that the ninety days could be suspended before the actual deadline. This Board agrees with Employee's assessment that DPM § 1602.3(a) establishes the deadline in which a claim must be initiated. Therefore, it logically flows that suspension of the deadline would have to occur prior to the deadline. Agency's argument lacks reason that a deadline could be suspended after it has expired.²³

²¹ Because the ninety-day deadline was October 4, 2016, Agency attempted to retroactively request for an extension for good cause in its October 6, 2016 submission to the DCHR Director. In an October 24, 2016 letter to Agency, the DCHR Director wrote, and Agency does not dispute, that “[o]n October 6, 2016, the D.C. Department of Human Resources received your request for an extension of the 90-day time limit to bring corrective or adverse action against [Employee].” *Respondent Department of General Services' Memorandum in Opposition to Motion for Summary Disposition*, p. 3 (December 18, 2017).

²² *Petition for Review of Initial Decision*, p. 14-15 (July 5, 2019).

²³ *Employee Keith Bickford's Answer to Petition for Review of Initial Decision*, p. 11-12 (August 9, 2019).

Furthermore, as the AJ held, Agency concedes that it received its final data regarding the adverse action on October 3, 2016.²⁴ Therefore, Agency could have submitted its request for an extension to DCHR prior to the October 4, 2016 deadline. Alternatively, because Agency admits that it began to prepare the proposed notice of removal on October 3, 2016,²⁵ it could have provided the actual proposed notice to Employee by the October 4, 2016 deadline. Agency offered no reason for its violation of DPM § 1602.3(c).

Conclusion

In accordance with DPM § 1602.3(a), Agency had ninety days to issue its notice of proposed action against Employee. It exceeded the deadline by two days. OEA has consistently held that the ninety-day deadline is a mandatory, rather than a directory provision. Moreover, OEA has held that missing the ninety-day deadline is neither *de minimus* nor harmless. The Superior Court for the District of Columbia has ruled that OEA's ninety-day rule findings are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Agency cannot retroactively attempt to extend the ninety-day deadline. Therefore, we must deny Agency's Petition for Review.

²⁴ *Initial Decision*, p. 8 (June 6, 2019) and *Petition for Review of Initial Decision*, p. 15 (July 5, 2019).

²⁵ *Petition for Review of Initial Decision*, p. 15 (July 5, 2019).

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **DENIED**. Consequently, Employee is to be reinstated to his position or a comparable position and restored back pay and benefits lost as a result of his termination.

FOR THE BOARD:

Clarence Labor, Chair

Patricia Hobson Wilson

Jelani Freeman

Peter Rosenstein

Dionna M. Lewis

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.