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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
)	
Employee)	OEA Matter No. 1601-0037-20
)	
v.)	
)	
D.C. DEPARTMENT OF YOUTH)	Date of Issuance: September 22, 2021
REHABILITATION SERVICES,)	
Agency)	MICHELLE R. HARRIS, ESQ.
)	Administrative Judge

Vanessa Dixon Briggs, Employee Representative
Kevin Hooks, Employee Representative
Stephen Milak, Esq., Agency Representative
Daniel Thaler, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On March 19, 2020, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of Youth Rehabilitation Services’ (“Agency” or “DYRS”) decision to suspend him from service for fifteen (15) days. Agency filed its Answer on August 5, 2020. This matter was assigned to the undersigned Administrative Judge (“AJ”) on December 12, 2020. On December 28, 2020, I issued an Order convening a Prehearing Conference in this matter for January 25, 2021. On January 19, 2021, Agency filed a request to continue the Prehearing Conference. On January 19, 2021 I issued an Order granting this request. The Prehearing Conference was scheduled for February 17, 2021 and Prehearing Statements were due on or before February 12, 2021.

During the Prehearing Conference I determined that an Evidentiary Hearing was warranted in this matter. Accordingly, on February 17, 2021, I issued an Order Convening an Evidentiary Hearing for April 7, 2021. Additionally, a briefing scheduled was established for parties to address issues raised at the conference. Specifically, Employee asserted that Agency had violated the “90-day Rule” and had not employed progressive discipline. Agency’s brief was due on or before March 10, 2021, Employee’s brief was due on or before March 26, 2021, and Agency had the option to submit a sur-reply brief on or before April 9, 2021. The parties complied with the prescribed deadlines. The Evidentiary Hearing was held on April 7, 2021. Following the receipt of the hearing transcript, I issued an Order on May 14, 2021, requiring the parties to submit their closing arguments on or before June 14, 2021. Both parties submitted their closing arguments. Agency noted that the transcript omitted exhibits entered into the record and filed

an addendum to include those exhibits. Employee's representative indicated that there were missing exhibits, but later cited that the exhibits were included with the transcript. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether the "90-Day Rule" pursuant to DPM § 1602.3(a) was violated in the administration of the instant adverse action.
2. Whether Agency had cause to take adverse action against Employee.
3. If so, whether the penalty of a fifteen (15) day suspension was appropriate under the circumstances and administered in accordance with all applicable laws, rules and regulations.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

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

OEA Rule 628.2 *id.* states:

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

SUMMARY OF TESTIMONY

On April 7, 2021, an Evidentiary Hearing was held before this Office. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding. Both Employee and Agency presented testimonial and documentary evidence during the course of this matter to support their positions.

Agency's Case in Chief

Justin Samples ("Samples") Tr. Pages 14 – 145

Samples works at Agency as a supervisory facilities operation specialist and has held this position for approximately four (4) years. Samples' duties include the supervision of approximately 16 employees and involves attendance enforcement. Samples explained that at Agency, when employees arrive at the facility, they are responsible to hand scan in and out at the start and end of their tour of duty.

Samples testified that Employee had an issue with hand scanning. Samples stated that Employee was a maintenance mechanic lead. Samples indicated that he personally instructed Employee to hand scan, but to his knowledge that Employee never hand scanned in and out of work. Samples sent an email to his supervisor, William Boberg, citing that Employee had refused to hand scan. Samples testified that Employee had refused to set up his hand scan and to meet with human resources to initialize the hand scan procedure. Samples explained that Boberg sent an email to Employee in July 2019 summarizing a conversation held in the office about the hand scanning procedures responsibilities, where Employee, his union representative, Samples and Boberg were present. Later, Samples noted that he did a verbal counseling that was later submitted in a memorandum.

Samples testified he sent the memorandum on July 25, 2019 to Employee regarding the duties and responsibilities of hand scanning. The memorandum informed Employee of the need to hand scan and those associated responsibilities. On July 31, 2019, an email was sent to Employee informing him to meet the HR representative to complete his hand scan procedure. Samples explained that there was a communication between him and Employee where Employee indicated that he did not know how to set up the hand scan. Samples asked Employee to meet with HR in order to have them walk him through the process and set up a hand scan profile. Samples believed that a profile was set up for Employee but did not recall the timing. Samples testified that Employee did not actually use the hand scan. Samples recalled a conversation on August 19, 2019, where he had another conversation with Employee following Employee's submission of missed hand scan punch forms. Samples inquired why Employee was using those forms instead of the scan. The missed hand scan forms are utilized when the machine is having issues. Employees are required to use those forms in order to have a record for their tour of duty. Samples iterated that the primary way of recording time was using the hand scan machine. Samples did not know why the hand scan was the primary method of time recording. Samples noted that he was not satisfied with Employee's response regarding the lack of use of hand scan. An email was sent on August 19, 2019 [tab 6] instructing Employee to meet with Christina Courtney at the hand scan machine to go over how to log in. Samples said this was in response to Employee citing that he did not know how to use the hand scan machine. Samples testified that following this, that Employee did not indicate a need for additional help with the hand scan process.

Samples testified that an email was sent to all staff, including Employee regarding time attendance guidance and environmental pay codes. Samples noted that the dates of these emails included November 19, 2019, October 11, 2019 and that these emails included attachments. The attachments were instructions about clocking in and out and the hand scan machine. Samples expected that Employee would punch in and out during his tour of duty using the hand scan machine. Samples testified that at this point, Employee still had not used the hand scan for his tour of duty. Samples did not know why. He explained that Employee had a doctor's note at one time but could not recall the date/time of that note and whether it was before or after this correspondence. Samples did not think that there was anything else he could do to have Employee comply with the hand scanning procedure, so he initiated discipline against Employee.

Samples explained that the disciplinary process involved several steps, including working with HR. In assessing the 15-day suspension, Samples referenced the DPM and examined Douglas factors. Samples testified that he provided the appropriate weight and consideration to the Douglas Factors. Samples also considered the past corrective or adverse action in the factors against Employee. That included a previous three (3) day suspension date December 13, 2019. The proposed noticed for the subsequent 15-day suspension was dated December 31, 2019. Samples testified that he did not have any personal animosity toward Employee, but noted he was fearful in the job after the incident for which Employee was suspended for three (3) days. Samples felt that he had no other choice than to discipline

Employee for the failure to hand scan. Samples explained that the failure to hand scan impacts safety and accountability for employees during the tour of duty and for payroll purposes.

On cross examination, Samples noted that Employee was initially hired in a lead position and was performing the duties of a supervisor when Samples was promoted. Samples believed that Employee may have supervised approximately 6-7 employees. During his term as a supervisor, Employee was not required to hand scan. Samples explained that the process to set up a hand scan is to meet with a HR team member and to be at the machine to capture their hand and fingerprint. The process does not involve any action by an employee's supervisor. A supervisor would become involved if there is an issue with the hand scan. Samples explained that he would ask an employee who noted an issue to meet with HR to ascertain what the issue was. Samples testified that there are some actions required by a supervisor to give permission for the person to be set up in the hand scan system. Samples explained that an employee will still receive a paycheck if they do not use the hand scan but use the hand scan form. He also stated that a paycheck would still be given even if neither are used, but that it takes a lot of "digging." Samples said that when neither is use, it would be incumbent upon him to review ways of entering the facility, to look a video of the employee at work. He viewed videos of Employee in this capacity. Samples could not recall if he had ever denied a timesheet for Employee due to a failure to hand scan or to submit a form.

Samples recalled sending an email on July 15, 2019 asking Employee to come by his office to meet with Christina Courtney to set up a hand scan. To his recollection, that was his first instance of asking Employee to hand scan. In that thread, Samples also sent an email to his manager [12:56pm], Boberg, informing him that Employee had refused to set up his scan, citing that his union representative would be present. Samples clarified that Employee said he would not do anything different from his current duties until the situation gets sorted out. At that time, Samples said that he had not considered it insubordinate, but in retrospect, it was. Samples did not document this refusal with Employee, but only with his manager.

Samples testified that Employee did submit hand scan forms to him later. Samples explained that an email was sent to advise Employee to meet at 10am to set up hand scan. At that time, Employee had not yet set up a profile or scanned in. Samples said that the email indicated to him that Employee was not moving forward. Samples did not believe that he communicated directly to Employee that he had not been moving forward with the process. Samples recalled another email sent advising Employee to meet with Christina Courtney. When asked again whether this email indicated that Employee was not moving forward with the process, Samples noted that to his belief, Employee was not, which was why he asked him to meet with the HR representative. Samples again noted that there was not any information in that email that specified Employee was not moving forward. Samples testified that he sent a time and attendance memorandum to all DYRS maintenance staff on October 11, 20219. When asked how this document evinced Employee's failure to hand scan, Samples explained that the memorandum provided details regarding the requirements and procedures for hand scanning, and that at the time of the memorandum, Employee had not done neither. This memorandum indicated that if an employee was unable to use the hand scan, that a missed punch hand scan form should be sent to management for approval. Employee submitted hand scan forms to Samples, and Samples said Employee was complying with the instructions of the memo. Samples could not recall if Employee was submitting hand scan forms at the time the November 19, 2019 memorandum was sent.

When asked to review hand scan forms, Samples noted that hand scan forms for Employee were submitted for January. Samples identified (Employee exhibits) and acknowledged that there were hand scan forms dated September 2019, some for February 2019, some for the first week in December 2019 and some from October 2019. Samples reviewed a document that Employee submitted to him indicating that Employee had submitted hand scan sheets every pay period since April 2019. Employee's message

also said that he was not able to set up the hand scan due to supervisor requirements. Samples noted that he didn't recall receiving hand scan forms from Employee in September 2019. He noted that if Employee had submitted those forms then he would have been complying with the instructions to submit hand scan forms if he could not hand scan. Samples did not recall whether Employee has submitted hand scan forms for all pay periods since April 2019.

Samples did not recall any meeting where Employee was offered an MSS positions. Samples explained that Agency's Exhibit 8 was a verbal counseling with Employee regarding the hand scan and that Boberg and Employee's union representative were present. Upon review of the document, Samples cited that the document does not specifically indicate Employee's failure to hand scan. When asked whether it was reasonable to say that the verbal counseling was not for a failure to hand scan, Samples said "at this point, that's correct." Samples agreed that this letter was dated for July 25, 2019 but could not recall when it was given to Employee, only that it was given in person. Samples believed that there was a signature page or receipt of acknowledgment but noted that it did not appear to be attached to that document. Samples did not recall a signature from Employee, HR or any other person as a witness. Samples said that he was sure that it was shared with Employee via email, which would have been proof that Employee received the letter. Samples explained that it was given to Employee in person and then followed up by the email. Samples was not aware of any email in the record to show that. Samples testified that verbal warnings that generally it was just manager and employee and a copy is put on file. Samples believed there was a record/proof of Employee's receipt of this document.

Samples testified that to his knowledge he first informed Employee of the hand scan issue in the July 25th correspondence. He noted that there was no mention of hand scan in the July 15th email message. Samples reviewed [agency tab 8] and noted that there was no information that indicated he "failed" to hand scan nor was it in the correspondence dated July 31, 2019 or August 19, 2019. Samples again recalled that the memorandum sent on October 11, 2019, was resent on November 19, 2019, but that there was nothing in those emails that noted Employee's failure to hand scan. Samples did not recall whether the Advanced Notice of Suspension dated December 31, 2019, was received by Employee in January 7, 2020. When asked whether the Advanced Notice was the first time Samples had notified Employee of a failure to hand scan, Samples responded "officially, like on paper? I believe so." Samples also agreed that the July 15th email was referenced in this Advanced Notice. Samples also said that he had not previously advised Employee of the failure to hand scan, but notified his manager, Boberg. Samples iterated that Employee understood he had refused to hand scan, as he was the person who said it. Samples also testified that he had not previously documented this in writing to Employee. Samples agreed that the August 19, 2019 email was referenced in the Advanced Notice as well as the October 11, 2019 correspondence. Upon review of those documents, Samples said that to the best of his recollection that the first time Employee was informed of a failure to hand scan was in the December 31, 2019 Advanced Notice.

Samples explained that as a supervisor, he hates that an issue rises to the imposition of a penalty and that the amount of time for which to discipline would be dependent as to when the conduct occurs or if it is still occurring. Samples testified that he examined the DPM and the Douglas factors in assessing discipline. When asked whether the discipline timeline occurred within 90 days as counted from July 15, 2019 to December 31, 2019 (or January 7, 2020), Samples said it did not. Samples believed that there was another action before the 15-day suspension. Samples maintained that all of Employee's prior failures to hand scan were the reason for the discipline. Samples testified that he believed Employee refused to scan because he had a profile set up and still never used the machine or attempt to use the machine and just submitted the hand scan forms instead. Sample said he believed there was previous communication about the hand scan refusal that may not be in the record. Samples testified that the months/countless times of Employee's refusal to hand scan led him to believe Employee would not hand scan.

On redirect, Samples read from the August 19, 2019 at 1:26pm email which stated that he was inquiring about the missed hand scan punches. There was another email [Tab 6] where a time of 2:10pm was reflected, but that was not the email cited in the Proposed Notice of Suspension. Samples testified that the proposed notice was not the first time he notified Employee of the failure to hand scan. Hand scan forms were not optional and were to be used for hand scan machine issues. Samples noted that his memorandum for time procedures did not indicate that Employee had the option of submitting a hand scan form in lieu of actual hand scanning. During additional cross examination, Samples cited that Employee told him in response to his inquiry as to why he wasn't hand scanning, that his wrist was broken and had been for three weeks. Employee also said he had a soft cast and wasn't trained on how to do the hand scan.

William Boberg ("Boberg") Tr. Pages 149-170

Boberg is the program manager for real estate property division at Agency and has held that position for approximately four (4) years. Boberg explained that the Agency's time clocking system is the biometric hand scanner. Employees are required to scan in upon entering and when leaving the facility then report for their workday. Boberg says that he has been with Agency for about six (6) years and that this policy was in place prior to his arrival. Boberg said that to the best of his knowledge, the majority of the DYRS employees in his division comply with the hand scan. The hand scan is used because it protects the agency, manager, and employee. Boberg explained they are a decentralized facility where management is not always in the exact location where employees are and can't verify if an employee is there or not. The hand scanner is the primary way to clock out. If the hand scan form is not working, then employees fill out a form indicating it was not working or that they had missed it as a secondary clock in/out method. The only time that the form should be used is if the hand scan is not working or if there was a one-off mistake that you forgot to clock in, and managers should be notified. Hand scanning is primarily used because it creates a digital log that cannot be manipulated.

Boberg testified that Employee was the maintenance lead at the Youth Services Center and reported to Justin Samples. Samples reports to Boberg. Boberg stated that Employee was always a maintenance lead. If a position description didn't specify an instruction but was provided later, the employee would be expected to follow that later instruction if it is morally, ethically and legally binding. Boberg recalled Employee receiving verbal counseling and a three-day suspension and a 15-day suspension. Boberg believed the 15-day suspension was for failure to follow instructions, specifically to hand scan. He said that Employee received instructions from him and Samples. Boberg testified that her personally instruction Employee and his union representative when they had a discussion about the rule and that he talked about the requirement to hand scan in and out of his shift. Boberg was not aware of any hand scan by Employee, but said Samples was responsible for monitoring that. Boberg said that when Employee was first assigned to the agency, that there wasn't a requirement for him to hand scan. That was later decided by management to incorporate hand scanning and he was directed that he would need to hand scan moving forward. Boberg explained that an employee not scanning is a fiscal liability and if they're not where they are supposed to be during work hours there are other issues.

On cross examination, Boberg recalled a document that highlighted his meeting with Employee and the union representative. Boberg indicated that his instruction was that if the hand scan machine is not operable or missed it, to submit the hand scan form. There have been instances where the hand scan machine is not operational. If that happens, employees should submit the forms to their supervisors. Typically an employee will notify the supervisor if they're having continuous problems with the hands scan machine and the supervisor would assist and connect with HR. Boberg did not recall if a supervisor had to authorize HR to set up a hand scan, but noted that supervisors will typically notify HR that there is someone who needs to be inputted in the system and stated that "I just don't know if authorized is the

word to use.” Boberg noted that if an employee received an instruction and doesn’t follow it, he would typically have a conversation and document in writing what was said. Boberg was not present during the process between Samples and Employee for their individual discussions and explained he was only present when messages were forwarded to him. Boberg stated that hand scan forms are for missed hand scans and are to be given to immediate supervisors.

On redirect, Boberg testified that he was not aware of any instances where the hand scan was out of operation and that he would’ve expected employees to hand scan. On additional cross examination, Boberg explained that there may be instances where employees must reestablish their handprint in the forms and that is done through HR. The hand scan machine and repairs are also managed by HR.

Christina Courtney (“Courtney”) Tr. Pages 174 – 207

Courtney has been at Agency since 2005 and works as a human resources specialist. Her responsibilities include payroll processing, inputting/correcting time, time clock input and clearing time clock. Courtney believes that there are roughly 600 employees at agency. Courtney is not familiar with the policies and procedures governing clocking in and out, but when a person comes to hand scan, it is a separate procedure. Courtney explained that once a class (refers to new hire training etc.) comes in with new staff and after training, they will be directed to locations where she would then enroll them in the hand scan. Courtney became aware of Employee in July 2019 in reference to hand scan, and believed he was required to hand scan. Her role was to input him into the database and then come to the machine on the first floor of the Youth Services Center to program his right hand to the time clock machine. Courtney explained that she typically does not encounter any problems with programming them in from the start point. However, once they are in the hand scan, sometimes the machine may not work and may have issues even after she clears the machine and wipes it down. Courtney testified that there can be an issue if someone has been programmed and must be reprogrammed, or they may get kicked out, but these issues are not frequent.

There are different reasons why the whole hand scan system may not be operational, again, Courtney explained it is not frequent, but it does happen. Power outages or other issues outside her control can occur. Usually it’s a technical issue that will shut the clock down and that will happen for all employees, not just one person. Courtney did not have any knowledge of a five (5) month period of back to back days where the time clock was not working. Courtney testified that once they are alerted of any issue, a time clock may be out for a maximum of two to three days, in order for IT to get the issue resolved. Courtney noted that the hand scan is important because it determines if a person was a work, what time they come in and what time they leave.

Courtney testified that she was first asked by a program analyst at YSC, Mr. Lewis, to set up a profile for Employee on July 19, 2019 (or around the beginning of July). She was told via email that Employee needed to be inputted in the system. After someone is in the system, they must program the clock and she has to put in a code as the timekeeper. Then the employee must provide the last four of their social security number (or five if someone has similar number) and that will be inputted in the system as well. Then the employee’s hand has to be programmed. This requires an employee to clench the sensors for it to connect and this must be done three times. After the last time, that’s when she makes sure the hand scan was captured. Courtney also testified that she set up Employee’s profile in July, but not his hand scan. She explained that there would be different times/meeting points. If she had to close out payroll or otherwise get to it or if something else had come up, she would communicate that to Employee or his manager and indicate other times to meet. Courtney said they ultimately met on August 2, 2019 to do the hand scan. She stated that she was unsure if she was asked to do this because the hand scan wasn’t taking, or if Employee wasn’t clocking in or otherwise. She noted that the manager asked her to check.

The next time she met with Employee he had on soft cast and she was unable to reprogram him since he had the cast on.

Courtney explained that the monitoring of daily hand scan is the responsibility of the manager. She reviews several hundred employees' times during a day or week, so she does not specifically check for one person etc. If a person is continually having issues with the hands scan, they can reach out. Courtney did not recall Employee coming back with any further issues following their meeting where he had on the soft cast. Courtney could not recall the date of the soft cast meeting, but she communicated it with his manager as well as her own.

On cross examination, Courtney explained that initial programming is something done prior to meeting the person at the hand scan. The initial programming includes the last four of the employee's social security number and their job title. Courtney reiterated that she is the person who establishes the hand scan for employees. If an employee has an issue with hand scanning, there are missed punch sheets that must be filled out and signed by the manager. If there is an issue happening with the time clock, there is a code that comes up on the machine. It will say did you forget to clock in or out, and the person must respond yes or no. The manager can monitor their employees under this system and if they go in, they can view if the person was having issues and it would give the date and time and missed punch. Courtney recalled that Employee had a cast on and did not recall him taking it off. Courtney explained that even if that did happen, she wouldn't have attempted to scan him. Courtney said Employee was put into the system in July 2019. Courtney recalled emails between her and Employee and attested that they were in the process of moving forward for him to hand scan in the system. Courtney noted that she and Employee planned different times to set up the hand scan and it didn't happen. Courtney was not aware that Employee was previously a supervisor and did not have to hand scan at that time. Courtney reiterated that when an employee cannot hand scan, they are supposed to fill out a missed punch sheet that must be given to their supervisor. If it's something continuous and not just a day here or there, then the manager will reach out to someone in HR and ask to be rescanned. If it's at the YSC, then then she would be the person to rescan. Courtney did not know whether an employee would be paid if their missed punch sheet was not signed by their manager. Courtney testified that there can be problems with hand scan, but if its continuous it requires communication with IT.

Mack McGhee ("McGhee) Tr. Pages 209 -237

McGhee has been at Agency for five years and works as the chief of secure programs. He oversees Youth Service Centers and New Beginnings Youth Development center. He occasionally serves as a deciding official in Agency disciplinary matters. Generally, when there is a proposed discipline, he reviews that and any response from the employee and then renders a decision. McGhee became aware of a disciplinary matter for Employee sometime in 2018 or 2019. He was tasked as the deciding official for Agency's decision to suspend Employee and was responsible for the Final Agency Decision. Based on his findings, he upheld Agency's decision to suspend Employee for 15 days. He reviewed Employee's disciplinary history, DPM Chapter 16 and the Table of Consequences [Illustrative Actions]. He also reviewed and considered the Douglas factors. He found that those were appropriately followed and that this was a second or third occurrence of the same infraction by Employee. He reviewed Employee's response but did not recall anything in particular about that response. McGhee says that when he gets a response from employees, he fact checks it with human resources. He thought Employee's response was about timeliness of service. He reviews approximately five or six disciplinary matters a year and there are times where he disagrees with Agency's proposed actions, but this was not one of them.

On cross examination, McGhee testified that he based his decision on the review of the documents. He reviewed pages of the final decision wherein it was noted that in Employee's response that

Employee was disagreeing with the Douglas factors and that there was no documentation from the supervisor to the Employee noting that the Employee failed to follow through with hand scan procedures as evidenced by emails between Employee and his supervisor and also Employee's emails with Christina Courtney. McGhee believed that he factored in Employee's response in terms of Douglas factors.

Employee's Case in Chief

Denise Harvest ("Harvest") – Tr. Pages 238-251

Harvest works as a maintenance mechanic at Agency's YSC. She has worked for the District government for over 15 years and for 14 years at Agency. Harvest has known Employee since he began at Agency and he was her supervisor. Harvest testified that she is required to hand scan. She recalled having to meet with someone at the hand scan machine, give her last four of her social security number and then had to place her hand on the scan and that she had to do it a couple of times and then it was set up. Harvest explained that sometimes employees are unable to hand scan and that it's out of their control. Harvest indicated that she was using the missed punch sheet and that the hand scan has not been working for approximately 6 months consecutively for her. Harvest testified that Christina Courtney helped her and that it would work and then go back out again. Harvest said the missed punch sheet is required and that she then provides it to her supervisor, Justin Samples. Harvest said she used to hand them to Samples, but he has since asked her to scan them into him each day. Harvest said she witnessed Employee attempting to hand scan, but not being able to. She also remembered him submitting hand scan forms but did not recall when that was. She said Employee submitted them through the scanner. Harvest said her office is right next to the fax machine. Harvest said she was not the only person having issues with the hand scan on that day.

On cross examination, Harvest testified that the hand scan is not near her desk. It is on the first floor of the building. Harvest does not commute to work with Employee and does not walk into the building with him. She typically arrives before Employee. Harvest said that she met with Ms. Courtney to address issues with the hand scan. She said that when the hand scan doesn't work, there is a missed punch sheet that has to be completed and that they give it to their supervisor. She tried to hand scan first, and when that didn't work, she reached out to Ms. Courtney. On redirect, Harvest clarified that she witnessed Employee submitting scan sheets to his supervisor, not that she had seen him try to use the hand scan machine. She witnessed Employee scanning missed punch sheets to his supervisor. Harvest said the hand scan is a problem for a lot of employees.

Tanishia Barnes ("Barnes") – Tr. Pages 251 -279

Barnes is a cook at New Beginnings for Agency and has worked for Agency for five years. She has known Employee for approximately three years. Barnes testified that she was the former president of Local 2092, and that is how she first came to know Employee and was his union representative. Barnes is familiar with the hand scanning procedure and said that when it was first set up, she had to meet someone at the machine, provide the last digits of her social and then they scanned her hand. Barnes has had issues with the hand scan and noted that the issues were often. Barnes said that this occurs for other employees as well. Barnes said that most of the time the issue for her is that there is something wrong with the machine itself. Sometimes she will get incorrect messages regarding clocking in or out, and that confirmations would show missed punches when she had scanned in. She said another person would have to come and help her fix the hand scan issue. Barnes explained that if there is an issue, a sheet must be filled out and provided to their supervisor. Barnes personally hands it to her supervisor.

Barnes did not recall representing Employee for a missed hand scan issue. She has not witnessed Employee submitting hand scan forms. Barnes recalled attending a meeting with Employee sometime in the summer of 2019. Barnes reviewed a document [agency 8] and said that there was not anything that said Employee had failed to hand scan. Barnes did not recall this document or any meeting about a hand scan situation. Barnes said that if she had attended a meeting about a verbal counseling that she would have gone with Employee as a union representative. Barnes had no knowledge of Employee attending meetings regarding workplace issues that she did not attend. Barnes testified that she did not attend any meetings about a disciplinary matter for a missed hand scan.

On cross examination, Barnes said she was not Employee's coworker and was not able to observe him on a day to day basis. As his union representative, she would only be called if there were an issue. She could not be sure if there were other meetings besides the one she mentioned attending. Barnes said that she would be called by Employee to assist with meetings, or possibly may receive an email from his supervisor if there would be a disciplinary action and she could be present. Barnes said it's possible that Agency told Employee to hand scan and she may not know. Barnes iterated that when she has issues with hand scanning, that her supervisors normally took the lead to address the hand scan malfunction, because she is not always aware. Barnes noted that if she noticed the hand scan didn't work, she would notify her supervisor because she would have to do the hand scan form. On redirect, Barnes testified that an employee is not able to control issues with the hand scan. Barnes also said that she had no reason to believe that Employee did not try to resolve the hand scan issue with his supervisor. On additional cross Barnes testified that employees are obligated to fulfill their duties and that if someone wasn't hand scanning, they would be reminded to then hand scan.

Employee – Tr. Pages 280 – 333

Employee began working at Agency in 2018 as a Supervisory Facility Operations Specialist, but explained that his "SF 08" Form/original letter indicated him as a "mechanic lead." He worked there for approximately two years and completed several different technical trainings and "MS" managerial training. Employee said while there, his entire maintenance department received an award and that he was Employee of the Month both in February and June 2019. Employee said he received a "3" on his first performance evaluation and a "2" on his second, which occurred about a month after he was given information about a change in duties/terms of his job. Employee testified that he worked hard and enjoyed being a team player, partnering with employees and supervisors. Employee explained that prior to July 2019, he and his supervisor were partners in that he was the Supervisory Operation Specialist for "[YSC]" and [Samples] was the Supervisory Specialist for New Beginnings. Employee noted that Samples was his time approval manager for his entire tenure at Agency.

Employee testified that he was not required to hand scan until he received the notice to begin hand scanning. He received documentation from Samples to meet with Ms. Courtney. Employee believed he was first informed on July 19, 2019 that he was required to hand scan. Employee contacted his union representative in April 2019 for a separate concern. Following the April meeting, Tanishia Barnes was involved and attended meetings that were held with Samples and Boberg. Employee iterated that the first time he had seen an email regarding a meeting with Boberg and verbal counseling[Agency Tab 8] was during the hearing in this matter. He recalled having a meeting with Boberg and noted that it was the day he was offered an MS position. Barnes was at the meeting, and responsibilities and duties were discussed. But the document [Agency 8] was never presented to him. Employee maintained that if there was a verbal counseling his union representative would have been there. Employee asserted that he had never received a verbal counseling. Employee said that earlier in the year, prior to the December/January notice, that Samples asked him why he wasn't hand scanning. Employee said the first notice he received

of a failure to hand scan was in January 2020, and that the notice was dated December 31, 2019 and it was a proposed action for 15-day suspension.

Employee testified that he began submitting hand scan failure/missed punch sheet from after his meeting in April 2019 because he felt that Agency was trying to trap him and make him lose his job. He explained that in the April meeting that no one mentioned he was required to hand scan, and that the document actually said that he was not required to hand scan as a supervisor. Employee started completing the hand scan forms because he felt there was hostility from Samples and Boberg. Employee asserted he submitted hand scan forms to Samples for every pay period from April 2019 up to the point where he was disciplined. Employee testified that he received an email from Samples telling him to meet with Christina Courtney at 10am to assist hm with “completing the hand scan set up.” Employee said it was his understanding that this meant he was moving forward with the process. Employee explained that he was unable to set up his hand scan through Ms. Courtney. Employee said that after a second attempt to set it up, Courtney told him he would need to check with his supervisor about it. Employee said he spoke to Samples about it and that Samples gave no response. He said that Samples ignored him from the July incident every time they spoke and that they otherwise communicated via email. Employee sent an email about the hand scan and Samples was non-responsive. Employee continued to submit hand scan forms and did so every pay period and figured that everything was validated.

On cross-examination, when asked if he was aware of hand scanning, Employee indicated that he was aware of hand scanning for the staff that he supervised, but when advised it was a yes or no question, Employee responded no. Employee said that he was made aware of hand scanning requirements in July 2019. To his knowledge, hand scanning was a measure of recording time. Employee also noted his awareness that there was no alternative to hand scanning and that the hand scan forms were not to be used in lieu of hand scans. Employee testified that he read a memorandum to all employees about missed punch forms and how they cannot be used in lieu of regular clock-in and clock-out. Employee noted an email for a meeting with Samples in July 15, 2019 and indicated that he did not begin hand scanning after that date because he was not set up with Ms. Courtney. Employee also recognized an email from Boberg which read that he would be required to set up his hand scan profile by no later than July 19, 2019 at 3pm and that he was to begin hand scanning at the beginning of his shift on July 22, 2019. Employee explained that he did not set up profiles and that he only responded to the time that Ms. Courtney advised him to meet her. His profile was not set up by July 19, 2019 and he did not begin hand scanning on July 22, 2019. Employee did not believe that the email was representative of him having received a verbal reprimand. Employee testified that he did not receive a verbal counseling memorandum, but attested that it was addressed to hm.

In another email chain from August 19, 2019 Samples inquired as to why Employee could not hand scan and Employee noted that he responded that he had a soft cast. He was asked to provide medical documentation and he did so. The medical documentation cleared him for full duty. Employee said he was never removed from full duty. Employee did not wear a cast at any other time or have any other physical ailment that precluded him from hand scanning. When he had the cast on, he was not required to hand scan. Employee testified that he did not received the advanced notice dated December 31, 2019, until January 6, 2020. He had not hand scanned by that date and did not have a profile set up.

On redirect, Employee testified that his supervisor denied his time in September, October and the beginning of the month of November (2019). When Samples denied his time, Employee submitted proof via camera and hand scan forms to HR who returned his pay retroactively following validation. Employee said that HR overturned his supervisor’s denial of pay. Employee said that hand scan forms were not to be used in lieu of hand scans, but there was no other way if an employee couldn’t hand scan. Employee explained that he could not abide by the deadlines set forth in the communication from Boberg because he

could not set up his own profile and he could not hand scan until he had one set up. When he had the cast, he was not able to extend his hand all the way to properly set up the scan, and Courtney told him she would get with Samples to set up another time.

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee was employed by Agency as Mechanic Lead. An Advanced Written Notice of Proposed Suspension was dated December 31, 2019. In a Final Written Notice dated February 18, 2020, Employee was notified of Agency's decision to suspend him without pay for fifteen (15) days for violation of DPM §1607.2 (d)(2) – Failure/Refusal to Follow Instructions: Deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions.

ANALYSIS

90 Day Rule – DPM §1602.3 (a)

At issue here is whether Agency, in administering the instant adverse action, adhered to applicable provisions of law, specifically DPM § 1602.3(a). Here, Employee avers that Agency violated the 90-Day rule because they did not issue the Advanced Written Notice of Proposed Action until December 31, 2019. Employee avers that Agency failed to abide by the “90-Day Rule” set forth in DPM § 1602.3 (a). Agency asserts that it did not violate the 90-Day Rule and that its action was timely in accordance with this rule.

District Personnel Manual §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.”¹ 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.”² 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 decision³ wherein the Court found that “the deadline was intended to bring certainty to employees of an adverse action that may otherwise linger indefinitely.”⁴ The Board has also held that this provision of the DPM 1602.3(a) like its counterpart in found in D.C. Code §5-1031, are mandatory in nature.⁵

In the instant matter Agency asserts, that it did not know that Employee was never going to comply with its instructions to hand-scan until November 2019. Employee asserts that Agency knew or should have known of the conduct based on emails that started on July 15, 2019, which were relied upon

¹ *Keith Bickford v Department of General Service*, OEA Matter No.1601-0053-17 *Opinion and Order on Petition for Review* (January 14, 2020).

² *Id.*

³ *Id.* citing to *District of Columbia Fire and Medical Services Department v D.C. Office of Employee Appeals*, 986 A.2d 419,425 (2010).

⁴ *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.”

⁵ *Id.* at Pages 9-10.

in the Advance Written Notice. In the Advance Written Notice of Proposed Suspension dated December 31, 2019, Employee was charged with the “Failure/Refusal to follow instructions: Deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions.” In that notice, the specifications included the following:

“On July 15, 2019 at 11:23 am, I instructed you to report to my office by 12:30pm that day for Christiana Courtney, Human Resource Specialist to set up your hand scan access at Youth Services Center (“YSC”). You refused to set up your hand scan access, requesting that your union representative be present and you refused to hand scan until a separate unrelated personnel issue had been resolved. On July 31, 2019 at 11:49am, I again instructed you to meet with Christina Courtney to assist you with completing the set-up of your hand scan access and demonstrate how to long log into the system.”

The Advanced Notice specification also included a citation regarding emails sent on August 19, 2019, October 11, 2019 and November 19, 2019.

Agency argues that its action was timely because it “allowed Employee a reasonable opportunity to comply with the hand-scan instructions, and then, promptly issued the Notice within 90 days of it becoming apparent that Employee was never going to comply.”⁶ Agency asserts that pursuant DPM § 1602.3(a), the 90-Day rule is “triggered when the agency or personnel authority knew or should have known of the performance of conduct supporting the action.”⁷ Agency notes that the courts have held that while the “knowledge of the conduct does not have to be a high degree of certainty to trigger the counting, it nonetheless should be a level of certainty above prediction.”⁸ Agency argues that it “could not have known that Employee would never comply with its instructions to hand-scan at the onset of giving Employee instructions.”⁹ Agency avers that Employee “did not tell DYRS that he would never comply, but instead refused to comply gradually.” Agency maintains that it was not until “Employee continued his noncompliance in the face of instructional reminders and progressive discipline, that DYRS knew that Employee’s failure to hand scan was a deliberate refusal to follow instructions warranting adverse action.”¹⁰ Further, Agency argues that it sent “instructional reminders” to Employee until November 2019 and that “the 90-Day rule was triggered no earlier than that point.”¹¹ Additionally, Agency asserts that it did not violate the purpose of the 90-Day rule in that there was no uncertainty regarding potential adverse action for Employee because his “non-compliance was ongoing at the time of the Notice.” Further, Agency argues that “if Employee was concerned about potential adverse action to the degree that it hung over his head, he could have simply begun to hand-scan or ask for help in doing so.” Agency also relies *Quamina v DYRS*,¹² wherein it asserts that an action was upheld despite the timeline being much longer than the instant matter. Agency avers that in that action was upheld. Agency avers that the employee in *Quamina* had consistently failed to hand scan from a time frame of 2015-2017. As a result, Agency asserts it did not violate the “mechanics or purpose of the 90-Day Rule.”

Employee contends that Agency failed to abide by this regulation and argues that the December 31, 2019 Advance Written Notice of Proposed Suspension was beyond the 90-day deadline required by this section of the DPM. Specifically, Employee asserts that Agency based its charged on an “allegation made 7/15/19 by Employee’s supervisor who claims that Employee blatantly refused to follow the

⁶ Agency’s Brief at Page 6 (March 10, 2021).

⁷ *Id.*

⁸ *Id. citing* to D.C. Fire & Emergency Med Servs Dept v DC Office of Emp Appeals, 986 A2d 419, 424 (D.C.201) and Graves v Office of Emp. Appeals, 805 A.2d 245, 248 (D.C. 2002).

⁹ *Id.*

¹⁰ *Id.* at Page 7.

¹¹ *Id.* at Page 8.

¹² OEA Matter No. 1601-0035-18, Initial Decision at Page 12 (May 14, 2019).

instruction to engage in the process necessary to hand scan at the beginning and end of work shifts.”¹³ Employee argues that management exceeded the 90-Day rule and therefore, the adverse action was untimely. Employee also notes that on July 18, 2019, Boberg sent an email with the subject of “Follow up to meeting on 7.16.19 (Duties Discussed)” and which noted that Employee should set up hand scan profile by July 19, 2019 and start hand scanning by July 22, 2019.¹⁴

Upon review of the record and consideration of the testimony in the Evidentiary Hearing in this matter, the undersigned finds that Agency violated the 90-Day Rule in this matter. Based on the specification in the Advance Written Notice and the evidence in the record, it is apparent to the undersigned that Agency knew or should have known of the conduct for which it was charging Employee by at least July 31, 2019. Agency also referenced that Employee refused instructions on July 15, 2019; however, for the reasons that will be explained below, the undersigned finds that July 31, 2019 is the anchor date that exhibits when Agency knew or should have known of the conduct for which it charged Employee.¹⁵ Agency avers that it “could not have known that Employee would never comply with its instructions at the onset of giving Employee the instructions.”¹⁶ Agency also asserts that its subsequent notices were “instructional reminders” and these instructional reminders continued until November 2019, and that the 90 Day Rule was not triggered until then. Further, Agency likens this matter to *Graves v. Office of Employee Appeals*¹⁷ wherein an employee was charged for AWOL for ten consecutive workdays or more. In *Graves*, an employee was assessed this charge before ten days had transpired. Agency cites that the “timeliness of the termination hinged on whether the counting was triggered on employee’s first day of absence or tenth day.” Agency notes that “the court ruled that the counting was not triggered until the tenth absence because agency could not have known how long the employee was going to be absent on the onset of the absence.” Agency avers that similarly; it could not have known that Employee would never comply.

The undersigned disagrees with Agency’s assertion. The *Graves* matter involved a charge wherein a specified amount of time is established for that specific charge for AWOL which requires an absence of ten (10) days for that action and as such, requires the 10th day to toll before that charge could be assessed. The undersigned finds this comparison to be incongruous with the instant matter as related to when Agency knew or should have known of Employee’s failure to follow instructions. Here, Agency provided instructions and a specific deadline in July of 2019 for Employee to set up a hand scan profile and to beginning hand scanning. Employee did not follow that deadline, and as a result the undersigned finds that Agency knew or should have known that Employee did not follow instructions at the time it sent a subsequent email on July 31, 2019 as noted in its Advance Written Notice.

Following Employee’s failure to abide by specific instructions to set up a hand scan profile by July 19, 2019 and to begin hand scanning on July 22, 2019, Agency sent an email to Employee on July 31, 2019. The undersigned finds that this follow up email sent July 31, 2019, clearly evinces that it knew or should have known that Employee was not following instructions, particularly given the specific deadline it set for Employee to comply with its instructions. Specifically, there was a meeting held on July 16, 2019, which was followed up in an email sent by William Boberg on July 18, 2019, noting that Employee was explicitly instructed to set up his hand scan profile by July 19, 2019, and that he was to begin hand scanning by July 22, 2019.¹⁸ The email sent by Employee’s supervisor, Justin Samples, on

¹³ Employee’s Brief (March 25, 2021).

¹⁴ *Id.*

¹⁵ *See*. Agency’s Brief at Page 2. Agency cites in its brief that “[o]n July 15, 2019, Mr. Samples instructed Employee via email to meet with DYRS Human Resource Specialist Christina Courtney (“Ms. Courtney”) to set up a hand scan profile. Employee *refused* this instruction.” (Emphasis Added). (March 10, 2021).

¹⁶ Agency Brief at Page 7 (March 10, 2021).

¹⁷ 805 A.2d 245, 248 (D.C. 2002).

¹⁸ Agency’s Closing Argument at Page 2 (June 14, 2021).

July 31, 2019, was sent because Employee had not complied with those deadlines. This is supported by the testimony provided by Samples and Boberg during the Evidentiary Hearing in this matter and is also exhibited in emails submitted as documentary evidence in this matter. Additionally, Employee's supervisor, Jason Samples, testified that Employee received verbal counseling in this matter.¹⁹ Samples testified that the (written) verbal counseling he authored that was dated July 25, 2019, was to inform Employee that he needed to hand scan and that none of it had occurred by the previously specified timelines.²⁰ Further, Agency consistently referred to Employee's failure to abide by those deadlines as a refusal to follow instructions. This is inclusive of the email correspondence in the record, the testimony in the evidentiary hearing, and in the Advanced and Final Notices for the adverse action. The Court of Appeals has held that while "knowledge of the conduct does not have to be a high degree of certainty to trigger the counting, it nonetheless should be a level of certainty above prediction."²¹ Because Agency provided a specified deadline that Employee did not abide by, the undersigned finds that Agency certainly should have known, above a level of prediction, that Employee was not complying. Further, the undersigned would note that based on the aforementioned timelines and emails that Agency had *actual knowledge* that Employee had not complied with its instructions on July 31, 2019.

The undersigned finds that Agency's reliance on these July timelines in its action against Employee and its own notation regarding refusals, but to then suggest that it was providing a "reasonable opportunity to comply" such that it could not have known until November 2019 that Employee would never comply with instructions, is disingenuous and is unsupported in the record. Further, the undersigned notes that the October 2019 and November 2019 emails were memorandums sent to all staff members regarding time reporting.²² Based on the record, the undersigned finds that Agency knew or should have known that Employee was refusing to following instructions by the time it sent its July 31, 2019 correspondence, particularly since Employee had failed to follow a specific instructional deadline set forth following a meeting held on July 16, 2019 and memorialized in written correspondence dated July 18, 2019. Agency's Advanced Written Notice was dated December 31, 2019. Consequently, in accordance with the 90-Day rule, I find that this was untimely as an Advanced Notice based on the July 31, 2019 date would have required the commencement of the adverse action and the Advance Written notice be issued by December 10, 2019 (90 business days). Wherefore, I find that Agency's notice of December 31, 2019 to be untimely and not in accordance with DPM 1602.3(a).

OEA has held that the 90-Day rule is mandatory in nature.²³ Wherefore, I find that Agency failed to abide by this regulatory provision. I further find that Agency failed to follow all appropriate laws, rules and regulations in its administration of the instant adverse action against Employee.

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. 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 find that Employee's 15-day suspension should be reversed.

¹⁹ It should be noted that Employee has disputed this verbal counseling and asserted he did not receive the July 25, 2019 notice.

²⁰ Evidentiary Hearing Transcript at Page 27 (April 7, 2021).

²¹ *D.C. Fire and Emergency Medical Services Department v DC Office of Employee Appeals*, 986 A.2d 419, 421 (DC 2010).

²² Evidentiary Hearing Transcript Page 39 -40 (April 7, 2021)

²³ *Keith Bickford v Department of General Service*, OEA Matter No.1601-0053-17 *Opinion and Order on Petition for Review* (January 14, 2020).

ORDER

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

1. Agency's action of suspending Employee from service for fifteen (15) days is **REVERSED**; and
2. Agency shall reimburse Employee all back-pay and benefits lost as a result of the suspension; and
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

Michelle R. Harris, Esq.
Administrative Judge