Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:

EMPLOYEE[1]

v.

METROPOLITAN POLICE DEPARTMENT,
Agency

OEA Matter No.: 1601-0049-15R21

Date of Issuance: August 26, 2021

OPINION AND ORDER
ON
REMAND

This matter was previously before the Board. Employee worked as a Civilian Claim Specialist with the Metropolitan Police Department's ("Agency") Medical Services Branch ("MSB"). Employee was charged with "any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations: misfeasance; dishonesty; unauthorized use of government resources; using or authorizing the use of government resources; using or authorizing the use of government resources for other than official business." Employee was also charged with violating Chapter 18, Section 1800.3 of the D.C. Personnel Regulations ("DCPR"), which prohibits District employees from engaging in outside employment or private business that conflicts or would appear to conflict with the fair, impartial, and objective

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

performance of officially assigned duties and responsibilities.[2] On February 5, 2015, Agency issued its Notice of Final Decision. Employee's termination was effective on February 6, 2015.

After conducting an evidentiary hearing, the AJ issued an Initial Decision on November 30, 2016. First, he addressed Employee's contention that Agency violated D.C. Code § 5-1031, commonly referred to as the "90-day rule." This rule prohibits an adverse action commencing against members of the Metropolitan Police Department more than ninety days, not including Saturdays, Sundays, or legal holidays, after the date Agency knew, or should have known, of the act or occurrence allegedly constituting cause. However, the AJ noted that § 5-1031(b) contains a tolling exception to the rule if the act or occurrence is the subject of a criminal investigation by the USAO or the Metropolitan Police Department. Although the United States Attorney's Office ("USAO") resolved its investigation on June 2, 2014 when it issued a Letter of Declination, the AJ stated that Agency's Internal Affairs Division ("IAD") did not complete its own internal investigation until September 25, 2014. Since Agency commenced its adverse action against Employee less than ninety days after IAD concluded its investigation, the AJ held that the 90-day rule was not violated.[3]

Next, the AJ found that there was substantial evidence in the record that Employee accessed his private law client's medical records using Agency's resources without authorization. In addition, he determined that Employee's use of Agency's resources for his personal law practice constituted misfeasance. He also noted that Agency provided sufficient evidence to support a charge of dishonesty because Employee lied about accessing Ms.

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[2] *Agency's Answer to Petition for Appeal*, Tab 2 (April 9, 2015). The charges levied against Employee included: Charge No. 1, Specifications Nos. 1, 2, and 3; and Charge No. 2, Specification No.1.
[3] *Initial Decision* (November 30, 2016).

Josephine Jackson's medical records.[4] With respect to the allegation that Employee utilized Agency's place of business, telephone, and fax number to advertise his private law practice on two websites, the AJ concluded that Agency failed to present any evidence to substantiate its claims. Notwithstanding this finding, the AJ concluded that Employee's misconduct constituted an on-duty or employment related act or omission that interfered with the efficiency and integrity of government operations.[5]

Regarding the penalty, the AJ identified two instances, including the one forming the basis of this appeal, in which Agency sustained charges of misfeasance against Employee. While Employee argued that Agency should not have been afforded an opportunity to present evidence of a third offense of misfeasance because the record was closed at the conclusion of the hearing, the AJ cited to OEA Rule 630.1, which provides that an AJ may reopen the record to receive further evidence or arguments at any time prior to the issuance of the Initial Decision. Thus, Agency's November 4, 2016 Response to the Remand Order was deemed permissible as part of the record. Accordingly, the AJ held that Agency provided evidence of three charges of misfeasance which warranted termination under the Table of Appropriate Penalties ("TAP").[6]

Finally, the AJ dismissed Employee's contention that Agency failed to consider the *Douglas* factors when selecting the appropriate penalty.[7] However, after reviewing the charging

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[4] In July 2013, Employee's union asked him to represent another union member and MPD civilian employee, Ms. Josephine Jackson, in a proceeding before the District of Columbia Office of Risk Management (ORM). Ms. Jackson was a private client of Employee.

[5] *Id.*

[6] *Id.*

[7] *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). Although not an exhaustive list, the factors that an agency may consider are as follows:

1. The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;

documents, including the Notice of Final Decision, the AJ surmised that Agency adequately considered Employee's "behavior in relation to his job position and duties, veracity, timeliness, and signed agreement with Agency's Acceptable Use Agreement…." Therefore, he found that Agency carefully considered the *Douglas* factors, although it did not actually identify the factors as such. Moreover, the AJ stated that OEA has held that the failure to discuss the *Douglas* factors did not amount to a reversible error. Thus, he concluded that Agency met its burden of proof with respect to the charges levied against Employee and held that Agency did not abuse its managerial discretion in selecting the appropriate penalty. Accordingly, Employee's termination was upheld.

Employee subsequently filed a Petition for Review with the OEA Board. On November 17, 2017, the Board denied Employee's appeal.[8] He then appealed to the Superior Court of the District of Columbia. On October 17, 2018, Superior Court upheld the Board's findings and

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2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3. The employee's past disciplinary record;
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7. Consistency of the penalty with any applicable agency table of penalties; The notoriety of the offense or its impact upon the reputation of the agency;
8. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
9. Potential for the employee's rehabilitation;
10. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
11. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[8] *Opinion and Order on Petition for Review* (November 17, 2017).

denied Employee's petition for review.[9] Thereafter, Employee filed an appeal with the District of Columbia Court of Appeals. In its October 29, 2020 decision, the Court ruled that the substantive charges against Employee were based on substantial evidence. However, it disagreed with the AJ's, the Board's, and Superior Court's determinations regarding when the ninety-day period was tolled under D.C Code § 5-1031(b). Therefore, the matter was remanded to the AJ for further proceedings.[10]

The AJ held a second evidentiary hearing on February 2, 2021, during which the parties addressed the issues as directed by the Court of Appeals. On March 18, 2021, the AJ issued an Initial Decision on Remand. First, the AJ confirmed that for purposes of D.C Code § 5-1031(b), Agency was deemed to have notice of the act or occurrence allegedly constituting cause on September 12, 2013, when it generated Incident Summary ("IS") number 13-002588. Thus, the ninety-day time period began to run on this date. The AJ noted, however, that the assigned investigator, Paulet Woodson ("Woodson"), did not actually begin to conduct her investigation until September 16, 2013, when she assessed that Employee's acts appeared to be criminal in nature. As a result, the AJ concluded that the ninety-day period began to be tolled on September 16, 2013.[11]

Next, the AJ concluded that the 90-day clock was tolled between September 16, 2013 through June 2, 2014 because Woodson referred the matter to the USAO, although it declined to prosecute Employee by a Letter of Declination dated June 2, 2014. In accordance with the USAO's instructions in its notice, Agency was directed to proceed with any administrative action it deemed appropriate. Accordingly, the AJ concluded that criminal charges against Employee were precluded after this date because neither Agency, the Office of the Corporation Counsel,

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[9] *Employee v. Metropolitan Police Department*, Case No. 2017 CA 007843 (D.C. Super. Ct. October 17, 2018).
[10] *Employee v. Metropolitan Police Dep't. et. al*., Case No. 18-CV1238 (D.C. Ct. of Appeals October 17, 2018).
[11] *Initial Decision on Remand* (March 18, 2021).

nor the Office of Police Complaints criminally investigated the matter. Lastly, he determined that Agency's administrative investigation concluded on September 25, 2014, when IAD issued its investigative report.[12]

In calculating whether Agency acted in a timely manner under D.C Code § 5-1031(b), the AJ provided that eighty-eight business days elapsed between June 2, 2014, when the USAO declined to prosecute, and October 6, 2014, when Employee received his advance notice of termination. After adding the two business days that lapsed prior to Woodson's initiation of her investigation, the AJ held that a total of ninety days passed between when Agency became aware of the acts allegedly constituting cause and the date on which Agency issued its advance notice of removal. Therefore, he opined that Agency did not violate the 90-day rule. The AJ also held that the substantive charges against Employee should be sustained. Consequently, Agency's termination action was, again, upheld.[13]

Employee disagreed and filed a second Petition for Review with the OEA Board on April 22, 2021. He argues that the Initial Decision should be reversed because the termination action was commenced on the ninety-first day after Agency received notice of Employee's infraction. Thus, Employee submits that Agency's notice was untimely. He also states that contrary to the AJ's findings, Woodson did not testify that she commenced her investigation on September 16, 2013, and that the evidence supports a finding that Woodson could not remember the exact date when her criminal investigation began. Since Employee believes that Agency committed a reversible procedural error, he asks that the Board grant his Petition for Review.[14]

In response, Agency contends that the Initial Decision on Remand is supported by substantial evidence. It explains that the AJ reasonably determined that Woodson initiated a

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[12] *Id.*
[13] *Id.*
[14] *Petition for Review* (April 22, 2021).

criminal investigation into Employee's conduct on September 16, 2013. Agency believes that Employee's argument that disciplinary action was commenced on the ninety-first, not the ninetieth business day, is misguided because he erroneously excludes September 16, 2013, the date the criminal investigation started, from the tolling period. In the alternative, Agency suggests that even if the AJ erroneously concluded that the ninety-day clock began to run on September 16, 2013, any error should be construed as *de minimus*. As a second alternative, it surmises that if the Board finds that the criminal investigation into Employee's misconduct did not begin on September 16, 2013, and the Board finds that the error was not *de mimimus*, its termination action should nonetheless be upheld related to Employee's untruthful statements in September of 2014. Accordingly, Agency request that Employee's Petition for Review be denied.[15]

Discussion

In its October 29, 2020 decision, the Court of Appeals held that it could not sustain the AJ's ruling because he treated the ninety-day period provided in § 5-1031 as tolled until IAD issued its investigative report in September of 2014. Under § 5-1031(b), however, tolling continues only if the matter is the subject of a criminal investigation. The Court noted that any potential criminal investigation ended when the USAO declined prosecution on June 2, 2014. D.C. Official Code § 5-1031 provides the following regarding the 90-day rule:

> (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 or the Metropolitan Police 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 or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.

[15] *Agency Answer to Petition for Review* (June 2, 2021).

> (b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department, the Office of the United States Attorney for the District of Columbia, or the Office of Corporation Counsel, or an investigation by the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) of this section shall be tolled until the conclusion of the investigation.

It is undisputed that the ninety-day clock began to run in this case on September 12, 2013, when IS number 13-002588 was generated. It is also undisputed that eighty-eight business days passed between June 2, 2014, when the USAO declined to prosecute, and October 6, 2014, when the advance notice of termination was issued.

In determining whether the matter was under criminal investigation during the remaining time, the AJ relied on the testimony of Woodson, who served as the investigator assigned to Employee's case. Woodson testified that it was her customary practice to immediately review files upon assignment.[16] According to Woodson, upon receiving and reviewing Employee's file, she immediately determined that his alleged misconduct had criminal overtones.[17] Based on the testimonial evidence, the AJ determined that Woodson's criminal investigation began no later than September 16, 2013. While Employee argues that Woodson could not recall whether she commenced her investigation on September 16th or September 17th, the OEA Administrative Judge was the fact finder in this matter and was in the best position to observe the demeanor of the witness in determining the veracity of their testimony. As this Board has consistently ruled, we will not second guess the AJ's credibility determinations.[18] The AJ found Woodson's

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[16] February 2, 2012 Evidentiary Hearing Transcript, p. 14and 45.
[17] *Id.*
[18] *Ernest H. Taylor v D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 2007); *Larry L. Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Paul D. Holmes v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009); *Derrick Jones v. Department of Transportation*, OEA Matter No. 1601-0192-09, *Opinion and*

testimony that she most likely began to conduct a criminal investigation upon receiving Employee's file on September 16, 2013 to be credible. Therefore, we find no compelling basis for overturning the AJ's finding as to when Woodson initiated her criminal investigation into Employee's conduct.

Next, Woodson testified that she went to the Police and Fire Clinic on September 18, 2013 to retrieve Employee's time and attendance records.[19] Between September 18, 2013 and October 1, 2013, Woodson stated that she continued her criminal investigation by gathering additional information and contacting Assistant United States Attorney, Jean Sexton, to request her input.[20] On October 1, 2013, Woodson referred the matter to the USAO for criminal review. Accordingly, this Board finds that a criminal investigation was being conducted from September 16, 2014 through October 1, 2013. Likewise, the matter was under criminal review by the USAO from October 1, 2013 through June 2, 2014, when the office declined to prosecute.[21] Therefore, the ninety-day time period under D.C. Code § 5-1031(b) was tolled during this time.

Based on the foregoing, we conclude that the AJ correctly determined that Agency did not violate the 90-day rule when it issued its October 6, 2014 Advance Notice of Proposed Removal. For purposes of D.C. Code § 5-1031(b), Agency became of aware of Employee's potential misconduct on September 12, 2013 when it generated an IS number. The record supports a finding that Woodson began her criminal investigation on September 16, 2013. Therefore, September 12th and September 13th of 2013 were not tolled because Agency was not

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Order on Petition for Review (March 5, 2012); *C. Dion Henderson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 1601-0050-09, *Opinion and Order on Petition for Review* (July 16, 2012); *Ronald Wilkins v. Metropolitan Police Department*, OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013); and *Theodore Powell v. D.C. Public Schools*, OEA Matter Nos. 1601-0281-10 and 1601-0029-11, *Opinion and Order on Petition for Review* (June 9, 2015).

[19] *Id*. at pp. 13-14; 62.

[20] *Id* at pp. 61-62.

[21] *See Employee* , Case No. 18-CV1238 (D.C. Ct. of Appeals October 17, 2018).

conducting a criminal investigation on these business days.[22] Woodson's investigation continued until October 1, 2013, and the USAO continued its investigation until June 2, 2014. The ninety-day time period was also tolled during this time. As previously stated, it is undisputed that eighty-eight business days passed between June 2, 2014 and October 6, 2014. In total, ninety business days elapsed between when Agency became aware of Employee's alleged misconduct and the date on which Agency issued its advance notice of termination. Therefore, Agency did not violate the 90-day rule as provided in D.C. Code § 5-1031.[23] As a result, the Initial Decision on Remand is upheld, and Employee's Petition for Review must be denied.

[22] September 13, 2013 fell on a Friday and the next business day was September 16, 2013.

[23] Employee suggests that September 16, 2013 should not be counted in calculating the ninety-day period. However, this method of calculation is inconsistent with the Court of Appeal's method of calculation in this case, as well as OEA's previous holdings as it relates to the 90-day rule. For example, in calculating that a total of eighty-eight business days elapsed between June 2, 2014 (letter of declination) and October 6, 2014 (advance notice of termination), the Court includes June 2, 2014 as its starting date. Thus, it logically follows that September 16, 2013 would be counted as the first day for purposes of determining statutory compliance. *See e.g. Stanton v. Metropolitan Police Department*, OEA Matter No. 1601-0152-09, *Opinion and Order on Petition for Review* (July 16, 2012); and *Lawrence v. Metropolitan Police Department*, OEA Matter No. 1601-0080-16, Opinion and Order on Petition for Review (September 4, 2018).

ORDER

Accordingly, it is hereby **ORDERED** that this Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

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Clarence Labor, Jr., Chair

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Patricia Hobson Wilson

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Jelani Freeman

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Peter Rosenstein

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Dionna Maria 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.