THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
SHOLANDA MILLER,	)	OEA Matter No. 1601-0325-10R15
Employee	)	
	)	
v.	)	Date of Issuance: June 6, 2017
	)	
D.C. METROPOLITAN POLICE DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON REMAND

This matter was previously before this Board. Sholanda Miller ("Employee") worked as an Officer with the Metropolitan Police Department ("Agency"). On November 23, 2009, Agency issued a Notice of Proposed Adverse Action ("Proposed Notice") to Employee informing her that she would be suspended for fifteen days. Employee was charged with neglect of duty and prejudicial conduct.[1] On February 1, 2010, Agency issued an Amendment to the Proposed Notice ("Amended Notice"), wherein it also charged Employee with Compromising a Felony. The Amended Notice proposed termination instead of the fifteen-day suspension.[2]

[1] For the neglect of duty charge, Agency provided that a joint investigation with the Federal Bureau of Investigation ("FBI") revealed that Employee had phone conversations with her boyfriend, Eric Shorts, where Mr. Shorts revealed that he threw a brick at an automobile, causing the driver to crash. Agency stated that Employee failed to report, investigate, or ensure that a member of the Department was notified of the alleged criminal conduct. As for the charge of prejudicial conduct, Agency stated that Employee's behavior brought discredit to the Department when the matter was brought to the attention of another law enforcement entity, the FBI. *Petition for Appeal*, p. 7-8 (June 16, 2010).

[2] Agency provided that the charge of compromising a felony was related to Employee's discussions with Mr. Shorts

Employee was subsequently found guilty of all three charges and served a Final Notice informing her that she would be terminated. The effective date of termination was May 21, 2010.[3]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on June 16, 2010. She alleged that Agency's actions were arbitrary and capricious; not supported by substantial evidence or in accordance with the law; and violated her procedural due process rights.[4] In its response to the Petition for Appeal, Agency denied Employee's allegations and provided that removal was in the range of penalties.[5]

The OEA Administrative Judge ("AJ") scheduled a Pre-hearing Conference and ordered both parties to submit Pre-hearing Statements.[6] Agency's Pre-hearing Statement reiterated that Employee was informed of Mr. Shorts' criminal activity but failed to act appropriately.[7] Employee's Pre-hearing Statement provided that the Amended Notice's penalty could not stand because she accepted the penalty provided in the Proposed Notice; thereby, creating a contractual agreement with Agency. She further submitted that Agency violated the "90-day rule" and the "55-day rule."[8]

Thereafter, the AJ issued an order requiring both parties to submit additional briefs addressing whether Agency violated the 90-day rule; whether Agency violated the 55-day rule; and whether Agency was prevented from removing Employee from service because she accepted

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regarding a homicide and stolen purses. *Respondent Metropolitan Police Department's Response to Petition for Appeal*, p. 2 (July 19, 2010).

[3] *Id.* at Tab B.

[4] *Petition for Appeal*, p. 3 (June 16, 2010).

[5] *Respondent Metropolitan Police Department's Response to Petition for Appeal,* p. 3-4 (July 19, 2010).

[6] *Order Convening a Pre-hearing Conference (*July 17, 2012).

[7] *Agency's Pre-hearing Statement* (August 30, 2012).

[8] According to D.C. Official Code § 5-1031 ("90-day rule"), no adverse action against a sworn member shall commence more than 90 days after the date that Agency knew or should have known of the act that allegedly constituted cause. Employee explained that Agency "…took 182 business days after the 90-day clock started to run." Employee also contended that in accordance with Agency's Collective Bargaining Agreement ("CBA") with the Fraternal Order of Police, Metropolitan Labor Committee, it had 55 days ("55-day rule") to issue and serve the final decision. *Employee's Pre-hearing Statement*, p. 5-7 (August 30, 2012).

the initial proposed penalty.[9] Employee asserted in her brief that the 90-day period commenced on March 5, 2009. She explained that on this date, Agency's investigation came to a close with the arrest of Mr. Shorts and marked the beginning of Agency's administrative review of her case. Employee also claimed that Agency knew of her actions and the criminal allegations as early as December of 2008. With regard to the 55-day rule, Employee provided that the fifty-five days began to run on November 23, 2009, and Agency did not serve its Final Notice until April 13, 2010.[10]

In its brief, Agency explained that after March 5, 2009, it conducted an investigation to determine whether Employee engaged in criminal activity. It argued that in accordance with D.C. Official Code § 5-1031(b), the 90-day period was tolled until the conclusion of its investigation.[11] Agency asserted that its investigation concluded on July 20, 2009, when the United States Attorney for the District of Columbia issued a letter declining to criminally prosecute Employee. It contended that on July 21, 2009, the 90-day period commenced, and it served the Proposed Notice eighty-six business days later on November 23, 2009.[12]

With regard to the 55-day rule, Agency opined that it complied with this rule because the Amended Notice was served on February 1, 2010, and the Final Notice was served on April 13, 2010.[13] Lastly, Agency stated that the matter was not resolved with the original penalty and argued that the principles of contract law were inapplicable to Employee's matter.[14]

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[9] *Order Requiring the Parties to Submit Briefs* (September 28, 2012).

[10] Employee reiterated that the penalty could not stand because she had a contractual agreement with Agency. *Brief of Employee*, p. 4-11 (October 12, 2012).

[11] D.C. Official Code § 5-1031(b) provides that:

> if the act. .. . constituting cause is the subject of a criminal investigation[,]. . . the 90 day period for commencing a[n] . . . adverse action . . . shall be tolled until the conclusion of the investigation.

[12] Furthermore, Agency argued that Employee failed to cite any rule of law that prohibited it from issuing the Amended Notice or modifying the penalty imposed.

[13] Agency asserted that the Amended Notice was the relevant notice for the purpose of determining the 55-day rule.

[14] It explained that further consideration was given to the matter, and as a result, it issued the Amended Notice to include additional charges and specifications. *Agency's Brief,* p. 4-10 (December 7, 2012). Employee submitted a

The AJ issued his Initial Decision on December 30, 2013. With regard to the 90-day rule, he considered D.C. Official Code § 5-1031(b) and found that the 90-day period commenced on July 21, 2009. He reasoned that from March 5, 2009 until July 20, 2009, Agency was conducting a criminal investigation of Employee. The AJ found that the criminal investigation concluded with the issuance of the declination letter on July 20, 2009. Accordingly, he ruled that Agency did not violate the 90-day rule because its Proposed Notice was issued eighty-six business days after July 21, 2009. With regard to the 55-day rule, the AJ found that Article 12, Section 6 of the CBA provided that an officer ". . . shall be given a written decision and the reasons therefore no later than fifty-five (55) business days after the date the employee [was] notified in writing of the charges or the date the employee elect[ed] to have a departmental hearing. . . ." He found that Employee was served with the Final Notice fifty days after the Amended Notice. Therefore, the AJ ruled that Agency did not violate the 55-day rule.[15]

Finally, with regard to Employee's belief that she had a contractual agreement with Agency, the AJ stated that the principles of contract law were inapplicable to her matter.[16] The AJ did not find any fault in Agency's decisions to amend the Proposed Notice, add additional charges, or enhance the penalty imposed. As a result, he determined that Agency had cause to remove Employee and upheld its decision.[17]

On February 3, 2014, Employee filed a Petition for Review with the OEA Board. She

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Reply Brief that opposed Agency's assertion that the 90-day deadline began to run on July 21, 2009. She reasoned that pursuant to the decision in *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. Metropolitan Police Department, Fire and Emergency Medical Services,* Case No. 08-57312 (June 28, 2012), the joint investigation conducted by Agency and the FBI ended on March 5, 2009, with the arrest of Mr. Shorts. Employee argued that Agency's review of the matter after that date was purely administrative in nature. She stated that *assuming arguendo* July 20, 2009, marked the beginning of the 90-day deadline, Agency's Amended Notice still violated the 90-day rule. Ultimately, Employee believed that Agency's Amended Notice violated the intent and purpose of the 55-day rule. *Employee's Reply Brief* (December 21, 2012).

[15] *Initial Decision,* p. 4-5 (December 30, 2013).

[16] The AJ reasoned that the principles of contract law are inapplicable in instances when an employee is disciplined for misconduct. *Id.* at 7.

[17] *Id.*

argued that the Initial Decision is based an erroneous interpretation of D.C. Official Code § 5-1031; that the AJ erroneously applied the 55-day rule; and that the AJ erroneously determined that the Proposed Notice was not an offer. Furthermore, Employee believed that the AJ prematurely concluded that Agency had cause to remove her. Therefore, she requested that the Board set aside the Initial Decision; rule that the 55-day rule was violated; and reinstate her to her position.[18]

In response to the Petition for Review, Agency stated that the AJ's interpretation of D.C. Official Code § 5-1031 and application of the 55-day rule were correct.[19] It believed that the Initial Decision also correctly determined that the Proposed Notice was not an offer. Thus, Agency contended that the AJ committed no error and that the Initial Decision should be affirmed.[20]

The OEA Board issued its Opinion and Order on April 14, 2015. It stated that the AJ's assessment of the 90-day rule and 15-day suspension were based on substantial evidence. However, it determined that the AJ offered no conclusions of law to support his findings regarding the 55-day rule. Thus, the Board remanded the matter to the AJ for consideration of the 55-day issue.[21]

The AJ held a Status Conference and requested that both parties file briefs addressing the issues on remand.[22] Employee provided that because Agency violated Article 12, Section 6 of the parties' contract, such a violation required that the AJ order Agency to rescind all disciplinary action taken against her. According to Employee, the proper date of calculation was

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[18] *Petition for Review*, p. 9-24 (February 3, 2014).
[19] Agency argued that Employee failed to cite any legal authority to support her argument that the AJ erred in finding that the 90-day period began on July 21, 2009. It stated that her argument regarding the CBA and the 55-day rule were not consistent with the CBA.
[20] *Agency's Brief in Opposition to Employee's Petition for Review,* p. 5-12 (March 10, 2014).
[21] *Sholanda Miller v. Metropolitan Police Department*, OEA Matter No. 1601-0325-10-R15, *Opinion and Order on Petition for Review* (April 14, 2015).
[22] *Order Scheduling Status Conference* (April 17, 2015) and *Order to Submit Written Briefs* (May 12, 2015).

the date she was "first served" the proposed notice. She argued that Agency could not be permitted to use the Amended Notice as "day one" for purposes of calculating the 55-day rule. Finally, Employee opined that because the 55-day period started on November 23, 2009, Agency could not state that an amendment to the Proposed Notice would restart the mandatory deadline. Therefore, Employee requested that Agency's disciplinary action be rescinded.[23]

In its brief, Agency argued that it complied with the 55-day rule. It stated that under Article 12, Section 6, Employee was entitled to a written decision within the fifty-five business days after the date she was notified in writing of the charges. Agency stated that there was no rule or regulation that prohibited it from amending a proposed adverse action. Thus, in the absence of a specifically identified rule, regulation, or legal principal that prohibits amending a proposed notice, Agency contended that its decision to amend the Proposed Notice was appropriate.[24]

The AJ issued an Initial Decision on Remand on May 6, 2016. He explained that Agency was accurate in its assertion that there was nothing to prevent it from amending a proposed action prior to it either being decided upon or implemented. The AJ held that Agency's action of amending the notice was permissible and concluded that Employee failed to proffer any credible evidence that would indicate that her removal was improper. He provided that Employee was notified in writing that she was being terminated. The AJ found that February 1, 2010, was the correct date for Agency to start its calculation of the 55-day period. Additionally, he held that the 90-day rule required Agency to notify Employee that she was being subjected to an adverse action of which it was aware. However, he found that the 55-day rule required Agency to provide written notice of its final decision. Accordingly, the AJ ordered that Employee's

[23] *Brief of Employee on Remand,* p. 10-17 (June 19, 2015).
[24] *Agency's Brief on Remand,* p. 6-10 (September 4, 2015).

removal be upheld.[25]

Employee filed a Petition for Review and Motion to Expedite on June 8, 2016. She argues that the AJ was not impartial and that he did not properly address the issues identified by the OEA Board. She states that the AJ did not provide substantial evidence to show that Agency complied with the 55-day rule. Employee maintains that the language in the CBA proves that November 23, 2009 and not February 1, 2010, is the correct start date for the 55-day deadline. She explains that the proper calculation is from the date an employee is first served with the Notice of Proposed Adverse Action, not any amendments thereto. Accordingly, Employee requests that the Board reverse the Initial Decision on Remand and that she be reinstated with back pay.[26]

On July 11, 2016, Agency filed its response to Employee's Petition for Review. It contends that the CBA does not prohibit restarting the 55-day rule when an amendment is made to the proposed notice. Agency asserts that Article 12, Section 6 allows the 55-day period to restart when the original charges are amended. Additionally, because the dispute between the parties regarding Article 12, Section 6 of the CBA is a grievance, Agency states that OEA lacks jurisdiction to adjudicate the matter. Therefore, it requests that Employee's petition be denied.[27]

Fifty-five day rule

The CBA between Agency and Employee's Union, the Fraternal Order of Police, MPD Labor Committee, provides the following in Article 12, Section 6:

> The employee shall be given a written decision and the reasons therefore no later than fifty-five (55) business days after the date the employee is notified in writing of the charges or the date the employee elects to have a departmental hearing . . . .

[25] *Initial Decision on Remand*, p. 8-9 (May 6, 2016).
[26] *Petition for Review of Initial Decision on Remand and Motion to Expedite*, p. 11-22 (June 8, 2016).
[27] *Agency's Brief in Opposition to Employee's Petition for Review of Initial Decision and Motion to Expedite,* p. 6-12 (July 11, 2016).

Historically, OEA has held that an adverse action is deemed to have commenced when an employee is formally notified of the proposed adverse action.[28] In *Curtis Adamson v. Metropolitan Police Department,* OEA Matter No. 1601-0041-04 (February 14, 2006), the AJ reasoned that because the 55-day rule is mandatory, an employee invoking the rule is not required to show actual harm as a result of a violation of the rule. Additionally, the case provided that any violation by an agency should result in summary reversal of the adverse action. Thus, the OEA Board reasoned that a violation of the 55-day rule is an absolute bar to the finalization of the adverse action.[29]

In the current matter, the issue is that Agency amended its proposed notice and is using the amended date to start the 55-day rule deadline. The AJ ruled that using the Amended Notice date is permissible by Agency. Although decisions from the Merit Systems Protection Board ("MSPB") are not binding on OEA, we have historically relied on its decisions for guidance. In both *Lawton v. Department of Veterans Affairs*, 53 M.S.P.R. 153 (1992) and *Fickie v. Department of Army*, 86 M.S.P.R. 525 (2000), the MSPB held that there was no law, rule, or regulation prohibiting an agency from amending a notice of proposed removal by deleting some charges and adding others. This is consistent with the AJ's reasoning in the current matter.[30] Therefore, there is no error in the AJ's reliance on the Amended Notice date to start the 55-day

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[28] *John v. Department of Human Services,* OEA Matter No. 1601-0213-91, *Opinion and Order on Petition for Review* (January 9, 1998); *Robert King v. D.C. Housing Authority,* OEA Matter No. 1601-0062-98, p. 17 (March 24, 2000); *Velerie Jones-Coe v. Department of Human Services,* OEA Matter No. 1601-0088-99, p. 3 (June 7, 2002); *Enid Cruz v. D.C. Office of Employee Appeals,* Civil Case No. 02MPA08, p. 8 (D.C. Super. Ct. January 28, 2004); and *Sherman Lankford v. Metropolitan Police Department,* OEA Matter No. 1601-0147-06, p. 3 (March 26, 2007).

[29] *Curtis Adamson v. Metropolitan Police Department,* OEA Matter No. 1601-0041-04, *Opinion and Order on Petition for Review,* p. 4 (September 3, 2008).

[30] This Board concludes that the AJ's decision is based on substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002). The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987) found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding.

rule deadline.

In accordance with Article 12, Section 6 of the CBA, Agency had fifty-five business days to provide a written decision after it notified Employee of the charges against her on February 1, 2010, the date of its Amended Notice. Agency provided its final notice to Employee on April 13, 2010. This is fifty business days after the amended notification. Therefore, as the AJ concluded, Agency did comply with the 55-day rule. Accordingly, we must uphold the Initial Decision on Remand. Therefore, Employee's Petition for Review on Remand is denied.

ORDER

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

FOR THE BOARD:

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Sheree L. Price, Chair

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Vera M. Abbott

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Patricia Hobson Wilson

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P. Victoria Williams

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.