THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
KYLE QUAMINA, Employee	OEA Matter No.: 1601-0055-17
v.	Date of Issuance: April 9, 2019
DEPARTMENT OF YOUTH REHABILITATION SERVICES, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Kyle Quamina ("Employee") worked as a Materials Handler for the Department of Youth Rehabilitation Services ("Agency"). On December 15, 2016, Employee received a Notice on Proposed Suspension of Thirty Days based on charges of failure or refusal to follow instructions; neglect of duty; failure to meet performance standards; providing false statements/records; fiscal irregularities; attendance-related offenses; and violation of Agency's conduct policy. Employee submitted a response to the proposed suspension on January 3, 2016. After conducting an administrative review, Agency's deciding official sustained the charges against Employee. A Final Notice on Proposed Suspension ("Final Notice") was issued via email on February 22,

2017.[1] Agency subsequently issued a Revised Final Notice on Proposed Suspension of Thirty Days ("Revised Final Notice") on May 3, 2017 because the first notice did not include appeal rights to OEA.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on June 2, 2017. In his appeal, Employee argued the Agency violated several D.C. Municipal Regulations ("DCMR") by placing him on administrative leave for more than ninety days, and by failing to issue a final decision within forty-five days after receiving Employee's response to the proposed suspension. He also contended that Agency's adverse action was not supported by substantial evidence and that the penalty was excessive. As a result, Employee requested that his suspension be reversed with back pay and attorney's fees.[2]

Agency filed its answer on July 19, 2017. It argued that Employee was properly disciplined for cause pursuant to D.C. Official Code § 1-601.01; § 1-616.51(1); and 6 DCMR § 1602.1. According to Agency, Employee made false statements to his supervisor regarding his attendance; had unauthorized absences; and falsified timesheets on at least two occasions. Additionally, it asserted that Employee's failure to "hand scan" upon the start and end of the work day constituted a neglect of duty.[3] Agency further explained that Employee violated its Conduct Policy, DYRS-010, which requires Materials Handlers to adhere to the highest level of ethical conduct and maintain the confidence of the public. Thus, it opined that a thirty-day suspension was an appropriate remedy pursuant to District regulations. Consequently, it requested that Employee's appeal be dismissed.[4]

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[1] *Agency's Supplemental Brief*, Attachment 2 (July 27, 2018).
[2] *Petition for Appeal* (June 2, 2017).
[3] According to Agency, hand scanning is a method used to track and supervise timekeeping and management procedures for its employees.
[4] *Agency Answer to Petition for Review* (July 19, 2017).

An OEA Administrative Judge was assigned to the matter in November of 2017. On January 11, 2018, the AJ held a prehearing conference. The parties were subsequently ordered to submit written briefs addressing whether Agency had cause to take adverse action against Employee and whether Agency followed the proper statutes, rules, and regulations in administering its adverse action. The AJ also ordered the parties to address the policies and procedures as they related to Agency's hand scan requirement.[5]

In its brief, Agency argued that Employee exhibited a pattern of failing to hand scan at the beginning of each workday and that he falsified a timesheet by indicating that he worked a full eight-hour workday on November 7, 2016, even though he admitted to departing for lunch at 2:00 p.m. and not returning. Agency explained that its Conduct Policy required Material Handlers to hand scan upon the start and end of the workday to assist supervisors in ensuring that employees were abiding by the time and attendance policies. According Agency, Employee failed to sign the Conduct Policy. It also stated that Employee only performed a hand scan ten times from August 1, 2016 to November 4, 2016. Thus, Agency reasoned that Employee's conduct constituted a neglect of duty. Additionally, Agency contended that Employee failed to meet its performance standards by not following directives; failing to accurately report his time/attendance; and being absent from work without prior authorization. Lastly, it posited that a thirty-day suspension was an appropriate penalty under District law. Therefore, Agency requested that OEA uphold Employee's suspension.[6]

In response, Employee reiterated that Agency violated several DCMR regulations by placing him on administrative leave for longer than ninety days and by failing to issue a final decision within forty-five days of receiving Employee's response to the proposed suspension.

[5] *Post-Prehearing Conference Order* (January 11, 2018).
[6] *Agency's Brief* (March 19, 2018).

Employee stated that Agency did not have cause to suspend him for thirty days because the charges were unsubstantiated and unsupported by the record. He further opined that Agency erred in concluding that the Conduct Policy required Material Handlers to hand scan during their tour of duty. Finally, Employee contended that a thirty-day suspension was excessive, and that Agency's selection of a penalty exceeded the limits of reasonableness. As a result, he asked that the AJ reverse Agency's adverse action.[7]

After reviewing Employee's brief, the AJ ordered Agency to submit a supplemental brief addressing whether it complied with the DCMR as it related to Employee's placement on administrative leave and whether Agency issued its final notice in a timely manner.[8] Agency filed a Supplemental Brief on June 13, 2008. It stated that Employee was previously placed on administrative leave in accordance with 6B DCMR § 1266.4 because of a seperate investigation related to a security breach that occurred at the New Beginnings Youth Department on November 7, 2011. Agency clarified that its Advance Notice on Proposed Suspension was based on Employee's unauthorized absences on November 7, 2016 and November 9, 2016, and that the notice was unrelated to the security breach investigation. Agency reasoned that even if Employee's placement on administrative leave was related to the charges forming the basis of this appeal, it did not violate 6B DCMR § 1619.2 because the final notice of suspension was issued less than ninety days after the issuance of the advance notice. In the alternative, Agency argued if Employee was in fact erroneously placed on administrative leave for more than ninety days, the error was harmless.[9]

The AJ subsequently held a prehearing conference on July 11, 2018. After the conference, the parties were ordered to submit additional supplemental briefs which addressed

[7] *Employee's Brief* (April 19, 2018).
[8] *Order for Supplemental Brief* (May 9, 2018).
[9] *Agency's Supplemental Brief* (June 13, 2018).

Agency's issuance of its Final Notice and its Revised Final Notice.[10] In his brief, Employee echoed his previous arguments regarding Agency's purported failure to issue a final decision in accordance with 6B DCMR § 1623.6. He further stated that Agency's error was not harmless.[11]

In response, Agency stated that under § 1623.6, a final decision was required to be issued within forty-five days after the receipt of Employee's answer to the proposed suspension. It explained that the forty-fifth day, February 18, 2017, fell on a Saturday; therefore, the deadline was the next business day, February 21, 2017. Agency sent a copy of the Final Notice to Employee via email on February 22, 2017. According to Agency, the Final Notice informed Employee of his right to file a disciplinary grievance but did not contain appeal rights to OEA. As a result, Agency issued a Revised Final Notice on May 3, 2017 which informed Employee of the right to file an appeal with this Office. It also acknowledged that the Final Notice was issued one day after the forty-five-day time limit imposed under § 1623.6. Agency believed that Employee nonetheless had a full and fair opportunity to prosecute an appeal before OEA, and that its procedural error did not violate Employee's due process rights.[12]

The AJ issued her Initial Decision on September 17, 2018. She held that Agency violated 6B DCMR § 1623.4, which requires that final agency decisions be accompanied by a copy of OEA's rules and an OEA appeal form. The AJ also found that Agency failed to comply with 6B DCMR § 1623.6, which provides in part that a final decision must be completed within forty-five days after the agency receives the employee's response to the advance notice of adverse action. She noted that Agency's February 22, 2017 notice was issued forty-six days after receiving

[10] *Order for Supplemental Briefs* (July 11, 2018).
[11] *Employee's Supplemental Brief* (July 30, 2018).
[12] *Agency's Supplemental Brief* (July 27, 2018).

Employee's response to proposed suspension and that the notice did not contain OEA appeal rights as required under OEA Rule 605.1.[13]

The AJ disagreed with Agency's argument that its procedural error was harmless because the first notice did not constitute a valid final notice pursuant to the applicable regulations. According to the AJ, Employee was not able to file an appeal with OEA until after he served the thirty-day suspension because Agency issued an invalid final notice. She further held that Agency's responsibility to adhere to the applicable procedural regulations was not eradicated simply because Employee ultimately filed an appeal with this Office. As a result, the AJ concluded that Agency did not comply with all applicable laws, rules, and regulation in its administration of the instant adverse action. Consequently, Employee's suspension was reversed, and Agency was ordered to reimburse Employee all back-pay and benefits lost as a result of the suspension.[14]

Agency disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on October 22, 2018. It argues that the AJ's finding that Employee's procedural due process rights were violated is not supported by substantial evidence and is based on an erroneous interpretation of the relevant case law. Agency argues that its Final Notice and the Revised Final Notice being served beyond the forty-five-day time limit imposed under 6B DCMR § 1623.6 does not invalidate Employee's suspension because the language of the regulation is directory, and not mandatory in nature. It also disagrees with the AJ's conclusion that the procedural violations constituted a harmful error. According to Agency, Employee suffered no prejudice by having to serve his suspension prior to asserting his appeal rights before OEA. Thus, it believes that the delays in issuing both notices did not render Employee's

[13] *Initial Decision* (September 17, 2018).
[14] *Id.*

suspension invalid. Consequently, Agency asks Board to grant its Petition for Review and reverse the Initial Decision.[15]

In his answer, Employee asserts that Agency waived its legal argument regarding the directory nature of § 1623 because it failed to raise this issue in its submissions to the AJ. He posits that even if Agency is permitted to raise the issue on appeal to the Board, the language of 6B DCMR § 1623 is mandatory, not directory in nature. Employee further argues that the AJ's conclusion that Agency's procedural errors were harmful is supported by substantial evidence in the record. Therefore, he requests that Agency's Petition for Review be denied.[16]

Notice Requirement

As a preliminary matter, this Board must determine whether the AJ erred in concluding that Agency's original Final Notice failed to satisfy the applicable statutory and regulatory requirements. OEA requires that an agency issue a final written decision in each disciplinary action over which this Office retains jurisdiction. D.C. Official Code § 1-606.04(e) states in pertinent part that "the personnel authority shall provide the employee with a written decision following the review…and shall advise each employee of his or her right to appeal to the Office as provided in this subchapter." Additionally, District Personnel Manual ("DPM") §1614.1 provides that the employee shall be given a notice of final decision in writing, dated and signed by the deciding official, informing him or her of all of the following:

> (a) Which of the reasons in the notice of proposed corrective or adverse action have been sustained and which have not been sustained, or which of the reasons have been dismissed with or without prejudice;
>
> (b) Whether the penalty proposed in the notice is sustained, reduced, or dismissed with or without prejudice;

[15] *Agency's Petition for Review* (October 22, 2018).
[16] *Employee's Response to Agency's Petition for Review* (November 26, 2018).

> (c) When the final decision results in a corrective action, the employee's right to grieve the decision as provided in § 1617;
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> (d) When the final decision results in an adverse action, the right to appeal to the Office of Employee Appeals as provided in § 1618. The notice shall have attached to it a copy of the OEA appeal form; and
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> (e) The effective date of the action.

Likewise, OEA Rule 605.1 states the specific information regarding appeal rights to OEA that an agency must include in its final decision: (a) notice of the employee's right to appeal to the Office; (b) a copy of the rules of the Office; (c) a copy of the appeal form of the Office; (d) notice of applicable rights to appeal under a negotiated review procedure; and (e) notice of the right to representation by a lawyer or other representative authorized by the rules.

In this case, Agency failed to comply with D.C. Official Code § 1-606.04(e) and OEA Rule 605.1 when it originally issued its Final Notice. The February 22, 2017 notice did not inform Employee of his right to appeal to OEA. Further, the notice did not contain a copy of the OEA appeal form. As a result, we find that the AJ correctly concluded that Agency violated D.C. Official Code § 1-606.04(e) and OEA Rule 605.1.

Harmless Error

While it is clear from the record that Agency violated the abovementioned statutory requirements pertaining to OEA appeal rights, this Board must next determine whether Agency's procedural errors were harmless.[17] OEA Rule 631.3 provides the following with respect to the harmless error test:

> Notwithstanding any other provision of these rules, the Office shall not reverse an agency's action for error in the application of its

[17] *See Vincent v. Dep't of Transp.*, No. CH07528910076, 1991 WL 54492 (M.S.P.B. Apr. 4, 1991) (holding that "[b]y definition, harmful procedural error is error by the agency in the application of its procedures which, in the absence or cure of the error, would have been likely to cause the agency to reach a conclusion different than the one reached.")

> rules, regulations, or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean:
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> Error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action.

Accordingly, an agency's violation of a statutory procedural requirement does not necessarily invalidate the agency's adverse action.[18] Thus, the facts in this matter warrant the invocation of a harmless error review. In determining whether Agency has committed a procedural offense as to warrant the reversal of its adverse action, this Board will apply a two-prong analysis: whether Agency's error caused substantial harm or prejudice to Employee's rights *and* whether such error significantly affected Agency's final decision to suspend Employee.

Based on the record, we find that Agency's failure to include appeal rights to OEA in its original Final Notice did not cause substantial harm or prejudice to Employee. Agency properly notified Employee of the proposed charges against him; Employee was given the opportunity to provide a response; and Agency conducted an internal administrative review of the charges. Therefore, Employee was afforded minimum due process rights.[19] This Board recognizes that Agency's February 22, 2017 Final Notice on Proposed Suspension was devoid of any information pertaining to OEA appeal rights, which resulted in Employee being unable to file an appeal with this Office in a timely manner.[20] However, Agency cured its procedural defect by way of the May 3, 2017 Revised Final Notice. Employee subsequently filed a Petition for Appeal

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[18] *See Diaz v. Department of the Air Force*, 63 F.3d 1107 (Fed. Cir. 1995).

[19] *See Darnell v. Department of Transportation,* 807 F.2d 943, 945–46 (Fed.Cir.1986) (holding that an agency's failure to provide a non-probationary Federal employee with prior notice and an opportunity to present a response, either in person or in writing, to an agency action appealable to the Board that deprives him of his property right in his employment constitutes an abridgement of his constitutional right to minimum due process of law). *See also Stephen v. Dep't of Air Force,* No. BN315H8710028, 1991 WL 70513 (M.S.P.B. Apr. 26, 1991) (holding that an appealable agency action taken without affording an appellant prior notice of the charges, an explanation of the agency's evidence, and an opportunity to respond, must be reversed because such action violates his constitutional right to minimum due process."

[20] OEA Rule 604.2 provides that appeals must be filed within thirty days of the appealed agency action.

with OEA and he has been afforded a full and fair opportunity to contest his suspension before an Administrative Judge. We further note that Employee's inability to assert his appeal rights until after he served the suspension did not inherently prejudice Employee, as the AJ seems to suggest. Consequently, we find that Agency's failure to include OEA appeal rights in its original Final Notice does not rise to the level of a reversible error.

Assuming *arguendo* that Employee was substantially prejudiced by Agency's delay; this Board nonetheless finds that the second prong of the harmful error test cannot be satisfied. As previously stated, OEA Rule 631.3 provides that an error in the application of an agency's procedures must also significantly affect the agency's final decision to take the adverse action. In *Santos v. Dep't of Navy*, 58 M.S.P.R. 694 (September 23, 1993), the Merit Systems Protection Board, OEA's federal counterpart, held that the "[r]eversal of an agency's action is warranted where the appellant establishes that the agency committed a procedural error that likely had a harmful effect on the outcome of the case before the agency."[21] In other words, there must be a showing that the procedural error was likely to have caused Agency to reach a different conclusion from the one it would have reached in the absence or cure of the error.[22]

The record does not support this supposition. Employee's submissions to this Office do not assert that but for Agency's error, he would not have been suspended. Indeed, after conducting an administrative review of the charges and Employee's response, Agency's deciding official determined that there was sufficient evidence in the record to sustain Employee's proposed suspension for each of the charges.[23] Further, Employee's pleadings do not allege that

[21] *See also Harding v. Office of Employee Appeals*, 887 A.2d 33 (D.C. 2005) (holding that an employee separated from service pursuant to a Reduction-in-Force could not prove that he would not have been separated from the agency if he had received the full thirty-day notice of separation required by statute.
[22] *See Mathis v. Department of State*, No. AT-0432-14-0867-I-1, 2014 WL 6616619 (Nov. 18, 2014) (M.S.P.B. November 18, 2014).
[23] *Agency's Answer to Petition for Appeal, Tab 14*.

Agency's Revised Final Notice sought to introduce any new evidence or allegations to which he did not have the benefit of reviewing and responding.[24] In light of the foregoing, this Board disagrees with the AJ's finding that Agency's noncompliance with D.C. Official Code § 1-606.04(e) and OEA Rule 605.1 constitutes a harmful error.[25]

45-Day Rule

Agency argues that the AJ erred in determining that the language of 6B DCMR § 1623.6 is mandatory. The regulation provides that the final agency decision shall be completed within forty-five (45) days of the latter of: (a) the expiration of the employee's time to respond; (b) the agency's receipt of the employee's response (if any); (c) the completion of the hearing officer's report and recommendation, if applicable; or (d) a date agreed to by the employee. The relevant date at issue here is January 4, 2017, the day that Agency received Employee's response to the Notice on Proposed Suspension. Agency concedes that it issued the February 22, 2017 Final Notice on the forty-sixth day; thereby, missing the procedural deadline by one day.[26] However, it contends that the forty-five-day time limit established by 6B DCMR § 1623.6 is directory, not mandatory in nature.[27] We agree.

In *Teamsters Local Union 1714 v. Pub. Employee Relations Bd.*, 579 A.2d 706, 710 (D.C. 1990), the D.C. Court of Appeals held that ("[t]he general rule is that '[a] statutory time period is not mandatory unless it both expressly requires an agency or public official to act

[24] *See Santos* at 697.
[25] In her ruling, the AJ relies on this Board's holding in *Jones v. D.C. Public Schools Department of Transportation*, OEA Matter No. 1601-0001-10, *Opinion and Order on Petition for Review* (February 5, 2013). However, we find the facts in this matter to be distinguishable from those in *Jones*. The agency in *Jones* failed to provide the employee with any final written decision after serving him with an advance notice of termination. Unlike Employee in this case, the agency in *Jones* attempted to use its advance notice as a final written notice of removal and did not afford the employee an opportunity to respond to the charges against him or the opportunity for an administrative review.
[26] The forty-fifth day from January 4, 2017 was February 18, 2017. However, February 18th fell on a Saturday; thus, the deadline was the following business day, February 21, 2017. Monday, February 20, 2017, was a federal and District holiday (George Washington's birthday).
[27] Employee argues that Agency waived its argument regarding the directory nature of 6B DCMR § 1623.6 by failing to raise the issue in any pleadings before OEA. However, this Board will address this issue, as it is germane to the disposition of the instant Petition for Review.

within a particular time period *and* specifies a consequence for failure to comply with the provision. In *Watkins v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0093-10, *Opinion and Order on Petition for Review* (January 25, 2010), this Board adopted the reasoning provided in *Teamsters* when examining a forty-five-day regulation which also addressed the time limit in which an agency was required to issue a final decision in cases of summary removal. The Board in *Watkins* noted that the personnel regulation regarding the forty-five-day rule did not specify a consequence for the agency's failure to comply; therefore, the regulation was construed to be directory in nature.[28] Unlike a mandatory provision, a directory provision requires a balancing test to determine whether "any prejudice to a party caused by agency delay is outweighed by the interest of another party or the public in allowing the agency to act after the statutory time period has elapsed."[29]

Here, 6B DCMR § 1623.6 provides a clear time limit for issuing final decisions in corrective or adverse actions, but it does not offer a consequence for failing to strictly adhere to the regulation. Therefore, Agency correctly asserted that the regulatory language of § 1623.6 should be considered directory, rather than mandatory in nature. Agency received Employee's response to the proposed thirty-day suspension on January 4, 2017 and its original Final Notice was not issued until the forty-sixth day after receiving Employee's response. As this Board held in *Watkins*, "[i]t is likely that the purpose of 45-day limit was to shorten the time in which an employee is faced with the uncertainty about when they may be subjected to removal." However, the Court in *Teamsters* noted the designation of a time limit cannot be considered a limitation of

[28] In distinguishing mandatory statutory language from directory language, the Board in *Watkins* highlighted the holding in *Metropolitan Police Department v. Public Employee Relations Board*, 1993 WL 761156 (D.C. Super. Ct. August 9, 1993), wherein the Court found statutory language mandatory, not directory, where it provided that no adverse action shall be commenced 45 days after an agency knew or should have known of the act constituting the charge.

[29] *See JGB Property v. D.C. Office of Human Rights*, 364 A.2d 1183 (D.C. 1976); and *Brown v. D.C. Public Relations Board*, 19 A.3d 351 (D.C. 2011).

an agency's power to act. As a result, Agency's procedural delay did not preclude it from suspending Employee.

In this matter, Employee is alleged to have committed several serious infractions, including falsifying time sheets; providing fiscal irregularities; failing to follow instructions; failing to meet performance standards; and violating Agency's conduct policy. When weighed against the prejudice to Employee, it is clear that the public interest in adjudicating this matter on its merits outweighs Agency's procedural delays.[30] Therefore, we disagree with the AJ's finding that the procedural errors warrant the outright reversal of Agency's adverse action.[31]

Conclusion

Based on the foregoing, this Board finds that Agency's failure to include OEA appeal rights in its February 22, 2017 Final Notice on Proposed Suspension violated D.C. Official Code § 1-606.04(e) and OEA Rule 605.1, but its procedural defect did not a constitute harmful error. Agency's May 3, 2017 Revised Final Notice on Proposed Suspension complied with the applicable OEA appeal requirements. Additionally, the language of 6B DCMR § 1623.6 is deemed to be directory, rather than mandatory. Thus, in the interest of justice, this matter must be remanded to the AJ for adjudication on its merits.

[30] *Watkins* at 5.
[31] If this Board were to utilize the May 3, 2017 revised notice as the date on which Employee received a valid final notice, we would still be inclined to reach the same conclusion regarding the public interest in adjudicating Employee's appeal on its merits.

ORDER

Accordingly, it is hereby ordered that Agency's Petition for Review is **GRANTED** and the matter is **REMANDED** to the Administrative Judge for further findings.

FOR THE BOARD:

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Clarence Labor, Chair

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Vera M. Abbott

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Patricia Hobson Wilson

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Jelani Freeman

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Peter Rosenstein

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.