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.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 1601-0050-16
RACHEL GEORGE,	)	
Employee	)	
	)	Date of Issuance: July 16, 2019
v.	)	
	)	
D.C. OFFICE OF THE	)	
ATTORNEY GENERAL,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Rachel George ("Employee") worked as a Support Enforcement Specialist with the D.C. Office of the Attorney General ("Agency"). On February 24, 2016, Agency issued an Advance Notice of Proposed Removal to Employee for "failing to satisfactorily perform one or more of the duties of [her] position" and "any on-duty employment-related act or omission that interferes with the efficiency or integrity of operations." The charges were based on Employee's failure to successfully complete a Performance Improvement Plan ("PIP"). On April 20, 2016, Agency issued its Final Decision on Proposed Removal, sustaining the charges against Employee. Her termination became effective on April 25, 2016.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on May 24, 2016. In her appeal, Employee argued that her removal was not taken for cause and that

Agency could not prove that the charges were supported by the evidence. She contended that the penalty of removal was excessive and exceeded the bounds of reasonableness. Lastly, Employee asserted that she was terminated in retaliation for engaging in whistleblowing activities. Therefore, she requested that she be reinstated with back pay, benefits, and attorney's fees.[1]

Agency filed its answer on August 10, 2016. It claimed that the charges forming the basis of Employee's appeal were fully justified because she failed to successfully satisfy the directives outlined in her PIP. As a result, it believed that Employee was properly terminated. In the alternative, Agency requested that a hearing be held in the matter.[2]

An OEA Administrative Judge was assigned to the matter in October of 2016. After a series of scheduling conflicts and a change in Employee's counsel, the AJ held a prehearing conference on September 26, 2017.[3] During the conference, it was determined that an evidentiary hearing was warranted. Therefore, a hearing was held on February 27, 2018 and February 28, 2018, wherein the parties presented documentary and testimonial evidence in support of their positions.[4] The parties were subsequently ordered to submit closing briefs.[5]

An Initial Decision was issued on October 22, 2018. The AJ held that Agency's termination action could not be sustained because it failed to comply with the mandatory language of District Personnel Manual ("DPM") §§ 1410.1 through 1410.7, which governs the guidelines for PIPs. Specifically, she found that Agency failed to provide Employee with a written decision as to whether she met the requirements of the PIP within ten calendar days of the end of the PIP period, as required under DPM § 1410.5. The AJ disagreed with Agency's

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[1] *Petition for Appeal* (May 24, 2016).
[2] *Agency Answer to Petition for Appeal* (August 10, 2016).
[3] *Order Granting Employee's Consent Motion to Continue Prehearing Conference* (August 15, 2017).
[4] *Order Convening Evidentiary Hearing* (December 15, 2017).
[5] *Order to Submit Closing Arguments* (March 23, 2018). On April 25, 2018, Employee's former counsel filed a Consent Motion to Withdraw from Case.

position that Employee could not challenge the ten-day regulatory period because she opted to have a meeting regarding PIP results with Agency on January 7, 2016. In addition, the AJ deemed the language of DPM § 1410.6 to be mandatory in nature; therefore, Employee's request for a meeting had no bearing on Agency's responsibility to issue a written decision within the specified time period.[6] Accordingly, she concluded that Agency's noncompliance triggered the invocation of DPM § 1410.6, which provides that an employee is deemed to have met the PIP requirements if an agency fails to issue a written decision within the prescribed time period. Thus, the AJ concluded that Agency failed to follow the proper laws, rules, and regulations in implementing its termination action.[7]

With respect to the penalty, the AJ reasoned that even if she found that Employee was disciplined for cause, the penalty was not appropriate. According the AJ, the Advance Notice of Proposed Removal and the Final Notice of Proposed Removal failed to cite with specificity which DPM provision Agency relied upon in selecting the penalty. She further explained that Agency cited to two different versions of the DPM in its charging documents. Based on the foregoing, the AJ determined that Agency did not meet its burden of proof in this matter. Consequently, its termination action was reversed, and Employee was ordered to be reinstated to her previous position with back pay and benefits.[8]

Agency filed a Petition for Review with OEA's Board on November 26, 2018. It argues that there is substantial evidence in the record to support a finding that Employee failed to meet the requirements of her PIP and that she was advised by her supervisors on a weekly basis of her performance deficiencies. Agency also submits that the AJ erred by failing to determine whether

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[6] The AJ noted that even if Agency had decided during the January 7, 2016 meeting that Employee successfully completed the PIP, it was still required to indicate so in writing no later than January 9, 2016.
[7] *Initial Decision* (October 22, 2018).
[8] *Id*.

its failure to issue a written decision regarding the results of Employee's PIP within ten days constituted a harmless error.[9] It is Agency's contention that the procedural error did not cause substantial harm or prejudice to Employee's rights and did not significantly affect its final decision to terminate her.

Additionally, Agency reasons that the AJ should have remanded the matter for reconsideration if she concluded that it had cause to take adverse action against Employee but found that the penalty of termination was not appropriate. Lastly, Agency explains that it was never advised that the AJ was going to consider the Hearing Officer's April 11, 2016 Report and Recommendation in rendering a decision and that it was not afforded the opportunity to object or to provide a response to a document with no binding effect. As a result, it asks that the Board grant its Petition for Review and reverse the Initial Decision.[10]

Employee also filed a Petition for Review with OEA's Board on November 21, 2018. She argues that she was unable to present certain documents during the evidentiary hearing; that her prehearing statement was altered by her former attorney; and that the September 26, 2017 and December 15, 2017 prehearing conferences were not recorded. She states that Agency violated Chapter 14 of the DPM by requiring her to be placed on a PIP and that she was "bombarded" with disciplinary actions based on false charges. Moreover, Employee asserts that she was improperly terminated while on medical leave. She provides explanations for why several of her assigned cases as a Support Enforcement Specialist were handled appropriately, contrary to Agency's assertions. Finally, Employee believes that Agency's actions were criminal and that she was threatened, intimidated, retaliated against, and terminated without cause. Therefore,

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[9] *Agency's Petition for Review* (November 21, 2018).
[10] *Id.*

Employee reiterates that Agency's termination action should be reversed and asks to be transferred to a different division with back pay, front pay, punitive damages, and benefits.[11]

Agency filed a Reply Brief on December 27, 2018. It asserts that Employee's November 21, 2018 filing constitutes an opposition to its Petition for Review, not an original Petition for Review. Agency maintains that Employee was properly terminated because her performance was deficient during the 2015 fiscal year. It restates its previous arguments detailing why Employee failed the requirements of her PIP. Additionally, Agency states that Employee's submission fails to specifically respond to any of the arguments presented in its Petition for Review. It denies any allegations of misconduct or improprieties with respect to acts of fraud or forgery purportedly committed by Agency's managers and other employees. Agency further states that Employee waived her argument regarding her Family and Medical Leave Act ("FMLA") status because she did not raise this issue before the AJ. As a result, Agency opines that Employee has demonstrated a complete failure to understand the issues in this matter and has made unsubstantiated and meritless accusations. Consequently, it maintains that the Initial Decision should be reversed.[12]

On December 31, 2018, Employee filed an answer to Agency's reply brief. She echoes her previous arguments regarding Agency's alleged retaliatory actions and issues with the implementation and execution of her PIP. Employee also makes numerous claims pertinent to specific work duties which formed the basis of her termination and, Agency's alleged prohibited personnel actions.[13]

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[11] *Employee's Petition for Review* (November 21, 2018).
[12] *Agency's Reply Brief* (December 27, 2018).
[13] *Employee's Answer to Agency's Petition for Review* (December 31, 2018).

Agency's Petition for Review

Agency argues that it is undisputed that on December 30, 2015, Employee was advised by her supervisors that she failed to satisfy the requirements under her PIP. It states that the AJ did not make a finding as to whether Employee actually met the PIP requirements, instead concluding that the termination action should be reversed because the language of DPM Chapter 14 is mandatory in nature. Agency contends that the AJ's failure to determine whether its failure to comply with DPM § 1410.5 was considered a harmless procedural error is not in accordance with OEA Rule 631.3.[14]

Chapter 14 of the DPM governs the implementation and regulation of PIPs. A PIP is a performance management tool designed to offer an employee the opportunity to demonstrate improvement in his or her work performance.[15] Under DPM § 1410.4, a supervisor or other reviewer is required to complete a PIP when an employee's performance has been observed by the supervisor as being deficient. A PIP must last at least thirty days but cannot exceed ninety days.[16] DPM § 1410.3 further provides that a PIP must: 1) identify specific performance areas in which an employee is deficient; and 2) provide concrete, measurable actions steps which the employee needs to take to improve the identified areas of deficiency. Additionally, DPM §§ 1410.5 and 1410.6 state the following with respect to implementing a PIP:

> 1410.5 Within ten (10) calendar days of the end of the PIP period, the employee's immediate supervisor or, in the absence of that individual, the reviewer shall make a determination as to whether the employee has met the requirements of the PIP. If the determination is that the employee has met the requirements of the Performance Improvement Plan, the employee's immediate

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[14] OEA Rule 631.2 provides that "[n]otwithstanding any other provision of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean an 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."

[15] DPM § 1410.2.

[16] DPM § 1410.3.

> supervisor, or in the absence of that individual, the reviewer, shall so inform the employee, in writing. If the determination is that the employee failed to meet the requirements of the Performance Improvement Plan, the employee's immediate supervisor or in the absence of that individual, the reviewer, as appropriate, shall issue a written decision to the employee to:
>
> (a) Extend the Performance Improvement Plan for an additional thirty (30) and not to exceed ninety days total, to further observe the employee's performance;
> (b) Reassign, reduce in grade, or remove the employee.
>
> 1410.6 Failure on the part of the supervisor, or, in the absence of that individual, the reviewer, to issue a written decision within the specified time period will result in the employee's performance having met the PIP requirements.

This Board agrees with the AJ's assessment that the language of DPM § 1410.5 created a mandatory obligation for Agency to issue a written decision regarding Employee's PIP results within ten calendar days of the end of the PIP period. In *Thomas v. Barry,* 729 F.2d 1469 (D.C. Cir. 1984), the District of Columbia Circuit Court 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 within a particular time period *and* specifies a consequence for failure to comply with the provision."[17] Likewise, in *Metro. Police Dep't. v. Pub. Employee Relations Bd.*, No. 92-29, 1993 WL 761156 (D.C. Super. Ct. Aug. 9, 1993), the D.C. Superior Court stated that "the phraseology used in a statute can create a mandatory limit on a government's authority to act," noting that the statute at issue which addressed an agency's ability to commence adverse actions

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[17] *See also Watkins v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0093-10, *Opinion and Order on Petition for Review* (January 25, 2010), wherein this Board adopted the reasoning provided in *Teamsters* when examining a forty-five-day regulation which 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.[17] 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."

against employees contained both mandatory language *and* a consequence for noncompliance.[18] Additionally, in *Rodriguez v. D.C. Office of Employee Appeals*, 145 A.3d 1005 (D.C. 2016), the D.C. Court of Appeals held that language contained in a Collective Bargaining Agreement regarding an agency's duty to notify the employee and his or her union about proposed disciplinary or adverse actions was mandatory. It reasoned that the agreement "did not simply require that the union be notified[;] it spelled out specific consequences if the union was not notified within forty-five days of the date that the [e]mployer knew or should have known of the act or occurrence: the adverse action could not be taken."[19]

In this case, DPM § 1410.5 establishes a clear timetable for issuing a written decision regarding whether an employee has met the requirements of the PIP. Additionally, DPM § 1410.6 establishes a consequence for the failure to comply with § 1410.5. Thus, an agency's failure to issue a written decision within ten days will result in the employee's performance having met the PIP requirements. Such a provision suggests that no other exceptions to the limitation established in DPM § 1410.5 were intended by the D.C. Council.[20]

The relevant day here is December 30, 2015, the day on which Employee's PIP ended. Under DPM § 1410.5, Agency was required to issue a written decision within ten calendar days of the end of the PIP period, or no later than January 9, 2015. Agency concedes that it did not issue a written decision by the prescribed deadline. Therefore, under DPM § 1410.6, Employee was deemed to have met the PIP requirements notwithstanding Agency verbally advising her that she failed the PIP requirements or Employee's subsequent request for a meeting to discuss her

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[18] The Court in this case examined the language of D.C. Official Code § 1-617 (b)(1), which provides the following regarding commencing disciplinary actions: "(b)(1) Except as provided in paragraph (2) of this subsection, *no corrective or adverse action shall be commenced pursuant to this section more than 45 days, not including Saturdays, Sundays, or legal holidays, after the date that the agency knew or should have known of the act or occurrence allegedly constituting cause, as that term is defined in subsection (d) of this section."* (emphasis added).

[19] *Id.* at 1012. *See also Teamsters Local Union 1714 v. Pub. Employee Relations Bd.*, 579 A.2d 706, 710 (D.C. 1990)

[20] *See Metro. Police Dep't D.C. v. Pub. Employee Relations Bd*. at 1.

job performance on January 7, 2015.[21] These acts did not divest Agency of its duty to comply with the requirements of DPM § 1410.5.[22] Furthermore, the AJ did not err by electing not to apply a harmless error test because of the mandatory nature of DPM § 1410.6. As a result, this Board finds that the AJ correctly concluded that Agency's failure to provide Employee with a timely, written notice of her PIP results warrants the reversal of Agency's adverse action.

Notice Requirement

Even if this Board were to find that the language of DPM § 1410.6 was directory, rather than mandatory in nature, we nonetheless agree with the AJ's finding that Agency's Advance Notice of Adverse Action did not cite, with sufficient legal specificity, what charges Employee was subject to. Agency asserts that its notice of discipline to Employee was adequate and that the AJ erred by finding that the penalty of termination was inappropriate. We disagree. In its closing argument, Agency submitted that its termination action was initiated under Chapter 6B, Sections 1605.4(m), 1607.1, and 1607.2(m) of the D.C. Municipal Regulations ("DCMR") based on Employee's "failure to meet performance standards."[23] However, in its February 24, 2016 Notice of Proposed Adverse Action, Agency stated the following with respect to the cause of action serving as the basis for Employee's termination:

> "…the cause underlying this proposed disciplinary action is your failure to satisfactorily perform one or more of the duties of your position and any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations. This removal is based on your failure to successfully perform under the PIP."[24]

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[21] We note that Agency fails to cite to any statute, case law, or regulation which supports its contention that Employee's request for a meeting effectively tolled the ten-day time period provided in DPM § 1410.5.

[22] Agency appears to place the blame on Employee for its failure to adhere to the ten-day regulatory time period by stating that "[a]ccomodating Employee's request for a meeting with the [Chief of Staff] likely caused Agency not to comply with DPM § 1410.5, and for that accommodation, Agency was penalized." *Agency's Petition for Review* at 8. We find this argument to be unpersuasive, as it was incumbent upon Agency to adhere to the applicable regulations regarding providing written notice to Employee about the PIP results.

[23] *Agency's Closing Argument*, p. 31 (April 23, 2018).

[24] *Agency's Answer to Petition for Appeal*, Tab 9.

On April 11, 2016, a Hearing Officer reviewed the charges against Employee, as well as her written response, providing the following in a footnote of the April 11, 2016 Report and Recommendation:

> "The Advance Written Notice of Proposed Removal does not explicitly state 'Neglect of Duty' however[,] the description of the charge falls under the parameter of the Neglect of Duty charge. See the applicable Table of Appropriate Penalties in Chapter 16 of the District Personnel Regulations."[25]

On April 20, 2016, Agency issued its Final Decision on Proposed Removal. In its notice, the Attorney General for the District of Columbia provided that:

> "This letter serves as my final decision on your proposed removal. For the reasons stated in the February 24, 2016 Notice of Proposed Adverse Action, and the April 11, 2016 [h]earing [o]fficer's recommendation and exhibits…the proposal to remove you from your position as a Support Enforcement Specialist is sustained."[26]

This Board is particularly troubled by Agency's lack of clarity and the inconsistencies provided in its notices to Employee regarding the charges levied against her; especially in a circumstance wherein a person is faced with the possibility of being divested of their employment and livelihood. Agency failed to cite to which version of the DPR it was utilizing to support its termination action in the advance notice.[27] Additionally, Agency's notice fails to state that Employee is being charged with neglect of duty. It then attempts to backtrack this error by way of the Hearing Officer's written recommendation, stating that Employee's termination was taken in accordance with Chapter 16, Section 1603.3(f)(3) of the DPR. Finally, Agency's closing

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[25] *Id*. at Tab 11. The Hearing Officer further stated that Agency's adverse action was taken in accordance with Chapter 16, Section 1603.3(f)(3) of the District Personnel Regulations ("DPR").

[26] *Id*. at Tab 12.

[27] Chapter 16 of the D.C. Personnel Regulations was amended by the D.C. Council, effective February 25, 2016. Prior to that, a 2012 version of the regulations applied to adverse actions initiated by agencies. Agency has relied on both the 2012 and 2016 versions of the DPR throughout the course of this appeal.

statement submitted to this Office instead provides that its adverse action was taken in accordance with Chapter 6B, Sections 1605.4(m), 1607.1, and 1607.2(m) of the DCMR.

Employees can only be expected defend against the charges actually levied against them.[28] Thus, Employee in this case could not reasonably be expected to conclude that the "failure to satisfactorily perform one or more of the duties of your position and any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations…failure to successfully perform under the PIP" was tantamount to a charge of neglect of duty as contemplated in 1603.3(f)(3) of the DPR. Of note, the phraseology Agency utilized in its advance notice could either be construed as a charge of neglect of duty or a charge of incompetence: both of which carry different penalties for first time offenses.[29] More importantly, Employee may not have been able to adequately defend against the charges because of Agency's lack of clarity with respect to the legal basis on which its termination action was predicated. As a result, we find that the AJ did not err in determining that Agency's error also served as a basis for reversing Employee's termination.

Admissibility of Evidence

Lastly, Agency opines that the AJ erred in relying on the Hearing Officer's April 11, 2016 Report and Recommendation because it was not informed that the document would be considered as evidence in rendering a decision. Agency argues that the report has no binding affect and that it was only included for the purpose of reciting the facts that resulted in Employee's termination. We are puzzled by this contention, but this Board nonetheless finds that Agency is misguided in its argument.

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[28] *See Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 662 (D.C. 1994); *Johnston v. Government Printing Office*, 5 M.S.P.R. 354, 357 (1981); and *Sefton v. D.C. Fire and Emergency Svcs*., OEA Matter No. 1601-0109-13 (August 18, 2014).

[29] *See* Table of Appropriate Penalties.

Agency fails to cite to any legal basis in support of its position. Agency was the party that submitted a copy of the Hearing Officer's report as evidence in its August 10, 2016 Answer to Employee's Petition for Appeal. It did not request that the document be admitted for a limited purpose, and at no point did Agency move for the exclusion of the report for any reason. OEA is guided by the Federal Rules of Evidence but is not bound by them. However, under Rule 402 of the Federal Rules of Evidence, all relevant evidence is generally admissible. It is clear that the Hearing Officer's report is relevant in light of the arguments in dispute. There is no compelling reason that it should not be considered as part of the record. The AJ was permitted to rely upon each document that was submitted throughout the course of the instant appeal and she acted reasonably in considering its probative value before rendering a decision. Consequently, we find Agency's argument to be meritless.

<u>Employee's Petition for Review</u>

Employee also filed a Petition for Review on November 21, 2018. Since Employee is the prevailing party, this Board will not address her substantive arguments. However, this Board notes that even if we were to address these arguments, Employee's numerous assertions appear to be mere disagreements with Agency's actions and the AJ's findings of fact. This is not a valid basis for appeal.

<u>Conclusion</u>

Based on the foregoing, we find that the Initial Decision was based on substantial evidence in the record.[30] DPM § 1410.5 required Agency to provide Employee with a written decision regarding her PIP results within ten calendar days of the end of the PIP period.

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[30] Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.13 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.

Agency's failure to do so violated the mandatory requirement of DPM § 1410.6. Additionally, Agency's Advance Notice of Adverse Action failed to adequately place Employee on notice of the specific charges against her. Lastly, the AJ acted reasonably in relying on the Hearing Officer's April 11, 2016 Report and Recommendation in rendering her decision. Accordingly, Agency's Petition for Review must be denied, and Agency shall reinstate Employee and reimburse all back pay and benefits lost as a result of her removal.

ORDER

Accordingly, it is hereby ordered that Agency's Petition for Review is **DENIED**. Agency is ordered to reinstate Employee and reimburse her all back pay and benefits lost as result of her termination.

FOR THE BOARD:

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Clarence Labor, 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 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.