THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No. 1601-0053-17
KEITH BICKFORD Employee v	Date of Issuance: June 6, 2019
DISTRICT OF COLUMBIA DEPARTMENT OF GENERAL SERVICES Agency	LOIS HOCHHAUSER, ESQ. Administrative Judge

Talon Hurst, Esq., and Daniel Crowley, Esq., Employee Representatives
C. Vaughn Adams, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

Keith Bickford, Employee, filed a petition with the Office of Employee Appeals ("OEA") on May 26, 2017, appealing the final decision of the District of Columbia Department of General Services, Agency, to terminate his employment, effective April 28, 2017.

The prehearing conference ("PHC") took place on November 16, 2017, and was attended by C. Vaughn Adams, Esq., Agency Representative, Talon Hurst, Esq. Employee Representative, and Employee. At the PHC, Employee, through counsel, stated that he was preparing to file a motion to dismiss. The parties agreed, and the Administrative Judge ("AJ") ordered, that discovery was stayed, and no hearing would be scheduled until the motion was decided. The November 17, 2017 Order memorialized the agreements reached at the PHC and set deadlines for filing and responding to the motion to dismiss.

Employee filed a *Motion for Summary Disposition* on November 30, 2017. Agency filed it opposition on December 18, 2017. Employee thereafter sought leave to reply to Agency's opposition, and subsequently filed a request for a hearing on his motion for summary disposition. The AJ issued an Order scheduling oral argument on all outstanding motions for October 3, 2018.

Oral argument took place on October 3, 2018. Employee was present, as were the representatives. Mr. Hurst and Mr. Adams presented arguments on behalf of their clients, and

responded to questions raised by the AJ. At the end of the proceeding, Mr. Adams agreed to provide copies of Agency's request for an extension of the deadline to the AJ and Employee, and did so prior to the October 5 deadline. On October 9, 2018, the AJ issued an Order summarizing the arguments presented on each issue, stated findings of fact made at the close of oral argument, and ordered the parties to file supplemental briefs on two issues identified in the Order. Timely submissions were filed, and the record was thereafter closed on November 6, 2018.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

ISSUES

Under the circumstances presented, was Agency permitted to issue its notice of proposed removal on October 6, 2016? If not, should Employee's *Motion for Summary Disposition* be granted?

FINDINGS OF FACT, ARGUMENTS BY PARTIES, ANALYSIS AND CONCLUSIONS OF LAW

Findings of Fact [1]

1. Employee began working for Agency in its Protective Services Division in 2011 as a Special Police Office. Prior to his removal, he had been promoted to the position of Supervisory Police Officer.

2. The Protective Services Division ("PSD") is Agency's police force, and is responsible for law enforcement activities and ensuring physical security of all properties under the control of the District of Columbia government.

3. On or about May 10, 2016, Agency was notified that its patrol cars frequently stopped near the 100 block of G Street S.W. in the District of Columbia, and that there were private residential apartments in the area, but no government facility that Agency monitored. During the relevant time period, Employee resided at 103 Street, S.W. which was near the 100 block of G Street, S.W.

4. Agency received the Trips Detail Report which listed the dates and times that an Agency vehicle was parked near the 100 block of G Street S.W. on or about May 11, 2016. Employee's timesheets were printed out on May 24, 2016.

5. On May 26, 2016, Agency provided Employee with "formal notice that he was under

[1] These findings of fact, largely uncontested, are based on the written submissions and their attachments the parties all of which are admitted into the record; the October 9, 2018 *Order*; and the two pages of emails between Agency and DCHR dated October 6, 2016 which Agency counsel emailed to the AJ following oral argument on October 3, 2018. These emails are also part of the record. The AJ commends the representatives on the high quality of their oral and written presentations.

investigation for possible misuse of a government vehicle. (Agency's *Memorandum in Opposition to Motion for Summary Disposition*, p.3). The memorandum entitled "Notification of Investigation into Mis-Use of Government Vehicle," stated in pertinent part:

> This memorandum serves as official notification that you are the subject of a pending investigation.

6. Pursuant to DPM § 1602.3(a), May 26, 2016 was the date to begin calculation of the 90 days Agency had to investigate and the matter

7. Consistent with Finding of Fact 6, October 4, 2016 was the deadline for Agency to complete its investigation and issue a notice of proposed disciplinary action[2]

8. On June 29, 2016, PSD Associate Director Anthony Fortune completed the Proposing Official's Rationale Worksheet to "assess the appropriateness of possible adverse action in accordance with *Douglas Factors* and the available evidence." (DGS *Memorandum in Opposition to Motion for Summary Disposition*, p.3). In the Worksheet Mr. Fortune refers to "56 different occasions" that Employee drive a government vehicle "to his home or some other non-government location."

9. Agency received the "sufficient clarification and additional information" it needed to complete its investigation by October 3, 2016, and "began preparation of [Employee's] advance notice" on that date. (DGS *Memorandum in Opposition to Motion for Summary Disposition*, p.3).

10. On October 6, 2016, Agency issued Employee a notice of proposed removal, stating that it was providing him with the 15 day advance written notice of its intention to remove him for cause. It charged him with off-duty conduct that adversely affects job performance, neglect of duty and violations of the collective bargaining agreement. He was charged with "repeatedly taking an Agency vehicle outside of the service area …to non-[Agency] addresses, including dates that he was on scheduled leave, annual leave, and/or sick leave. The notice referred to the report it received on May 12, 2016 from the logistics unit about the "high frequency of PSD vehicles being driven to a particular address and other addresses in the same and the complex," and the Trip Detail Report for the period between December 3, 2015 and May 10, 2016, which Agency stated confirmed that Employee "drove a government vehicle to a non-government location within the service area on at least 56…occasions." Employee was placed on administrative leave.

11. On October 6, 2016, at 12:37 p.m., Vikkie Garay, Agency Human Capital Administrator, sent an email to Justin Zimmerman, Associate Director of Policy and Compliance Administration of the D.C. Department of Human Resources (DCHR) entitled "Request for Suspension of 90 Day Requirement." In the email, she asked DCHR, as the personnel authority, to either grant Agency a 60-day extension or

[2] This date was also calculated by the AJ and parties at oral argument and included in the October 9 Order.

"completely" suspend the 90-day requirement. She stated that Agency became aware of the misconduct and notified Employee that he was the subject of an investigation on May 26, 2016. In support of the request, she explained that Agency received the "final data" on October 3, 2016, and needed additional time to "conduct a complete investigation and to ensure fairness." Mr. Zimmerman responded by email asking for the employee's name and whether he was a member of the union. Ms. Garay emailed the information to Mr. Zimmerman at 5:02 p.m. that evening.

12. In his response to the notice of proposed removal submitted on October 24, 2016,[3] Employee argued that Agency was untimely in issuing the notice of proposed removal, pursuant to 6B D.C.M.R. §1602.3, and contested the validity of the charges.

13. By letter dated October 24, 2016, DCHR Director Ventris Gibson granted Agency's request, and granted Agency's request, stating in pertinent part:

> On October 6, 2016, [DCHR] received [Agency's] request for an extension of the 90-day time limit [to] bring ...adverse action against [Employee]. For the reasons that follow, your request is GRANTED, and I am extending the time for bringing appropriate action an additional 60 calendar days [from] the date [of] this correspondence.
>
> [Agency] asserts that it was first notified that [Employee] may have misused government vehicle(s) on May 26, 2016. However, you found the evidence that was supplied to be insufficient...to make a definitive conclusion as there were numerous gaps in the automated data. Consequently, [Agency] required additional time to comb through manual logs... to get a clear picture as to the potential misconduct. On October 3, 2016, [Agency] received the reconstructed data it needed and now requests an extension of time for bringing appropriate action...
>
> [P]ursuant to D.C.M.R.§1602.3(c), [the 90 business days] time limit may be suspended by the personnel authority for good cause.
>
> Under these facts, we are not convinced that the time for bring[ing] action began on May 26, 2016, because [Agency] may not have known, or had the ability to know, whether misconduct had actually occurred. Nevertheless, if May 26, 2016 is, in fact, the appropriate starting date, the manual reconstruction of the vehicle log data [aids] in conducting a thorough investigation into the circumstances. Accordingly, DCHR concludes that there is good cause to suspend the time limit. In our opinion...30 calendar days is a reasonable amount of time to address the data integrity issue.
>
> Therefore, for the above reasons, the time limit for bringing appropriate action...is extended to November 7, 2016. [4]

[3] Employee requested and received an extension to file his response.

14. In his report, issued by email on February 21, 2017, Hearing Officer Brian Killian concluded that Agency failed to timely issue the proposed notice as required by.§1602.3, and failed to establish cause. He recommended that Employee be reinstated.

15. The Final Agency Decision upholding the proposal to remove Employee was issued on April 24, 2017. Employee was notified in the decision that his termination would take effect on April 28, 2017.

Arguments by the Parties and Analysis[5]

This matter is governed by 6 B D.C.M.R. § 1602.3, which states:

> Corrective and adverse actions taken against employees are subject to the following limitations:
>
> (a) A corrective or adverse action shall be commenced no more than ninety (90) business days after the agency or personnel authority knew or should have known of the performance or conduct supporting the action;
>
> (b) When there is an investigation involving facts or circumstances germane to the performance or conduct supporting a corrective or adverse action, the time limit established in paragraph (a) shall be tolled pending any criminal investigation by the Metropolitan Police Department or any other law enforcement agency with jurisdiction within the United States, the Office of the United States Attorney for the District of Columbia, or the Office of the Attorney General; or, pending any investigation by the Office of the Inspector General, the Office of the District of Columbia Auditor, or the Office of Police Complaints.
>
> (c) Except in matters involving employees of the Metropolitan Police Department and Fire and Emergency Medical Services Department, the time limit imposed in paragraph (a) may be suspended by the personnel authority for good cause and shall be suspended pending any related investigation by the Board of Ethics and Government Accountability.

At issue is whether Agency violated 6B D.C.M.R. § 1602.3(a) by issuing its notice of proposed discipline two days beyond the deadline pursuant to that provision. In order to answer that question, the first issue to be resolved is whether the word "shall" in 6B D.C.M.R. § 1602.3(a) is directory or

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[4] The AJ is aware that the October 24, 2016 letter granting the extension may specify more than one date for the extended deadlines. However, for the purpose of this *Initial Decision*, there is no need to resolve any confusion since the date of the new deadline is not relevant.

[5] Since § 1602.3 became effective on May 12, 2017, neither party could find decisions interpreting its language. Both parties relied on cases and decisions determining whether provisions containing "shall" under similar circumstances were mandatory or precatory.

mandatory. The question of whether the word "shall" be mandatory or directory has been the subject of considerable debate by administrative agencies and courts.

Black's Law Dictionary (6th ed.) provides the legal definition of the word "shall":

> As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty...

Although the primary definition states that "shall" is mandatory, the conclusion contains the qualifying language that "this word is *generally* imperative or mandatory." (emphasis added). In addition, *Black's* offers a secondary definition:

> [It] may be construed as "merely permissive or directory... to carry out a legislative intention and in cases where no right or benefit to any one depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense.

Agency argues that the word "shall" in § 1602.3(a) is directory, because although it requires that an agency act within a specific time period, it does not contain a consequence if agency fails to meet the deadline as required by *Lakeba Watkins v. District of Columbia Youth & Rehabilitation Services*, OEA Matter No. 1601-0093-07, *Opinion and Order on Petition for Review* (*O&O*) (January 25, 2010). In the *O&O*, the Board determined that a provision, which like § 1602.3(a),[6] stated that an agency "shall" complete an action within a stated time was permissive, concluding that a "statutory time period is not mandatory unless it both expressly requires an agency to act within a particular time period and specifies a consequence for its failure to comply." The Board found that although the provision required agency to act within a stated time period, it did not "offer a consequence for failing to strictly adhere to the regulation."

Employee, on the other hand, contends that 6B D.C.M.R .§ 1602.3(a) imposes a mandatory deadline requiring Agency to issue its proposed notice by no later than October 4, 2016, *i.e.*, 90 days after it became aware of and started investigating Employee. In support of his position, Employee points to a number of decisions issued by this Office, including *Sholanda Miller v. District of Columbia Metropolitan Police Department*, OEA Matter No. 1601-0325-10, *Opinion and Order on Petition for Review* (April 14, 2015) and *Stanley Barker v. District of Columbia Metropolitan Police Department,* OEA Matter No. 1601-0143-10, *Opinion and Order on Petition for Review* (November 28, 2012) in which the Board determined that the language in D.C. Code § 5-1031 established

[6] In that matter, the provision at issue was District Personnel Regulation §1614.3, which required an agency to issue a final decision with a 45-day period,

mandatory deadlines. Employee maintains that the language of the two provisions are sufficiently similar to require that they be interpreted in the same manner.[7]

The AJ concludes that the word "shall" is mandatory. She notes that utilizing the word "may" in lieu of "shall," as provided in the second paragraph of the definition in *Black's* would not require compliance, but would merely allow it. As the Court stated in *Leonard v. District of Columbia*, 801 A.2d 82 (D.C. 2002), the "normal rule" is that the verb "shall" denotes a "mandatory requirement." Further, failing to impose a consequence for violating a mandated deadline would essentially negate the deadline. It is illogical that time and effort would be expended establishing deadlines if they could be ignored without consequence. It is logical to assume that there is an implicit consequence if an agency fails to issue its notice by the mandated deadline, *i.e.,* it will be barred from doing so.

In *Lakeba Watkins v. District of Columbia Youth & Rehabilitation Services,* a case relied upon by Agency to support its position that "shall" is precatory, the Board stated that its decision was "clearly distinguishable" from the decision reached by the Superior Court of the District of Columbia in *Metropolitan Police Department v. Public Employee Relations Board*, 1993 WL 761156 (D.C. Super.).[8] In that decision, the Court determined that statutory language stating that "no adverse action shall be commenced 45 days after an agency knew or should have known of the act constituting the charge" was mandatory. The AJ finds that the provision in that matter is substantially similar to the provision in this matter, and thus supports the conclusion that the provision is mandatory.

The determination that "shall" is mandatory, however, does not resolve this matter, since despite mandatory language, a deadline may in fact be extended. In fact, 6B D.C.M.R. § 1602.3(c) includes both directory and mandatory language identifying circumstances that may or must extend deadlines:

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[7] D.C. Code § 5-1031 states in pertinent part:

1 (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 shall be commenced more than 90 [business] days... after the date that the Fire and Emergency Medical Services Department knew or should have known of the act or occurrence allegedly constituting cause.

(a-1)(1) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause.

2 (b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by ... any law enforcement agency..., the 90-day period for commencing a corrective or adverse action under subsection (a) or (a-1) of this section shall be tolled until the conclusion of the investigation.

[8] However, mandatory language in a collective bargaining agreement is often considered an "absolute bar" that requires no interpretation, since it is the result of negotiations and has been approved by the parties.as in effect at that time. *Curtis Adamson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0041-04, *Opinion and Order on Petition for Review* (September 3, 2008).

> [T]he time limit imposed in paragraph (a) *may* be suspended by the personnel authority for good cause and *shall* be suspended pending any related investigation by the Board of Ethics and Government Accountability. (emphasis added).

Similarly, although D.C. Code § 5-1031 mandates in subpart (a) that no adverse action can be taken after 90 days from the date an agency became aware of the misconduct, it further mandates in subpart (b) that the 90 days is tolled during a criminal investigation.[9] The fact that the legislation that establishes mandatory deadlines also provides for exceptions and extensions, supports the conclusion that "shall" establishes a mandatory deadline, since exceptions and extensions would not be necessary if deadlines were merely precatory. In *Teamsters Local Union 1714 et al. v. Public Employee Relations Board*, 579 A.2d 706 (D.C. 1990), the Court of Appeals cautioned that the presumption that a statutory time period is not mandatory unless it both establishes a deadline for the action to be completed, and a consequence for failing to meet the deadline, is "not conclusive." The decision as to whether a deadline is mandatory or precatory, must be based on other factors, such as the "precise statutory language," and legislative history. In addition to concluding why the "precise language" supports the conclusion that the language is mandatory, the AJ finds the legislative history further supports that finding. The *Notice of Proposed Rulemaking*, published on November 20, 2015, provided notice of proposed changes to Chapter 16. The *Notice* states in pertinent part, that the proposed rules include "the establishment of a time limit in which management *must* initiate a corrective or adverse action." (emphasis added). 62 D.C.R. 015142 (November 20, 2015). The explanation contains the word, "must" when stating the requirement that agency initiate an adverse action within the established time limit. The word "must" replaced by the word "shall" in the final language, supports the conclusion that the intention was to establish mandatory deadlines.

The AJ finds that Agency was not entitled to an extension of time in this matter. The primary reason for reaching this decision is that Agency failed to request the extension in a timely manner. Agency sought a retroactive extension by requesting it two days after the deadline. Absent a showing of good cause, there is no basis for granting the request. *See, e.g., Owens-Corning Fiberglas Corp. v. Henkel*, 689 A.2d 1224 (D.C. 1997). To do so, would further undermine the establishment of deadlines and timeframes. Agency did not offer any reason for delaying its request until two days after the deadline. In its October 6, 2016 request for an extension, Agency stated that it had received "final data" on October 3, 2016. Thus, there was no reason Agency could not have submitted its response prior to the October 4 deadline. Indeed, if Agency had not received necessary data by the end of September, and with an October 4 deadline approaching, it would have been reasonable for Agency to have sought the extension before October 4. There was no reason offered by Agency why it delayed requesting the extension until two days after the October 4 deadline.

In addition, Agency's documents support the conclusion that Agency may not have needed an extension. Agency acknowledged that although it received the "final data" on October 3, 2016, it needed additional time to "conduct a complete investigation and to ensure fairness." However, Agency represented that it began preparing the 15-day proposed notice of removal on October 3, a day before the deadline. (*Memorandum in Opposition to Motion for Summary Disposition*, p.3.). This

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[9] In both *Sholanda Miller v. District of Columbia Metropolitan Police Department* and *Stanley Barker v. District of Columbia Metropolitan Police Department*, *supra,* cases cited by Employee, the period for calculating the deadline had been tolled due to criminal investigations.

representation alone indicates that that Agency had sufficient information to issue the proposed notice in a timely manner. However, there is additional support for that conclusion. The Proposing Official's Rationale Worksheet, completed on June 29, 2016, references specific information, such as the allegation that on "56 different occasions" Employee drove a government vehicle "to his home or some other non-government location that are also included in the October 6 notice. This lends further support to the conclusion that Agency had sufficient information to issue the proposed notice in a timely manner.

Finally, Agency contends that assuming, *arguendo*, that Agency violated the 90-day time limit, the violation should be excused because it was *de minimis* and did not harm or prejudice Employee. The AJ does not find either argument supports excusing Agency's failure to meet a mandatory requirement absent good cause. This Board has stated that an employee is not required to show actual harm resulted from Agency's failure to meet mandatory deadlines in disciplinary matters. *See, e.g., Sholanda Miller v. District of Columbia Metropolitan Police Department* and *Curtis Adamson v. D.C. Metropolitan Police Department, supra.*

Conclusions

The criteria for determining if the *Motion for Summary Disposition* should be granted is governed by OEA Rule 615.1, which states in pertinent part:

> If, upon examination of the record in an appeal, it appears to the Administrative Judge that there are no material and genuine issues of fact, that a party is entitled to a decision as a matter of law...the Administrative Judge may, after notifying the parties and giving them an opportunity to submit additional evidence or legal argument, render a summary disposition of the matter without further proceedings.

In this matter, following the filings of the motion and opposition, the AJ heard oral argument on the issue, and the parties thereafter submitted supplemental briefs. After a thorough review and consideration of all of the submissions of the parties, discussed earlier in this decision, the AJ has determined that there are no "material and genuine" issues of disputed facts on relevant issues. She therefore concludes that further proceedings are not required.

Pursuant to OEA Rule 628.2, 59 D.C.R. 2129 (March 16, 2012), Agency carries the burden of proof on all issues, except those of jurisdiction. It must meet its burden by a "preponderance of the evidence" which is defined in OEA Rule 628.2 as "[t]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue." Based on the facts, analysis and conclusions; and for the reasons provided herein, the AJ further concludes that Agency failed to meet its burden of proof. She therefore concludes, that Employee's motion should be granted.

ORDER

For the reasons stated, based on the findings, analysis and conclusions reached herein, it is hereby:

ORDERED: Employee's *Motion for Summary Disposition* is granted.

ORDERED: Agency's decision to terminate Employee is reversed.

ORDERED: Agency shall reinstate Employee to his last position of record, and reimburse him any and all back-pay and benefits lost as a result of his termination.

ORDERED: Agency shall file with this Office within 30 days from the date this *Initial Decision* become final, documentation of compliance with these directives.

FOR THE OFFICE:

for Lois Hochhauser, Esq.
Administrative Judge

NOTICE OF APPEALS RIGHTS

This is an Initial Decision that will become a final decision of the Office of Employee Appeals unless either party to this proceeding files a Petition for Review with the office. A Petition for Review must be filed within thirty-five (35) calendar days, including holidays and weekends, of the issuance date of the Initial Decision in the case.

All Petitions for Review must set forth objections to the Initial Decision and establish that:

1. New and material evidence is available that, despite due diligence, was not available when the record was closed;

2. The decision of the presiding official is based on an erroneous interpretation of statute, regulation, or policy;

3. The finding of the presiding official are not based on substantial evidence; or

4. The Initial Decision did not address all the issues of law and fact properly raised in the appeal.

All Petitions for Review should be supported by references to applicable laws or regulations and make specific reference to the record. The Petition for Review, containing a certificate of service, must be filed with Administrative Assistant, D.C. Office of Employee Appeals, 955 L'Enfant Plaza Suite 2500, Washington, D.C. 20024. Four (4) copies of the Petition for Review must be filed. Parties wishing to respond to a Petition for Review may file their response within thirty-five (35) calendar days, including holidays and weekends, after the filing of the Petition for Review.

Instead of filing a Petition for Review with the Office, either party may file a Petition for Review in 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.

CERTIFICATE OF SERVICE

I certify that the attached **INITIAL DECISION** was sent by regular mail on this day to:

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Katrina Hill
Clerk

June 6, 2019
Date