GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: Teamsters Local Union No. 1714 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO (on behalf of Jean Harrod), Petitioner, and District of Columbia Department of Corrections, Respondent.	PERB Case No. 87-A-11 Opinion No. 284

DECISION AND ORDER ON REMAND

This case is again before the Public Employee Relations Board (Board) on remand from the D.C. Court of Appeals. (Teamsters Local Union 1714 v. PERB, 579 A. 2d. 706 (1990).) In reversing the D.C. Superior Court's Order which had affirmed the Board's Opinion in Teamsters Local 1714 and Dept. of Corrections, 35 DCR 8173, Slip Op. No. 189, PERB Case No. 87-A-11 (1988), the court remanded the case with instructions that this agency must adequately explain its conclusions regarding the meaning and relationship of the statutory and regulatory provisions concerning the "45-day rule."

The Board, having considered the parties' briefs on these issues [1]/ as well as the entire record and relevant law, has determined for the reasons set forth below that the forty-five-day time period contained in the Comprehensive Merit Personnel Act of 1978 (CMPA) at D.C. Code Sec. 1-617.3(a)(1)(D) is

[1]/ The Board solicited briefs from the parties and believes that this provided them an adequate opportunity to express their views and concerns to the Board. We therefore deny the Teamsters' request for oral argument in this matter pursuant to Board Rule 538.2.

directory in nature. [2]/ Upon reconsideration, however, and as also explained below, we conclude that the regulatory provision, DPM Sec. 1604.38, is mandatory.

The background of this matter can be briefly stated as follows. On September 28, 1987, Teamsters Local Union No. 1714 a/w Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO (Teamsters), on behalf of Jean Harrod (Grievant), filed an Arbitration Review Request with the Board. The Request asserted that the Arbitration Award on its face was contrary to law and public policy and that the Arbitrator exceeded his jurisdiction because the Award improperly placed the burden on the Grievant to establish any prejudice as a consequence of the Department of Corrections' (DOC) failure to render a final decision on a proposed adverse action within the 45-day period required by D.C. Code Sec. 1-617.3(a)(1)(D) and District Personnel Manual (DPM) Sections 1604.30 and 1604.38. On October 14, 1987, DOC filed an Opposition to the Arbitration Review Request. On November 2, 1988, the Board issued Opinion No. 189 which granted the Request and reversed and remanded the Award to the Arbitrator with directions to issue an award in accordance with the Board's Opinion. The Board found consistent with law the Arbitrator's conclusion that DOC's failure to issue a timely decision on a proposed disciplinary action did not automatically forfeit its right to implement the decision. Slip Op. No. 189 at 3. The Board determined contrary to law and public policy, however, the Arbitrator's finding that the Teamsters bore the burden of establishing that the Grievant suffered prejudice as a result of the agency's delay in issuing its decision regarding the discipline.

In December 1988, both the Teamsters and the District of Columbia (on behalf of DOC) petitioned the D.C. Superior Court for review of Board Opinion No. 189. By two separate orders dated February 21, 1989, the Superior Court dismissed the petitions and affirmed Board Opinion No. 189, whereupon both parties renewed their appeals before the D.C. Court of Appeals. On August 22, 1990, the Court issued a consolidated decision reversing the Order of the Superior Court with instructions to remand to the Board for further proceedings consistent with the Court's opinion. Teamsters Local Union 1714 v. Public Employee

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[2]/ A statutory provision which specifies a certain period of time within which an act is to be done that is construed as "directory" leaves intact the authority to act beyond the specified time period unless actual prejudice is established. See Black's Law Dictionary 547 (4th ed. rev. 1976). If the time period is construed as a forfeiture of the authority to act beyond the specified time period, it is deemed "mandatory". Id.

Relations Board, supra, p.1. On October 1, 1990, the Superior Court vacated its previous orders and remanded the case to the Board as instructed.

In its Opinion, the D.C. Court of Appeals noted District of Columbia case law that a statute imposing a time limit within which a public official must act and which does not specify the consequences of noncompliance is presumptively directory rather than mandatory. 579 A.2d at 710. Nonetheless, said the Court, the Board's reliance on a presumption that these statutory and DPM provisions are directory was conclusory. The Court directed the Board to further explain the reasoning underlying its interpretation that the "forty-five-day rule" contained in D.C. Code Sec. 1-617.3(a)(1)(D) and DPM Section 1604.38 was in each case directory rather than mandatory. Should the statute be found to be directory, the Court ruled, the Board should determine "whether the agency has chosen to make the forty-five-day rule mandatory by promulgation of the regulation [i.e., DPM Sec. 1604.38]." Id. at 711, Slip Op. at 12. [3]/

For the reasons that follow, upon reconsideration, we grant the Teamsters' request for review.

1. The Mandatory vs. Directory Nature of the "Forty-Five-Day Rule"

The so-called "forty-five-day rule" is contained in D.C. Code Sec. 1-617.3(a)(1)(D) and DPM Sec. 1604.38.

A. D.C. Code Sec. 1-617.3

Procedures and appeals.

(a)(1) An individual in the Career and Education Services against whom an adverse action is recommended in accordance with this subchapter is entitled to the reasons, in writing, and to the

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[3]/ The Court of Appeals' opinion went on to discuss "The Prejudice Determination" that must follow upon a conclusion that the governing rule is directory. The opinion noted that PERB, although it had found the statutory provision directory, did not make the prejudice determination the Court thought necessary, a determination relating to the burdens of pleading "or perhaps even initial production" on the issue of prejudice, and the relation of such burdens to the burden of persuasion. 579 A.2d at 711, Slip Op. at 12-13. See our treatment of this question in footnote 6, infra.

following:

> (A) Notice of the Action sought and of charges preferred against him or her;
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> (B) A copy of the charges;
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> (C) A reasonable time for filing a written answer to the charges with affidavits; and
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> (D) A written decision on the answer within forty-five (45) calendar days of the date the charges are preferred. (emphasis added)

Paragraph (a)(1) is directed to Career and Educational Services employees and the substance of its subsections indicates an intent to provide certain procedural entitlements to these employees when adverse actions are proposed to be taken against them. Thus, the 45 days in Sec. 1-617.3(a)(1)(D) specifically limits the time period within which the affected employee is entitled to "[a] written decision on the answer". Nothing contained in Sec. 1-617.3(a)(1) either is expressly directed to the agency's authority to take adverse action or "specifies a consequence for failure to comply with the provision." Thomas v. Barry, 729 F.2d 1469, 1470 n.5 (D.C. Cir. 1984).

The designation of the 45-day time period in this D.C. Code section is similar in nature to the time-period designation contained in the regulation addressed by the D.C. Court of Appeals in Vann v. D.C. Board of Funeral Directors and Embalmers, 441 A.2d 246 (1982). There, the Court found directory a regulation of the D.C. Board of Funeral Directors and Embalmers which provided that its decision be rendered "'in writing, as soon as practicable, but not later than ninety days after the date the hearing is completed[.]'" Id. at 247, citing 5 DD DCRR Section 50.1. Here we have a statute -- as there, a regulation -- that affects both public and private interests; here, the public interest in effective and efficient provision of the service of the agency in question (the Department of Corrections) and the private interest of the employee in being disciplined only in accordance with due process.

We find nothing to evince an intent by the D.C. Council that a late written decision on a recommended adverse action must forfeit that agency's authority to act. Indeed, another provision in the Code leads to the opposite conclusion.

This is the section of the Code (Sec. 1-601.2) which sets forth the purpose of the merit system and which begins with the announcement: "(a) The Council of the District of Columbia declares that it is the purpose and policy of this chapter to assure that the District of Columbia government shall have a modern flexible system of public personnel administration, which shall ... (7) [e]stablish the means to... maintain[ing] an effective and responsive work force consistent with merit principles[,] and, as provided in subsection (b)(4), "[t]he Career and Educational Services ... shall follow merit principles such as the following ... (4)[r]etaining employees on the basis of their performance, correcting inadequate performance and separating employees whose inadequate performance cannot be corrected[.]"

An automatic forfeiture of an agency's authority to take disciplinary action if ~~that is not done~~ within a fixed period of time, i.e. 45 days, would not be consistent with these purposes of administrative flexibility, correcting inadequate performance, and maintaining an effective and responsive work force. Nor is such rigidity essential if employees are to have the "enhance[d]" rights "to challenge the actions or failures of their agencies" that the Council sought to give them in enacting the "purpose" section of the "Employee Rights and Responsibilities" subchapter of Title 1 of the Code, see Sec. 1-616.1(1). This paragraph (1-616.1(1)) does not address employee discipline for job performance, its procedures and the required protection for employees. Rather, the paragraph is addressed to what is known colloquially as whistle-blowing.

We have canvassed the limited legislative history of D.C. Code Sec. 1-617.3(a)(1)(D), but find no serious guidance on the mandatory/directory question. The legislative materials are described in the margin. [4]/

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[4]/ D.C. Code Sec. 1-617.3(a)(1)(D) is part of the CMPA which replaced Title 5, United States Code (the personnel law for Federal Government employees) as the personnel law for District Government employees in 1978. The corresponding provision in the U.S. Code (which appeared in earlier drafts of Sec. 1-617.3(a)(1)(D)) provided that an employee for whom corrective or adverse action is recommended, "is entitled to a written decision and the specific reasons therefore at the earliest practicable date." 5 USC Sec. 7501 (emphasis added). Bill 2-10, Committee Draft #1, D.C. Register, July 15, 1977, and Committee Print, District of Columbia Committee, House of Representatives, January 1979, p. 360.

During the legislative process, a fixed time period was set, at first of 30 and then at its present 45 days. This expansion of

For the above reasons, we conclude that D.C. Code Sec. 1-617.3(a)(1)(D) does not establish a mandatory rule and that the Arbitrator's conclusion to the contrary (Award at 12) cannot stand.

B. DPM Section 1604.38 provides as follows:

> The decision shall be rendered no more than forty-five (45) days from the date of delivery of the notice of proposed corrective or adverse action; provided that the period may be extended when the employee does the following:
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> (a) Requests and is granted an extension of the time allotted for answering the notice of the proposed action; or
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> (b) Agrees to an extension of time requested by the agency. (emphasis added)

The general rule 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" (Thomas, supra, 729 F.2d at 1470 n.5), which, as the D.C. Court of Appeals has told us, is only a presumption, has also been applied to District agencies' statutorily authorized regulations. See, e.g., JBG Properties, Inc., supra and Vann, supra. Our finding in Opinion No. 189, Slip Op. at 3, that DPM Sec. 1604.38 lacked "a specific limitation curtailing the power of the agency for failure to act within a certain time period" established only that the DPM provision was entitled to this presumption. A determination must therefore be made whether "the designation of the time must be considered a limitation of the power of the

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(footnote 4 Cont'd)
time was made at the suggestion of the then D.C. Personnel Director who remarked that "[t]he thirty-day limitation prescribed in this subsection does not provide sufficient time to adequately review the employee's answer to charges. In fairness to employees, this limitation should be extended to forty-five days." Committee on Government Operations, Compensatory Merit System; Legislative History at 1328.

officer" [5]/ which, if found, would rebut the presumption. This requires an analysis of the regulation to determine its nature and intent.

Upon review, we find that, in contrast to D.C. Code Sec. 1-617.3(a)(1)(D), which establishes an employee entitlement, DPM Sec. 1604.38 limits the exercise of an agency's authority to act, i.e., to decide to take corrective or adverse action with respect to employees. The tenor and absolute wording of DPM Sec. 1604.38, requiring that "[t]he decision shall be rendered [within] no more than forty-five (45) days", reflects an intent that the regulation be strictly adhered to by those agencies subject to its coverage, notwithstanding its lack of explicit consequences for nonconformance. The two exceptions to the 45-day time limit (see p. 9, supra) provide further evidence that strict agency compliance is intended unless deviation is requested or authorized by the employee pursuant to one of those exceptions. In particular, DPM Sec. 1604.38(b), which permits the extension of the 45-day period, if consent is granted by the employee, would be rendered meaningless.

The same intent is manifested by a related DPM provision, Sec. 1604.30 which provides in pertinent part:

> If a corrective or adverse action is proposed in connection with circumstances described in subsection 1604.27 above, the notice period shall be waived and the employee shall be given all of the following:
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> * * *
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> (d) A written decision on the proposed action by a deciding official and specific reasons therefor at the earliest practicable date, but not later than forty-five (45) days from the date of receipt of notice of proposed action. (emphasis added)

Thus, notwithstanding our finding that the statutory "forty-five-day rule" is directory, it is our view that the District Personnel Office has chosen to make the rule mandatory by promulgating the regulation.

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[5]/ JBG Properties Inc., supra, 364 A.2d at 1185, (quoting 2A Sutherland, Statutory Construction, Section 57.19 at 445 (3rd. ed. 1978)).

Why might the District thus impose upon itself a discipline greater than is required by the governing statute, i.e., D.C. Code Sec. 1-617.3(a)(1)(D)? The District, through its Personnel Office, could well have thought at the time DPM Section 1604.38 was adopted that such a requirement was necessary to encourage agencies to comply with their own rules. Absent such a rule, the agencies would have no external incentive to act on proposed employee discipline in a timely manner, and any agency could simply fail to do so. Thus it would be entirely rational for the District to adopt a requirement of timely action if an agency is to act at all in this area.

Additionally, in choosing to limit its agencies' freedom to act to an extent greater than is required by statute, the District would know that its choice is not irreversible. As would not be true were a statute to require compliance with a strict time limit if adverse action is to be taken, a regulation so requiring (i.e., a DPM section) can be amended by the Executive Branch that adopted it. If experience were to teach that the requirement is overly strict in that, in the perception of the Executive, it is interfering with proper management and can and should be replaced by a less rigid alternative, the Executive is free to amend the regulation. That is obviously true in theory, and this Board knows that it is also true in fact: compare our experience under the Interim Rules adopted by the first Board under the CMPA. Those Rules were adopted in good faith in anticipation of what would be needed. In the event, inadequacies appeared as did simple need for changes in some and expansion or greater specification in others. And so, in 1990, following the required procedures, we amended those Rules.

We conclude that DPM Sec. 1604.38 is mandatory in nature. DOC was therefore legally barred from taking the challenged adverse action against the Grievant because it did so after the time limitation had expired. [6]/ Thus, we find contrary to law

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[6]/ DOC cites Brock v. Pierce, 476 U.S. 253 (1986), wherein the Court ruled that a statute which provided that the Secretary of Labor "shall" issue a final determination within 120 days "did not deprive him of the power to act on the complaint [which the statute addressed]." DOC further quotes the Court's observation that "[w]hen...there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that [the legislature] intended for the agency to lose its power to act." (emphasis added) (DOC Br. at 6 quoting the Court at 259). We have made no such assumption as to either D.C. Code Sec. 1-617.3(a)(1)(d) or DPM Sec. 1604.38. Our determinations are based on our examination and analysis as discussed in the text above.

and public policy the Arbitrator's conclusion that the Teamsters must establish "harmful error", i.e., prejudice, if relief is to be had for nonconformance with the regulation. This erroneous conclusion has the effect of bringing the resulting Award within our scope of review.

We, therefore grant the Teamsters' request for review.

ORDER

IT IS HEREBY ORDERED THAT:

The Decision in Opinion No. 189 is reversed to the extent inconsistent with this Decision and Order and the Arbitration Review Request is granted. The Arbitration Award is set aside, and this matter is remanded to the Arbitrator with instructions to issue an Award upholding the grievance for failure of the Department of Corrections to comply with the governing regulation.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

July 19, 1991

(footnote 6 Cont'd)

With respect to whether "less drastic remedies" are available, we concluded for the reasons discussed in the text that by promulgating this mandatory regulation the District has elected to bear the consequences. Having so concluded, we have no occasion to reach the issue of prejudice resulting from agency violation of a directory rule.

Court of Appeals ruled that "the time limits for filing appeals with the administrative adjudicative agencies are mandatory and jurisdictional, thus obviating any need for a showing of prejudice...." Id., Slip Op. at 2 and 6. As a mandatory and jurisdictional provision of our rules, MPD's right to request review of the Arbitration Award was automatically forfeited when it failed to do so within the prescribed time limit. [5]/ Thus, contrary to MPD's contentions, the Executive Director's action in dismissing its Request was not a "discretionary quasi-judicial act" requiring review by the Board. Moreover, pursuant to D.C. Code Sec. 1-605.1(k) of the Comprehensive Merit Personnel Act (CMPA), the Board may appoint such persons as it deems necessary to carry out its business. [6]/

MPD's second argument in its Motion, relying upon Interim Rule 100.13, is of no avail. Interim Board Rule 100.13 provides:

> "When an act is required or allowed to be done at or within a specified time, the Board, the Chairperson or the Executive Director shall have discretion to order the period extended or reduced when it may be

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[5]/ A statutory provision which specifies a certain period of time within which an act is to be done that is construed as "directory" leaves intact the authority to act beyond the specified time period unless actual prejudice is established. See Black's Law Dictionary 547 (4th ed. rev. 1976). If the time period is construed as a forfeiture of the authority to act beyond the specified time period, it is deemed "mandatory". Id. Cf., Teamsters Local Union No. 1714 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO and D.C. Department of Corrections, 38 DCR 5080, Slip Op. No. 284, PERB Case No. 87-A-11 (1991); Woodley Park Community Association v. District of Columbia Board of Zoning Adjustment, 490 A.2d 628, 635 (1985) and Thomas v. District of Columbia Department of Employment Services, 490 A.2d 1162, 1164 (1985).

[6]/ Notwithstanding MPD's contention that the CMPA did not contain any provisions authorizing the Board to delegate such "discretionary" acts and final decisions to the Executive Director, MPD acknowledged in its Motion that it was informed by the Executive Director in a letter dated August 5, 1987, during the processing of PERB Case Nos. 86-A-06 and 87-A-04, that the Board had "decided at the outset of [its June 14, 1987] meeting...to defer to [the Executive Director's] discretion in making determinations on issues of timeliness." (Motion at 6-7.) As noted by FOP, Interim Rule 109.1 (now Board Rule 500.3) provides "[t]he Executive Director is the principal administrative officer of the Board and performs such duties as assigned by the Board ... ."