No. 20-CV-482

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

OFFICE OF THE ATTORNEY GENERAL
FOR THE DISTRICT OF COLUMBIA,
APPELLANT,

V.

DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS, *et al.*,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE OFFICE OF THE ATTORNEY GENERAL FOR THE DISTRICT OF COLUMBIA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Page(s)

Cases

Statutes and Regulations

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* Authorities upon which we chiefly rely are marked with asterisks.

ARGUMENT

The Office of the Attorney General ("OAG") lawfully terminated child-support specialist Rachel George for failing to satisfy a 42-day performance improvement plan ("PIP"). After George agreed to forgo a written decision within ten days of the end of her PIP, OAG provided her timely written notices explaining that she was terminated for her PIP failure. George was entitled to nothing more in terms of notice, and she does not argue otherwise on appeal. The Office of Employee Appeals ("OEA") thus legally erred in vacating George's termination on the grounds that she had not received a written decision within ten days after her PIP ended and that she lacked notice of the charges against her. The OEA's error is all the more evident in light of this Court's recent decision in *D.C. Department of Health v. D.C. Office of Employee Appeals* (*Stanback*), 273 A.3d 871 (D.C. 2022). *Stanback* confirms that the ten-day timeframe for written decisions is simply a "default rule," of the kind that is presumptively waivable, and suggests that any violation of the rule in this case was harmless. *Id*. at 877-78 & n.5. This Court should reverse.

I. The OEA Legally Erred By Vacating George's Termination Because She Waived The Ten-Day Rule.

A. George waived the ten-day rule by agreeing to extend the default timeframe for receiving a written decision.

The ten-day rule is a waivable time limit for receiving a written decision, and George waived it by agreement. The rule directs supervisors to provide employees "a written decision" on their PIP performance within ten calendar days of the end of

the PIP, and failure "to issue a written decision within the specified time period will result in the employee's performance having met the PIP requirements." 6-B DCMR §§ 1410.5, 1410.6.[1] George does not deny that she waived this rule by agreeing to receive a written decision more than ten days after her PIP ended on December 30, 2015. *See* George Br. 17-18. Nor could she. At a meeting she requested with OAG's Chief of Staff Kim Whatley on January 7, 2016, George and her union representatives agreed to receive a written decision on January 19, 2016, so that George could better respond to evidence of her PIP failure. JA 27-28, 247-49, 355-58; *see* JA 507 ("I had requested for the hearing to discuss the PIP with Kim Whatley."). George cannot plausibly dispute that she waived the ten-day rule by agreeing to that schedule, and she does not attempt to do so on appeal.

Yet the OEA ignored those facts by misreading the ten-day rule as a nonwaivable deadline simply because it is "mandatory" and has a "consequence for the failure to comply." JA 629-31. That is wrong as a matter of law: even mandatory time limits with consequences for noncompliance are waivable unless they clearly provide otherwise. *Crawford v. United States*, 932 A.2d 1147, 1156-58 (D.C. 2007). As this Court recognized in *Stanback*, the ten-day process is simply a "default rule."

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[1] As OAG's opening brief noted (at 2 n.1), the PIP regulations in 6-B DCMR § 1410, et seq., were amended in non-pertinent respects several years after George's termination. 66 D.C. Reg. 5868-5870 (May 10, 2019).

273 A.3d at 877-78. And parties routinely waive such rules through agreement. *See Dist. No. 1-Pac. Coast Distrib. v. Travelers Cas. & Sur. Co.*, 782 A.2d 269, 276 (D.C. 2001) (explaining "parties can contract out of" a "default rule" (internal quotation marks omitted)). Nothing in the personnel regulations suggests that the ten-day rule operates differently, let alone that it expressly forecloses waiver, *see United States v. Mezzanatto*, 513 U.S. 196, 208 n.5 (1995) (recognizing that "parties can" indeed "waive the default rule"). The OEA erred in concluding otherwise.

B. Even absent the waiver, any violation of the ten-day rule was harmless as George received multiple written decisions within 100 days of her PIP's inception.[2]

Stanback suggests that, even if George had not waived the ten-day rule, any extension beyond ten days was harmless since George received written decisions within 100 days of her PIP's start. *See* 273 A.3d at 877-88 & n.5; 6-B DCMR § 631.3 (providing that the OEA "shall not reverse an agency's action" if the "error was harmless"). As OAG's opening brief explained (at 2-6), PIPs can last up to 90 days, and the default period for receiving a written decision is ten calendar days after the PIP ends. 6-B DCMR §§ 1410.2, 1410.5, 1410.6. Putting those timelines together, *Stanback* recognized that the regulations establish a "maximum 100-day period (ninety plus ten)" "for a PIP and a written determination," so that no employee

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[2] This argument was not raised in OAG's opening brief, as *Stanback* had not yet been decided. *See* OAG Br. 25 n.7.

is "left to worry about their fate for more than 100 days after [a PIP's] inception." 273 A.3d at 873, 877 (vacating employee's removal because, while he received a written decision six days after his PIP ended, the PIP itself lasted 101 days).

Stanback thus suggests that an untimely written decision might be harmless if issued within the "100-day PIP-plus-determination period." *Id.* at 877-78 & n.5 (this scenario may be "more amenable to" a "harmless error analysis"). While not deciding the issue, *Stanback*'s suggestion aligns with the OEA's 2016 ruling in *Jackson v. D.C. Department of General Services*, which indicates that violations of PIP deadlines are harmless if the employee receives written notice within 100 days of the PIP's start. *See Stanback*, 273 A.3d at 878 ("*Jackson* is in no tension with the OEA's decision below or with our reasoning today."). In *Jackson*, the OEA upheld an employee's removal because he received notice of his PIP failure within 96 days of the PIP's inception. OEA Matter No. 1601-0034-11a, at 7 & n.21 (Mar. 29, 2016), https://tinyurl.com/5cpnnakt. Although the PIP itself improperly lasted 92 days, the OEA found any "error to be *de minimis*." *Id.* at 7. As *Stanback* explained, the error in *Jackson* was harmless because the employee still received written notice "within the maximum 100-day-PIP-plus-determination period." 273 A.3d at 878.

So too here. George's PIP started on November 18, 2015. JA 8-11, 22, 505. Her supervisors provided her a written decision 62 days later, on January 19, 2016, explaining that she "had failed to meet the PIP requirements" and recommending

her termination. JA 22-29; *see* JA 599, 657. OAG then gave George a written notice of proposed removal on February 24, 2016, 98 days after her PIP began, again explaining that she had "failed to meet the elements of [her] PIP." JA 34-48. Because those written decisions were issued "within the maximum 100-day PIP-plus-determination period," any violation of the ten-day rule in this case was clearly harmless, as George was not "left to worry about [her] fate for more than 100 days." *Stanback*, 273 A.3d at 877-78 & n.5.

II. The OEA Legally Erred By Vacating George's Termination Based On An Alleged Inadequacy In The Notice Of Termination, And Any Flaw Was Harmless In Any Event.

OAG provided George adequate notice that the cause for her termination was the failure to perform her PIP. "Cause" for termination is any nonarbitrary reason for "adverse action," including "performance deficits" such as "[n]eglect of duty" and "[f]ailure to meet performance standards." 6-B DCMR §§ 1605.4(e), (m), 1699.1. Failing a PIP is a performance deficit by any measure: a PIP identifies "specific performance areas in which the employee is deficient," *id.* § 1410.3, and agencies can "remove" employees who "failed to meet the [PIP] requirements," *id.* § 1405(b); *see id.* § 1605.1 (authorizing "adverse action" if "performance measures are not met"). Thus, failing a PIP is "cause" for termination.

The notice of proposed removal in February 2016 clearly stated the basis for George's termination, and she does not argue otherwise. *See* George Br. 17-18. That

notice explained that George's "removal [wa]s based on [her] failure to successfully perform under the PIP," which was a "failure to satisfactorily perform one or more duties of [her] position" and thus constituted "cause" for removal. JA 34. Following a designated hearing officer's decision to uphold the removal, OAG issued a final decision in April 2016, incorporating "the reasons stated" in the February notice and thus reinforcing that George was terminated for failure to satisfy the PIP. JA 125.

In challenging that decision before the OEA, George and her counsel never once claimed that she lacked adequate notice of the charges against her. *See, e.g.*, JA 127-30, 138-40, 521-35, 568-84. Far from it. Under the heading "CHARGE AGAINST MS. GEORGE," George's closing argument to the OEA acknowledged that "[t]he Agency's case was *built entirely on* Ms. George's failing the Performance Improvement Plan," and that she "was not charged with any deficiencies *other than* failure to complete the PIP." JA 569 (emphases added).

The OEA nevertheless held that George lacked notice of that very charge. It acknowledged that the notices of removal identified George's "failure to successfully perform under the PIP" as the "cause" for her termination. JA 631-32. But rather than focus on the clarity of those notices, or George's own admissions, the OEA instead saw confusion in other isolated statements. JA 631-33. According to the OEA, George "may not have" known "the legal basis" for her removal because, while the notices described George's PIP failure as the basis for

termination, OAG's closing argument before the OEA referred to a "failure to meet performance standards" whereas the designated hearing officer had referred to a "neglect of duty." JA 631-33. Because those independently sufficient bases for removal are mentioned separately in a non-exhaustive list of causes for termination, *see* 6-B DCMR § 1605.4, the OEA speculated that George might not have understood "the charges levied against her." JA 631-33.

The OEA's ruling is incorrect. Notices must inform employees of "the specific performance or conduct at issue" and how their "performance or conduct fails to meet appropriate standards." 6-B DCMR § 1618.2. But they need not cite a specific provision or intone a particular label, such as "neglect of duty" or "failure to meet performance standards." *See, e.g.*, *id.* § 1623.4(b) (stating that final notices "shall not" include "specifications" of cause). An "employee need only receive enough information to permit preparation of an informed reply," *Brook v. Corrado*, 999 F.2d 523, 526-27 (Fed. Cir. 1993), and George plainly had that here. As noted, she admittedly knew that her termination was "built entirely" on her PIP failing and that she could be removed on that basis, JA 569, which is not surprising since failing a PIP is both a neglect of duty *and* a failure to meet performance standards, *see* OAG Br. 30-34. In short, because the notices apprised George of the basis for her termination, she received all the notice to which she was due. Any perceived defects

were, at most, harmless and in no way justified the OEA's order reinstating George to a child-support position without determining the merits of her removal.

CONCLUSION

This Court should reverse the Superior Court's decision and remand for the OEA to address George's challenge to the merits of her termination.

Respectfully submitted,

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July 2022

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I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

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4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the party protected under such order," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); see also 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal

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5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

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/s/ Bryan J. Leitch	20-CV-482
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CERTIFICATE OF SERVICE

I certify that on July 25, 2022, this reply brief was served through this Court's electronic filing system to:

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