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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JACQUELINE HURST,	)	
Employee	)	OEA Matter No. 1601-0302-10
	)	
v.	)	Date of Issuance: March 27, 2013
	)	
D.C. DEPARTMENT OF YOUTH	)	
REHABILITATION SERVICES,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

John Stolarz, Esq., Employee Representative
Margaret Radabaugh, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On April 30, 2010, Jacqueline Hurst ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Department of Youth Rehabilitation Services ("DYRS" or "Agency") decision to place her on Enforced Leave effective April 23, 2010. Employee was a Youth Development Representative with DYRS. Employee was charged in accordance with District Personnel Manual ("DPM") §1620.1. On June 4, 2010, Agency submitted its Answer to Employee's Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge ("AJ") on July 07, 2012. Thereafter, on July 12, 2012, I issued an Order Scheduling a Status Conference in this matter for August 8, 2012. During the August 8, 2012, Status Conference, the parties agreed to submit this matter to mediation. A Mediation Conference was scheduled for October 10, 2012. However, on August 22, 2012, the Mediation Conference was canceled as Agency declined to continue mediation. Thereafter, on October 12, 2012, the undersigned AJ issued another Order Scheduling a Status Conference for November 13, 2012. On October 25, 2012, Employee submitted a request that the Status Conference be rescheduled for another date due to a conflict in Employee's attorney's schedule. This request was granted in an Order dated October 26, 2012, and the Status Conference in this matter was rescheduled for December 18, 2012.

Both parties were present for the December 18, 2012, Status Conference. On January 23, 2013, I issued a Post-Status Conference Order requiring the parties to submit written briefs addressing the issues raised at the Status Conference. On February 1, 2013, the undersigned received Employee's Motion for Extension of Time to file her Post-Status Conference brief. This Motion was

granted. Subsequently, the parties submitted a Consent Motion for extension of time to file the Post-Status Conference brief. This Motion was granted in an Order dated February 22, 2013. Both parties have submitted their written briefs. After considering the parties' arguments as presented in their submissions to this Office, I have decided that there are no material facts at issue in dispute, and as such, an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

OEA has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

Whether Agency's action of placing Employee on Enforced Leave was done in accordance with District laws, rules and regulation.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

According to the record, Employee was hired as a Youth Development Representative ("YDR") in 2004. On November 9, 2009, Maryland Police notified Agency that Employee had been arrested and charged in Maryland on two (2) outstanding warrants for (1) bad check/utter/stop payment - $500 or more, a felony in Maryland; (2) for theft less than $500 and bad check/utter/NSF under $500; and (3) Theft, less than $500 value.[1] Agency notified Employee on November 25, 2009, in a Notice of Proposed Enforced Leave that she would be placed on five (5) days Administrative Leave ("AL") from November 25, to November 29, 2009.[2] Employee was also notified in this Notice that if a determination was made to take the action proposed in the Notice, Employee would be placed on Enforced Leave beginning November 30, 2009.[3] Subsequently, on December 1, 2009, Agency issued an Amended Notice of Proposed Enforced Leave wherein, it amended the start and end date of Employee's AL to November 26, 2009 - November 30, 2009.[4] The Amended Notice also stated that if a determination is made to take the action proposed in the Amended Notice, Employee would be placed on Enforced Leave beginning December 1, 2009. While Employee was notified in both the Notice and the Amended Notice of her right to review any material upon which the proposed action is based on, she was not notified of her appeal rights to this Office. On April 23, 2010, Agency issued a Notice of Final Agency Decision ("FAD") on the Proposed Enforced Leave to Employee, placing her on Enforced Leave effective April 23, 2010. The FAD also provided her with her appeal rights with this Office.[5]

Employee's Position

Employee contends that Agency failed to comply with the requirements of § 1-616.54(e) of the Comprehensive Merit Personnel Act ("CMPA"), rendering the Enforced Leave void *ab initio*. Employee explained that the decision to place her on Enforced Leave was substantively and procedurally wrong because no decision was made within five (5) days as required by D.C. Code § 1-

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[1] Maryland Criminal Code § 8-103(b). *See also* Agency's Answer (June 4, 2010) at Tab 6.
[2] Agency's Answer at Tab 7.
[3] *Id*.
[4] *Id*. at Tab 8.
[5] *Id*. at Tab 9.

616.54(e), until April 10, 2010.[6] Additionally, Employee explains that D.C. Municipal Regulations ("DCMR") § 1620.6(h) requires that the Notice of Proposed Enforced Leave inform Employee of her right to a written decision within five (5) days of the AL. Employee maintains that placing her on Enforced Leave is a drastic measure which places an undue hardship on her, and Agency has the burden of complying with the regulation.

Furthermore, Employee asserts that Agency abused its discretion because the offense with which Employee was charged with did not impact her suitability to continue performing the duties of her position. Employee states that the decision to place her on Enforced Leave is clearly discretional and Agency was not required to do so. Employee also explained that stopping payment on one's check when the retailer deposited a check clearly marked "Do not cash" does not relate to her work and did not impact her suitability to continue performing her duties at Agency. Employee also states that the penalty taken against her is out of proportion to the violation with which she was charged. She maintains that a less severe discipline would have been the appropriate action because she had not had any major disciplinary problems since the beginning of her employment at Agency.[7]

In addition, Employee notes that she is entitled to reimbursement for pay lost while on Enforced Leave because other similarly situated African Americans employed by Agency and charged with violating a criminal law were placed on AL with pay. Employee maintains that the failure to place her on AL with pay is a violation of her equal rights and a discriminatory act. Employee also notes that whether or not she was later convicted is irrelevant because the date of the imposition of the AL without pay is the primary focus, and not the eventual outcome of the charges. Furthermore, Employee asserts that her removal was illegal because the regulation requires a conviction before a person is removed. Employee explains that she was not convicted within the meaning of 6B DCMR §1619.1 because the court withheld the entry of a conviction, and she neither pleaded guilty nor entered a plea of nolo contendere. Additionally, Employee submits that she is entitled to an Evidentiary Hearing on whether the Enforced Leave without pay should be reversed and that she be reimbursed to wages which she should have received, along with an award of attorney fees and the costs of this action.[8]

Agency's Position

In its Answer, Agency alleges that OEA does not have jurisdiction to hear appeals related to Enforced Leave because Enforced Leave is not an adverse action under District of Columbia Personnel Regulations ("DCPR").[9] Agency also submits that it had the authority to place Employee on Enforced Leave, in accordance with DCPR, even though Employee was not an employee of the Department of Correction or Metropolitan Police Department ("MPD'). Agency explains that Employee was charged and arrested in Maryland for the crime of passing a bad check over $500 which is considered a felony. Therefore, pursuant to 6 DCMR § 1620, Agency had the authority to place Employee on Enforced Leave pending the outcome of her felony and/or misdemeanor cases.

Agency also notes that Employee had a criminal arrest that related to her position. Agency explains that Employee was arrested for theft and passing bad checks, crimes that raised questions about the veracity and dependability of how Employee will perform her duties. Agency notes that

[6] Employee's position statement and request for Evidentiary Hearing (February 11, 2013).
[7] *Id*.
[8] *Id*.
[9] Agency's Answer, *supra*.

DYRS is an Agency responsible for the rehabilitation of youth who commit crimes within the District, and YDRs are charged with assisting in the rehabilitation of all in its custody. Additionally, YDRs are responsible for documenting and logging incident reports as well as ensuring that residents are following rules and regulations. Therefore, it is imperative that Agency be able to rely on the integrity of reports written by YDRs. Agency also explains that a YDR arrested for fraud related crimes and/or theft raises serious concerns about the Agency's ability to rely on the truthfulness or veracity of the documentation submitted by Employee.[10] Furthermore, Agency submits that Employee was compensated while she was on Enforced Leave in accordance with applicable District laws and regulations. Agency explains that the Notice of Proposed Enforced Leave issued to Employee placed her on five (5) days AL, followed by Enforced Leave effective November 30, 2009.[11] Agency also asserts that both the Notice and Amended Notice of proposed Enforced Leave advised Employee of her appeal rights, and that if no action was taken, any annual leave, compensation time or pay lost as a result of the proposed action would be restored.

In its Post-Status Conference brief, as well as its Reply brief, Agency maintains that it did not engage in disparate treatment. Agency submits that Employee has not offered any evidence to support a finding of disparate treatment. Agency also highlights that Employee has failed to make a prima facie showing of disparate treatment, explaining that Employee simply listed ten (10) individuals in support of her claim and alleges that they were all "charged with a criminal violation."[12] Agency further explains that for the first six (6) individuals Employee listed, she provided their respective online criminal court case summaries, however, for the remaining four (4) individuals, Employee simply submitted her own affidavit stating that these four (4) individuals were arrested. Agency notes that, Employee failed to provide any case numbers or supporting documentation to substantiate her allegations.[13]

Jurisdiction

In its Answer to Employee's Petition for Appeal, Agency asserts that OEA does not have jurisdiction over Enforced Leave because it is not an adverse action. While Agency is correct in its assertion that Enforced Leave is not an adverse action[14], I find that this Office has jurisdiction over this matter. Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the CMPA, sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") reads in pertinent part as follows:

> (a) An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . ., an adverse action for cause that results in removal, reduction in grade, *placement on enforced leave*, or suspension *for 10 days or more* . . ., or a reduction in force [RIF]. . . . (Emphasis added).

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[10] *Id*.
[11] The effective date of the Enforced Leave was amended to December 1, 2009. See Agency's Answer and Post-Status Conference brief.
[12] Agency's Reply Brief (March 1, 2013).
[13] *Id*.
[14] See DPM § 1620.2.

Here, Employee was placed on Enforced Leave from December 1, 2009 through February 1, 2011. This is more than ten (10) days. And pursuant to the aforementioned provision, I find that OEA has jurisdiction over this matter.

Enforced Leave

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, DPM § 1620.1 provide as follows: [n]otwithstanding any other provision of this chapter, a personnel authority may authorize placing an employee on enforced leave if:

> (a) A determination has been made that the employee utilized fraud in securing his or his or her appointment or that he or she falsified official records;
>
> (b) The employee has been indicted on, *arrested for*, or convicted of a felony charge (including conviction following a plea of nolo contendere) (emphasis added); or
>
> (c) The employee has been indicted on, *arrested for*, or convicted of any crime (including conviction following a plea of nolo contendere) that bears a relationship to his or her position; except that no such relationship need be established between the crime and the employee's position in the case of uniformed members of the Metropolitan Police Department or correctional officers in the D.C. Department of Corrections. (Emphasis added).

Here, Agency placed Employee on Enforced Leave after she was arrested and charged in Maryland for bad check/utter/Stop Payment - $500 or more; (2) for theft less than $500 and bad check/utter/NSF under $500; and (3) Theft, less than $500 value. These offenses constitute a felony in Maryland. Employee argues that the criminal charges in Maryland do not relate to her job with Agency. Employee also argues that although she was arrested and charged with a felony, she was never convicted, therefore, Agency was not justified in its action against her. I disagree with this argument. Employee was charged and arrested for committing a felony in Maryland. All three referenced charges against Employee are fraud related crimes, which generally speaks to an individual's credibility and veracity. As a YDR, Employee was tasked with the responsibility of generating work related reports as needed. I find that Employee's misconduct in the instant matter relates to her job as a YDR in that it will affect Agency's ability to rely on the truthfulness and integrity of the reports Employee submits to Agency as part of her job responsibility. Moreover, DPM § 1620.1(b) does not require a connection between the criminal offense and the employee's position. It simply requires that the employee be indicted on, *arrested for*, or convicted of a felony charge. (Emphasis added). In this matter, Employee was arrested for a felony. Consequently, I conclude that Agency had sufficient cause to place Employee on Enforced Leave pursuant to DPM § 1620.1.

Employee also contends that Agency failed to comply with the requirements of § 1-616.54(e) of the CMPA rendering the Enforced Leave void *ab initio*. Employee explained that a decision on Enforced Leave was not made within five (5) days as required by D.C. Code § 1-616.54(e). Additionally, Employee submits that she was not informed of her right to a written decision within

five (5) days of AL as prescribed in DCMR § 1620.6(h). 6B DCMR § 1620.6 highlights in pertinent part as follows: the proposing official shall issue a written notice to propose placement of an employee on enforced leave. The notice *shall* inform the employee of the following: (a) the reasons for the proposed enforced leave; …. (h) *The right to a written final decision within the five (5) workdays of administrative leave*. (Emphasis added). D.C. Code § 1-616.54(e) also provides that, "[w]ithin the 5-day administrative leave period, the employee's explanation, if any, and statements of any witnesses shall be considered and a written decision *shall* be issued by the personnel authority. (Emphasis added). Here, Agency did not comply with the requirements of 6B DCMR § 1620.6(h). Employee was placed on AL from November 26, 2009 through November 30, 2009. According to this provision, Agency was required to provide Employee with a written final decision with respect to the Enforced Leave by November 30, 2009; however, Agency did not comply. Agency provided Employee with a written final decision in this matter on April 23, 2010, more than five (5) days from when Employee was placed on AL.

DCMR § 631.3 provides that "… [OEA] 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." (Emphasis added). Here, Agency's action does not constitute a procedural error because the error was not related to Agency's procedure, but rather an error in complying with a Statute. The provisions of D.C. Code § 1-616.54(e) and 6B DCMR § 1620.6 specifically mandate Agency to provide a written final decision within the five (5) workdays of administrative leave, yet Agency failed to comply. Moreover, the District of Columbia Court of Appeals has held that, "[v]erbs such as "must" or "**shall**" denote **mandatory** requirements unless such construction is inconsistent with the manifest intent of the legislature or repugnant to the context of the statute."[15] In this matter, Agency has not established that the construction of D.C. Code § 1-616.54(e) is inconsistent with the manifest intent of the legislature or repugnant to the context of the statute. Accordingly, I find that Agency's failure to comply with this mandate is not harmless error.

Employee also submits that she is entitled to an Evidentiary Hearing on whether the Enforced Leave without pay should be reversed and that she be reimbursed her lost wages, as well as attorney fees and costs. According to our rules, an AJ has the discretion to decide a matter on the record or conduct an Evidentiary Hearing.[16] Both parties agree that Employee was arrested and charged with a felony in Maryland, and this resulted to her being placed on Enforced Leave. Therefore, I find that there is sufficient documentary evidence to decide this matter on the record. And because there are no material facts in dispute in this matter, I further find that an Evidentiary Hearing is unwarranted. Additionally, the record is very clear as to the specific District laws, regulations or policies that apply to this case.

Disparate Treatment

Employee also asserts that Agency engaged in disparate treatment when it placed her on Enforced Leave. Employee explained that other similarly situated African Americans employed by Agency, and charged with violating a criminal law were placed on AL with pay, and not Enforced Leave. OEA has held that, to establish disparate treatment, an employee must show that he/she

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[15] See *Williams v. United States*, 33 A.3d 358 (D.C. 2011); *citing Leonard v. District of Columbia*, 801 A.2d. 82, 84-85 (D.C. 2002).
[16] OEA rule § 624.2.

worked in the same organizational unit as the comparison employees. They must also show that both the petitioner and the comparison employees were disciplined by the same supervisor for the same offense within the same general time period.[17] Additionally, "in order to prove disparate treatment, [Employee] must show that a similarly situated employee received a different penalty."[18] In this matter, while Employee has provided this Office with information of ten (10) individuals who currently or have worked for Agency in support of her disparate treatment claim, I agree with Agency that Employee has not met her burden of proof in this matter. The general period for which these ten (10) individuals were charged with a criminal offense ranges from 2007 through 2012. Nonetheless, Employee has not shown that any of the ten (10) comparison employees were disciplined by the same Supervisor. Moreover, the evidence provided by Employee shows that none of the ten (10) comparison employees were charged with passing a bad check of $500 or more. Accordingly, I find that Employee has not established a prima facie showing of disparate treatment.

CONCLUSION

Agency was authorized to place Employee on Enforced Leave pursuant to DPM § 1620.1. However, because Agency failed to comply with the mandatory requirement of DCMR § 1620.6(h) and D.C. Code § 1620.6(h), I conclude that Agency action of placing Employee on Enforced Leave should be reversed.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of placing Employee on Enforced Leave is **REVERSED**; and
2. Agency shall reimburse Employee all back-pay, benefits lost as a result of the Enforced Leave; costs and attorney's fees; and
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.
Administrative Judge

[17] *Mills v. D.C. Department of Public Works*, OEA Matter No. 1601-0001-09, Opinion and Order on Petition for Review (December 12, 2011), citing *Manning v. Department of Corrections*, OEA Matter No. 1601-0049-04 (January 7, 2005); *Ira Bell v. Department of Human Services*, OEA Matter No. 1601-0020-03, Opinion and Order on Petition for Review (May 6, 2009); *Frost v. Office of D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995); and *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227, 236 (D.C. 1998).

[18] *Metropolitan Police Department v. D.C. Office of Employee Appeals, et al.*, No. 2010 CA 002048 (D.C. Super. Ct July 23, 2012); citing *Social Sec. Admin. V. Mills*, 73 M.S.P.R. 463, 473 (1991).