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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
HEATHER STRAKER,)	
Employee)	OEA Matter No. 1601-0125-12
)	
v.)	Date of Issuance: July 2, 2014
)	
METROPOLITAN POLICE DEPARTMENT,)	
Agency)	MONICA DOHNJI, Esq.
)	Administrative Judge
Robert P. Waldeck, Esq., Employee Representative		
Brenda Wilmore, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On June 29, 2012, Heather Straker (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Metropolitan Police Department’s (“MPD” or “Agency”) decision to place her on Indefinite leave without pay effective June 14, 2012. According to Agency’s Final Notice of Indefinite Suspension without Pay, Employee was disciplined in accordance with § 1603.5(a) and § 1603.5(b)(1) of the District Personnel Manual (“DPM”)¹. At the time of her suspension, Employee was a Police Officer at Agency. On August 3, 2012, Agency submitted its Answer to Employee’s Petition for Appeal.

Following a failed mediation attempt, this matter was assigned to the undersigned Administrative Judge (“AJ”) in October of 2013. Thereafter, I issued an Order scheduling a Status Conference in this matter for November 19, 2013. Both parties were in attendance. During

¹ § 1603.5 (a) Any act or omission which constitutes a criminal offense, whether or not such act or omission results in a corrective action; and ... that applies to § 1603.5 (b)(1) all employees of the MPD. It should be noted that the cause of action in the Proposed Indefinite Suspension without Pay notice issued to Employee on April 19, 2012, lists the cause of action as: “violation of General Order series 120, Number 21, Attachment “A,” Number 7: Conviction of any member of the force in any court of competent jurisdiction of any criminal or quasi-criminal offense, or of any offense in which the member either pleads guilty, receives a verdict of guilty or a conviction following a plea of nolo contendere, or is deemed to have been involved in the commission of any act which would constitute a crime whether or not a court record reflects a conviction. This misconduct is further defined in the District Personnel Manual, Chapter 16, § 1603.4.”

the Status Conference, the parties notified the undersigned that they were engaged in out-of-court settlement talks, and requested additional time. Following another failed mediation attempt, on February 19, 2014, the undersigned issued an Order convening a Status Conference for March 11, 2014. Both parties were in attendance. On March 14, 2014, I issued a Post-Status Conference Order requiring the parties to submit written briefs addressing the issues raised at the Status Conference. Both parties have submitted their briefs. After considering the parties' arguments as presented in their submissions to this Office, I have decided that 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 indefinite suspension without pay was done in accordance with all applicable laws, rules, or regulations.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSION

According to the record, Employee was a Police Officer with Agency. In August of 2011, Employee was indicted by a D.C. Superior Court Grand Jury for First Degree Fraud and Second Degree Theft.² On April 19, 2012, Agency issued a Proposed Indefinite Suspension without Pay notice to Employee, informing her that she would be placed on indefinite suspension without pay, pending the resolution of the administrative charges against her.³ The notice also provided Employee with the reasons for the proposed action, as well as her appeal rights. On May 14, 2012, Employee filed a response to the April 19, 2012, notice with Agency's Director of Human Resource Management Division.⁴ Thereafter, on May 18, 2014, Agency issued a Final Notice of Indefinite Suspension without Pay to Employee placing her on indefinite suspension without pay, pending the resolution of the criminal and administrative action against Employee.⁵ The penalty of indefinite suspension without pay was effective fifteen (15) days from the date of the issuance of the Final Notice of Indefinite Suspension.

Employee's Position

In her submissions to this Office, Employee does not dispute that she was indicted by a D.C. Superior Court Grand Jury for Fraud and Theft; instead Employee argues that Agency committed harmful error, and violated her due process rights. Employee explains that by failing to provide evidence to support its proposal for indefinite suspension, Agency made it impossible for Employee to make a meaningful reply. Employee also asserts that Agency failed to follow its own procedure in issuing its proposal for indefinite suspension. Employee maintains that the proposal for indefinite suspension did not provide a statement of the alleged act or omission; the

²Agency's Brief (April 8, 2012). *See also*, *U.S. v. Straker*, 20012 CF2 005285.

³Agency's Answer at Tab 1 (August 3, 2012).

⁴*Id.* at Tab 4.

⁵*Id.* at Tab 5.

location of the alleged act or omission; and a copy of the investigative report. Employee further maintains that, these failures constitute a due process violation under the U.S. Constitution, and harmful error as she was not given enough information for a meaningful response.

In addition, Employee argues that Agency did not cite authorities in its proposed removal to support that an indictment for a crime constitutes cause under District law, making it difficult for her to provide a meaningful reply to the charges. Employee also contends that DPM §1603.4 does not list indictment as cause, and no listing of any cause is provided in this section. Employee further notes that, indictment is specifically not listed as cause in DPM §1619. Employee states that Agency committed harmful error and violated her due process rights by substituting a different authority for cause in its Final Notice of indefinite suspension. Employee explains that, Agency sought to correct this mistake on the correct provision of law after the fact by changing its basis for acting against Employee in the Final Notice of indefinite suspension to DPM §1603.5, rather than the original DPM § 1603.4 in the proposal for indefinite suspension.

Furthermore, Employee asserts that, Agency committed harmful error by failing to act under the correct provision of the law for Enforced Leave. Employee maintains that Agency committed harmful error by not meeting the requirements of D.C. law for Enforced Leave resulting in Employee's loss of pay, as she was not allowed to use her remaining leave balance. Employee explains that, in D.C., employees indicted for a crime are placed on Enforced Leave pursuant to D.C. Code § 1-616.54 and not on indefinite suspension. Employee further maintains that Agency did not provide the five (5) day administrative leave as required under the Enforced Leave provision, nor did it propose to work through Employee's remaining leave and compensation time.

Employee also notes that the indefinite suspension should have been mitigated to a suspension with pay. Employee further argues that if she was put on indefinite suspension for her participation in events leading to the indictment, Agency is not able to remove her for the same cause of action. Employee also states that, Agency's attempt to construe the provision of its Collective Bargaining Agreement ("CBA") between Agency and the Union to allow it to make an end-run around D.C. law regarding how Agency may put an employee on leave without pay is flawed. Employee explains that Article 12, § 10 of the CBA which Agency cites in support of its indefinite suspension argument deals with how an officer is returned to work after the indictment is resolved. Employee highlights that there is no section in the CBA that authorizes Agency to avoid D.C. Code's mandate to put an employee on Enforced Leave when they are indicted.⁶

Agency's Position

Agency submits that General Order ("GO") 120.21 governs discipline of sworn officers pursuant to D.C. Code § 1-608.01(d). Agency explains that 6 District of Columbia Municipal Regulation ("DCMR") § 1601.5 highlights that the GO takes precedence over the DCMR. Agency admits that the incorrect DPM section for cause was cited in the proposal for indefinite suspension; however, it was a typographical error which the Final Agency Decision corrected. Agency maintains that this constitutes harmless error as it caused no substantial harm or prejudice to Employee's rights and it did not significantly affect Agency's final decision to take

⁶ Petition for Appeal (June 29, 2012); Employee's Brief, (May 22, 2014).

the adverse action. Agency also submits that the penalty of indefinite suspension was appropriate under the table of penalty (“TAP”) and District laws. Agency maintains that Employee engaged in serious misconduct for which she was eventually charged with. Agency further notes that, according to the TAP, the penalty for the first offense for this cause of action is ten (10) days suspension to removal. Agency denies that Employee’s penalty should have been mitigated.

In addition, Agency argues that the CBA clearly recognizes that a member may be indefinitely suspended pending termination otherwise, there would be no need for references to issuance of charges and proposed action after the member has already been suspended without pay. Agency explains that the CBA expressly contemplates that members may be suspended without pay pending termination proceedings, citing Article 12, § 10 of the CBA.

Agency denies that it committed harmful error or violated Employee’s due process by failing to cite authorities in its proposal that support the conclusion that an indictment for a crime constitutes cause. Agency also denies that it committed harmful error or violated Employee’s due process by substituting a differing authority for cause in its final notice of indefinite suspension without pay. Additionally, Agency denies committing harmful error by failing to act under the Enforced Leave provision.⁷

Analysis

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 § 1603.2 provides that disciplinary action against an employee may only be taken for cause. Under DPM §1603.5(a), the definition of “cause” includes any act or omission which constitutes a criminal offense, whether or not such act or omission results in a corrective action. Pursuant to DPM § 1603.5 (b)(1), this applies to all employees of the MPD.

Agency contends that the CBA clearly recognizes that a member may be indefinitely suspended pending termination. Agency further argues that it had cause to discipline Employee pursuant to §1603.5(a),(b)(1), and that pursuant to the D.C. Court of Appeal’s ruling in *D.C. Metropolitan Police Department v. Broadus*⁸, a criminal indictment for offenses committed by an off-duty police officer constitutes "cause" for suspension without pay from the police force under D.C. Code. Recently, the D.C. Court of Appeal in *District of Columbia Metropolitan Police Department v. District of Columbia Office of Employee Appeals and O’Boyle*⁹ held that, “unpaid suspension of police officers was an authorized interim administrative suspension authorized pursuant to the District of Columbia Comprehensive Merit Personnel Act (CMPA)...” This Court explained that, pursuant to D.C. Code §§ 1-16.54(a)(3), (b), (c); 6B DCMR §§ 1620.1 (c), 1620.4, 1620.12(a)-(c), 1620.15, 1620.15, MPD GO No. 1202.1 (D)2(b)(1) and DPM § 1620.1, an agency may impose an interim administrative suspension without pay until the agency completes its own investigation and determine if an employee should be disciplined. The Court further noted that, according to these provisions, such an interim suspension “is not a corrective or adverse action,” and is “distinguishable from

⁷ Agency’s Brief (April 8, 2014); Agency’s Answer (August 3, 2012).

⁸ 560 A.2d, 501 (1989).

⁹ 88 A.3d 724 (May 22, 2014)

disciplinary suspension imposed as punishment following a final determination of misconduct.”¹⁰ Like in *O’Boyle*, Employee in the current matter was placed on indefinite suspension without pay, pending the outcome of the criminal and administrative investigation. Based on the D.C. Court of Appeal’s reasoning in *District of Columbia Metropolitan Police Department v. District of Columbia Office of Employee Appeals and O’Boyle*, I conclude that, in this matter, I am primarily guided by D.C. Code § 1-16.54, which provides in relevant part:

(a) [n]otwithstanding any other provision of this chapter, a personnel authority may authorize the placing of an employee on annual leave or leave without pay, as provided in this section, if:

(1) 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;

(2) 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

(3) 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).

(b) Prior to placing an employee on enforced leave pursuant to this section, an employee shall initially be placed on administrative leave for a period of 5 work days, followed by enforced annual leave or, if no annual leave is available, leave without pay. The employee shall remain in this status until such an action in accordance with regulations is issued pursuant to § 1-616.51, taken as a result of the event that caused this administrative action, is effected or a determination is made that no such action in accordance with regulations issued pursuant to § 1-616.51 will be taken.

.....

(d) A written notice issued pursuant to this section shall inform the employee of the following:

(1) The reason for the proposed enforced leave;

(2) The beginning and ending date of administrative leave;

(3) The beginning date of the proposed enforced leave;

(4) His or her right to respond, orally or in writing, or both, to the notice; and

¹⁰ *Id.*; citing 6B DCMR § 1620.2 and MPD GO No. 1202.1(D)2(b)(1).

(5) His or her right to be represented by an attorney or other representative.

(e) Within 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.

Here, Employee does not deny that she was indicted by the D.C. Superior Court Grand Jury for First Degree Fraud and Second Degree Theft. While Agency was justified in placing Employee on suspension pending the outcome of the investigation of her criminal offense, Agency did not use the correct provision of law in placing Employee on indefinite suspension without pay, and I find that this constitutes a due process violation as well as harmful error. Agency did not follow the Enforced Leave provisions noted above when it placed Employee on indefinite suspension without pay. Employee was not placed on administrative leave for a period of five (5) work days before being placed on leave without pay; she was not informed of her right to a written decision within five (5) days of the administrative leave as prescribed by D.C. Code § 1-616.54; and the Proposal for Indefinite Suspension without pay was not in compliance with D.C. Code § 1-616.54(d).

DCMR § 631.3 provide 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." 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. Moreover, the District of Columbia Court of Appeal 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."¹¹ In this matter, Agency has not established that the construction of D.C. Code § 1-616.54 is inconsistent with the manifest intent of the legislature or repugnant to the context of the statute. Further, Agency's noncompliance with D.C. Code § 1-616.54 was prejudicial to Employee as she was not provided with an opportunity to use her leave or benefit from the five (5) days mandatory administrative leave requirement. Accordingly, I find that Agency's failure to comply with this mandate constitutes harmful error.

CONCLUSION

Agency was authorized to place Employee on interim administrative suspension pending the investigation of her criminal indictment. However, because Agency used the wrong provision of the law and it failed to comply with the mandatory requirement of D.C. Code § 1-616.54, I conclude that Agency's action of placing Employee on indefinite suspension without pay constitutes harmful error and a violation of Employee's due process rights. Accordingly, Agency's action should be reversed.

¹¹ 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).

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:

MONICA DOHNJI, Esq.
Administrative Judge