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**THE DISTRICT OF COLUMBIA  
BEFORE  
THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	OEA Matter No.: 1601-0023-22
EMPLOYEE, <sup>1</sup>	)	
Employee	)	
	)	Date of Issuance: June 15, 2023
v.	)	
	)	
DISTRICT OF COLUMBIA DEPARTMENT	)	
OF PUBLIC WORKS,	)	
Agency.	)	MICHELLE R. HARRIS, ESQ.
	)	Senior Administrative Judge
	)	
Charles Walton, Esq., Employee Representative		
Felix I. Nnumolu, Esq., Agency Representative		

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On November 29, 2021, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the D.C. Department of Public Works’ (“DPW” or “Agency”) decision to suspend him from service for thirty (30) days effective November 1, 2021, through November 30, 2021. On December 6, 2021, OEA issued a letter requesting an Agency Answer by January 6, 2022. Following a request for an extension of time, Agency filed its Answer to Employee’s Petition for Appeal on February 4, 2022.

Following a failed attempt at mediation and several extensions of time requested by the parties, I was assigned this matter on October 4, 2022. On October 12, 2022, I issued an Order Scheduling a Prehearing Conference for November 17, 2022. On November 10, 2022, Agency filed a Consent Motion requesting an extension of time to prepare for the Prehearing Conference. Agency cited therein that it had previously relied upon Employee’s counsel having cited that Employee would be filing a voluntary withdrawal of the matter at OEA. However, since Employee had not submitted a withdrawal, Agency needed time to prepare for the Prehearing Conference. On November 15, 2022, I issued an Order granting Agency’s Motion and rescheduled the Prehearing Conference to January 12, 2023. Prehearing Statements were due on or before January 3, 2023. On

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<sup>1</sup> Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

January 3, 2023, Agency filed a Motion for Summary Disposition. On January 12, 2023, Agency appeared for the conference as required, however neither Employee nor his representative appeared. Further, Employee had not submitted a Prehearing Statement by January 3, 2023, as required. As a result, I issued an Order for Statement of Good Cause to Employee. Employee was ordered to submit a statement of good cause for the failure to appear as well as a prehearing statement and response to Agency's Motion for Summary Disposition. Employee's statements and response were due on or before January 23, 2023. Employee complied with the prescribed deadline and filed his own Motion for Summary. On February 3, 2023, Agency filed a response to Employee's Motion.

On January 25, 2023, I issued an Order scheduling a Status Conference for February 8, 2023. Both parties appeared as required. Following the Status Conference, I issued an Order requiring briefs from both parties to address the issues identified during the conference. Agency's brief was due on or before March 6, 2023, Employee's brief was due on March 15, 2023, and Agency had the option to submit a sur-rely brief on before March 24, 2023. On March 1, 2023, Agency filed a Consent Motion to Extend the Deadlines. I issued an Order on March 2, 2023, granting Agency's Motion. Agency's brief was now due by or before April 3, 2023, Employee's brief was due by April 10, 2023, and Agency had the option to submit a sur-reply by April 17, 2023. Both parties submitted their briefs in accordance with the prescribed deadlines. I have determined that an Evidentiary Hearing in this matter is not warranted. The record is now closed.

#### JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).<sup>2</sup>

#### ISSUE

1. Whether Agency had cause to take adverse action against Employee; and
2. If so, whether the thirty (30) suspension was the appropriate penalty under the circumstances.

#### BURDEN OF PROOF

OEA Rule § 631.1, 6-B District of Columbia Municipal Regulations ("DCMR") Ch. 600, et seq (December 27, 2021) states:

The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.<sup>3</sup>

OEA Rule § 631.2 *id.* states:

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<sup>2</sup> As will be explained in the analysis below, while this matter represents a unique issue in terms of the actual processing of the disciplinary action that might be seen as a jurisdictional issue, the undersigned finds that OEA retains jurisdiction. It should also be noted that neither party raised jurisdiction as an issue, but dispute whether there is any relief that OEA can grant in this matter.

<sup>3</sup> OEA Rule § 699.1.

For appeals filed under § 604.1, the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

#### FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Employee works at Agency as a Heavy Mobile Equipment Mechanic Foremen. On August 2, 2021, an Advanced Written Notice of Proposed Removal was issued to Employee. The causes of action for the proposed removal were: 1) Failure/Refusal to Follow Instructions under DPM§ 1607.2(d)(1); 2) Failure/Refusal to Follow Instructions under DPM§ 1607.2(d)(2); and 3) Safety and Health violations under DPM§ 1607.2(i)(4). On October 6, 2021, the Hearing Officer's Report/Recommendation was issued wherein the Hearing Officer, Nana-Bailey Thomas, Esq., found that there was a lack of evidence to sustain the charges in the proposed notice and that the matter should be rescinded.<sup>4</sup> In a Final Decision on Proposed Removal dated October 26, 2021, the Deciding Official sustained the charges, but instead of removal, Employee was assessed a 30-Day suspension to be served from November 8, 2021 through November 30, 2021.<sup>5</sup> Employee never served the suspension as noted in the Final Decision and instead, remained on paid administrative leave until December 1, 2021.

#### Agency's Position

Agency asserts that in the instant matter, while Employee was served with a Final Notice that affected a 30-day suspension, Employee never served the suspension and as a result there is no relief or remedy that can be granted.<sup>6</sup> Specifically Agency cites the following:

“Agency placed Employee on paid administrative leave on October 12, 2021, pending an investigation into his alleged misconduct. Employee received his regular pay during his time on paid administrative leave. Approximately two weeks later, Agency issued its initial Final Decision on October 25, 2021. However, due to a scrivener's error, Agency reissued the Final Decision on October 26, 2021, during the Covid-19 pandemic. see Attachment I (Mayor's Order Extending Public Emergency for COVID-19). The Final Decision explicitly indicated that the "effective date" of

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<sup>4</sup> Employee's Petition for Appeal at Attachments – Advanced Written Notice of Proposed Removal dated August 2, 2021. (November 29, 2021).

<sup>5</sup> The Final Notice cites that the starting date was November 8, 2021. But the parties have referenced the start date as November 1, 2021.

<sup>6</sup> Agency's Brief in Support of its Motion for Summary Disposition at Page 2 (April 3, 2023). Agency cites to following D.C. Code provisions:

“Under D.C. Code g 1-616.52(b), an employee can appeal a 30-day suspension to OEA. This is a procedural right that, when exercised, in no way "delay[s] the effective date of a decision by the agency." D.C. Code g 1-616.52(c). Numerous regulations govern consideration of an employee's claim on appeal. District of Columbia employees cannot be suspended without cause. 6-8 DCMR § 1602.1. According to the District of Columbia Municipal Regulations (DCMR'), an agency must initiate an adverse action ninety days after it knew or should have known about the conduct supporting the adverse action. 6-8 DCMR § 1602.3(a). After a final determination in the matter has been made, the final decision must be completed within forty-five days of the latter of: (1) the expiration of the employee's time to respond to proposed action; (2) the agency's receipt of the employee's response (if any); (3) the completion of the hearing officer's report and recommendation; or (4) a 2 date agreed to by the employee. 6-8 DCMR § 1623.6. A copy of the final decision must be placed in the employee's official personnel file. 6-8 DCMR § 1623.9.”

Employee's suspension was Monday, November 1, 2021 through Tuesday, November 30, 2021. The Final Decision also notified Employee that he will return to duty on Wednesday, December 1, 2021. Employee did not serve the suspension and instead remained on paid administrative leave until December 1, 2021. The pandemic caused significant disruptions in the District, even forcing a shutdown of all but the most essential activities. It was during this period that Agency failed to process Employee's suspension."<sup>7</sup>

Further, Agency asserts that "it never processed Employee's suspension and did not place the October 26, 2021 Final Decision in his personnel file." Agency contends that "there is no record whatsoever of the suspension in Employee's personnel file."<sup>8</sup> Agency argues that neither the "D.C. Code nor the DCMR addresses whether an agency can implement a suspension after failing to do so within a specified period." This noted, Agency asserts that it has deemed Employee's suspension to be "unenforceable and has no intention of attempting to enforce it." Wherefore, Agency maintains that "because Employee never served the suspension, he has not suffered any harm for which a remedy can be issued by this tribunal."<sup>9</sup>

### **Employee's Position**

Employee contends and requests that the Final Decision in this matter and Employee's personnel records be removed to no reflect any disciplinary action related to this matter.<sup>10</sup> Further, Employee avers that pursuant to D.C. Code § 1-616.52 (b) that employees can appeal a 30-day suspension to OEA. Further, Employee avers that because Agency issued a Final Decision, there is nothing barring Agency from placing that decision in Employee's personnel file. Additionally, Employee cites that the Final Decision should be reversed because the "Hearing Officer found insufficient evidence to support a removal and because the Hearing Officer [sic] found that the matter against Employee should be rescinded for lack of evidence."<sup>11</sup>

Additionally, Employee avers that while the suspension was meant to be effective from November 1, 2021, through November 30, 2021, he was out on administrative leave from August 2, 2021, until December 1, 2021. Employee asserts that "due to the Agency's error, the employee served a suspension but remained on paid administrative leave until December 1, 2021. This was an error and not a choice of the Agency."<sup>12</sup> Further Employee argues the following:

"The Agency is factually incorrect in stating that the "Agency placed Employee on paid administrative leave on October 12, 2021, pending an investigation into his alleged misconduct." As stated above, the Employee was removed from the premises on August 2, 2021. While the Employee received his regular pay during his forced leave, he lived under the threat of unpaid leave because of what he was told in August 2021 and the Agency's Final Decision of October 2021. While the Agency's Final Decision explicitly indicated that the "effective date[s]" of the Employee's suspension

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<sup>7</sup> Agency's Brief in Support of Motion for Summary Disposition at Page 3 (April 3, 2023).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Employee also cites to a request for attorney fees. However, the undersigned has noted that this request is premature.

<sup>11</sup> Employee's Brief at Page 3.

<sup>12</sup> *Id.* at Page 4.

were Monday, November 1, 2021, through Tuesday, November 30, 2021, the Employee was, in fact, removed from the workplace from August 2, 2021, until December 1, 2021. Due to the Agency's error, the employee served a suspension but remained on paid administrative leave until December 1, 2021. ...Unless this tribunal reverses the Final Decision of the Agency against the Employee, that Final Decision continues to be a mark in the Employee's disciplinary record that could impact his current and future employment, as this disciplinary record could be used as a future factor in a disciplinary action or removal."<sup>13</sup>

As a result, Employee avers that OEA should reverse the Final Decision and require Agency to remove all records of this disciplinary action from his personnel file.

### **ANALYSIS**

The instant matter is uniquely situated in terms of review because there was a Final Decision issued on October 26, 2021, which assessed a 30-Day suspension against Employee. However, it is undisputed that Employee never served the 30-Day suspension and instead was on paid administrative leave. For the purposes of the consideration of this matter, I find that because Agency issued a final agency decision affecting a suspension, pursuant to D.C. Code §1-606.03, this Office retains jurisdiction over this matter.

### **Whether Agency had cause for Adverse Action**

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

(a) An employee *may appeal a final agency decision* affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), *an adverse action for cause* that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, *or suspension for 10 days or more* (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. *(Emphasis added).*

Additionally, DPM § 1601.7 provides that “[e]ach agency head and personnel authority has the obligation to and shall ensure that corrective and adverse actions are only taken when an employee does not meet or violates established performance or conduct standards, consistent with this chapter.” Pursuant to OEA Rule § 631.1, Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. In the instant matter, the undersigned finds that Agency has not shown cause for adverse action. Namely, the Hearing Examiner’s Report/Recommendation dated October 6, 2021, explicitly cited that there was a lack of evidence and that the action should be rescinded. The Deciding Official signed a document on October 26, 2021, noting that it had accepted the Hearing Officer’s recommendation, but Agency still

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<sup>13</sup> *Id.* at Pages 4-5.

elected to sustain the charges, but reduced the penalty to a 30-Day suspension. The Hearing Officer's recommendation, coupled with Agency's numerous errors in the processing and administration of this action, clearly evince that Agency had no cause for action in this matter. Further, Agency admits to its errors in processing this matter. Thus, I find that Agency has failed to meet its burden of proof for cause.

### **Whether the Penalty was Appropriate**

Based on the aforementioned findings, I find that Agency did not have cause for adverse action against Employee. As a result, I find that the penalty of suspension for thirty (30) days was inappropriate under the circumstances. This stated, the undersigned notes that while the Final Decision effected a 30-Day suspension against Employee, Employee never served this suspension. Suspension as defined by the DPM is "the temporary placing of an employee in a non-duty, non-pay status." Here, Employee was on administrative leave prior to the effective date of the suspension. Employee admitted that he continued to receive his full pay during the suspension period of November 1, 2021, to November 30, 2021. Accordingly, I find that the issue of the 30-day suspension *without pay* is moot.

Employee also asserts that the record regarding this disciplinary matter should be removed from his personnel file. Agency has asserted that this action is not a part of Employee's personnel file.<sup>14</sup> To the extent that Agency's assertion is forthcoming and in good faith regarding this matter, I find that Employee's request for the remedy of removal of the disciplinary action from the personnel record to be moot.

### **ORDER**

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

1. Agency's action of suspending Employee from service for thirty (30) days is **REVERSED**.
2. Agency shall ensure/confirm that Employee's personnel file has no information pertaining to the instant disciplinary action and that this is not a part of any disciplinary or personnel record.
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:

**/s/ Michelle R. Harris**  
MICHELLE R. HARRIS, Esq.  
Senior Administrative Judge

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<sup>14</sup> Agency's Brief in Support of its Motion for Summary Disposition (April 3, 2023).