

Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals’ website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
EMPLOYEE ¹ ,)	
)	OEA Matter No.: 1601-0025-23
v.)	
)	Date of Issuance: May 30, 2024
DISTRICT OF COLUMBIA)	
DEPARTMENT OF CORRECTIONS,)	
Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Correctional Officer with the Department of Corrections (“Agency”). On December 19, 2022, Agency issued Employee a notice which proposed placing him on enforced leave beginning December 28, 2022. The action was taken based on Agency’s receipt of an “Affidavit in Support of Criminal Complaint and Arrest Warrant” which charged Employee with wire fraud under 18 U.S.C. § 1343. The charges stemmed from Employee’s alleged act of embezzling over \$10,000 from the Fraternal Order of the Police – Department of Corrections Labor Committee (“FOP”), while serving as the entity’s chairman. Employee filed a response to the proposed notice on December 21, 2022, opposing his placement on enforced leave. On

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

December 28, 2022, Agency issued its final decision. As a result, Employee was placed on enforced leave effective December 28, 2022.²

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on January 30, 2023. In his appeal, Employee argued that he was wrongly placed on enforced leave as a result of an undisclosed legal issue. He stated that his leave status at the time of Agency’s action was connected to a workers’ compensation claim and that he was not released to return to duty. Therefore, Employee believed that his placement on enforced leave was improper and requested that his leave status be reversed.³

Agency filed its answer on February 6, 2023. It conceded that Employee was placed on administrative leave from December 19, 2022, through December 27, 2022, and enforced leave on December 28, 2022. Agency provided that Employee was placed on leave in accordance with Chapter 6B, Section 1617.3 of the District Personnel Manual (“DPM”) based on his indictment and arrest for wire fraud in violation of 18 U.S.C. § 1343. However, it denied Employee’s claim that his leave status was connected to a workers’ compensation claim and appeal. It noted that the D.C. Office of Risk Management (“ORM”) issued a notice to Employee on June 21, 2022, indicating that his compensation claim was denied by the Public Sector Workers’ Compensation Program. Thus, Agency reasoned that its decision to place Employee on enforced leave was solely based on the documented evidence of his indictment and arrest for a crime that bore a relationship to Employee’s job position.⁴

An OEA Administrative Judge (“AJ”) was assigned to the matter in February of 2023 and a status conference was held on April 13, 2023. During the conference, it was determined that

² *Agency’s Answer to Petition for Appeal*, Tab 2 (February 6, 2023).

³ *Petition for Appeal* (January 30, 2023).

⁴ *Agency’s Answer to Petition for Appeal* (February 6, 2023).

Employee had retired from his position. Therefore, the AJ ordered Employee to submit a brief addressing whether OEA could exercise jurisdiction over his appeal.⁵ In his brief, Employee affirmed his status as retired, but noted that his retirement did not occur until after the effective date of the enforced leave action. Therefore, he maintained that OEA has jurisdiction over his appeal.⁶ In response, Agency contended that pursuant to Chapter 6B, § 604.15 of the D.C. Municipal Regulations (“DCMR”), OEA lacks jurisdiction over appeals from employees who have voluntarily retired. Since Employee was no longer within the employ of Agency, it maintained that his appeal was improperly before this Office.⁷

On July 27, 2023, the AJ issued an Order Regarding Jurisdiction and Order for Briefs, holding that OEA retains jurisdiction over Employee’s appeal. She explained that Employee’s personnel action form (“SF-50”) reflected that he was placed on enforced leave effective December 28, 2022; however, he did not retire until February 17, 2023. Since Employee retired after the effective date of the enforced leave action, the AJ concluded that the matter warranted further adjudication. Therefore, the parties were ordered to provide supplemental briefs addressing whether the enforced leave action was taken for cause.⁸

Employee’s brief argued that his placement on both administrative and subsequently enforced leave violated Agency policy and procedures, which adversely affected him in many ways. He went on to describe that being placed on leave resulted in a loss of pay, which forced him to retire in February of 2023. Additionally, Employee stated that he has an ongoing civil action complaint against the District government and Agency for discrimination, as is currently appealing ORM’s June 21, 2022, denial of his worker’s compensation claim. Therefore, he reasoned that

⁵ *Order for Briefs Regarding Jurisdiction* (April 13, 2023).

⁶ *Employee’s Brief on Jurisdiction* (April 13, 2023).

⁷ *Agency’s Brief on Jurisdiction* (May 23, 2023).

⁸ *Order Regarding Jurisdiction and order for Briefs* (July 27, 2023).

Agency wrongfully placed him on enforced leave due to his official work status related to the compensation claim. Consequently, he requested the repayment of all benefits lost as a result of the enforced leave action.⁹

Conversely, Agency disagreed with Employee's contention that it erred by placing him on enforced leave during his quest for workers' compensation benefits, noting that Employee's appeal was ultimately dismissed by the Office of Administrative Hearings on May 8, 2023, with prejudice. It provided that Employee was placed on administrative leave as a result of a separate matter in 2012 that is unrelated to the current enforcement leave action. According to Agency, Employee failed to cite to any rule, regulation, or legal precedent which limited its ability to change an employee's leave status after he or she is arrested for and charged with a crime constituting a felony. As such, it opines that's that Employee was properly placed on enforced leave in accordance with 6B DCMR § 1617.3. Therefore, it requested that Employee's placement on leave be upheld.¹⁰

The AJ issued an Initial Decision on July 27, 2023. She agreed with Agency's position that placing Employee on enforced leave was warranted following his arrest and charges for wire fraud. The AJ explained that Employee was arrested and charged by the U.S. Attorney's Office of the District of Columbia ("USAO") for violating 18 U.S.C. § 1343. She provided that 6B DCMR § 1617.3 authorizes an agency to place an employee on enforced leave if he or she has been indicted on, arrested for, charged with, or convicted of a felony. According to the AJ, the record clearly established that Employee was arrested and charged with wire fraud under 18 U.S.C. § 1343, which constitutes a felony. She disagreed with Employee's argument that he was in the midst of a related workers' compensation claim because the claim was dismissed with prejudice by the Office of

⁹ *Employee's Brief* (September 25, 2023).

¹⁰ *Agency's Sur-Reply Brief* (October 5, 2023).

Administrative Hearings on May 8, 2023. Since Employee's conduct violated 6B DCMR § 1617.3, the AJ concluded that Agency's enforced leave action was conducted in accordance with all applicable rules and regulations. As a result, Employee's placement on enforced leave was upheld.¹¹

Employee subsequently filed a Petition for Review with the OEA Board on November 15, 2023. He submits that Agency erred because he did not receive a copy of its Sur-Reply Brief until October 5, 2023, the same day it was filed with OEA. Thus, Employee asserts that Agency's brief is considered new evidence to which he was denied a meaningful opportunity to respond. Additionally, he maintains that Agency should not have placed him on enforced leave because he was in inactive duty status as result of his workers' compensation appeal. Employee claims that he had no knowledge of the dismissal of his claim in May of 2023. Notwithstanding, he maintains that the Initial Decision erroneously held that he could be placed on enforced leave and requests that his petition be granted.¹²

In response, Agency highlights that a copy of its sur-reply was mailed to Employee on October 5, 2023. Furthermore, Agency questions the effect, if any, of its Sur-Reply Brief on the resolution of this appeal because from a substantive standpoint, Agency's filing solely aimed to reiterate its position that Employee's appeal of the denial of his workers' compensation claim had little to no impact on the criminal indictment for wire fraud. Agency agrees with the AJ's assessment that because Employee was charged with a felony, it had the authority to administer the enforced leave action in accordance with 6B DCMR §§ 1617.3. Therefore, it considers the Initial Decision to be based on substantial evidence.¹³

¹¹ *Initial Decision* (October 17, 2023).

¹² *Petition for Review* (November 15, 2023).

¹³ *Agency's Answer to Petition for Review* (December 1, 2023).

Substantial Evidence

On Petition for Review, this Board is tasked with determining whether the AJ's findings of fact and conclusions of law are based on substantial evidence in the record. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. For the reasons discussed herein, this Board finds that the Initial Decision is supported by substantial evidence.

Discussion

Chapter 6B, Section 1617 of the DCMR addresses enforced leave. Enforced leave occurs when an employee is involuntarily placed in a non-duty leave status, which is neither a corrective nor an adverse action for purposes of Chapter 6B.¹⁴ Pursuant to Section 1617.3, an agency may place an employee on enforced leave when there is reliable evidence that he or she:

- (a) Utilized fraud in securing his or her appointment;
- (b) Falsified officials records;
- (c) Has been indicted on, arrested for, charged with, or convicted of a felony charge (including conviction following a plea of nolo contendere); or
- (d) Has been indicted on, arrested for, or convicted of any crime that bears a relationship to his or her position.

Section 1617.4 goes on to provide that notwithstanding § 1617.3(c), the Department of Corrections may place a correctional officer on enforced leave when he or she has been arrested, charged, indicted, or convicted of any crime irrespective of the relationship between the crime and the employee's duties and responsibilities. Any decision to place an employee on enforced leave must be approved in writing by the appropriate personnel authority and identify the evidence relied upon

¹⁴ 6B DCMR § 1617.1.

by the agency to support the action. Finally, in accordance with § 1617.6, upon finding that the conditions described in § 1617.3 are met, the personnel authority shall place the employee on administrative leave for five days prior to the effective date of the enforced leave action.

Here, the Proposed Notice of Enforced Leave provided that Employee was being placed on leave beginning December 28, 2022, after Agency received a copy of a December 16, 2022, Affidavit in Support of Criminal Complaint and Arrest Warrant. The affidavit stated the following in pertinent part:

This affidavit is made in support of a criminal complaint and arrest warrant charging [Employee] with a violation of 18 U.S.C. § 1343 (Wire Fraud). Specifically, from approximately June 2018 through May 2019, [Employee] embezzled funds from the Fraternal Order of Police - Department of Corrections Labor Committee ("Labor Committee") while he served as the Committee's chairman.¹⁵

The affidavit went on to detail the facts and probable cause supporting the arrest warrant issued to Employee. On December 19, 2022, Employee was arrested at the Central Detention Facility and charged in federal court with embezzling over \$10,000 from the FOP.¹⁶ Moreover, the record reflects that from June 21, 2022, through December 18, 2022, Employee was on regular duty status.

A charge for Wire Fraud under 18 U.S.C. § 1343 states the following:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution,

¹⁵ *Agency's Answer to Petition for Appeal*, Attachment 4.

¹⁶ *Agency's Brief on Jurisdiction*, Exhibit 3.

such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

Employee has not disputed that he was charged or arrested with wire fraud, which constitutes a felony and DPM § 1617.3 does not contemplate a conviction as a prerequisite to placing an employee on enforced leave. Further, Employee has failed to provide a compelling legal basis for finding that an unrelated workers' compensation claim prevented Agency from invoking 6B DCMR §§ 1617.3 or 1617.4 after receiving notice that he was arrested for a felony. Therefore, this Board finds that Agency properly placed Employee on enforced leave pursuant to the relevant regulations. Additionally, nothing within OEA's rules authorizes or requires a party to respond to a sur-reply brief. Employee was afforded several opportunities to present this tribunal with arguments in support of his position, which he has done. In light of the foregoing, we must deny Employee's Petition for Review and uphold the Initial Decision.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

Clarence Labor, Jr., Chair

Peter Rosenstein

Dionna Maria Lewis

Arrington L. Dixon

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1