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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ROBERT ALVARADO,)	
Employee)	OEA Matter No. 1601-0173-12
)	
v.)	
)	Date of Issuance: November 7, 2017
DISTRICT OF COLUMBIA)	
FIRE AND EMERGENCY)	
MEDICAL SERVICES DEPARTMENT,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Robert Alvarado (“Employee”) worked as a Lieutenant with the D.C. Fire and Emergency Medical Services Department (“Agency”). On July 2, 2012, Agency issued a final notice of adverse action to Employee. It charged Employee with “any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include: Neglect of Duty.” Specifically, Agency claimed that Employee violated a patient’s right to privacy and failed to wear appropriately compliant work gear. The notice provided that Employee was suspended for two hundred and sixty-four hours and demoted to the position of Sergeant. The effective date of Employee’s suspension and demotion was July 2, 2012.¹

¹ *Petition for Appeal*, p. 22 (July 21, 2012).

On July 31, 2012, Employee challenged the adverse action by filing a Petition for Appeal with the Office of Employee Appeals (“OEA”). He stated that Agency retaliated against him for an interview that he provided to Washington’s Fox 5 News (“Fox 5”). During the interview, a citizen suddenly approached him who required immediate assistance due to chest pains. Employee explained that he quickly assisted the patient, and he was unable to remove the microphone attached to his lapel from the interview. Therefore, Employee requested that OEA rescind the adverse action and his suspension without pay.²

On August 30, 2012, Agency filed its Answer to Employee’s Petition for Appeal. It explained that Employee violated Agency Bulletin No. 3, the *Patient Bill of Rights* because a portion of the care that he rendered was recorded by Fox 5; thereby, violating the patient’s expectation of privacy. Additionally, Agency provided that Employee did not comply with its uniform policy. Agency asserted that Employee’s lack of cooperation made him insubordinate. Therefore, it requested that its action be upheld.³

The Administrative Judge (“AJ”) issued his Initial Decision on February 2, 2015. After his review of the Trial Board Findings of Fact, Conclusions, and Recommendations, the AJ found that Agency did not prove that Employee violated any privacy rights absent a complaint from an aggrieved patient.⁴ He explained that Agency did not provide evidence that the patient complained that his privacy was violated; therefore, it could not assume that the patient’s rights were violated. Additionally, the AJ held that Agency did not have substantial evidence to make a finding of guilt regarding its uniform policy. As a result, he ordered that Employee’s

² *Id* at 6-8.

³ *D.C. Fire and Emergency Medical Services Department’s Answer to Employee’s Petition for Appeal*, p. 1-9 (August 30, 2012).

⁴ This matter was adjudicated based on the standard outlined in *Elton Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002). Pursuant to *Pinkard*, an Administrative Judge of this Office may not conduct a *de novo* hearing in an appeal before them, but they must rather base their decision solely on the record provided by the Fire Trial Board.

suspension and demotion be reversed. Additionally, he ordered that Agency reimburse Employee with back pay and benefits.⁵

On March 9, 2016, Employee filed a Motion to Enforce. He explained that although he was suspended for two hundred and sixty-four hours, he used 1,363 hours of sick and annual leave as a result of Agency's action. It was Employee's position that he should be reimbursed for the 1,363 hours. In addition to arguing that Agency failed to reimburse him for sick and annual leave, he also contended that Agency failed to promote him to Captain; failed to pay him for lost overtime; failed to allow access to education training courses; and failed to pay for his attorneys' fees. Accordingly, Employee requested that Agency properly reimburse his back pay.⁶

Agency filed its Response to Employee's Motion to Enforce on April 29, 2016. It argued that Employee was issued multiple checks as reimbursement for back pay for the two hundred sixty-four duty hour suspension period of July 2, 2012 to August 21, 2012, and for the reduction in rank between July 1, 2012 and May 30, 2015. Specifically, Agency provided that Employee was reimbursed a total of \$10,440.84 in back pay for the reversed suspension. Additionally, it explained that it reimbursed Employee \$51,557.80 in back pay for the reversed demotion. As for Employee's other arguments, Agency contended that Employee was not entitled to a promotion,⁷ reimbursement of sick and annual leave that he chose to use and was paid for,⁸ overtime pay,⁹

⁵ *Initial Decision*, p. 8-10 (February 2, 2015).

⁶ *Employee's Motion to Enforce*, p.1-4 (March 9, 2016).

⁷ Agency provided that Employee was properly restored to the rank of Lieutenant, but a promotion to the rank of Captain was not automatic. According to Agency, to be considered for the rank of Captain, Employee was required to participate in the promotion examination process.

⁸ As Employee contended, he used 1,363 hours of sick and annual leave during his two hundred and sixty-four day suspension period. Agency opined that reimbursement for leave beyond the two hundred and sixty-four days is meritless. It provided that Employee offered no explanation why he used excess leave for the suspension period. Moreover, it provided that Employee was restored any leave that he failed to accrue during the suspension period on June 26, 2015.

⁹ Agency argued that in accordance with DCMR 6-B, 1149.14, Employee is not entitled to overtime pay. This

access to education,¹⁰ or attorneys' fees.¹¹ Therefore, Agency requested that Employee's motion be denied.¹²

On December 30, 2016, the AJ issued an Addendum Decision on Compliance. He held that Agency fully reimbursed Employee all back pay due to him. The AJ explained that because a promotion to the rank of Captain is predicated on passing the examination, Employee was not entitled to be automatically promoted to Captain. Furthermore, the AJ agreed with Agency and determined that Employee was fully compensated for all back pay due to him from the leave used as the result of the action taken against him. Therefore, he found that Employee was not entitled to be reimbursed for 1,363 hours of sick and annual leave. Accordingly, the AJ ruled that Agency complied with the Initial Decision and dismissed the matter.¹³

Employee filed a Petition for Review on February 2, 2017. He argues that in accordance with DCMR § 1149.10, an employee who can demonstrate that they used sick and annual leave due to an agency's unwarranted or unjustified personnel action is entitled to recover back pay. Employee claims that he is able to provide medical documentation from his medical provider that he was on medical leave as a result of Agency's unjustified personnel action. Thus, he requests that his sick and annual leave be restored.¹⁴

On March 8, 2017, Agency filed its response to Employee's Petition for Review. It argues that OEA Rule 633.1 provides for appeals through Petitions for Review of Initial Decisions, not Addendum Decisions on Compliance. Thus, it claims that Employee has no right

section of the regulation provides that "an employee entitled to back pay under this section shall have included in the back pay computation any pay or benefit that the employee would have received, except that overtime pay shall not be included in the back pay award."

¹⁰ Agency claimed that Employee did not make any specific requests that he was denied access to training courses or classes. Therefore, he is not entitled to reimbursement for his alleged denial of access to education.

¹¹ Agency provided that because the Initial Decision did not award attorney's fees, Employee was not entitled to those fees at this time.

¹² *Agency's Response to Employee's Motion to Enforce*, p.1-6 (April 29, 2016).

¹³ *Addendum Decision on Compliance*, p. 3-6 (December 30, 2016).

¹⁴ *Petition on Review*, p. 3-6 (February 2, 2017).

to seek review of a finding on compliance. Therefore, Agency requests that Employee's petition be denied.¹⁵

DCMR § 1149.10 provides the following as it relates to back pay:

When an appropriate authority corrects or directs the correction of an unjustified or unwarranted personnel action, the agency shall determine the employee's back pay entitlement by recomputing for the period covered by the corrective action the pay and benefits of the employee as if the unjustified or unwarranted personnel action had not occurred, but in no case shall the employee be granted more pay or benefits than he or she would have been entitled by law, Mayor's Order, regulation, or agency policy.

Furthermore, DCMR § 1149.1 defines unjustified or unwarranted personnel action as:

an act of commission (that is, an action taken under authority granted to an authorized official) or of omission (that is, non-exercise of proper authority by an authorized official) that is subsequently determined to have violated or improperly applied the requirements of a nondiscretionary provision, as defined herein, and thereby resulted in the withdrawal, reduction, or denial of all or any part of the pay or benefits, as used herein, otherwise due an employee. The words "personnel action" include personnel actions and pay actions, alone or in combination.

Employee argues that the unjustified or unwarranted personnel action taken by Agency covered 1,363 hours. However, as provided in its final agency notice, Agency suspended Employee for two hundred and sixty-four hours.¹⁶

This Board agrees with the AJ's ruling that two hundred and sixty-four hours is the period of the unjustified personnel action. Agency imposed a suspension for that specific length of time which resulted in a denial of pay and benefits that were due to Employee. The record clearly establishes that the action was only for that period. It would have been unreasonable and in conflict with the regulation if the AJ held Agency responsible for a period beyond the length of the action, as Employee requests.

¹⁵ *Agency's Response to Employee's Petition for Review*, p. 2 (March 8, 2017).

¹⁶ *Petition for Appeal*, p. 72 (July 31, 2012).

Moreover, Employee's argument regarding the 1,363 leave hours is untimely, and the AJ was not required to make a ruling on this issue. A review of record indicates that it was not until his filing of the Motion to Enforce that Employee raised the request for back pay of 1,363 hours.¹⁷ At the time this argument was presented, the Initial Decision was already issued related to the personnel matter involving the two hundred and sixty-four hour suspension. In accordance with OEA Rule 632.1, "the initial decision shall become final thirty-five (35) calendar days after issuance." Moreover, OEA Rule 632.2 provides that "the initial decision shall not become final if any party files a petition for review or if the Board reopens the case on its own motion within thirty-five (35) calendar days after issuance of the initial decision." Finally, OEA Rule 632.5 provides that all "administrative remedies shall be considered exhausted when a decision becomes final in accordance with this section." The matter did not come to the Board as an appeal of the Initial Decision. It is an appeal from the enforcement issue. The Initial Decision was issued on February 2, 2015. Therefore, all remedies related to the adverse action were final thirty-five days after February 2, 2015. Therefore, any annual or sick leave used beyond the two hundred and sixty-four day period was actual leave taken by Employee, and he is not entitled to additional back pay beyond what Agency has already proven that it provided.

Additionally, this Board cannot consider Employee's argument regarding medical documentation as proof of an extended leave. Employee failed to raise this argument before the Initial Decision became final in this matter. As a result, Employee's request for back pay for 1,363 hours and his medical documentation that were raised in his Motion to Enforce are untimely. Accordingly, this Board must deny Employee's Petition for Review of his back pay enforcement.

¹⁷ *Employee's Motion to Enforce* (March 9, 2016).

ORDER

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

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams

Jelani Freeman

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.