THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
RICHARD HAIRSTON,	)	OEA Matter No. 1601-0059-07
Employee	)	
	)	Date of Issuance: September 18, 2012
	)	
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF CORRECTIONS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Richard Hairston ("Employee") was a correctional officer with the Department of Corrections ("Agency"). On April 6, 2005, Employee was arrested and charged with possession of a controlled substance. Agency subsequently placed Employee on paid administrative leave pending the outcome of the investigation of his arrest.[1] On July 21, 2005, Employee was placed on probation without adjudication of guilt in the Superior Court for the District of Columbia for possession of marijuana.[2] On August 16, 2005, Agency issued a written notice to place Employee on enforced, unpaid leave in accordance with Chapter 16 of the District Personnel Manual ("DPM").

[1] *Agency's Prehearing Statement and Supporting Documents,* Exhibit 3 (April 19, 2007).
[2]The Court ordered that Employee be placed on probation for nine months with "testing [in] accordance with probation protocol, testing full screen, including marijuana." On March 16, 2006, Employee completed probation, and his record was expunged in accordance with D.C. Official Code §48-904.01(e)(2). *Petition for Appeal*, Exhibit 2 (March 9, 2007).

Agency provided in the notice that Employee would "remain on [e]nforced [l]eave until such time as corrective or adverse action is effected, or a determination is made that disciplinary action will not be taken." It went on to note that "if no disciplinary action [was] taken, annual leave, compensatory time, or pay lost as a result of the enforced leave action [would] be restored."[3] Agency informed Employee of his right to appeal its final decision to the Office of Employee Appeals ("OEA") within thirty days of receipt of the decision. However, at that time, Employee did not file an appeal with OEA.

On September 30, 2005, Agency issued an advanced notice to remove Employee from his position. The cause was based on Employee's "conviction (including a plea of nolo contendere) of another crime regardless of punishment at any time following the submission of an employee's job application when the crime is relevant to the employee's position, job duties, or job." It reasoned that Employee's arrest and conviction posed a risk to his co-workers and the inmate population at Agency. [4]

Employee submitted an opposition to the proposal on October 5, 2005. He argued that he had not been formally found guilty or convicted. He explained that the Court placed him on probation without entering a judgment of guilty and without entering a record of conviction.[5] Employee stated that in accordance with the Controlled Substances Act ("the Act"), the Court would dismiss the charge if he complied with the terms of his probation.[6] Therefore, he

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[3] *Id.*, Exhibit #4.
[4] *Agency's Prehearing Statement and Supporting Documents,* Exhibit 6 (April 19, 2007).
[5] Additionally, Employee argued that his vehicle, which contained the marijuana, was not parked on government property, and he did not test positive for marijuana.
[6] The relevant portion of the Controlled Substances Act, D.C. Official Code § 48-904.01(e)(1) provides that:

> . . . if during the period of probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him or her. Discharge and dismissal under this subsection shall be without court adjudication of guilt . . . Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime (including the penalties prescribed under § 48-904.08 for second or subsequent convictions) or for any other

requested that Agency re-evaluate the proposed adverse action.[7]

After an administrative hearing, the hearing officer recommended that Employee be returned to duty. He reasoned that if Agency terminated Employee, it would be "circumventing the intent of [the Act] and would prevent the due course of law." Therefore, he recommended that ". . . any action to terminate be stayed until . . . [either] (1) successful appeal; (2) adjudication of guilt; or (3) discharge of dismissal order [from the Court]."[8]

On November 21, 2005, the Interim Director for Agency concurred with the recommendation.[9] However, he did not issue Agency's final decision. Thus, Employee was not returned to work; his benefits were not restored; and he remained in an enforced, unpaid leave status.

Thereafter, Employee's counsel wrote to Agency regarding reinstatement.[10] Agency responded, stating that on January 26, 2006, a new Director had been appointed and had not yet decided on whether to accept the hearing officer's recommendation. Agency also stated that it was awaiting an opinion from the Office of the Attorney General ("OAG") on the applicability of the Act to Employee's case.[11]

Employee completed the required probation as ordered by the Court on March 26, 2006. As a result, the record for his possession charge was expunged and the matter was dismissed. Agency still did not reinstate Employee.

On July 7, 2006, the OAG rendered an opinion to Agency on the applicability of the Controlled Substance Act in Employee's case. The OAG explained to Agency that Employee's

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purpose.

[7] *Petition for Appeal*, Exhibit #4 (March 9, 2007).
[8] *Agency's Prehearing Statement and Supporting Documents,* Exhibit #9 (April 19, 2007).
[9] *Id.*, Exhibit #10.
[10] *Petition for Appeal*, Exhibit #6 (March 9, 2012).
[11] *Id.*, Exhibits #7 and #8.

charges were dismissed because the Controlled Substance Act provides first time offender consideration. Because the charges were dismissed, "there [was] no record of conviction and thus, there would be no evidentiary support for [Agency's] cause [of action]."[12] Accordingly, on December 13, 2006, Agency informed Employee that the proposed removal action against him was dismissed with prejudice. However, in the same notice, Agency included information pertaining to a new proposed removal action and informed Employee that a charge of malfeasance had been proposed against him. Therefore, Employee would remain on enforced, unpaid leave status until a final decision had been issued on the new charge.[13]

Employee, unaware of the new proposed removal action, wrote to Agency on December 18, 2006, requesting information on the malfeasance charge. He also requested back pay and back benefits for the dismissed first charge.[14] However, Agency did not comply with the request.

On March 9, 2007, still in an enforced, unpaid leave status and awaiting information on the malfeasance charge, Employee filed a Petition for Appeal with OEA. He argued that because Agency nullified the first charge, he should be compensated for the back pay and benefits lost while he was on enforced, unpaid leave. He further asserted that Agency did not issue a timely final decision from which he could appeal. Finally, he noted that Agency did not issue a new written notice of proposal to remove him or explain why he was guilty of the charge of malfeasance. Therefore, Employee requested back pay for the period he was on enforced leave for the first removal action. Additionally, he asked that Agency provide him with a written

[12] *Agency's Prehearing Statement and Supporting Documents,* Exhibit #11 (April 19, 2007).
[13] *Id.*, Exhibit #12.
[14] In addition, on January 19, 2007, Employee presented a FOIA appeal to the Mayor of the District of Columbia which requested documents related to the malfeasance charge. *Petition for Appeal,* Exhibit #16 (March 9, 2012).

notice of proposed removal or a final decision on the malfeasance charge.[15]

Agency responded to the Petition for Appeal by filing a Pre-hearing Statement on April 19, 2007. It argued that OEA does not have jurisdiction over the appeal because Employee still had not received a final decision on the charge of malfeasance. Agency explained that it had not issued a final decision on the malfeasance charge because it was awaiting Employee's response to the new proposed removal. Therefore, it requested that the matter be dismissed with prejudice based on OEA's lack of jurisdiction.[16]

On May 22, 2007, Employee responded by arguing that Agency violated Chapter 16, §§ 1603.3, 1613.1, and 1614.2 of the DPM when it failed to timely render a decision; when it failed to restore his employment after dismissing the charge; and when it failed to compensate him for the back pay lost while he was on enforced leave. With regard to the second proposed written notice of removal, Employee argued that it was not timely served and cannot stand because the law prohibits any discipline of an employee for charges based on the circumstances which led to the first charge.[17] Further, since the enforced, unpaid leave continued indefinitely, Employee posited that this constituted constructive discharge and that OEA had jurisdiction over the appeal.[18]

On July 23, 2007, the OEA Administrative Judge ("AJ") issued an order directing Employee to answer whether the appeal should be dismissed for lack of jurisdiction. In his response, Employee reiterated the arguments in his Opposition to Agency's Pre-hearing Statement.[19] Agency also submitted a response on September 12, 2007. It stated that

[15] *Petition for Appeal* (March 9, 2007).
[16] *Agency's Prehearing Statement and Supporting Documents* (April 19, 2007).
[17] On May 14, 2007, Employee also responded to the proposed removal for malfeasance. Later on June 5, 2007, the hearing officer for the malfeasance charge recommended that Employee be demoted and forfeit any back pay or leave benefits he may claim.
[18] *Employee's Opposition to Motion to Dismiss Appeal* (May 22, 2007).
[19] He asserted that OEA had jurisdiction over his appeal because Agency violated DPM § 1614.2. His suspension

Employee's appeal was a grievance over which OEA lacked authority to adjudicate. It stated that OEA's rules do not address indefinite suspensions. Further, it argued that Employee's claim of constructive discharge was not valid. Therefore, it motioned that the appeal be dismissed with prejudice.[20]

In an order denying Agency's motion to dismiss, the AJ disagreed with its contention that OEA did not have jurisdiction over appeals of ten days or more. The AJ also stated that Agency should have provided Employee a final decision on the enforced, unpaid leave within five work days of the administrative leave. Therefore, he ordered the parties to submit legal briefs on the proper remedy for Agency's failure to render a timely decision on the enforced leave for the malfeasance charge.[21]

Instead of responding to the AJ's order, Agency motioned for the AJ to reverse his decision and grant its motion. It explained that a final decision for the enforced leave was issued on August 16, 2005. The final decision on the proposed first charge provided that Employee's enforced leave status would remain in effect until the malfeasance charge had been adjudicated.[22] Therefore, Agency believed that Employee was not entitled any remedy because a new notice of proposed enforced leave was not yet issued.[23] Employee opposed Agency's Motion, arguing that the dismissal of the first adverse action allowed for the return of his benefits pursuant to DPM §

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was indefinite, and an indefinite suspension constitutes constructive removal. *Employee's Brief on Jurisdiction* (August 24, 2007).

[20] *Agency's Response to Administrative Judge's Post Conference Order Dated July 23, 2007, Regarding the Issue of Jurisdiction (Constructive Discharge)* (September 12, 2007).

[21] *Order Denying Agency's Motion to Dismiss for Lack of Jurisdiction and Order on Remedy* (September 27, 2007).

[22] Agency asserted that Employee's Petition for Appeal to OEA for the enforced leave was due thirty days after the final decision on August 16, 2005. Therefore, the appeal for the enforced leave needed to be filed by September 30, 2005. Agency also reasoned that even if employee wanted to appeal the December 13, 2007 final decision, he could have done so within 30 days, but his appeal to OEA wasn't filed until March 9, 2007.

[23] *Agency's Motion for Administrative Judge to Reverse Decision and Order Dated September 27, 2007 and to Grant Agency's Motion Dated September 11, 2007* (October 10, 2007).

1619.5.[24]

On October 24, 2007, the AJ issued his Initial Decision. He found that Agency implemented three adverse actions: the enforced leave since 2005, the proposed termination for a criminal conviction, and the proposed termination for malfeasance. Because the proposed termination for a criminal conviction was dismissed and the proposed malfeasance charge was not a final decision, the AJ determined that OEA lacked jurisdiction over them. However, he ruled that OEA did have jurisdiction over the enforced leave. He found that while Agency gave Employee a timely notice to appeal the final decision on the enforced leave, Employee's appeal to OEA was untimely. As a result, he ruled that OEA lacked jurisdiction over his appeal and dismissed the matter.[25]

Employee filed a Petition for Review on January 7, 2008. With regard to the first proposed termination, Employee argues that Agency violated DPM § 1614.2 by not promptly issuing a final decision; it violated DPM § 1619.5 when it rescinded it but did not rescind the enforced leave; and Agency's inaction constituted constructive discharge. Employee believes that the proposed termination for malfeasance was a new proposal to which the previous enforced leave did not apply. Therefore, he requests that the Board reverse the Initial Decision and assert jurisdiction over his appeal.[26]

This case presented a very complicated set of facts. However, in the end, the only determination for this Board to make is if OEA has jurisdiction to consider the merits of the case. As the AJ succinctly provided, OEA lacks jurisdiction over the charges against Employee.

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[24] *Employee's Brief on Remedy for Improper Enforced Leave,* p. 3-7 (October 12, 2007).
[25] *Initial Decision*, p. 4-7 (October 24, 2007).
[26] *Petition for Review* (January 7, 2008). Employee filed a supplemental document on February 13, 2009, which provided that Agency finally demoted him as a result of the malfeasance charge. Employee filed a Petition for Appeal, and the AJ held that the demotion was improper and ordered that he be reinstated to his position with back pay.

As it relates to the enforced leave, D.C. Official Code § 1-606.03 provides that

> An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIIII-A of this chapter), an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more (pursuant to subchapter XXIV of this chapter), or a reduction-in-force (pursuant to subchapter XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.

Moreover, OEA Rule 604.2 provides that "an appeal filed pursuant to Rule 604.1 must be filed within thirty (30) days of the effective date of the appealed agency action." The language of both regulations are clear, an agency's final action against an employee triggers the jurisdictional clock to appeal to OEA. Employee had thirty days from the effective date of the enforced leave in which to file Petitions for Appeal with OEA.

The effective date of the enforced leave was August 18, 2005.[27] Thus, Employee's appeal should have been filed by September 17, 2005. His appeal was not filed until March 9, 2007, which was nineteen months after the effective date. OEA has consistently held that time limits for filing appeals are mandatory in nature.[28] In accordance with OEA Rule 629.2, Employee has the burden of proving issues of jurisdiction including the timeliness of his filing. Because Employee failed to prove that his petition was timely filed with OEA, we must dismiss his case.

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[27] *Petition for Appeal*, Exhibit 1 (March 9, 2007).
[28] *Alfred Gurley v. D.C. Public Schools*, OEA Matter No. 1601-0008-05, *Opinion and Order on Petition for Review* (April 14, 2008), __ D.C. Reg. __ ( ) citing *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991) and *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162, 1164 (D.C. 1985); *James Davis v. Department of Human Services*, OEA Matter No. 1601-0091-02, *Opinion and Order on Petition for Review* (October 18, 2006), __D.C. Reg. __ ( ).

As for the proposed termination for criminal conviction and malfeasance charges, again, D.C. Official Code D.C. Official Code § 1-606.03 provides guidance. The relevant section provides that "an employee may appeal 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, or suspension for 10 days or more . . ., or a reduction-in-force . . . to the Office." There was no final agency decision rendered in either of the two matters at the time the Petition for Review was filed. Neither appeal was ripe for review by OEA. Therefore, OEA lacked jurisdiction to consider them.

Because Employee did not timely file his Petition for Appeal and because we lack jurisdiction over the other charges, we must DENY Employee's Petition for Review.

ORDER

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

FOR THE BOARD:

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Clarence Labor, Chair

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Barbara D. Morgan

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Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.