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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: March 29, 2016
METROPOLITAN POLICE)	
DEPARTMENT,)	
Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Heather Straker (“Employee”) worked as a Police Officer with the Metropolitan Police Department (“Agency”). On May 18, 2012, Agency issued a final notice of indefinite suspension without pay to Employee. The notice provided that Employee was indicted on charges of first degree fraud and second degree theft. Consequently, she was suspended indefinitely pending the resolution of the criminal and administrative actions against her.¹

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on June 29, 2012. She argued that the suspension action should be reversed because Agency failed to specify the conduct charged; it failed to offer the authority upon which it relied to conclude that an indictment constituted cause; and it committed harmful error by failing to follow the

¹ *Petition for Appeal*, p. 30-32 (June 29, 2012).

enforced leave requirements. Therefore, Employee requested that the indefinite suspension without pay be mitigated to suspension with pay. Alternatively, she reasoned that if the indefinite suspension action is upheld, then Agency should be barred from removing her from her position for the same offense.²

On August 3, 2012, Agency filed its response to Employee's Petition for Appeal. It denied all of the allegations raised by Employee. Agency provided a copy of the Grand Jury Indictment against Employee for first degree fraud and second degree theft. Furthermore, it submitted a copy of a Community Service Deferred Prosecution Agreement. The terms of the agreement provided that Employee perform thirty-two hours of community services and resign from Agency in exchange for having the charges against her dismissed with prejudice. Employee signed the agreement on June 20, 2012.³

The OEA Administrative Judge ("AJ") issued an Order Requesting Briefs on March 14, 2014. She asked the parties to address whether Agency followed the proper statutes, regulations, and laws when placing Employee on an indefinite suspension without pay. Additionally, she requested arguments regarding the appropriateness of the penalty.⁴

In its brief, Agency contended that, in accordance with General Order 120.1 and District Personnel Manual ("DPM") § 1603.5, it had cause to indefinitely suspend Employee.⁵ As for the appropriateness of the penalty, Agency relied on Article 12, Section 10 of its Collective Bargaining Agreement and DPM § 1619.8. According to Agency, Employee could have been indefinitely suspended under the terms of its Collective Bargaining Agreement. Furthermore, Agency stated that under the DPM, the range of penalty for the first offense of the cause of

² *Id.*, 1-16.

³ *Metropolitan Police Department's Answer to Petition*, Tabs # 5 and 6 (August 3, 2012).

⁴ *Post Status Conference Order* (March 14, 2014).

⁵ Agency provided that it inadvertently stated that it relied on DPM § 1603.4 in Employee's proposed removal notice, but it corrected the typographical error in her final notice.

action was a ten-day suspension to removal.⁶

On May 22, 2014, Employee filed her brief. She argued that Agency should have placed her on enforced leave. Therefore, she requested that the AJ reverse the indefinite suspension and force Agency to retroactively apply the enforced leave requirements provided in the D.C. Official Code. Employee also asserted that the language provided in the Collective Bargaining Agreement did not absolve Agency of following the enforced leave requirements. Finally, Employee conceded that Agency could suspend her without pay, but she took issue with how it implemented her suspension. Therefore, she requested that the suspension be reversed and that she be suspended with pay.⁷

The AJ issued her Initial Decision on July 2, 2014. She held that in accordance with *District of Columbia Metropolitan Police Department v. D.C. Office of Employee Appeals and O'Boyle*, 88 A3d. 724 (D.C. 2014), Agency could impose an interim, administrative suspension without pay pending an investigation or while it determined what disciplinary action could be taken against an employee.⁸ The AJ applied the Court's reasoning and found that Agency had cause to impose Employee's indefinite suspension pending the resolution of her criminal case. However, she provided that Agency did not use the correct statute or regulation to suspend Employee. She ruled that Agency did not place Employee on administrative leave for five days; Employee was not informed of her right to a written decision within five days of the administrative leave; and Agency's proposal for indefinite suspension did not comply with the requirements outlined in D.C. Official Code § 1-616.54. The AJ considered these violations

⁶ *Agency's Brief*, p. 1-5 (April 8, 2014).

⁷ *Appellant's Brief*, p. 3-13 (May 22, 2014).

⁸ The Court cited to D.C. Official Code § 1-616.54, DCMR § 1620, and Metropolitan Police Department General Order 1202.1 to support its holding.

harmful error and ordered that the enforced leave action be reversed.⁹

Agency filed a Petition for Review with the OEA Board on August 1, 2014. It concedes that Employee was not placed on enforced leave pursuant to the regulations; however, it contends that it afforded her due process beyond the regulatory requirements. Agency asserts that Employee was allowed to respond and remained in full pay status beyond the five days provided for in D.C. Official Code § 1-616.54. Moreover, it claims that Employee was not denied due process because she had two opportunities to appeal the proposed indefinite suspension. Finally, Agency explains that its procedural error did not harm Employee because the error would not have resulted in it reaching a different conclusion from the one it would have reached if the error was cured.¹⁰

Administrative and Enforced Leave

D.C. Official Code § 1-616.54 and DPM § 1620 both address administrative and enforced leave. D.C. Official Code § 1-616.54(a) and (b) provide the following:

- (a) Notwithstanding any other provision of this subchapter, 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 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); 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.

- (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 time as an action

⁹ *Initial Decision*, p. 4-7 (July 2, 2014).

¹⁰ *Agency's Petition for Review*, p. 3-7 (August 1, 2014).

in accordance with regulations 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.¹¹

In the current matter, the AJ found that Agency adequately proved that Employee was indicted for a crime. Employee does not dispute this point, and the record supports the conclusion that she was indicted while being a uniformed member of Agency. Therefore, D.C. Official Code § 1-616.54(a)(3) and DPM § 1620.1(c) have been met.

D.C. Official Code § 1-616.54(b) requires that an employee be placed on administrative leave for five days prior to an enforced leave action. The Court in *O'Boyle* held that “before suspending an employee without pay, MPD must provide employee with written notice of the proposed suspension.”¹² On April 19, 2012, Agency issued a proposed notice to Employee stating that she would be suspended indefinitely without pay. The notice does not indicate that Employee would be placed on administrative leave prior to the suspension action. Additionally, Employee was not provided an opportunity to use any annual leave that may have been available

¹¹ Similarly, DPM §§ 1620.1 and 1620.14 provide the following:

1620.1 Notwithstanding any other provision of this chapter, a personnel authority may authorize placing an employee on enforced leave if:

- (a) A determination has been made that the employee utilized fraud in securing his or her appointment or that he or she falsified official records;
- (b) The employee has been indicted on, arrested for, or convicted of a felony charge (including conviction following a plea of *nolo contendere*); or
- (c) 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.

1620.14 An employee shall remain on enforced leave until such time as disciplinary action, in accordance with this chapter and taken as a result of the event that caused the administrative action, is effected, or a determination is made that no disciplinary action will be taken.

¹² *District of Columbia Metropolitan Police Department v. D.C. Office of Employee Appeals and O'Boyle*, 88 A3d. 724 (May 22, 2014).

before being placed on leave without pay.¹³ Thus, as the AJ held, Agency did not comply with the terms of this statute.

This Board must note that although Agency did not comply with the notice requirements of the administrative leave terms, it did offer Employee the equivalent of the administrative leave in practice. As previously stated, Agency issued its proposed notice on April 19, 2012. Employee's suspension action did not start until June 2, 2012, fifteen days after Agency's final decision was issued on May 18, 2012.¹⁴ In accordance with D.C. Official Code § 1-616.54(b), Employee's administrative leave period would have ended on April 24, 2012. Because Employee remained on paid status until June 2, 2012, she was provided an additional thirty-nine days of paid leave. Employee's criminal case was resolved on June 20, 2012. The record does not indicate if Employee had annual leave which could have extended her paid status beyond June 2, 2012. Therefore, we must remand the matter to the AJ to determine if she did.

Written Decision

The AJ also held that Agency violated D.C. Official § 1-616.54(e) because it failed to issue a written decision within the five-day administrative leave period. D.C. Official § 1-616.54(e)-(f) provides the following:

- (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.
- (f) If a determination is made to place the employee on annual leave or leave without pay, the decision letter shall inform him or her of the placement on enforced leave, the date the leave is to commence, his or her right to grieve the action within 10 days of receipt of the written decision letter, and if the enforced leave lasts 10 or more days, his or her right to file an appeal with the Office of Employee Appeals within 30 days of the effective date of the appealed agency action.

¹³ *Agency's Petition for Review*, Tab #1 (August 1, 2014).

¹⁴ *Id.*, Tab #5.

Similarly, DPM § 1620.6(h) provides that the proposed “notice shall inform the employee of . . . the right to a written final decision within the five (5) workdays of administrative leave.” DPM § 1620.10 provides, *inter alia*, that “. . . if the enforced leave lasts ten (10) days or more, the employee has the right to file an appeal with the Office of Employee Appeals within thirty (30) days of the final decision.”

Therefore, a final decision in this case should have been issued by April 24, 2012, the final day of Employee’s administrative leave period. However, Agency did not issue a final decision on enforced leave until May 18, 2012. This Board agrees with the AJ’s assessment that Agency violated the statute and regulation because it waited nearly one month before issuing a final decision.¹⁵ However, because Employee remained in a paid status, this violation did not negatively impact Employee’s rights.

Employee’s paid administrative leave ceased on June 2, 2012. Therefore, Agency violated the statutory requirement from June 2, 2012 until the criminal matter was resolved on June 20, 2012. Thus, if after further review, the AJ is still inclined to reverse the enforcement action on remand, it appears that Employee would only be entitled to reimbursement of back pay and benefits from June 2, 2012 until June 20, 2012.

Conclusion

As outlined above, Agency violated several sections of D.C. Official Code § 1-616.54. Because the enforced leave language is clear and mandatory, we believe that Agency’s violations amounted to harmful error. There were clear violations of Employee’s rights.

¹⁵ Additionally, the final notice failed to include any language regarding an enforced leave or language pertaining to Employee’s annual leave. However, the final notice did provide a start date for the suspension action. Employee was provided the requisite ten days to grieve the action to the Chief of Police. Additionally, the notice informed Employee of her right to appeal the action to OEA. It should be noted that the notice stated that Employee had fifteen days to appeal to OEA, but D.C. Official § 1-616.54(f) clearly provides that she had thirty days to appeal.

Moreover, Agency's argument that the error could not have been cured lacks merit. Agency's errors in failing to provide Employee with the opportunity to use annual leave could easily be corrected by the AJ by awarding back pay for the enforced leave period from June 2, 2012 through June 20, 2012. As a result, we must remand this matter to the AJ for additional determinations to be made regarding Employee's annual leave status at the time of this action. Specifically, the AJ must determine if Employee had leave which could have extended her paid leave beyond June 2, 2012.

ORDER

Accordingly, it is hereby **ORDERED** that this matter is **REMANDED** to the Administrative Judge for further determinations to be made.

FOR THE BOARD:

Sheree L. Price, Vice Chair

Vera M. Abbott

A. Gilbert Douglass

Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. 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.