THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
GLORIA EVANS,	)	OEA Matter No. 1601-0055-11
Employee	)	
v.	)	Date of Issuance: December 10, 2014
D.C. DEPARTMENT OF YOUTH	)	
REHABILITATION SERVICES,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Gloria Evans ("Employee") worked as a Program Analyst with the D.C. Department of Youth Rehabilitation Services ("Agency"). On December 3, 2010, Agency issued a Final Decision on Enforced Leave. It provided that in accordance with Chapter 16, Section 1620 of the District Personnel Manual ("DPM"), Employee was placed on enforced leave for the following causes:

> indicted on, arrested for, or convicted of a felony charge (including conviction following a plea of *nolo contendere*). Felony charge: possession with intent to distribute PCP and
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> indicted on, arrested for, or convicted of any crime (including conviction following a plea of *nolo contendere* that bears a relationship to [her] position of Program Analyst. The specific crimes are as follows: (1) possession with intent to distribute – PCP; (2) driving under the influence of alcohol/drugs; (3) reckless driving; and (4) operating (a vehicle) while impaired.

Therefore, beginning on December 6, 2010, Employee was placed on enforced leave.[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on January 3, 2011. In her petition, she argued that Agency's enforced leave action against her was unfair because it failed to consider her substance abuse problem. Therefore, Employee requested that the decision be reversed and that no disciplinary action be taken against her.[2]

Agency filed its Response to Employee's Petition for Appeal and contended that the matter should be dismissed as moot. It submitted that because Employee pled guilty to the felony charges against her and submitted a letter of resignation to Agency, then her appeal was moot. Agency further asserted that Employee's request barring any disciplinary action also be rendered moot because of her decision to resign from her position. It provided that because no justiciable issue existed and there was no relief that OEA could grant, then Employee's Petition for Appeal should be dismissed with prejudice.[3]

To address the resignation issue, the Administrative Judge ("AJ") issued an Order on Jurisdiction. In the order, she ruled that Employee had the right to appeal the enforced leave action and that her resignation was a separate issue.[4] Subsequently, the AJ requested that the parties submit briefs on the enforced leave action.

In her Pre-hearing Statement, Employee argued that Agency did not recognize substance abuse as a medical condition. Moreover, she provided that she sought treatment through the Employee Assistance Program ("EAP") in November of 2010. Employee also contended that Agency failed to consider the contributions she made during her tenure in the District government. As a result, Employee requested that her annual leave, compensatory time, and lost

[1] *Petition for Appeal,* Attachment # 1 (January 3, 2011).
[2] *Id.* at 3.
[3] *Agency's Motion to Dismiss Employee's Petition for Appeal as Moot,* p. 3-4 (March 28, 2011).
[4] *Order on Jurisdiction,* p. 2-4 (February 7, 2013).

pay be restored.[5]

Agency provided that it had official documentation from police officers detailing Employee's arrest on felony charges. Additionally, it contended that Employee's signed plea agreement provided evidence to support its decision to place her on enforced leave. Agency outlined the procedural steps it took to comply with DPM § 1620. Moreover, it provided that its management and Human Resources personnel were unaware that Employee was in treatment through the District's EAP. However, it explained that even if it was aware of Employee's treatment, her reckless behavior demonstrated the potential safety risk to her co-workers and the youth within the Department of Youth Rehabilitation Services. Accordingly, Agency reasoned that the enforced leave action was based on substantial evidence and requested that Employee's appeal be dismissed.[6]

The AJ issued her Initial Decision in this matter on June 27, 2013. She found that the Metropolitan Police Department Arrest/Prosecution Report served as substantial evidence to support Agency's decision to place Employee on enforced leave. Moreover, she found no procedural errors in Agency effectuating the enforced leave action in accordance with DPM § 1620. Additionally, she held that even though Employee was placed in a difficult situation, her resignation was indeed voluntary. Therefore, she upheld the enforced leave action.[7]

On September 5, 2013, Employee filed a Petition for Review with the OEA Board.[8]

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[5] *Employee's Pre-hearing Statement* (March 8, 2013). In her Post Pre-hearing Brief, Employee provided that because she was asked to resign as a part of her plea agreement, it is her belief that her resignation amounted to a corrective or adverse action. Therefore, she contended that Chapter 16 of the DPM was not followed. *Response to Post Pre-hearing Conference Order* (April 12, 2013).

[6] *Agency's Pre-hearing Statement,* p. 4-8 (March 8, 2013). In its Brief, Agency explained that its enforced leave action was not a corrective or adverse action. Further, it provided that Employee's work performance was not relevant as it related to the enforced leave because it is an administrative action. Finally, it claimed that Employee's resignation was voluntary. *Agency's Brief,* p. 2-4 (April 9, 2013).

[7] *Initial Decision,* p. 7-11 (June 27, 2013).

[8] It should be noted that the Petition for Review was filed beyond the thirty-five day period because the AJ mailed the Initial Decision to Employee's old address. The record reflects that Employee offered a change of address to

Employee contends that her direct supervisor knew of her treatment through the EAP and that typically employees are provided with three opportunities to seek help through the EAP. She informed the Board that she successfully completed the Substance Abuse Program and counseling as a condition of her plea agreement. Additionally, Employee highlighted the projects that she completed while with Agency. She again reiterates that she did not voluntarily resign from her position. Thus, she requests that the AJ's decision be reconsidered.[9]

This Board must make clear that the action on appeal is Agency's enforced leave and at the time of the appeal, no disciplinary action had been taken by Agency. However, it appears that Employee is of the belief that if the enforced leave action is reversed, then she would be reinstated to her position with back pay and benefits. As will be discussed in greater detail below, an enforced leave action is administrative in nature and does not rise to the level of a disciplinary action. Agency did not have an opportunity to make a decision on what, if any, disciplinary action would be taken against Employee because she resigned from her position. First, we will address the enforced leave action; then we will discuss Employee's resignation.

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. 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. Substantial evidence is defined

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OEA on September 4, 2012. However, the AJ failed to use the new address. This is of no fault to Employee; therefore, this Board will consider the merits of Employee's claims on Petition for Review.

[9] *Petition for Review to Initial Decision* (September 5, 2013).

as evidence that a reasonable mind could accept as adequate to support a conclusion.[10] Therefore, if there is substantial evidence to support the AJ's decision on enforced leave, then this Board must accept it.

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.
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> (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 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]

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[10] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

[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.

In the current matter, the AJ found that Agency adequately proved that Employee was arrested for a felony charge. Employee does not dispute this point, and the record supports the contention that she was arrested for a felony. Therefore, D.C. Official Code § 1-616.54(a)(2) and DPM § 1620.1(b) 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. On November 22, 2010, Agency issued a proposed notice to Employee placing her on administrative leave from November 23, 2010 through November 30, 2010.[12] Therefore, Agency properly placed Employee on administrative leave for five days prior to being placed on enforced leave.

Written Decision

Moreover, Agency adhered to D.C. Official Code § 1-616.54(e) by issuing a written decision within the five-day administrative leave period. D.C. Official Code § 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.
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> (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.

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."

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] *Agency's Motion to Dismiss Employee's Petition for Appeal as Moot,* Tab #3 (March 28, 2011).

DCMR § 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 regarding enforced leave should have been issued by November 30, 2010, the final day of Employee's administrative leave period. However, Employee requested an extension to submit her response to the Deciding Official in this case. Her request for an extension was granted on November 30, 2010, and she had until December 1, 2010 to submit the response. Consequently, Agency did not issue its final written decision until December 3, 2010. However, Employee's administrative leave was extended until December 3, 2010, to account for her extension, instead of ending on November 30, 2010. Employee's paid administrative leave ceased on December 3, 2010, and the enforced leave action commended on December 6, 2010.[13] Thus, Agency properly complied with D.C. Official Code § 1-616.54(e)-(f) and DPM § 1620.6(h).

It must be noted that in accordance with DPM § 1620.14, Employee was required to remain on enforced leave status until such time as disciplinary action was 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. Because a determination on disciplinary action was not made by Agency in this case, Employee was still properly on enforced leave until her resignation.[14]

Resignation

In *District of Columbia Metropolitan Police Department v. Stanley*, 942 A.2d 1172, 1175-1176 (D.C. 2008), the D.C. Court of Appeals held that "the fact that an employee is faced

[13] *Id.*, Tab #4.
[14] Employee's claims regarding the EAP, her tenure, and her contributions to Agency are all viable arguments when addressing the merits of a disciplinary action. However, because no such action took place, these arguments are irrelevant and cannot be used to combat an administrative action such as enforced leave.

with an inherently unpleasant situation or that his choice is limited to two unpleasant alternatives is not enough by itself to render the employee's choice involuntary." It provided that the test to determine voluntariness is an objective one that, considering all the circumstances, the employee was prevented from exercising a reasonably free and informed choice. The Court provided that as a general principle, an employee's decision to resign is considered voluntary "if the employee is free to choose, understands the transaction, is given a reasonable time to make his choice, and is permitted to set the effective date. With meaningful freedom of choice as the touchstone, courts have recognized that an employee's resignation may be involuntary if it is induced by the employer's application of duress or coercion, time pressure, or the misrepresentation or withholding of material information."

In the current case, Employee provides on Petition for Review that her decision to resign was the result of a plea agreement. It was Employee who set the effective resignation date, as evidenced in her notice to Agency.[15] The record does not reflect, nor does Employee contend, that Agency applied any duress, coercion, time pressure, misrepresented facts, or withheld information. Employee had freedom of choice. Thus, under the circumstances, Employee's resignation can only be deemed voluntary.

Conclusion

There is substantial evidence in the record to support the AJ's determination that Agency properly adhered to the enforced leave regulations. Additionally, the AJ properly held that Employee's resignation was voluntary. Therefore, this Board must deny Employee's Petition for Review.

[15] *Agency's Motion to Dismiss Employee's Petition for Appeal as Moot,* Tab #7 (March 28, 2011).

ORDER

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

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

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.