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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
JACQUELINE HURST,	)	OEA Matter No. 1601-0302-10
Employee	)	
	)	Date of Issuance: September 16, 2014
	)	
D.C. DEPARTMENT OF YOUTH	)	
REHABILITATION SERVICES,	)	
Agency	)	
_____	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Jacqueline Hurst (“Employee”) worked as a Youth Development Representative with the Department of Youth Rehabilitation Services (“Agency”). On April 23, 2010, Agency issued a Notice of Final Decision to Employee informing her that she was placed on enforced leave. The notice explained that there was a determination that Employee utilized fraud in securing her employment or she falsified records; she was indicted on, arrested for, or convicted of a felony charge; or she was indicted on, arrested for, or convicted of any crime in relationship to her position.<sup>1</sup>

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on April 30, 2010. She asserted that she should not have been subjected to enforced leave because she was not a member of the Department Of Corrections or Metropolitan Police pursuant to

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<sup>1</sup> *Petition for Appeal*, p. 6 (April 30, 2010).

District personnel regulations.<sup>2</sup> Therefore, she requested reinstatement to her position.

In response to the Petition for Appeal, Agency asserted that its action was in accordance with D.C. Municipal Regulations (“DCMR”) Title 6, § 1620.1(b) and (c).<sup>3</sup> It was Agency’s position that OEA lacked jurisdiction to hear cases regarding enforced leave. Therefore, it believed that it had the authority to place Employee on enforced leave pending the outcome of her case. Accordingly, Agency requested that the appeal be dismissed.<sup>4</sup>

The matter was assigned to an OEA Administrative Judge (“AJ”), who requested briefs addressing whether Employee’s conduct was in violation of the District’s laws and regulations; whether Employee should have been compensated while on enforced leave; whether Agency engaged in disparate treatment; and whether the enforced leave was appropriate under law, regulations, or the Table of Penalties.<sup>5</sup> Employee’s brief provided that Agency did not comply with D.C. Official § 1-616.54(e). The statute required that a final decision on enforced leave be rendered within five days of the period of administrative leave. Specifically, she asserted that Agency did not issue its final decision until April 23, 2010.<sup>6</sup> Additionally, Employee argued that Agency engaged in disparate treatment and that the removal should not stand because she was not convicted, but rather, granted probation before judgment.<sup>7</sup> Accordingly, she believed that she was entitled to an evidentiary hearing. Therefore, she requested that she be reimbursed for the time she was not compensated and that she be awarded attorney fees and costs.<sup>8</sup>

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<sup>2</sup> Employee provided that the action occurred as the result of a dog kennel bill. *Id.* at 3.

<sup>3</sup> Agency explained that Employee was placed on enforced leave because she was charged and arrested in the state of Maryland for passing bad checks over the amount of \$500.00. This was considered a felony under Maryland law. Agency reasoned that Employee’s criminal charges were related to her position because her arrest for fraud and/or theft raised concerns about its ability to rely on the integrity of her reports.

<sup>4</sup> *Agency’s Answer to Employee’s Petition for Appeal*, p. 3-6 (June 4, 2010).

<sup>5</sup> *Post Status Conference Order* (January 23, 2013).

<sup>6</sup> Employee also provided that the Agency did not compensate her during the administrative leave period.

<sup>7</sup> Employee believed that she was singled out when Agency placed her on enforced leave without pay because there were other employees with criminal violations who were placed on administrative leave with pay.

<sup>8</sup> *Employee’s Position Statement and Request for Evidentiary Hearing*, p. 3-6 (February 11, 2013).

In its brief, Agency provided that once it exhausted Employee's annual leave and compensatory time, she was placed in a Leave Without Pay status in accordance with 6B DCMR § 1620.12. Agency also contended that it did not engage in disparate treatment.<sup>9</sup> In response to Employee's contention regarding disparate treatment, Agency submitted that Employee did not meet her burden of proof because she did not submit evidence showing that she was similarly situated to other employees.<sup>10</sup>

The AJ issued her Initial Decision on March 27, 2013. She found that pursuant to D.C. Official Code § 1-606.03, OEA had jurisdiction to hear Employee's appeal. The AJ held that the relevant section of the DCMR only required that an employee be indicted on, arrested for, or convicted of a felony charge, and Employee was arrested for a felony.<sup>11</sup> Thus, the AJ concluded that Agency had cause to place Employee on enforced leave.

With regard to Employee's contention that Agency did not render a final decision within five days, the AJ found that Agency failed to comply with 6B DCMR § 1620.06(h). She reasoned that Employee was placed on administrative leave on November 26, 2009, and Agency was required to render a final decision by November 30, 2009. The AJ opined that this error was not a procedural error, but rather, a failure to comply with a statute.<sup>12</sup> Accordingly, the AJ reversed Agency's action; ordered it to reimburse Employee all back-pay and benefits lost as a result of the enforced leave; and pay Employee's costs and attorney's fees.<sup>13</sup>

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<sup>9</sup> *Agency's Brief*, p. 5-7 (February 11, 2013).

<sup>10</sup> *Agency's Reply Brief*, p. 3-5 (March 1, 2013).

<sup>11</sup> The AJ also found that the crimes were related to Employee's duties. She explained that Employee's misconduct would affect Agency's ability to rely on the truthfulness and integrity of the reports Employee submitted as part of her job responsibility. *Initial Decision*, p. 5 (March 27, 2013).

<sup>12</sup> She found that such an error was not harmless. She explained that the provisions of D.C. Official Code § 1-616.54(e) and DCMR § 1620.6 required that Agency provide a written decision on the enforced leave within five days of administrative leave.

<sup>13</sup> With regard to disparate treatment, the AJ found that Employee did not meet her burden of proving that any of the aforementioned employees had the same supervisor as her or that they were charged with passing a bad check in the amount of \$500.00 or more. *Id.*, 5-7.

Agency filed a Petition for Review on May 1, 2013. It argues that the AJ erroneously concluded that the required five-day time period was not a procedural provision. It also contends that the AJ erroneously concluded that the provisions of D.C. Official Code § 1-616.54(e) and 6B DCMR § 1620.6 are mandatory.<sup>14</sup> Lastly, Agency argues that the AJ's finding that the error was not harmless was not supported by substantial evidence.<sup>15</sup> Therefore, Agency requests that the Board grant the Petition for Review and remand the matter for further proceedings.<sup>16</sup>

In response to the Petition for Review, Employee cites *Teamsters Local Union 1714 v. Public Employee Relations Board*, 579 A.2d 706 (D.C. 1990) and asserts that the court held that the general rule is that a statutory time period is not mandatory unless it requires an agency to act within a specified time period and provides specific consequences for its failure to comply with the statute. However, Employee argues that the court went on to provide that “when a statute . . . does not set forth the consequence for noncompliance with the time limit, the phraseology of the statute must be examined to determine whether the designation of time must be considered a limitation of the power of the officer.” Employee argues that the AJ erred in concluding that there was no disparate treatment.<sup>17</sup> Therefore, she requests that the Board uphold the AJ's decision because Agency failed to comply with the requirements of the D.C. Official Code, and/or because Agency did not rebut her proof that there was disparate treatment.<sup>18</sup>

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<sup>14</sup> Agency asserted that a statutory time limit is presumed to be directory unless it expressly requires an agency to act within a specified time period and states the consequence for noncompliance. *Agency's Petition for Review*, p. 7-8 (May 1, 2013).

<sup>15</sup> Agency reasons that there was no finding that its noncompliance with the required five-day time period prejudiced Employee. Agency states that it was not afforded the opportunity to demonstrate how its delay did not prejudice Employee. It notes that on April 21, 2010, Employee provided her verbal response to the enforced leave. Consequently, it issued its final decision two days later. *Id.* at 10.

<sup>16</sup> *Id.*

<sup>17</sup> Employee explained that she is Caucasian and submitted proof that she was treated less favorably in comparison to African Americans at Agency. She provides that Agency did not submit anything to controvert her assertion that there was disparate treatment. Therefore, Employee believes that this finding of the AJ should be reversed.

<sup>18</sup> *Employee's Response to Agency's Petition for Review*, p. 2 (June 10, 2013).

## Administrative and Enforced Leave

D.C. Official Code § 1-616.54 and DCMR § 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 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.<sup>19</sup>

In the current matter, the AJ found that Agency adequately proved that Employee was

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<sup>19</sup> Similarly, DCMR §§ 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.

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 DCMR § 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 25, 2009, Agency issued a proposed notice to Employee placing her on administrative leave from November 25, 2009 through November 29, 2009.<sup>20</sup> Therefore, Agency properly placed Employee on administrative leave for five days prior to being placed on enforced leave.

#### Written Decision

However, the AJ 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.

Similarly, DCMR § 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." 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

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<sup>20</sup> There was an amended notice issued by Agency which listed the revised administrative leave period as November 26, 2009 through November 30, 2009. *Agency Answer to Employee's Petition for Appeal*, Tab # 7 and 8 (June 4, 2010).

(30) days of the final decision.”

Therefore, a final decision regarding enforced leave should have been issued by November 30, 2009, the final day of Employee’s administrative leave period. However, Agency did not issue a final decision on enforced leave until April 23, 2010. It was not until this notice that Employee was finally provided with appeal rights to OEA.<sup>21</sup> This Board agrees with the AJ’s assessment that Agency violated the statute and regulation because it waited over four months before issuing a final decision on enforced leave.

Employee’s paid administrative leave ceased on November 30, 2009. Therefore, Agency violated the statutory requirement from November 30, 2009 until a decision was issued on April 23, 2010. However, we do not agree with the AJ’s ruling that the entire enforced action must be reversed to correct Agency’s wrongdoing. It is our belief that under the circumstances, Agency’s violation amounts to harmless procedural error in this case.

#### Harmless Error

OEA Rule 631.3 defines harmless procedural error as “an error in the application of the agency’s procedures, which did not cause substantial harm or prejudice to the employee’s rights and did not significantly affect the agency’s final decision to take the action.” We submit that Agency’s failure to issue its final decision by November 30, 2009, did not cause substantial harm to Employee or prejudice her rights because of D.C. Official Code § 1-616.54(b). This section of the Code provides that an “employee shall remain [on enforced leave] until such time as an action . . . taken as a result of the event that caused this administrative action, is effected or a determination is made that no such action . . . will be taken.”<sup>22</sup>

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<sup>21</sup> *Agency Answer to Employee’s Petition for Appeal*, Tab # 9 (June 4, 2010).

<sup>22</sup> Likewise, DCMR § 1620.14 provides that “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.”

In light of D.C. Official Code § 1-616.54(b), even if Employee was properly provided the final decision during the administrative leave period, she still could have been on enforced leave well beyond April 23, 2010. In accordance with D.C. Official Code § 1-616.54(b), Employee could have statutorily remained on enforced leave until a final decision was made regarding what, if any, *disciplinary action* would be taken (emphasis added).<sup>23</sup> Because the enforced leave could have continued until disciplinary action was taken, we believe that Agency's violation amounts to harmless error.

#### No Substantial Harm or Prejudice

Agency's failure to provide the written decision within the administrative leave period simply resulted in Employee not receiving her appeal rights to OEA four months prior to the date that she actually received the notice. Instead of Employee having the ability to appeal the enforced leave action in December of 2009, she was unable to do so until a decision was issued in April of 2010. Moreover, the lack of a final decision did not impact the length of her enforced leave period – she could have been on leave until a decision on discipline was made. It also did not impact her pay -- in accordance with D.C. Official Code § 1-616.54(b), Employee was placed on paid administrative leave, followed by annual leave, and finally leave without pay.<sup>24</sup> Therefore, Agency's violation of D.C. Official Code § 1-616.54(e) did not cause substantial harm or prejudice Employee.

#### Conclusion

It is this Board's belief that the AJ exceeded her authority by reversing the entire

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<sup>23</sup> The D.C. Court of Appeals recently clarified the difference between an enforced leave action and a disciplinary action. In *District of Columbia Metropolitan Police Department v. District of Columbia Office of Employee Appeals and James O'Boyle*, 88 A.3d 724, 728 (D.C. 2014) the court held that an enforced leave is not a disciplinary action. It provided that an enforced leave is neither a corrective or adverse action. The court reasoned that an enforced leave without pay is an authorized interim administrative suspension—rather than final adverse action—authorized pursuant to D.C. Official Code § 1-616.54.

<sup>24</sup> *Agency Answer to Employee's Petition for Appeal*, Tab # 8 (June 4, 2010).

enforced leave action. Agency's error to provide the final notice, could have easily been corrected by the AJ by awarding back pay for the enforced leave period from November 30, 2009 through April 23, 2010, instead of reversing the entire enforced leave action. Similar logic has been applied by OEA in RIF matters where agencies are statutorily required to provide thirty days' notice prior to the effective date of termination pursuant to D.C. Official Code § 1-624.08(e). Instead of reversing the entire RIF action, OEA Administrative Judges and the OEA Board have ordered the agencies to reimburse employees for back pay from the period that they should have received notice until they did obtain notice, or alternatively, they are awarded back pay for the entire thirty-day period.<sup>25</sup>

As a result, we grant Agency's Petition for Review in part and deny in part. We grant Agency's petition regarding harmless error and deny its request for a remand. Similarly, we uphold the Initial Decision in part and reverse it in part. We uphold the Initial Decision regarding Agency's failure to provide a final decision on enforced leave. However, we reverse the decision to vacate Agency's entire enforced leave action. As a result, Agency's enforced leave action is upheld. However, it is ordered to reimburse Employee for back pay and benefits from November 30, 2009 until April 23, 2010 for its failure to provide her with a timely, final decision on enforced leave.<sup>26</sup>

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<sup>25</sup> *Laura Smart v. D.C. Child and Family Services*, OEA Matter No. 2401-0328-10, *Opinion and Order on Petition for Review* (March 4, 2014); *Belinda Bryant v. D.C. Public Schools*, OEA Matter No. 2401-0256-10, *Opinion and Order on Petition for Review* (October 29, 2013); *Willie Bennett v. D.C. Public Schools*, OEA Matter No. 2401-0002-11 (March 22, 2013); *Dorothy Greer v. Department of Housing and Community Development*, OEA Matter No. 2401-0025-11 (February 11, 2013); *Jessica Edmond v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0344-10 (November 6, 2012); and *Deborah Moore v. D.C. Public Schools*, OEA Matter No. 2401-0218-10 (July 27, 2012).

<sup>26</sup> As for Employee's argument regarding disparate treatment, OEA has held that to establish disparate treatment an employee must show that he worked in the same organizational unit as the comparison employees. They must also show that both the petitioner and the comparison employees were disciplined by the same supervisor for the same offense within the same general time period. See *Manning v. Department of Corrections*, OEA Matter No. 1601-0049-04 (January 7, 2005). As the AJ held, Employee did not offer any evidence to support a finding of disparate treatment in this case. She failed to provide evidence establishing that other employees with similar charges, who shared her supervisor, were not subjected to enforced leave.

**ORDER**

Agency's Petition for Review is granted in part and denied in part. Agency is, therefore, ordered to reimburse Employee for back pay and benefits from November 30, 2009 until April 23, 2010 for its failure to provide her with a timely, final decision on enforced leave. Evidence documenting Agency's compliance shall be provided to the Office of Employee Appeals' General Counsel's Office.

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.