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

In the Matter of:)	
)	
EMPLOYEE ¹ ,)	
Employee)	OEA Matter No. 1601-0025-23
)	
v.)	Date of Issuance: October 17, 2023
)	
D.C. DEPARTMENT OF)	MICHELLE R. HARRIS, ESQ.
CORRECTIONS,)	Senior Administrative Judge
Agency)	
)	
)	
)	

Employee, *Pro Se*
Timothy J. McGarry, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On January 30, 2023, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the D.C. Department of Corrections’ (“Agency” or “DOC”) action to place him on Enforced Leave effective December 28, 2022. On January 30, 2023, OEA issued a letter requesting that Agency file an Answer by March 1, 2023. Agency filed its Answer to Employee’s Petition for Appeal on February 6, 2023. This matter was assigned to the undersigned on February 8, 2023. On February 9, 2023, I issued an Order Convening a Prehearing Conference for March 9, 2023. Prehearing Statements were due on or before March 3, 2023. Agency submitted its Prehearing Statement as required, however, Employee failed to submit his statement. On March 9, 2023, Agency appeared for the Prehearing Conference as required, however, Employee failed to appear. As a result, on March 9, 2023, I issued an Order for Statement of Good Cause to Employee. Employee was required to submit a statement of good cause for his failure to appear as required by March 20, 2023. Additionally, Employee was required to submit his Prehearing Statement. On March 15, 2023, Employee filed a statement of good cause, citing that he missed the Prehearing Conference because of ongoing medical/health issues.

On March 16, 2023, I issued an Order scheduling a Prehearing Conference for April 4, 2023, and required that Employee submit his Prehearing Statement by March 31, 2023. Employee filed his Prehearing Statement on March 24, 2023. On March 27, 2023, Agency filed a Motion to Continue

¹ Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

citing to schedule conflicts for April 4, 2023. On March 28, 2023, I issued an Order granting Agency's Motion and rescheduled the Prehearing Conference to April 13, 2023. Both parties appeared as required. During the Prehearing Conference, Employee cited that he had retired from Agency in February 2023. As a result, I issued an Order on April 13, 2023, requiring that the parties address this Office's jurisdiction since Employee cited that he had retired. Employee's brief was due on May 4, 2023, and Agency's response was due on May 24, 2023. Both parties submitted their briefs by the prescribed deadlines. On July 27, 2023, I issued an Order Regarding Jurisdiction. Because Employee's effective date of retirement occurred after the effective date of the action, I found that this Office retained its jurisdiction over this matter. Accordingly, that same Order required the parties to submit briefs addressing the issues in this matter. Agency had the option to submit a brief by August 14, 2023, and Employee was ordered to submit a brief by August 28, 2023. On August 30, 2023, Employee filed a Motion for an Extension of Time (three weeks) to submit his brief. Employee's Motion was granted, and his brief was due on or before September 21, 2023. That Order also provided Agency the option to submit a Sur-Reply brief on or before October 5, 2023. Both parties submitted the filings as prescribed. Considering the parties' arguments as presented in their submissions to this Office, it has been determined that an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. If so, whether the penalty of enforced leave was appropriate under the circumstances and administered in accordance with all applicable laws, rules and regulations.

BURDEN OF PROOF

OEA Rule § 631.1, 6-B District of Columbia Municipal Regulations ("DCMR") Ch. 600, et seq (December 27, 2021) states:

The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.²

OEA Rule § 631.2 *id.* states:

For appeals filed under § 604.1, the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

² OEA Rule § 699.1.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Employee worked for Agency as a Correctional Officer and has been with Agency since 1990.³ The following is a relevant timeline narrative leading up to Employee's filing of his Petition for Appeal on January 30, 2023:

“On December 19, 2022, Employee was arrested at the Central Detention Facility (CDF) and charged in federal court with embezzling over \$10,000 from the Fraternal Order of Police-Department of Corrections Labor Committee, while serving as the Committee's chairman.”⁴ On December 19, 2022, Agency submitted an Enforced Leave Request to the D.C. Department of Human Resources (DCHR), attaching a copy of the U.S. Attorney's Office Press Release and an Affidavit in Support of Criminal Complaint and Arrest Warrant.” That same day, DCHR approved the Enforced Leave Request. In a notice issued December 19, 2022, Agency issued a five (5) day advance notice to Employee of a proposed Enforced Leave. Employee filed an appeal on December 21, 2022. On December 28, 2022, Agency issued a final notice and placed Employee on Enforced Leave effective that same day.⁵

Jurisdiction

This Office's jurisdiction is conferred upon it by law and was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 (“CMPA”), D.C. Official Code §1-601-01, *et seq.* (2001). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 (“OPRAA”), D.C. Law 12-124, which took effect on October 21, 1998. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions. According to 6-B of the District of Columbia Municipal Regulation (“DCMR”) § 604.1⁶, this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting:

- (a) A performance rating resulting in removal;
- (b) An adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more; or
- (c) A reduction-in-force; or
- (d) A placement on enforced leave for ten (10) days or more.

OEA Rule 631.1, 6B DCMR Ch. 600, 631.1 (December 27, 2021), states that “[t]he employee shall have the burden of proof as to issues of jurisdiction...” Pursuant to this rule, the burden of proof is by a preponderance of the evidence which is defined as “[t]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.” This Office has no authority to review issues beyond its jurisdiction.⁷ Therefore, issues regarding jurisdiction may

³ Employee's Petition for Appeal (January 30, 2023).

⁴ Agency Answer (February 6, 2023).

⁵ Agency's Answer (February 6, 2023).

⁶ *See also*. Chapter 6, §604.1 of the District Personnel Manual (“DPM”) and OEA Rules.

⁷ *See. Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

be raised at any time during the course of the proceeding.⁸ During a Prehearing Conference held on April 13, 2023, Employee cited that he had retired from Agency in February 2023. As a result, the parties submitted briefs addressing this Office's jurisdiction. In an Order Regarding Jurisdiction issued on July 27, 2023, I determined that because Employee had retired after the effective date of the adverse action in this matter, OEA retained jurisdiction over this matter. Following the issuance of this Order, the parties were provided with deadlines to submit briefs regarding Agency's action in this matter.

Employee's Position

Employee asserts that Agency wrongfully placed him on Enforced Leave, citing that he was on worker's compensation leave at the time of the actions that led to his arrest.⁹ Further, Employee asserts that he had to retire from Agency on February 17, 2023, because Agency's action of placing him on Enforced Leave resulted in his "lost [sic] of salary, pay, no income and denied benefits entitled to as an employee of the District of Columbia."¹⁰ Employee reiterated that Agency's action of placing him on enforced leave precluded him from accessing his benefits and services. He also asserts that he had been seen by doctors as related to his worker's compensation leave.¹¹ As a result, Employee argues that Agency's actions were improper and that he should be restored for what he lost.

Agency's Position

Agency asserts that its actions of placing Employee on enforced leave were warranted and appropriate following Employee's arrest and charges for violating federal laws. Agency further argues that its action of placing Employee on enforced leave was for cause. Agency asserts that "on December 19, 2022, Employee was arrested and charged in federal court by the U.S. Attorney's Office of the District of Columbia with violating 18 U.S.C. § 1343. On December 28, 2022, Agency issued to Employee its Final Agency Decision-Enforced Leave, placing Employee on enforced leave."¹² Agency avers that its actions were in accordance with 6-B DCMR § 1617.3 (2019). Agency asserts that this sections provides that "an agency may place an employee on enforced leave when there is reliable evidence that he or she: (a) Utilized fraud in securing his or her appointment; (b) Falsified official records; (c) Has been indicted on, arrested for, charged with or convicted of a felony charge (including conviction follow a plea of nolo contendere); or (d) Has been indicted on, arrested for, or convicted of any crime that bears relationship to his or her position."¹³ Additionally, Agency contends that 6-B DCMR§ 1617.5 provides that: "the Metropolitan Police Department may place uniformed members and the Department of Corrections may place a correctional officer on enforced leave when he or she had been arrested, charged, indicted or convicted of any crime irrespective of the relationship between the crime and the employee's duties and responsibilities." Agency avers that "the fact that

⁸ See *Brown v. District of Columbia Public Schools*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (January 22, 1993); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).

⁹ Employee's Petition for Appeal (January 30, 2023).

¹⁰ Employee's Brief on Jurisdiction (May 4, 2023).

¹¹ Employee's Brief (September 21, 2023).

¹² *Id.*

¹³ *Id.* at Page 5.

Employee was arrested and charged with a crime entitled Agency to place him on enforced leave and provided Agency good cause to do so.”

Further, Agency argues that Employee has “never disputed that he was arrested and charged with a crime.”¹⁴ In its Sur-Reply brief, Agency asserts that Employee’s brief discusses matters irrelevant to the instant matter and that Employee presents no arguments to contravene the enforced leave action.¹⁵ Additionally, Agency argues that Employee’s worker’s compensation matter before the Office of Administrative Hearings (“OAH”) was dismissed on May 8, 2023, for failure to prosecute. As a result, Agency avers that the current adverse action was for cause and in accordance with all applicable laws, rules and regulations and should be upheld.

ANALYSIS

In the instant matter, I find that Agency had cause for its action of placing Employee on Enforced Leave. The record is clear that Employee was arrested and charged for a federal crime in violation of 18 U.S.C § 1343 (Wire Fraud).¹⁶ Further, I find that the Affidavit is sufficient evidence for Agency to rely upon in administering the action of Enforced Leave pursuant to 6B DCMR 1617.3 (2019). That section provides that an Agency can place an employee on enforced leave when they have been indicted, arrested or charged with a felony crime. Here, it is undisputed that Employee was charged with Wire Fraud and that charge constitutes a felony.¹⁷ Employee’s argument that he was on worker’s compensation at the time he was placed on enforced leave is irrelevant. Further, I find that based on the record, Employee’s assertions regarding that leave are not accurate. That notwithstanding, because Employee was charged with a felony, I find that pursuant to 6B DCMR 1617.3, Agency has the authority to administer the enforced leave action on Employee. Accordingly, I find that Agency’s actions were for cause and were conducted in accordance with all applicable laws, rules and regulations. As a result, I further find that Agency’s action should be upheld.

ORDER

It is hereby **ORDERED** that Agency’s action of placing Employee on Enforced Leave is hereby **UPHELD**.

FOR THE OFFICE:

/s/ Michelle R. Harris
MICHELLE R. HARRIS, Esq.
Senior Administrative Judge

¹⁴ *Id.*

¹⁵ Agency’s Sur-Reply Brief (October 5, 2023).

¹⁶ Agency’s Answer at Tab 4 – Proposed Notice of Enforced Leave dated December 19, 2022, which includes a copy of the United States District Court for the District of Columbia’s “Affidavit in Support of Criminal Complaint and Arrest Warrant.” This affidavit noted that these charges stemmed from actions taken by Employee from June 2018 through May 2019, where he was accused of embezzling funds from the Fraternal Order of Police-Department of Corrections Labor Committee where he served as the Committee Chairperson. (February 6, 2023).

¹⁷ *Id.*