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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	OEA Matter No.: 1601-0015-14
STEVE STEINBERG,	)	
Employee	)	
	)	Date of Issuance: November 13, 2015
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
FIRE & EMERGENCY MEDICAL	)	
SERVICES,	)	
Agency	)	Sommer J. Murphy, Esq.
_____	)	Administrative Judge
Jeffrey O’Toole., Esq., Employee Representative		
Lindsay Neinast, Esq., Agency Representative		

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On November 5, 2013, Steve Steinberg (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) contesting the District of Columbia Fire and Emergency Medical Services’ (“Agency” or “DC FEMS”) decision to change his pay status from Administrative Leave With Pay (“ALWP”) to Leave Without Pay (“LWOP”), effective October 6, 2013. Employee, who works as an Emergency Medical Technician (“EMT”), previously filed a Petition for Appeal with this Office in 1997 after being terminated. His termination was overturned by OEA, and Agency was ordered to reinstate Employee to his previous position as an EMT. Agency was further ordered to pay Employee all back pay and benefits lost as a result of his termination.

I was assigned this matter in July of 2014. On July 21, 2014, I issued an Order convening a Prehearing Conference for the purpose of assessing the parties’ arguments. Employee filed a Motion to Continue on August 22, 2014. The Motion was granted and the Prehearing Conference was held on October 1, 2014. However, Agency informed the Undersigned, via email, on November 19, 2014, that there were pending issues regarding the adequacy of tax records provided by Employee that were necessary to calculate the amount of back pay that he was entitled to. Counsel for Agency further questioned whether OEA has jurisdiction over the instant appeal because the unresolved issues were related to Employee’s calculation of back pay and

other human resource-related complications.<sup>1</sup> A telephonic Status Conference was subsequently held on April 22, 2015, during which it was determined that the parties must first address the jurisdiction issue before proceeding to an Evidentiary Hearing on the merits of Employee's appeal. On April 25, 2015, the Undersigned issued an Order, requiring both parties to submit written supplemental briefs to address whether OEA has jurisdiction over the instant appeal. Both parties complied with the Order.

### JURISDICTION

Jurisdiction has not been established in this matter.

### ISSUE

Should Employee's appeal be dismissed for lack of jurisdiction?

#### ***Uncontested Facts***

1. Employee works as an Emergency Medical Technician, Grade 6, Step 1, with D.C. FEMS.
2. On January 10, 1997, he was terminated from his position as an EMT.
3. On January 21, 1997, Employee filed a Petition for Appeal with this Office, arguing that his termination was done so in retaliation for filing a Worker's Compensation claim in 1995.
4. On May 24, 2004, the OEA Administrative Judge ("AJ") reversed Agency's action of terminating Employee and ordered that he be reinstated to his prior position as an EMT. The AJ further ordered Agency to reimburse Employee for all back pay and benefits lost as a result of his removal.<sup>2</sup>
5. On September 11, 2008, OEA's General Counsel's Office issued an Order on Compliance because Agency had not complied with the AJ's Initial Decision.<sup>3</sup>
6. In July of 2009, Employee filed a lawsuit against the District of Columbia and various officials in the U.S. District Court for the District of Columbia.<sup>4</sup>
7. On July 26, 2012, Agency sent a letter to Employee stating that he would be reinstated to an administrative position contingent upon the completion, verification, and return of certain Human Resources forms.<sup>5</sup>
8. Agency placed Employee on Administrative Leave With Pay ("ALWP") beginning on December 24, 2012.

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<sup>1</sup> Agency's November 19, 2014 communication to the Undersigned included a series of emails between Payroll Operations Manager, Keely Williams, Office of Pay and Retirement Services Director, Chris LaCour, and several other employees from DC FEMS, and Human Resources. Agency previously filed a Motion to Dismiss for lack of jurisdiction on November 26, 2013.

<sup>2</sup> *Steinburg v. D.C. FEMS*, OEA Matter No. 1601-0015-14 (May 12, 2004).

<sup>3</sup> *Steinburg v. D.C. FEMS*, General Counsel's Order on Compliance, OEA Matter No. 1601-0183-97 (September 11, 2008).

<sup>4</sup> Employee's Opposition to Agency's Motion to Dismiss Employee's Petition for Appeal (December 12, 2013). The parties continue to litigate the issues of protective orders, money damages and injunctive relief in D.C. Superior Court and the U.S. District Court for the District of Columbia.

<sup>5</sup> *Id.* at Exhibit E.

9. On February 25, 2013, Employee returned to work on a reduced work schedule per the order of the D.C. Police and Fire Clinic. Employee was sent home at the end of his tour of duty on February 25, 2013.
10. On October 2, 2013, D.C. FEMS Chief, Kenneth Ellerbe, issued Employee a letter stating Agency would be terminating his ALWP status effective October 5, 2013.<sup>6</sup> The letter alleged that Employee had failed to provide satisfactory tax return records for the purpose of calculating the back pay and benefits owed to him as of his wrongful termination.
11. On October 6, 2013, Employee was placed on Leave Without Pay (“LWOP”) status. He remains on LWOP as of the date of this Initial Decision.
12. Employee subsequently filed a Petition for Appeal with OEA.

#### FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, amended certain sections of the CMPA. Amended D.C. Code §1-606.3 (a), which is also, enumerated in OEA’s rules and regulations states the following:

604.1 Except as otherwise provided in the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code §§ 1-601.01, *et seq.* (2006 Repl. & 2011 Supp.)) or § 604.2 below, any District of Columbia government employee may appeal a final agency decision affecting:

- (a) A performance rating which results in removal of the employee;
- (b) An adverse action for cause which results in removal;
- (c) A reduction in grade;
- (d) A suspension for ten (10) days or more;
- (e) A reduction-in-force; or
- (f) A placement on enforced leave for ten (10) days or more.<sup>7</sup>

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. Preponderance of the evidence is “that 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.” Under OEA Rule 628.2, 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. The jurisdictional issues to be decided in this case are: 1) whether Chief Ellerbe’s October 2, 2013, letter to Employee regarding his change in pay status constitutes a final agency adverse action; and 2) whether Employee’s placement on LWOP status was tantamount to being placed on enforced leave for ten (10) or more days as defined under the relevant statutory and regulatory provisions.

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<sup>6</sup> Agency Reinstatement Efforts/Mandate Non-Compliance/Pay Status Change (October 2, 2013).

<sup>7</sup> 59 DCR 2129 (March 16, 2012).

The parties in this case have engaged in extensive litigation and communication for several years regarding the calculation of back pay owed to Employee after Agency's decision to terminate him in 1997 was overturned by OEA. Agency placed Employee on LWOP in October of 2013 because the amount of back pay owed to him could not be calculated based on the tax information that was submitted. Employee argues that his change in pay status to LWOP constituted an involuntary and wrongful placement on enforced leave. Employee further argues that there is no "consequential relationship between Agency's ability to calculate the back pay and benefits it owes to Employee and Employee's ALWP."<sup>8</sup> In his Petition for Appeal, Employee states that "I was on Administrative Leave With Pay for medical reasons and the agency forced me onto Leave Without Pay for a [wholly unrelated reason] to my medical reason."<sup>9</sup> Employee cites to Agency's October 2, 2013 letter, which indicated that his status was being changed from ALWP to LWOP as a result of Employee's failure to submit satisfactory tax records to Agency. Agency's notice further stated the following:

"Naturally, you are free to use any other accrued leave in lieu of LWOP. Furthermore, the Department will draw down your restored leave balance (once tabulated) by the number of ALWP hour[s] used to date."<sup>10</sup>

D.C. Official Code §1-616.54 and DCMR §1620 both address administrative and enforced leave. D.C. Official Code § 1-616.54 provides the following in pertinent part:

- (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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<sup>8</sup> Employee Brief at 4 (August 22, 2014).

<sup>9</sup> Petition for Appeal (November 5, 2013).

<sup>10</sup> *Id.*

(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>11</sup>

(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 further states that “[i]f 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.”

In this case, I find that Agency's decision to change Employee's pay status from ALWP to LWOP effective October 6, 2013 did not constitute an enforced leave action as defined under D.C. Code § 1-616.54 and DCMR § 1620. Chief Ellerbe's October 2, 2013 letter to Employee specifically addressed Agency's inability to calculate back pay stemming from OEA's decision to reinstate Employee in 2004. The letter was not a proposed advance notice of Agency's intent

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<sup>11</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.

to place Employee on enforced leave without pay based on any reasons enumerated in § 1-616.54 (e.g., fraud, arrest and/or conviction of a crime). Moreover, Ellerbe's letter did not serve as a final notice that Employee was being placed on enforced leave without pay for any of the aforementioned reasons. Agency also gave Employee the option of utilizing his restored leave balances (when calculated) in lieu of being placed on LWOP. In sum, Employee is appealing an administrative change in pay status, and not a placement on enforced leave for ten (10) or more days.

Employee submits that 6B D.C.M.R § 1266.1 and § 1267.10 should be controlling in this action because the provisions govern when an agency may place an employee on involuntary leave without pay status. Employee was out of work for medical reasons while under the supervision of Dr. Kennel from the D.C. Police and Fire Clinic.<sup>12</sup> Dr. Kennel was also responsible for examining Employee each month and to determine whether he could medically cleared to return to duty. However, the letter that Employee has provided to this Office as a purported final agency action is entitled "Reinstatement Efforts, Mandate Non-Compliance/Pay Status Change." This document does not refer to any issues pertinent to Employee's medical status. Moreover, there is no credible evidence in the record to support a finding that Agency issued Employee a final notice of an appealable adverse action that falls within the jurisdictional parameters of D.C. Code §1-606.3, *supra*.

It is an established matter of public law that the OEA no longer has jurisdiction over grievance appeals.<sup>13</sup> This Office is primarily charged with determining whether an agency had cause to take adverse action against an employee, and whether the penalty was within the range allowed by law. Employee's attempt to resolve any issues related to tax documents and/or the calculation of back pay owed to him fall beyond the purview of this Office's jurisdiction. Likewise, Agency's action of changing Employee's pay status to LWOP based on a reason not enumerated in § 1-616.54 and DCMR § 1620 is an administrative action that constitutes a grievance; not a placement on enforced leave. As such, I find that Employee's appeal does not meet the jurisdictional burden of proof required under OEA Rule 628.1, and must therefore be dismissed.

### ORDER

It is hereby **ORDERED** that Employee's Petition for Appeal is **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

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SOMMER J. MURPHY, ESQ.  
ADMINISTRATIVE JUDGE

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<sup>12</sup> Employee Brief.

<sup>13</sup> Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.