



Agency Prehearing Statement. On March 19, 2025, I issued a Post Prehearing Conference Order requiring the parties to submit briefs in this matter. The March 19, 2025 Order required Employee to submit a responsive brief by April 9, 2025. Agency had the option to submit a sur-reply brief by April 21, 2025. Employee submitted his brief as required. On April 21, 2025, Agency, by and through email correspondence, cited that it would not elect to file a sur-reply brief and would rely upon its previously submitted filings. Considering the parties' arguments as presented in their submissions to this Office, I have 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.<sup>2</sup>

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.

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

Employee is an Information Technology Specialist and has been with Agency for approximately 15 years. The following is a relevant timeline narrative leading up to Employee's filing of his Petition for Appeal on January 14, 2025:

"On or about November 19, 2024, after Employee failed to show up for work, OCTO became aware that he had been apprehended and arrested as a fugitive in connection with a criminal case in Maryland. On November 1, 2024, in *State of Maryland v. [Employee]*, the District Court of Maryland for Montgomery County issued a warrant

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<sup>2</sup> OEA Rule § 699.1.

for Employee’s arrest on four felony charges: Rape First Degree, Rape Second Degree, Assault First Degree and Assault Second Degree. On November 14, 2024, a charge was filed against [Employee] in the District of Columbia Superior Court for a single count of Fugitive from Justice.”<sup>3</sup> On December 5, 2024, Agency issued a Proposed Notice which advised Employee of the intent to place him on enforced leave because “OCTO had received reliable evidence that he had been indicted on, arrested for, charged with or convicted of a felony charge...”<sup>4</sup> On December 12, 2024, in the Circuit Court for Montgomery County, a grand jury returned an indictment against [Employee] for two felony counts of Rape Second Degree and two felony counts of Sex Offense Third Degree.”<sup>5</sup> A final notice dated January 9, 2025, cited that Agency had determined that it would place Employee on Enforced Leave effective January 9, 2025.

### **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”) § 604.1<sup>6</sup>, 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.*

### **Agency’s Position**

Agency asserts that its actions of placing Employee on enforced leave were warranted and appropriate following Employee’s arrest and subsequent felony charges. Further, Agency maintains that it followed all applicable laws, rules and regulations and that its action of placing Employee on enforced leave was for cause and warranted in the circumstances. Agency asserts that “on or about November 19, 2024, after [Employee] failed to show up for work, OCTO became aware that he had been apprehended and arrested as a fugitive in connection with a criminal case in Maryland.”<sup>7</sup> Agency further notes that “[o]n November 1, 2024, in *State of Maryland v [Employee]*, the District Court of Maryland issued a warrant for [Employee’s] arrest on four felony charges: Rape First Degree, Rape Second Degree, Assault-First Degree and Assault-Second Degree.”<sup>8</sup> Agency cites that on November 14, 2024, “a charge was filed against [Employee] in the District of Columbia Superior Court for a single count of Fugitive from Justice.”<sup>9</sup> After Employee’s arrest on November 19, 2024, Agency

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<sup>3</sup> Agency’s Prehearing Statement at Page 1-2 (March 13, 2025).

<sup>4</sup> *Id.* at Page 2.

<sup>5</sup> *Id.*

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

<sup>7</sup> Agency Answer at Page 1 (February 13, 2025).

<sup>8</sup> *Id.* Agency also references Pages 26-27 which include a copy of the District Court of Maryland for Montgomery County Arrest Warrant and Statement of Charges.

<sup>9</sup> *Id.* at Page 2.

asserts that Employee remained in custody until bail. Agency also avers that a condition of Employee's release was that he have no contact with minors.<sup>10</sup>

Agency asserts that "in a letter dated December 5, 2024, [Employee's] supervisor, Carmen Mirabile, notified him of OCTO's intent to place him on enforced leave pursuant to DPM §1617.3 (c), because OCTO had obtained reliable evidence that he had been indicted on, arrested for, charged with or convicted of a felony charge."<sup>11</sup> Further, Agency maintains that this "notification informed [Employee] of his right to submit a written response to OCTO Deputy Director Henry Lofton within two calendar days."<sup>12</sup> Agency further avers that this notice was served on Employee on December 7, 2024, and that Mr. Lofton did not receive a response. Agency further cites that on "December 12, 2024, in the Circuit Court for Montgomery County, a grand jury returned an indictment against [Employee] for two felony counts of Rape Second Degree and two felony counts of Sex Offense Third Degree."<sup>13</sup> Agency explains that on January 9, 2025 "Mr. Lofton as the deciding official, notified [Employee] of his decision to place [Employee] on enforced leave, effective the same day, pending a final decision on any following corrective or adverse action."<sup>14</sup> Agency further notes that Employee's trial in Maryland is currently scheduled for May 19, 2025.<sup>15</sup>

Agency maintains that its actions were in accordance with the DPM. Specifically, Agency asserts that "per DCMR §1617.3 9 (c), an agency may place an employee on enforced leave when there is reliable evidence that he or she...has been indicted on, arrested for, charged with or convicted of a felony charge (including conviction following a plea of nolo contendere)."<sup>16</sup> Agency argues that "Maryland's court records make it indisputably clear that a warrant was issued for [Employee's] arrest, and he was subsequently arrested on that warrant for four felony sex crimes."<sup>17</sup> Because of this, Agency maintains that it was "legally within OCTO's discretion to place [Employee] on enforced leave." Agency also avers that it complied with the requirements of "DCMR §1617.7" in that it "provided Employee with a notice of the proposed enforced leave action, and in that same notification, it provided him the opportunity to respond in writing."<sup>18</sup> Additionally, Agency avers that Employee "concedes that he was both arrested and charged criminally." Agency further asserts that "[i]n doing so, [Employee] also concedes OCTO's legal basis for placing him on enforced leave."<sup>19</sup> Agency maintains that given the nature and circumstances of the charges Employee is facing, as well as his directive of non-contact with minors; Employee's "presence at OCTO would be unworkable and inappropriate." Agency asserts that there are times where children are present in its building and there is a public art gallery as well.<sup>20</sup>

Agency also avers that the "Table of Illustrative Actions recommends only one course of action for DC employees charged with felonies: enforced leave pending criminal prosecution. 6B DCMR § 1607.2(a)(3)."<sup>21</sup> Agency maintains that this is exactly what it has done in this matter. Agency further explains that "given the sensitivity of this particular case, the implications of the court order, and

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

<sup>11</sup> Agency's Prehearing Statement at Page 1 (March 13, 2025).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* See also, Agency Answer.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at Page 3.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at Page 4.

<sup>21</sup> *Id.*

OCTO's duty to act responsibly in the public interest, there is only one prudent course of action here: OCTO must await the conclusion of the criminal case and then make a decision on an adverse or corrective action."<sup>22</sup> Agency acknowledges that although Employee "evidently disagrees with this use of OCTO's discretion within its business judgment, that disagreement in no way diminishes OCTO's ability or authority to place him on enforced leave."<sup>23</sup> As a result, Agency avers that its action was warranted and that it complied with all applicable policies, procedures and regulations in its administration of the enforced leave action.

### **Employee's Position**

Employee argues that Agency's action of Enforced Leave is unwarranted in his matter. Employee asserts that he has "proudly served the DC Government for over 25 years – 10 years with DC Public Schools, as a computer teacher and nearly 15 years with OCTO."<sup>24</sup> Employee asserts that while Agency raises concerns about the "Maryland Judge's order regarding children [he] wants to clarify that where he currently resides there are many families with children that he does not interact with" and that "even before the charges in Maryland, [his] interactions with children at OCTO's 200 I Street SE building were virtually nonexistent."<sup>25</sup> Employee asserts that the charges in Maryland "are of a personal nature and have no bearing on [his] ability to fulfill [his] professional responsibilities." Employee further maintains that his performance has been "stellar" at Agency and that he is well regarded among his colleagues. Employee further argues that Agency's action of Enforced Leave is a burden and also double jeopardy. Employee avers that "preventing [him] from working and receiving wages during this time imposes an additional and significant burden on [him]." Further, he argues that this action "penalizes [him] due to circumstances unrelated to [his] professional role and is, in essence, akin to double jeopardy." Employee notes that as of the date of the submission of his response, his annual leave hours at Agency were depleted.<sup>26</sup>

Further, Employee asserts that he was arrested by the U.S. Marshals on the morning of November 13, 2024, while in route to OCTO headquarters and that he was released on bail on November 21, 2024.<sup>27</sup> Employee also explains that "due to his arrest, the U.S. Marshals confiscated [his] keys, including his mailbox key." To this end, Employee asserts that he received the December 5, 2024 letter ("December 5<sup>th</sup> Letter") on December 12, 2024. Employee also cites that the December 5<sup>th</sup> letter also "outlined Proposed Enforced Action set to begin December 16<sup>th</sup>." However, Employee asserts that Agency "began involuntarily deducting from his accrued annual leave hours on December 16<sup>th</sup>."<sup>28</sup> Employee also avers that the language used by Agency in its pleadings, specifically the word "lure" to describe events leading to a child's presence in his home is "factually incorrect and defamatory."<sup>29</sup> Employee further notes that this language was not used in any of the "Maryland court documents." Employee also argues that he received the Final Agency action dated January 9, 2025,

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at Page 3.

<sup>24</sup> Employee Response to OCTO's Decision for Enforced Leave (April 7, 2025). It should be noted that Employee's April 7, 2025, response was presented in two parts of the same submission. The first was titled as "Response to OCTO's Statement of the Factual Background", and the second was "Response to OCTO's Decision for Enforced Leave." For ease of reference, this Initial Decision will reference both statements as presented.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Employee Response to OCTO's Statement of the Factual Background (April 7, 2025).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

on January 14, 2025, but reiterates that Agency had been deducting his leave hours since December 16, 2024.<sup>30</sup>

Employee also proposes that he be reinstated to work remotely “until [his] Maryland case reaches a conclusion.” Employee avers that OCTO has “previously implemented special arrangements allowing employees to work remotely, including from locations outside the continental United States, for extended periods.”<sup>31</sup> Employee cites that his role can be performed remotely in its entirety and that there are no operational necessities that warrant his physical presence at the office. As a result, Employee maintains that Agency’s “discretionary action to place [him] on enforced leave is unwarranted” and that alternatives should be considered.<sup>32</sup>

### **ANALYSIS**

In the instant matter, I find that Agency had cause for its action of placing Employee on Enforced Leave. Pursuant to 6B DCMR 1617.3(c), an agency can place an employee on enforced leave when they have been indicted, arrested or convicted with a felony charge (including conviction following a plea of nolo contendere). Here, the record is clear that Employee was arrested and later indicted for four (4) felony charges in the State of Maryland. This is evinced in the record not only by the District Court of Maryland for Montgomery County’s initial arrest affidavit but is also found in subsequent records in both the District Court of Maryland for Montgomery County and the Circuit Court of Maryland for Montgomery County. These alone would be sufficient to rely upon regarding evidence of proof of an arrest and/or indictment. That said, Employee has also attested to his arrest, albeit he maintains these charges are of a personal nature that have no bearing on his work. As a result, I find that both the arrest affidavit and Employee’s own admission of his arrest could be relied upon in administering the action of Enforced Leave. Accordingly, I find that it is undisputed that Employee was charged with two (2) counts of Rape in the Second Degree and two (2) counts of Sex Offense in the Third Degree, all of which are felony charges.<sup>33</sup>

Employee’s arguments regarding alternatives like remote work and depletion of his annual leave are not relevant to Agency’s discretion in levying the charge of Enforced Leave. I further find that Employee’s arguments regarding Agency’s decision to place him on Enforced Leave are also insufficient to warrant an alternative penalty, as Agency has the discretionary authority in determining penalties. OEA has consistently held that “the primary responsibility for managing and disciplining Agency’s work force is a matter entrusted to the Agency, not this Office.”<sup>34</sup> Therefore when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency but is simply to ensure that “managerial discretion has been legitimately invoked and properly exercised.” Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.<sup>35</sup> Accordingly, because Employee was arrested

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<sup>30</sup> *Id.*

<sup>31</sup> Employee’s Response to OCTO’s Decision for Enforced Leave (April 7, 2025).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> See *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

<sup>35</sup> *Love* also provided the following:

[OEA’s] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency’s shoes in the first instance; such an approach would fail to accord proper deference to the agency’s primary discretion in managing its

for and charged with felonies, I find that pursuant to 6B DCMR 1617.3, Agency has the authority to administer the enforced leave action on Employee. Accordingly, I further find that Agency's actions were for cause and were conducted in accordance with all applicable laws, rules and regulations. As a result, I conclude that Agency's action should be upheld.

ORDER

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

FOR THE OFFICE:

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

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workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, it is appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. (Citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981)).