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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
KHALAF JOHNSON,)	OEA Matter No. 1601-0162-09
Employee)	
)	Date of Issuance: January 30, 2012
)	
)	
D.C. DEPARTMENT OF HEALTH,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Khalaf Johnson (“Employee”) worked as a Pest Controller with the Department of Health (“Agency”). On January 29, 2009, Agency mailed Employee an advanced notice of proposal to remove him from his position. He was charged with absence without leave (“AWOL”). According to Agency, for sixteen days Employee did not call to request leave or notify his supervisor of his absence.¹ On March 6, 2009, Agency issued its final decision to remove Employee from his position.²

Employee filed an appeal with the Office of Employee Appeals (“OEA”) on July 16, 2009. He argued that he did not receive the notice of removal from Agency until June 9, 2009. He explained that the notices were mailed to the wrong address. As a result, Employee

¹ *Agency Answer*, Exhibit #1 (October 8, 2009).

² *Id.*, Exhibit #3.

requested that he be allowed to have a hearing and that he be reinstated to his position.³

Agency filed its response to Employee's Petition for Appeal on October 8, 2009. It contended that Employee was notified of his AWOL status by notices sent through Federal Express. Agency claimed that the notices "were sent to the home address available to [it]."⁴ However, Employee failed to respond to the notices. Then on April 9, 2009, Agency sent a notification of personnel action to Employee. Agency noted that "the address used for the [notice of personnel action] was 7 Adams Street, N.W., Washington, D.C. 20001-1025."⁵ It concluded by arguing that Employee's appeal was untimely filed beyond the thirty-day period he had to respond.⁶

In light of Agency's argument that Employee's petition was untimely filed, the Administrative Judge ("AJ") requested that Employee submit a brief on jurisdiction.⁷ Employee filed the brief and argued that his appeal was, indeed, timely because he did not receive Agency's final notice of removal until June 9, 2009. He moved that the AJ summarily reverse the action against him because it failed to formally serve him with a notice of removal. Consequently, the thirty-day time period in which to file his appeal with OEA had yet to trigger.⁸

On April 26, 2010, the AJ ordered both parties to submit briefs that addressed whether Agency's adverse action was taken for cause and whether the penalty was appropriate under the

³ *Petition for Appeal*, p. 3 (July 16, 2009).

⁴ Agency included the advanced written notice of proposed removal, an amended notice of proposed removal, and the notice of final decision. All three notices listed 1719 27th Street, SE, Apartment 202, Washington, D.C. 20020, as Employee's address.

⁵ No explanation was provided as to why Agency decided to send the personnel action to a different address than the address used for the notices.

⁶ *Agency Answer*, p. 1-2 and Exhibits #1-4 (October 8, 2009).

⁷ *Order on Jurisdiction* (March 1, 2010).

⁸ *Employee's Brief in Support of OEA's Jurisdiction and Motion for Summary Reversal on the Pleadings*, p. 1-5 (March 15, 2010).

circumstances.⁹ Agency filed its brief addressing the issues raised by the AJ.¹⁰ Employee's brief failed to address either issue. Instead, he focused on his failure to be properly served with the notices because Agency mailed them to a different address than that listed on his personnel action form.¹¹

Before the AJ issued his Initial Decision on this matter, Agency filed a response to Employee's Brief on June 4, 2010. It requested that the AJ affirm its decision to remove Employee because he failed to address the issues set forth by the AJ in his April 26, 2010 order. Agency went on to provide that Employee's argument that he failed to receive the notices is flawed because the notices were sent to his last known address. Moreover, Employee responded to its final decision to remove him on March 30, 2009.¹² Therefore, he did receive notice of its decision.¹³

The AJ issued his Initial Decision on October 14, 2010. He held that although Employee's Petition for Appeal was filed beyond the 30-day period, he would consider the matter on its merits. He reasoned that as a result of the address confusion related to Employee's receipt of the advanced and final notices of removal, he should determine if agency's action was taken for cause and was appropriate under the circumstances.¹⁴

The AJ stated that Agency sent the notices to the 27th Street address in a good faith attempt to ensure that Employee received the documents in a timely manner. He determined that it may be debatable as to whether or not Employee actually received the notices in a timely

⁹ *Order to Submit Briefs* (April 26, 2010).

¹⁰ *Agency's Brief* (May 7, 2010).

¹¹ *Employee's Brief* (May 21, 2010).

¹² The document is addressed to Agency's deciding official regarding its notice of final decision for removal. It is dated March 30, 2009 and is signed by Employee.

¹³ *Agency's Reply*, p. 2 and Exhibit #2 (June 4, 2010).

¹⁴ *Initial Decision*, p. 3-5 (October 14, 2010).

manner. However, what is not debatable was that Employee had a fair opportunity to address whether or not Agency had cause to remove him, but he chose not to address this issue.¹⁵ As a result, the AJ found that Agency had the requisite cause to remove Employee and that removal was appropriate under the circumstances.¹⁶

Employee disagreed with the Initial Decision and filed a Petition for Review on November 19, 2010. He argued that the District Personnel Manual (“DPM”) provides that advance and final notices of discipline must be delivered to employee in a manner to ensure receipt. He contends that Agency failed to comply with that requirement by mailing his notice to a different address than that listed as his “official address.” Employee went on to provide that the OEA record is “devoid of any evidence whatsoever that [Agency] ever properly notified [Employee] of his proposed or final termination.” Moreover, he explained that the AJ had no evidence to support his conclusion that the notices were sent to Employee’s last known address of record with the District of Columbia government. Accordingly, Employee requested that the Initial Decision be reversed and that he be reinstated and awarded back pay and attorney’s fees.¹⁷

On December 23, 2010, Agency filed a response to Employee’s Petition for Review. It argued that the Petition for Review should be dismissed because it was filed one day past the thirty-five day deadline in which to file an appeal with the OEA Board. Agency went on to assert that Employee makes the argument that the notices should have been sent to his address of record and not his last known address. However, he does not dispute that the address to which the notices were mailed was not his actual address. It went on to note that Employee squandered

¹⁵ *Id.* at 6.

¹⁶ *Id.*, 6-8.

¹⁷ *Employee’s Petition for Review of Initial Decision* (November 19, 2010).

an opportunity to argue his case on the merits before the AJ. It provided that the Initial Decision was based on substantial evidence. Thus, his Petition for Review should be denied.¹⁸

The first issue that the Board must address is whether Employee actually received notice of Agency's decision to remove him from his position. DPM section 1608.7 and 1614.6 provide that if the employee is not in a duty status, i.e., at work, the notice of proposed action and final decision shall be sent to the employee's last known address by courier, or by certified or registered mail, return receipt requested before the time the action becomes effective.

Employee argued that 1719 27th Street, SE, Apartment 202, Washington, D.C. 20020, was not his last known address. He provided a pay stub from June of 2007 and a Personnel Form 50 from December of 2004 and March of 2009 which listed his address as 7 Adams Street, N.W., Washington, D.C. 20001-1025. Agency relied on arrest records from December 2008 which listed the 27th Street address. Although, there are valid arguments regarding Employee's last known address, there is clear proof in the record that Employee actually received Agency's final notice regardless of the address used. Thus, if Agency failed to use Employee's actual last known address, this mistake was *de minimis* at best.

In Agency's reply to a brief filed by Employee, it provided a letter dated March 30, 2009, from Employee to the Agency's deciding official regarding Agency's "notice of final decision . . . for removal." Employee clearly states in this letter that he disagrees with Agency removing him from his position. He stated that he was arrested and attempted to contact his supervisor. He concluded the letter by providing that he should not be removed from his position "because in [his] absence [he] made attempts to contact [his supervisor] and he was not available."¹⁹ Despite

¹⁸ *Department of Health's Response in Opposition to Employee's Petition for Review of Initial Decision* (December 23, 2010).

the confusion about which address was the proper address for mailing the notices, this response to Agency's removal action proves that Employee received the final notice to remove him from his position. Agency's notice of final decision was issued on March 6, 2009, by Deputy Director Feseha Woldu.²⁰ Twenty-four days later, Employee sent a response to Deputy Director Woldu addressing the removal charge imposed on him.²¹ Thus, Employee cannot now allege that he did not receive notice of the removal action.

Moreover, Employee failed to address the specific adverse action taken against him and the underlying cause of that action. He ignores the fact that the particular adverse action sought by Agency could be initiated under the DPM only after he, as a first-time offender, had been absent without leave for ten consecutive workdays or more.²² Accordingly, we must address the merits of the removal action.

The AJ and Agency correctly note that Employee chose not to address the merits of the removal action. After reviewing the record, this Board believes that the AJ's decision to uphold Agency's removal action was based on substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.²³ Therefore, this Board must determine if a reasonable mind would accept the Agency and AJ's assessments that Employee's failure to report to work for sixteen days is adequate to support an AWOL charge.

DPM section 1268.1 provides that "an absence from duty that was not authorized or

¹⁹ *Agency's Reply*, Exhibit #2 (June 4, 2010).

²⁰ *Agency Answer*, Exhibit #3 (October 8, 2009).

²¹ *Agency's Reply*, Exhibit #2 (June 4, 2010).

²² *Graves v. D.C. Office of Employee Appeals*, 805 A.2d 245, 248 (D.C. 2002).

²³ *Black's Law Dictionary*, Eighth Edition; *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).

approved, or for which a leave request has been denied, shall be charged on the leave record as —absence without leave (AWOL). The AWOL action may be taken whether or not the employee has leave to his or her credit.” Section 1268.4 goes on to provide that “if it is later determined that the absence was excusable, or that the employee was ill, the charge to AWOL may be changed to a charge against annual leave, compensatory time, sick leave, or leave without pay, as appropriate.” According to Agency, Employee did not report to work for his scheduled tour of duty from December 19, 2008 through January 16, 2009. During this period, Employee was not on authorized annual or sick leave. He also did not provide documentation that he was ill during the period in question.²⁴ Employee offered no explanation for his absence, so a determination could not be made as to whether his absence was indeed excusable. Thus, AWOL was the proper charge under the circumstances.

When determining the appropriateness of an agency’s penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).²⁵ According to the Court in *Stokes* OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties. Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District government employees.

²⁴ The D.C. Court of Appeals in *Murchinson v. D.C. Department of Public Works*, 813 A.2d 203 (D.C. 2002), held that an employee must be incapacitated by their illness and unable to work during the AWOL period for it to be deemed a legitimate excuse for that cause of action.

²⁵ See also *Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011); and *Beverly Gurara v. Department of Transportation*, OEA Matter No. 1601-0080-09, *Opinion and Order on Petition for Review* (December 12, 2011).

Section 1619.1 section 6(b) of the DPM clearly lists that the penalties for an on-duty or employment-related act or omission that interfered with the efficiency or integrity of government operations, absence without leave charge ranges from a reprimand to removal for the first offense.²⁶ Hence, removal was an appropriate penalty for Employee.²⁷

Based on the aforementioned, there is no clear error in judgment by Agency. Removal was within the range of penalties for the AWOL charge, as evidenced in Chapter 16 of the DPM. Accordingly, Employee's Petition for Review is DENIED.

²⁶ Similarly, DPM section 1619.1 6(a) provides that unauthorized absence for ten consecutive days or more constitutes abandonment, and the penalty for the first offense is removal.

²⁷ When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised." *See Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). OEA has previously held that the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office. *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 and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011). Agency's reliance on DPM § 1619 to determine the penalty for the AWOL charge is proper. When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. *See Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011); *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (February 1, 1996); and *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (September 21, 1995).

As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. *Love* also provided that "[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 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, is it 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).

ORDER

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

FOR THE BOARD:

Clarence Labor, Chair

Barbara D. Morgan

Richard F. Johns

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.