THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
KEVIN JOHNSON	)	OEA Matter No. 1601-0002-06
Employee	)	OEA Matter No. 1601-0053-06
	)	
v.	)	Date of Issuance: February 8, 2008
	)	
OFFICE OF PROPERTY MANAGEMENT	)	Muriel A. Aikens-Arnold
Agency	)	Administrative Judge
	)	

Dia Khafra, AFGE Local 631
Pamela L. Smith, Esq., Assistant Attorney General for the District of Columbia

INITIAL DECISION

INTRODUCTION AND BACKGROUND

On October 11, 2005, Employee, a Pipe Insulator, filed a Petition for Appeal (PFA) of Agency's action to suspend him from duty for fifteen (15) days effective September 26 through October 10, 2005 for Inexcusable Absence Without Leave.[1] On April 18, 2006, Employee filed a second Petition for Appeal of Agency's action to remove him effective March 19, 2006 for: Inexcusable Absence Without Leave and Incompetence.

Both matters were consolidated and assigned to this Judge as of June 20, 2006.[2] On August 1, 2006, an Order Convening a Prehearing Conference was issued scheduling said conference on August 22, 2006. Due to various requests from the parties, that meeting was

[1] This appeal (1601-0002-06) was previously assigned to Administrative Judge Sheryl Sears, who scheduled a Prehearing Conference on 4/26/06; however, due to a family emergency, Employee was unable to attend and the meeting was not held.

[2] See OEA Rule 612.1 which permits consolidation of two or more appeals with adjudication as one action.

postponed and ultimately held on December 5, 2006, at which time an evidentiary hearing was scheduled. The evidentiary hearing was held on February 20, 2007, in Employee's absence; and the Hearing record was closed.[3] On February 23, 2007, this Office received a written request from Employee requesting an "emergency continuance" due to a conflicting court date. On March 30, 2007, an Order Denying a Continuance and Closing the Record effective May 7, 2007, was issued.[4] Following a number of requests from the parties to extend the deadline for submission of Closing Arguments, the record was closed effective September 18, 2007.

JURISDICTION

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

ISSUES

1) Whether Agency's action to suspend Employee for 15 days was taken for cause; and If so, whether the penalty was appropriate under the circumstances;

2) Whether Agency's action to remove Employee was taken for cause; and If so, whether the penalty was appropriate under the circumstances.[5]

PROCEDURAL HISTORY, STATEMENT OF CHARGES, AND PARTY POSITIONS

By memorandum dated August 31, 2005, Employee was notified of a proposal to suspend him for 15 calendar days based on a charge of Inexcusable Absence Without Leave and Violation of Leave Restriction. Employee failed to maintain regular attendance and to report to work at the proper time. Specifically, since being placed on leave restriction, Employee accumulated 14 days of unexcused absences. On September 16, 2005, a final decision was issued sustaining the 15-day suspension.[6]

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[3] Prior to the hearing, the Union represented that Employee was "on the way." However, Employee did not arrive; nor communicate with anyone regarding his absence.

[4] Employee's request was forwarded to his Union representative, who filed a written response. The Union represented that Employee met with representatives the day before the hearing to prepare his case; that Employee did not inform them regarding any emergency or conflicting court date; that the Union had no contact with Employee thereafter; and that an investigation into this matter disclosed that Employee was previously served a summons to appear in the District Court of Maryland the same day, but failed to do so.

[5] See OEA Rule 629.1 which provides that the burden of proof with regard to material facts shall be by a preponderance of evidence.

[6] See Joint Exhibits (hereafter "Jt. Ex.") 1A (proposal) and 1B (decision), neither of which cite specific dates of unexcused absences. Employee's 9/6/05 response to the notice denied the charges.

By memorandum dated February 1, 2006, Employee was notified of a notice proposing to remove him for Inexcusable Absence Without Leave. Specifically, Employee failed to maintain regular attendance and to report to work at the proper time, even while on leave restriction, from October 11, 2005 through January 27, 2006 Elements of prior disciplinary action, including, *inter alia*, two (2) suspensions from duty without pay, were also cited. Further, Agency tried other means, such as counseling, to no avail. Employee failed to improve his attendance and failed to consistently communicate with the office and the union regarding his personal status on days that he did not come to work. On March 6, 2006, a final decision was issued affirming Employee's removal effective March 19, 2006.[7]

Employee's Position.

First, Employee contends that Agency's action to suspend him for 15 days was invalid based on the following: 1) Agency erroneously cited 14 days of unexcused absences during the period July 13, 2005 and August 31, 2005 when Employee had only 8 days of unexcused absences; 2) The July 12, 2005 Memorandum of Direction-Leave Restriction, cited as the underlying basis for the period of unexcused absences charged was invalid as follows: a) did not contain a specific time period of its duration; b) erroneously cited a "four-week period of irregular attendance," prior to issuance of said memorandum, which was subsequently approved as a disability claim; and c) the aforementioned four-week period should have been reflected as LWOP (leave without pay) rather than AWOL (absence without leave) on the supervisor's time and attendance sheets while the disability claim was pending. Since the basis for the Leave Restriction was invalid, so was the suspension [8]

Second, Employee contends that, in the Advance Written Notice of Proposed Removal, absences using approved annual and sick leave were erroneously cited since those absences were *excused.* Further, the leave restriction letter, also cited therein, was invalid for the reasons outlined above. As stated by Employee, "[S]ince this violation of Leave Restriction was utilized by Agency . . . to demonstrate their adherence to the principle of progressive discipline and as a basis for termination . . . and since the Leave Restriction was indeed invalid, then the termination itself must be invalidated.[9]

[7] See Jt. Ex. 1D and 1E (day-to-day time & attendance sheets covering the period from 11/5/04 to 1/26/06 were attached). The charge of Incompetence was cited in the Final Decision, but was not previously cited in the proposed notice, and will not be considered by the Judge in evaluating the merits of the removal action.
[8] See Union's Post-Hearing Brief (UPB) at pp. 6-8.
[9] See UPB at pp. 10-12.

Agency's Position.

Agency contends that Employee could not perform the major responsibilities of his job due to numerous inexcusable absences without leave, which adversely affected the daily scheduling and performance of emergency maintenance and other services for the District government, the completion of assigned work as scheduled, and employee morale. Despite attempts to rehabilitate Employee's poor time and attendance through other forms of discipline, Agency maintains that both adverse actions were appropriate in this case. Further, the 15-day suspension and termination were supported by a preponderance of the evidence, and the penalties were within the range allowed by law, regulation, or guidelines and clearly not errors of judgment.

SUMMARY OF MATERIAL TESTIMONY

Mickael Claggett, Supervisor, Construction Department

Mr. Claggett testified that he supervised Employee from October 2004 until February 2006. Due to poor attendance, Employee was placed on leave restriction, several times, whereupon he was required to provide medical evidence whenever he was out on sick leave.[10] During the periods from July 13, 2005 and August 31, 2005; and from October 11, 2005 and January 25, 2006, Employee's attendance was poor, and he did not bring in doctor's notes to support his sick leave absences. Although Employee was required to request annual leave 24 hours in advance, he failed to do so. Most of the time, a family member or friend would call in after Employee's reporting time, to request annual leave the same day. When Employee's leave ran out, he was charged AWOL (absence without leave).[11]

Employee's unexpected absences resulted in shifting around employees to fill in, to hold people over or reorganize the whole day's activities. Even though Employee was counseled, issued letters of warning, and suspended from duty, he failed to improve his attendance. Management officials had discussions with Employee and union representatives regarding ways to motivate Employee to improve his attendance, to no avail.[12]

Employee indicated that he wished to request leave under the Family and Medical Leave Act, but when the paperwork was received, the forms were not completely filled out and were not

[10] See Transcript (hereafter referred to as "Tr.") at p. 60. When questioned by the Judge, Mr. Claggett testified that Employee was issued a letter dated 7/12/05 placing him on leave restriction;
[11] See Tr. at pp. 23-27, 50. This witness affirmed the accuracy of the day-to-day attendance sheets (attached to Jt. Ex. 1E) which he prepared.
[12] See Tr. at pp. 32-34.

signed by Employee or a physician.[13]

Henry Edwards, General Construction Foreman (Proposing Official)

Mr. Edwards testified that, after management officials had numerous conversations with Employee regarding his irregular attendance, he issued the proposed 15-day suspension dated August 31, 2005. Employee's tardiness and absences adversely affected day-to-day operations in providing city services.[14]

Mr. Edwards did not recall the dates of absences on which the 15-day suspension was based, but stated that the absences occurred subsequent to the July 12, 2005 leave restriction letter. He also stated that he did not recall the duration of the leave restriction. However, he was aware of Employee's unexcused absences, as he was in contact with Mr. Claggett on a daily basis.[15]

David L. Wellington, Branch Chief, Field Activity Division[16]

Mr. Wellington testified regarding the 15-day suspension, the proposed removal notice, and the Agency's efforts to work with Employee over a period of two to three years to improve his attendance. After four (4) placements on leave restriction, numerous discussions with Employee, and two (2) suspensions from duty without pay, he did not improve his attendance, resulting in the termination. Employee's unreliability affected the morale of other employees and seriously impacted the ability of Agency to perform its work in a timely manner.

The Leave Restriction letter, dated July 12, 2005, did not reflect a period of time within which it was effective. Nor did the proposed notice of 15-day suspension specify the 14 days of unexcused absences since "being placed on leave restriction." Nevertheless, whether or not Employee was on leave restriction, absences wherein the Employee failed to report or call would trigger an adverse action. There were a combination of things that led to Employee's eventual removal.[17]

When a claim for disability is pending, an Employee's absence from work is charged to

[13] See Tr. at pp. 41,44.

[14] See Tr. at pp. 50, 69-70.

[15] See Tr. at pp. 72-84; see Employee Exhibit (hereafter referred to as "EE") 7.

[16] He was the Deciding Official on the 15-day suspension and the Proposing Official on the Advance Notice of Proposed Removal.

[17] See EE-7; Tr. at pp. 89-94; 101-106; 113-117. During the two periods of absence, on which the suspensions were based, Employee was not granted approved leave under the Family and Medical Leave Act.

sick leave, annual leave, or leave without pay. When such claim is approved, that person is paid by the Claims Office for those absences. Although Mr. Wellington was aware that Employee was absent due to disability for a period of time, he was *not* aware that Employee's work-related injury claim, from April 27, 2005 to July 12, 2005, was subsequently granted.[18]

ANALYSIS AND CONCLUSIONS

Whether Agency's Action Was Taken For Cause.

D.C. Official Code §1-616.51 (2001) requires the Mayor, for employees of agencies for whom he is the personnel authority to "issue rules and regulations to establish a disciplinary system that includes," *inter alia*, "1) A provision that disciplinary actions may only be taken for cause; [and] 2) A definition of the causes for which a disciplinary action may be taken." The action herein is under the Mayor's personnel authority. Said regulations were published by the D.C. Office of Personnel (DCOP) published at 47 D.C. Reg. 7094 *et seq*. (September 1, 2000).[19]

In an adverse action, this Office's Rules and Regulations provide that an agency must prove its case by a preponderance of the evidence. "Preponderance" is defined as "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." OEA Rule 629.1, 46 D.C. Reg. 9317 (1999).

Based on a review of the entire record, this Judge concludes that Agency's actions, in both matters, were supported by a preponderance of the evidence. First, Employee does not dispute unscheduled absences charged to AWOL on July 20, 2005, July 26, 2005, August 5, 8 and 9, 2005, August 12, 2005, August 16, 2005, and August 18, 2005 when he either failed to report or call in or failed to submit medical evidence to cover purported sick leave absences. Nor does he dispute the AWOL's on October 20, 2005 October 26, 2005, November 1, 2005, November 3-4, 2005, November 9, 2005, and November 16, 2005. Moreover, Employee argued (and consequently admitted) that "[O]nly in 3 AWOL instances (10/14/05; 10/18/05; and 12/02/05) did he request sick leave without providing a doctor's slip."[20]

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[18] See JE-1E with attached time & attendance sheets: Item #65 (5/5/05, 8 hrs AWOL-Injury Compensation claim not yet approved) through Item #111)7/11/05, 8 hrs AWOL-Has not reported or called; JE-1C (Compensation Order dated 7/12/05); also Tr. at p. 111-113.

[19] Section 1603.3 sets forth the definition of cause for which a disciplinary action mat be taken. Here, Employee was suspended from duty without pay for fifteen (15) days and subsequently removed from service for "Inexcusable Absence Without Leave" which is one of the causes set forth therein.

[20] See UPB at p. 14; and Tr. at p 25 where the Union argues that Mr. Claggett's testimony that Employee *did not consistently* bring in doctor's notes to cover sick leave, during the period 10/11/05 and 1/26/06, was in error.

Second, this Judge had the opportunity to listen to the testimony of witnesses, who presented persuasive testimony. Relative to the 15-day suspension, Mr. Claggett's time and attendance records reflect that Employee incurred eight (8) 8-hour AWOL (absence without leave) absences, one (1) 8-hour LWOP (leave without pay) absence and three (3) 8-hour sick leave absences annotated "APPROVED" between July 20, 2005 and August 31, 2005. Even though Mr. Edwards did not recall the specific dates of unexcused absences on which the 15-day suspension was based, he clearly stated that Employee " . . . was supposed to call in and he didn't call like he was supposed to. He was supposed to call to me and he did not call and that's what I remember."

Relative to the removal action, Employee does not dispute ten (10) AWOL absences between October 11, 2005 and December 2, 2005, a period of less than two (2) months. Nor does Employee dispute eleven (11) days of absences due to illness during that same period of time. Rather, Employee argues that the "sick leave" was approved, and therefore, should not be counted against him. Contrary to Employee's assertion, "approved sick leave" does not mitigate the removal in this matter. If anything, those sick leave absences reflect Employee's marginal value to the agency because of his unreliable attendance. Moreover, Employee was previously placed on leave restriction, suspended for five (5) days, and suspended for fifteen (15) days based upon failure to improve his attendance.

In spite of Employee's various arguments regarding errors in witness testimony and errors in letters to him, the record reflects that he failed to maintain regular attendance and incurred inexcusable absences. The fact that the most recent leave restriction letter did not, *inter alia*, reflect a specific period of time during which it was effective, does not excuse the fact that Employee failed to improve his attendance after notification thereof. Nor does the erroneous citation of the period of disability which was coincidentally *granted* on the same date that the leave restriction letter was issued, excuse subsequent AWOL and sick leave absences incurred. Even if Employee did not receive said letter, as he claims, the record reflects a number of personal discussions with him, over a period of time, in attempts to improve his attendance; and Employee sometimes provided medical evidence, as he knew he should, to cover sick leave absences.

Based on the foregoing and Employee's nine (9) years' service, it is reasonable to believe that Employee was fully aware of his responsibility to report to work on time every day; and that failure to do so would lead to further disciplinary action. This Judge, therefore, concludes that the 15-day suspension and the removal action were each supported by a preponderance of the evidence.

Whether the Penalty Was Appropriate Under the Circumstances.

When assessing the appropriateness of the 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." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment." *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 1915, 1916 (1985).

An employer is entitled to require its employees to be present for work and on time. Unauthorized absences from duty by their very nature disrupt the efficiency of the operation In this instance, the testimony by management officials reflects that Employee's failure to maintain regular attendance adversely impacted Agency's ability to perform required services in a timely manner and lowered the morale of other employees whose schedules were unexpectedly shifted around. Further, there is no evidence that Employee's rehabilitation is a viable option.

Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. Based on the totality of circumstances, this Judge concludes that: 1) the 15-day suspension was an appropriate penalty for Inexcusable Absence Without Leave; 2) removal was the appropriate penalty and promoted the efficiency of the service, and 3) both adverse actions were within the parameters of reasonableness, were not errors of judgment, and should be upheld.

ORDER

It is hereby Ordered that Agency's action in removing Employee is UPHELD.

FOR THE OFFICE:

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MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge