

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Administrative Assistant of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

|                              |   |                                 |
|------------------------------|---|---------------------------------|
| _____                        | ) |                                 |
| In the Matter of:            | ) |                                 |
|                              | ) |                                 |
| TYWANIA NESMITH              | ) |                                 |
| Employee                     | ) |                                 |
|                              | ) |                                 |
|                              | ) | OEA Matter No. 1601-0116-02     |
|                              | ) |                                 |
| v.                           | ) |                                 |
|                              | ) | Date of Issuance: June 22, 2005 |
|                              | ) |                                 |
| DEPARTMENT OF HUMAN SERVICES | ) |                                 |
| Agency                       | ) |                                 |
|                              | ) |                                 |
| _____                        | ) |                                 |

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Employee, a 14-year District government veteran, was an Administrative Officer detailed to Agency's Office of Communications and Public Affairs. In early August 2001, it became apparent to Agency that Employee was not reporting to work on a regular basis. By August 11, 2001, Employee had no sick or annual leave to her credit. As a result, Agency placed her on a restricted leave policy. Employee continued, however, to be

absent on several days in September 2001 and also from October 8, 2001 through January 16, 2002.

On January 16, 2002, Employee contacted an agency official about returning to her position. Instead of allowing Employee to return to work on that day, the agency official advised Employee that she needed to report to a meeting on January 24, 2002 so that Agency and Employee could discuss the cause for her excessive absenteeism. As directed, Employee reported to the meeting. During the meeting Employee was told that she needed to present a doctor's certificate by February 8, 2002, to excuse the time she was absent in September and October 2001. Employee never did submit the required documentation and failed to report to work at any time following the January 24, 2002 meeting.

Thus on June 19, 2002, Agency charged Employee with inexcusable neglect of duty and absence without leave for the period of May 5, 2002 through June 6, 2002. Agency proposed removing Employee and notified her of its intentions in a June 19, 2002 letter. The letter concluded by stating that Employee remained on an active duty status and that she would continue to be charged with AWOL if she continued to be absent from work. On August 9, 2002 the removal action took effect.

Employee timely appealed Agency's action to this Office. In an Initial Decision issued March 12, 2004, the Administrative Judge reversed Agency's action and ordered that Employee be reinstated to her position and that all pay and benefits be restored to her from the date of her removal until the date she is reinstated. The Administrative Judge held that Agency had failed to prove the charges it brought against Employee. Instead, according to the Administrative Judge, Agency had, in effect, "barred

[Employee], without official action, from coming to work.” *Initial Decision* at 11. Based on this premise the Administrative Judge held that “Employee’s absence from May 5, until June 6, 2002, was excusable.” *Id.* She went on to state further that “because she was not permitted to come to work . . . her failure to complete any assigned duties during her absence[]” was also excusable. *Id.*

We now have before us Agency’s Petition for Review which was filed on April 16, 2004. In it Agency argues that the Initial Decision is not supported by substantial evidence. Specifically Agency contends that “[t]he conclusion that Agency refused to permit Employee the opportunity to return to work after February 8, 2002 is not supported by substantial evidence in the record.” *Agency’s Petition for Review* at 5. We agree with Agency.

As mentioned earlier, on January 16, 2002, after having not reported to work for over three months and instead of reporting to work on that day, Employee *called* her office and spoke to an agency official. That person told her that because she had absented herself from work since October 2001, she was not to report to work on *that day* but rather she was to first report to a meeting scheduled for January 24, 2002. Apparently the Administrative Judge interpreted this to mean that Agency had barred Employee from ever returning to work even after the January 24, 2002 meeting.

We, however, believe that Agency’s intention in making this statement is more reasonably interpreted to mean that on that particular day, January 16, 2002, Employee was not authorized to simply “show up” for work after having been absent and having had no contact with Agency for over three months. We base this conclusion on the fact that in the June 19, 2002 notice of proposed removal, Agency told Employee that she was still

being kept in an active duty status. Moreover, she was warned that if she continued to be absent, she would be charged with AWOL. We infer from these statements that Agency still considered Employee to be an employee of the agency and that, contrary to what the Administrative Judge said, Agency had not “locked the door to Employee’s office door and then penalized her for failing to open it, go in and do her work.” Further other than Employee’s assertion that Agency had barred her from returning to work, we find nothing in the record to support that claim.

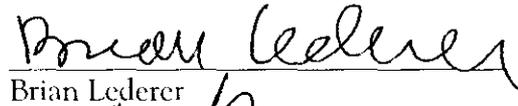
This Office has held that to excuse an extended absence from work without leave, an employee must present the agency with documentation that demonstrates that the employee had an incapacitating illness. See, e.g., *Akinde v. Department of Human Services*, OEA Matter No. 1601-0202-91 (March 24, 1995); see also *Murchison v. D.C. Dep’t of Pub. Works*, 813 A.2d 203, 206 (D.C. 2002) (a physician’s report that did not address the severity of the employee’s medical condition or the extent to which it was exacerbated by her working conditions was insufficient to show that the employee had an incapacitating illness to excuse seven weeks of absence without leave). In the case before us, there is no evidence in the record to conclude that Employee had an incapacitating illness that prevented her from reporting to work during the period for which she was charged with AWOL. Because there is not substantial evidence in the record to support the Initial Decision, we grant Agency’s Petition for Review and vacate the Initial Decision.

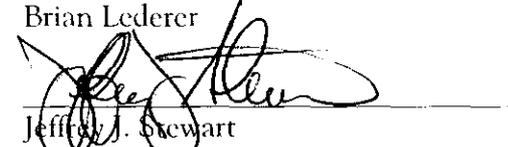
ORDER

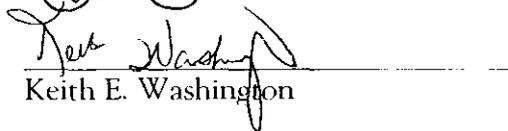
Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **GRANTED** and the Initial Decision is **VACATED**.

FOR THE BOARD:

  
\_\_\_\_\_  
Horace Kreitzman

  
\_\_\_\_\_  
Brian Lederer

  
\_\_\_\_\_  
Jeffrey J. Stewart

  
\_\_\_\_\_  
Keith E. Washington

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.