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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
RESIAL SHANNON	)	OEA Matter No. 1601-0395-10
Employee	)	
	)	Date of Issuance: May 1, 2013
	)	
DISTRICT OF COLUMBIA DEPARTMENT OF	)	
YOUTH AND REHABILITATION SERVICES	)	Lois Hochhauser, Esq.
Agency	)	Administrative Judge
	)	

Resial Shannon, Employee, *Pro Se*
Eric Huang, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Resial Shannon, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on August 31, 2010, appealing the final decision of the District of Columbia Department of Youth and Rehabilitation Services (DYRS), Agency herein, to terminate his employment, effective August 18, 2010. At the time of Agency's decision, Employee was in permanent career status and held the position of Juvenile Justice Institutional Counselor.

The matter was assigned to me on July 20, 2012. The prehearing conference took place on September 5, 2012. The hearing took place on November 1, 2012 and November 15, 2012. At the proceeding, the parties had full opportunity to, and did in fact, present testimonial and documentary evidence as well as argument in this matter.[1] The record was closed at the end of the hearing on November 15, 2012.[2] Throughout the proceedings, Agency was represented by Eric Huang, Esq., and Employee represented himself.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

ISSUE

Did Agency meet its burden of proof in this matter?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

[1] Testimony was presented under oath. The transcript is cited as "Tr", followed by the page number. Exhibits are cited as "A" for Agency and "E" for Employee, followed by the exhibit number

[2] The parties chose to present oral closing arguments in lieu of submitting written briefs.

Employee began employment with Agency in 2005. At the time the adverse action was initiated, he was serving as a Juvenile Justice Institutional Counselor at Exodus House, a "preplacement program" designed to prepare youth to live in community-based residential facilities. Exodus House was one of several programs conceived and implemented by Maurice Shaw, who directed the program and was responsible for hiring Employee. Mr. Shaw also served as Employee's supervisor. Employee began his assignment at Exodus House in May 2010, shortly before it began accepting clients. (Tr, 80). Until his removal, Employee had never been the subject of any attendance problem or any adverse action. (Tr, 11). Employee received and signed a copy of Agency's Policy and Procedures Manual Regarding Time, Attendance and Leave on September 18, 2008. (Tr, 14; Ex A-1).

Employee was "detained" or incarcerated on May 19, 2010, as a result of a prior domestic relations matter. He contacted Takisha Brown, a co-worker at Exodus House who was responsible for finding replacements for absent employees, on May 21, 2010, the first day after his incarceration that he was scheduled to work. During the first two days of his absence, *i.e*., May 21 and May 22, 2010, he was carried on sick leave, although he did not request leave. Agency charged Employee with absence without official leave (AWOL) for ten consecutive work days beginning May 23, 2010. (Ex A-2).

By letter dated June 8, 2010, Agency notified Employee that as of that date, he had been AWOL for ten consecutive days and that he could not be reached at his home telephone number. The letter did not include a mailing address, listing only Employee's name and "Washington, DC 20009." The letter directed Employee to contact Mr. Shaw or Ms. Stephanie Goode, Agency Human Resources (HR) Specialist; by June 14, 2010 "to advise [them of his] employment status with the agency." The letter stated that if Employee failed to contact one of these individuals "by the designated time," Agency would initiate the "appropriate disciplinary action." (Ex A-3). Employee contacted Ms. Goode in a timely manner, and explained to her that he had been detained. He advised her that he thought he be placed in a half-way house and able to return to work within a few days.

Employee returned to work on June 21, 2010, and worked the following three days. He was then notified that he was being placed on administrative leave. On June 28, 2010, Agency issued its "Advanced Written Notice of Proposed Removal" notifying Employee that it was proposing to terminate him. (Ex A-4). The removal was based on the following charges:

1. Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations –
   a. Unauthorized Absence, D.C. Mun. Regs. § 1603.3(f)(1); and
   b. Absence without Official Leave (AWOL), D..C. Mun. Regs. § 1603.3(f)(2).
2. Any other on-duty or employment related reason for corrective or adverse action that is not arbitrary or capricious. D.C. Mun. Regs. § 1603.3(g).

In the Notice, Agency stated:

> Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations – unauthorized absence and absence without official leave.
>
> You were scheduled to report to work on Sunday, May 23, 2010. However you did not report for duty and you failed to obtain approval for the absence from Maurice Shaw, your immediate supervisor. Accordingly, DYRS carried you in an …AWOL…status. Additionally, you failed to report to work and obtain approval from your supervisor for a total of nineteen (19) consecutive scheduled work days (May 23, 2010 – June 16, 2010).
> Pursuant to the District of Columbia Personnel Regulations, absence of ten (10) consecutive days or more constitutes abandonment. Therefore, your 19 consecutive absences from scheduled work days is abandonment. D.C. Mun. Regs.16 § 1603.19.1 (Table of Appropriate Penalties).
>
> Any on-duty or employment- related reason for corrective or adverse action that is not arbitrary or capricious.
> Pursuant to the DYRS Establishment Act, the Agency may take any actions necessary to promote the safety and well-being of the youth in the Department's custody. D.C. Code § 2-1515.05(h).
>
> A critical aspect of DYRS programs and operations is to maintain safety and well-being of youth and security of facilities. An important mechanism for achieving this goal is employees reporting to work timely and consistently. The failure to work timely and consistently compromises the effective operation of the agency and the agency's ability to trust employees to competently perform their duties of maintaining safety and security.

David Muhammad, Committed Program Manager and Proposing Official, concluded in the letter that Employee's failure to report to work:

> [D]emonstrates by a preponderance of the evidence, abandonment, unauthorized absences, and AWOL from your position of record.
>
> Moreover, your unauthorized failure to report for work placed an undue hardship on the Agency and your co-workers. Your unauthorized absences created staffing shortages that forced other employees to work overtime.
>
> Consequently, I am proposing your removal from the agency because your behavior: 1) decreased the agency's capacity to carry out assigned functions, and 2) adversely affected the agency's operations by diminishing the public trust in employees who serve DYRS youth.

By letter dated June 29, 2010, Marc Schindler, Agency Interim Director, notified Employee that he was being placed on paid administrative leave effective June 29, 2010. (Ex A-5). On July 1, 2010, a letter amending the June 29 letter was issued, changing the

effective date for placement on administrative leave to June 30, 2010. (Ex A-6). The Notice of Final Decision upholding the removal was issued on August 18, 2010. (Ex A-7).

Agency's position is that Employee's failure to report for work for ten consecutive days without approved leave constitutes a basis for removal pursuant to DPM §1603.3(f)(1). It maintains Employee did not follow Agency procedures, which required him to notify his supervisor of his absence and to request leave. It maintains that when it became aware of Employee's incarceration, it began charging him with AWOL. (Tr, 16). It asserts that his absence without approved leave for a period of ten days constitutes abandonment of position. Agency contends that it makes its decisions on an individual basis but as a "general policy" it does not hold a position for an employee who is incarcerated and is not required to do so. (Tr, 17-18). It asserts that it considered the fact that Employee was incarcerated when reaching its decision,

Maurice Shaw testified that he had worked in government for 40 years, and that in May 2010, he was the Manager of Agency's Community Residential Programs, supervising three sites he had created, including Exodus House. He said he had hired staff, and had selected Employee because of his positive attributes:

> Because of the staffing complement for Exodus, and because it was a new program in the things we were trying to do, I wanted to get those individuals that I felt could handle the workload, would be – had good communication skills. I couldn't take any lazy people, I needed people who would be energetic, self-starters, self-directed, to be able to carry out the mission of the program. (Tr, 24)

Mr. Shaw stated he had supervisory responsibility for employees assigned to Exodus House, including Employee. He said his primary office was in another location, but that he had satellite offices at Exodus House and another location. According to the witness, employees could reach him by email and by his government or personal cell phone. He said he made his contact information available, and that he encouraged "everyone to call him on his [personal] cell phone." (Tr, 25). The witness testified that when employees were going to be absent without advance permission, they could contact him directly or call the facility and inform the staff on duty that they were feeling ill and were taking sick leave. The staff would then contact him and notify him of the change in staffing. He said he generally contacted staff at Exodus House in the morning, four to six times a week. (Tr, 26).

Mr. Shaw testified that he did not authorize Employee to be placed on sick leave for the first two days, and assumed that Ms. Brown or the person who completed Employee's time and attendance (T&A) made that decision. (Tr, 45). He said he first learned that Employee was on sick leave when he signed the T&A, but that he did not question the leave because employees were permitted to call in and obtain sick leave "without having to call the supervisor directly for sick leave" up to two hours after the start of the tour-of-duty pursuant to the collective bargaining agreement, and also because he had never had a problem with Employee's use of leave. (Tr, 46, 60). He was unsure if he signed the Employee's T&A during the first or second week of Employee's absence. (Tr, 61).

Mr. Shaw stated that he was initially told of Employee's absence by Exodus staff. He was unsure how or when he learned that Employee was incarcerated, but stated that the information was confirmed by Agency HR staff. He stated that after answering questions from HR about whether Employee had notified him that he was going to be out and whether he had approved leave for Employee, both of which he answered in the negative; HR instructed him to place Employee on AWOL. (Tr, 31, 62-63; Ex A-2). He said he told HR that Employee was a "good worker" and that he wanted to keep him, but was told that Employee's absence for ten consecutive days was grounds for removal. (Tr, 64). He said that he was told that the reason for the AWOL status was that Employee "failed to notify immediate supervisor or request leave." (Tr, 32). The witness testified that although he signed AWOL slips for Employee for the ten days he was scheduled to work beginning on May 23, 2010, he did not sign the AWOL slips until well after that time when he was instructed to do so by HR.

Mr. Shaw stated he was first contacted by Employee after Employee had been out for about a week and that he was also contacted by a friend of Employee's at about that time. He said he was surprised Employee did not contact him earlier, because he wanted to keep Employee on staff, and would have tried to do so, but that by the time Employee called, HR had decided what to do and the matter was "out of his hands." (Tr, 34, 68). In response to Employee's question as to why he did not tell Employee how to proceed when they spoke, Mr. Shaw stated that despite his 40 years of government experience, he had never had a staff person be detained. He denied assuring Employee that "everything would be okay." (Tr, 53). Mr. Shaw did not recall participating in a conference call with Employee and Ms. Brown, but said it might have taken place. (Tr, 35, 38). Mr. Shaw agreed with Employee that he had spoken to Employee about retaining him, and that if Employee was placed in a halfway house, "we'd be able to work from there." (Tr, 42).

In response to a question by Employee, Mr. Shaw stated that he did not consider the leave process at Exodus House to be "chaotic," but agreed that he was not always notified when an employee called in to say he or she was going to be absent (Tr, 37). He identified Takisha Brown as Employee's co-worker who, although was not a supervisor, served in a "quasi managerial position." He said that she took telephone calls from Exodus House employees who were going to be out, but she was not authorized to grant leave. (Tr, 34-35). He recalled Ms. Brown advising him that Employee had been detained, but was not certain when they spoke, although he surmised that given the schedules, it was probably three or four days after Employee's first day of absence. He said Ms. Brown told him that she had advised Employee to contact him. (Tr, 42). He also recalled telling Ms. Brown to have Employee contact him. (Tr, 48). Mr. Shaw stated he would have told Employee about the AWOL status and that the matter was out of his hands, and said he told Employee to contact Ms. Goode at HR. (Tr, 52).

Takisha Brown testified that she was responsible for obtaining coverage for absent employees and that if an employee "called in, [she] called that request sick leave and [would leave] a message on Mr. Shaw's cell phone." (Tr, 87). She recalled that Employee telephoned and informed her that "he was not going to be in for a length of time," but she did not recall the date of the call. She said that Employee asked to speak with Mr. Shaw, but that "Mr. Shaw was not available" so she telephoned Mr. Shaw and left a message on his cell phone relating

the conversation. She said she telephoned Mr. Shaw because she was not "in the position to approve time at any level." She said Mr. Shaw returned the call, and she informed him of the message from Employee and asked him if he wanted her to obtain coverage. (Tr, 73). She said she told him that Employee would be out for "an extended time" and that Employee was going to try to call back to talk directly with him. (Tr, 82). Ms. Brown did not recall participating in a conference call with Mr. Shaw and Employee but stated that Employee telephoned again stating that he was going to "be out for a while" and that she conveyed that conversation to Mr. Shaw. She was unsure of the date of the call. (Tr, 74). She said that Mr. Shaw was aware that Employee was going to be out for a "length of time" and directed her to obtain coverage. (Tr, 95). Ms. Brown thought there was a "great possibility" that she transmitted a telephone call from Employee to Mr. Shaw so that they could talk, but did not participate in the call. (Tr, 79). She did not know how Employee came to be placed on sick leave for two days. (Tr, 81).

Catherine Ohler, Agency HR specialist, stated that according to the DPM, an employee must speak directly with a supervisor to request unscheduled leave; and that it is not acceptable for an employee to leave a voicemail or email message with the request. The witness said that if a supervisor is not available, the employee must speak with the supervisor's supervisor. She noted that a supervisor cannot delegate this authority. (Tr, 172, 178). She said that an employee who fails to comply with this procedure would be charged with AWOL, and that the DPM provides that the penalty for ten days of consecutive unauthorized leave is removal. She stated Agency has consistently applied this penalty. (Tr, 169). Ms. Ohler testified that an employee may be granted up to three days of sick leave without a doctor's excuse but even then the employee must telephone every day and that it was not common practice for an employee to be automatically put on sick leave. (Tr, 176). She did not know how Agency learned that Employee was incarcerated. (Tr, 179).

Employee testified that, whether "official or unofficial," he was aware that he was required to contact his employer, and that he "took every measure to do so." (Tr, 11). He said he first called Exodus House on May 21, the first day that he was scheduled to work after his incarceration. He said that Mr. Shaw was not on-site at the time, so he explained to Ms. Brown that he was detained and that he thought he might be away from work for 90 days. (Tr, 101-102). Employee stated that his contacts with Mr. Shaw always went through Ms. Brown, because it was the only way he could reach Mr. Shaw since he did not have Mr. Shaw's telephone number and Ms. Brown had the number as part of her duties. (Tr, 39). He stated he next called on May 23, and spoke with Ms. Brown about his time sheet for that pay period. He testified that Ms. Brown told him she had spoken with Mr. Shaw, and that Employee would be carried on sick leave and if his sick leave ran out, he would be granted annual leave. (Tr, 105-106). Employee stated that when he called several days later, Ms. Brown told him that Mr. Shaw had received his message "and everything should be fine." He said he did not feel he needed to contact Mr. Shaw immediately because he thought the situation had been resolved. (Tr, 102). Employee testified said he had two conversations with Mr. Shaw between May 25 and June 1, and that Mr. Shaw never mentioned that he had been placed on AWOL

> [Mr. Shaw's] only question was 'Is everything okay,' 'What's going on?' and like I said, I guess he wanted to hear from me directly, not from Ms. Brown. So

> I told him I was going to be detained for 90 days. He said, 'What was the charge?' I told him I was stepped back. (Tr, 107).

Employee said during his third conversation with Ms. Brown, about a week after the second conversation that she told him it was important for him to contact Mr. Shaw. (Tr, 108). He said that since he could not directly contact Mr. Shaw, he telephoned Ms. Brown again and she told him that she had spoken with Mr. Shaw and had made him aware of Employee's situation. He said when he spoke with Ms Brown again, she advised him to call Mr. Shaw and he did. He said he spoke with Mr. Shaw twice and that during the second conversation, he said that Mr. Shaw told him that "[he] didn't know what's going on" and that Employee needed to contact Ms. Goode "because the matter was "out of [his] hands." (Tr, 109). He testified that he telephoned Ms. Goode and explained his situation to her, and that she told him to be sure he spoke with Mr. Shaw. He said no one told him he was on AWOL status. He said Ms. Goode asked him for his address.

Employee stated that in response to the letter from Agency notifying him that he had been absent for ten consecutive days and that he had to contact Mr. Crawford or Ms. Goode and advise Agency if he wanted to retain his position before June 14, he contacted Ms. Goode and informed her that he was still interested in his position. He was unsure of the date he received the letter, but stated he spoke with Ms. Goode on or before the deadline. (Ex A-3, Tr, 110-111, 119). He testified that he complied with all instructions. (Tr, 120).

Employee testified he reported back to work on June 21, 2010. (Tr, 112). He said he had previously advised Ms. Brown and Mr. Crawford that he had been released to a half-way house and was going to report to work, but was not certain if he contacted Mr. Shaw with that information. (Tr, 113). Employee testified he worked his full tour-of-duty on June 21 and the following three days. He said at some point during this time, Mr. Shaw showed him the AWOL papers and that it was the first time he was advised of the AWOL status. (Tr, 124). He said he signed the documents given to him, but did not think there would be an issue because he had never had an attendance or disciplinary problem. (Tr, 125). Employee stated that he had more than 100 days each of sick leave and annual leave available, and if he had known there was a problem, he would have utilized his leave. (Tr, 13). He said Mr. Shaw did not tell him to stop reporting to work, and he was not aware that he was being placed on administrative leave until he received the notice. (Tr, 127; Exs A-5, A-6).

Employee noted that since he was carried on sick leave for the first two days, he believed, given the leave he had available, that his leave would be continued, and that if it ran out, he would be placed on leave without pay. (Tr, 14). He said that he should have been told if he was not being granted leave. Employee noted that given Mr. Shaw's 40 years of government employment, he thought that Mr. Shaw would have told him what he needed to do. (Tr, 13). He said that based on his conversation with Mr. Shaw, he believed his job was being held for him.

D.C. Code §1-616.51 (2001) requires that the Mayor "issue rules and regulations to establish a disciplinary system [for agencies over which he has personnel authority] that includes…1) A provision that disciplinary actions may only be taken for cause [and] 2) A definition of the causes for which disciplinary action may be taken." Agencies have the

primary responsibility for managing their employees. One of these responsibilities is maintaining discipline. *See, e.g., Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994). Agencies have considerable discretion and this Office has long held that it will not substitute its judgment for that of an agency when determining if a penalty should be sustained. OEA's review is limited to determining that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia,* 502 A.2d 1006, 1009 (D.C. 1985). If an agency has exercised its discretion appropriately, its decision will not be disturbed.

In order to determine if an agency has acted appropriately, this Office must ensure that the penalty reflects a "responsible balancing" of relevant factors. *Lovato v. Department of the Air Force*, 48 M.S.P.R. 198 (1991). If it is determined that relevant factors were not considered or if the imposed penalty constitutes an abuse of discretion, then the agency's decision may be reversed. *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C. Reg. 352 (1985).

In this matter, Agency based its decision to remove Employee on the fact that he was absent for more than ten days without approved leave which Agency argues constitutes abandonment of position. However, "abandonment…connotes a voluntary decision to quit*." Taylor v. District of Columbia Department of Employment Services*, 741 A2d 1048 (DC 1999). For the reasons discussed below, the Administrative Judge concludes that the evidence did not reasonably lead to the conclusion that that Employee made a voluntary decision to quit his position, or that he abandoned it.

It is within the province of an administrative judge to assess the credibility of witnesses. *Dell v. Department of Employment Services*, 499 A.2d 102 (D.C. 1985). The District of Columbia Court of Appeals emphasized the importance of credibility evaluations by the individual who sees the witness "first hand." *Stevens Chevrolet Inc. v. Commission on Human Rights*, 498 A.2d at 440-450 (D.C. 1985). In determining credibility, the Administrative Judge considered the demeanor of the witness, the character of the witness, the inherent improbability of the witness's version, inconsistent statements of the witness and the witness's opportunity and capacity to observe the event or act at issue. *Hillen v. Department of the Army,* 35 M.S.P.R. 453 (1987). The Administrative Judge found the witnesses to be credible, and it appears that the uncertainty regarding the dates of the telephone calls, the content of the conversations, and who participated in which conversations were based primarily on the passage of time. No one appeared to be certain, and the testimony of each witness was not consistent in all instances. The Administrative Judge was most careful in assessing Employee's credibility since he had the most vested interest in the outcome of this matter. She found Employee to be credible on the pertinent facts.

Employee was clear in his testimony that he communicated his desire and intention to retain his job with Agency staff, and that he maintained contact with Agency while incarcerated to keep staff updated. Employee notified Ms. Brown on May 21, 2010 that he had been detained and would be out for a period of time. He continued to contact Ms. Brown and/or Mr. Shaw to keep them apprised of his situation. The procedures at Exodus House were new, and they

included having staff contact Ms. Brown if they were going to be out. Employee followed that procedure. Employee was aware that he was carried on sick leave for the first two days of his absence, although he did not discuss leave with Ms. Brown or Mr. Shaw, and reasonably assumed his leave would be used until exhausted since he had approximately two hundred days of combined sick and annual leave. Employee contacted Ms. Goode at Mr. Shaw's direction and contacted her in a timely manner to Agency's letter telling him he needed to contact Ms. Goode if he planned to return to work and if he did not, he would be considered to have abandoned his position. Employee informed Ms. Goode of his situation and that he planned to return to work. There is no evidence that Ms. Goode or anyone at Agency advised him of the leave process for this unusual circumstance. Employee returned to work, and continued to work for about four days before being placed on administrative leave.

Agency had a written leave policy, and Employee received a copy of that policy. He did not follow the stated procedures. However, as noted above, the evidence established that the policy was not utilized at Exodus House at the time of this incident. For example, Ms. Ohler testified that an employee was required to speak directly with a supervisor to request unanticipated leave, and if the supervisor is not available, the employee was required to speak with the supervisor's supervisor. She stated that a supervisor could not delegate this authority. (Tr, 172, 178). However, employees at Exodus House were directed to contact Ms. Brown if they were going to be absent. Although Mr. Shaw stated all employees had his telephone number, he did not dispute that Ms. Brown was permitted to take those calls. Ms. Ohler testified that an employee could be granted up to three days of sick leave without a doctor's excuse but the employee was still required to telephone in every day. This contradicted Mr. Shaw's testimony that employees were permitted up to three days of sick leave without approval. No Agency witness knew who authorized Employee's sick leave for the first two days of his absence. The customs and past practices that parties maintain over a course of time, may be critical where an agency relies on a written policy. *Steelworkers v. Warrior & Gulf Navigation Co*., 363 U.S. 574 (1960). Exodus House was too new to have well-established customs and past practices. However, there was substantial evidence in the record that employees were not required to follow the written leave policy, and that other procedures were in place. This is not necessarily a criticism. Exodus House was new, Mr. Shaw had many responsibilities in operating the three programs he had just established, and it was critical to have a mechanism for employees to call in when they were going to be out so the facilities would have sufficient staff. He delegated the responsibility to Ms. Brown. The lines of authority were not clearly in place at Exodus House during this time period. Employee was aware that he needed to be in touch with Mr. Shaw, and believed, reasonably, from past experience, that the contact could be made through Ms. Brown, particularly if Mr. Shaw was not available. Even if Mr. Shaw invited employees to telephone him, it would not be unreasonable to expect that Employee may not have had Mr. Shaw's telephone number with him when he was detained. However, Employee did try to reach Mr. Shaw and was told that Mr. Shaw had received his messages. Employee also spoke with Mr. Shaw by telephone several times.

Employee continued to contact Ms. Brown, Mr. Shaw and Ms. Goode and advise him of his status and when he anticipated returning to work. Agency, through Ms. Brown, Mr. Shaw and Ms. Goode, was aware of the reason for Employee's absence. Mr. Shaw credibly

testified that in his 40 years of government experience, he did not know the leave procedure as it pertained to an incarcerated employee. It is not unreasonable to expect that Employee, with far less experience, was unaware of the policy. Ms. Goode, the HR specialist who should have known the procedures that Employee needed to utilize, did not advise Employee of the leave procedure he needed to follow despite her awareness that he intended to return to work and did not abandon his position.

Agency based its decision to remove Employee on the fact that he was absent for more than ten days without approved leave which it argues, constitutes abandonment of position. However, "abandonment…connotes a voluntary decision to quit," *Taylor, supra.* The Administrative Judge concludes that based on the circumstances and facts presented, Agency could not reasonably conclude that Employee made a voluntary decision to quit his job.

Agency was not required to grant leave to Employee. It was not required to hold his position open until he could return to work. The fact that an employee is incarcerated is not good cause for being AWOL. In *Rojas v. U.S. Postal Service.,* 74 M.S.P.R. 544 (M.S.P.B. May 8, 1997) aff'd, 152 F.3d 940 (Fed. Cir. 1998), the Merit Systems Protection Board stated that "[a]bsence without leave is inherently connected to the efficiency of the service." *See also*, *e.g., Gibbs v. Dep't of Navy*, 33 M.S.P.R. 261 (M.S.P.B. Apr. 16, 1987). However, while in its advanced notice Agency gave "lip service" to these factors, it did not present sufficient evidence in support of them. For example, the evidence did not support the conclusion that his absence impacted on Agency's efficiency. Employee notified Ms. Brown, who was responsible for obtaining replacements, of his absence. In *Rojas*, the Merit Systems Protection Board sustained the agency's decision to remove an employee who was incarcerated for ten years. It identified the factors that agency considered:

> [A]gency considered the appellant's prior satisfactory service, but found that it was outweighed, inter alia, by the negative impact of his absence on its operations, and his poor prospects for rehabilitation. The agency also noted that the length of the appellant's prison sentence precluded any alternative sanction, and that the appellant failed to provide the deciding official with any mitigating circumstances.

These factors are not present in this case. There was no evidence presented that Agency considered Employee's satisfactory work history. To the contrary, Mr. Shaw stated he wanted to retain Employee and would have taken all necessary steps if had he been aware of the problem. There was no evidence that Employee's absence negatively impacted on Agency's operations, although Agency did state that it was required to pay overtime. There was no evidence that Agency considered Employee's "prospects for rehabilitation." Indeed, Mr. Shaw considered Employee the type of individual he wanted to work at Exodus House and wanted to retain Employee. Employee was detained for a domestic relations matter, which could have been related to custody or support. Agency did not argue that there was little chance that Employee could be rehabilitated. In addition, unlike the employee in *Rojas* who was incarcerated for ten years, Employee thought he would be detained 90 days and actually only missed about three weeks of work. Agency did not present sufficient evidence that it considered these factors when determining the penalty it will impose. Rather, as discussed, it

focused on his "abandonment" of the position, and the evidence did not support that conclusion. It focused on the fact that he did not comply with the written policy, but there was ample evidence in the record that the written policy was not strictly adhered to at Exodus House, and in any event, might not have been possible under the circumstances in this matter. Under the circumstances presented, the reasonable course of action, since Agency was well aware that Employee could not have previously requested leave, would have been for Agency to have allowed Employee to request leave and then make a determination utilizing the standards of *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981) and *Rojas*. Agency offered no reason for its failure to do so.

On March 19, 2013, this Board issued its *Opinion and Order on Petition for Review* in *Mavins v. District of Columbia Department of Transportation*, OEA Matter No. 1601-0202-09, in which it reversed an Initial Decision reinstating an employee who had been removed based on a charge of AWOL after he had been incarcerated. This Administrative Judge issued the *Initial Decision* in *Mavins*, and therefore is very familiar with the facts. She reviewed both the *Initial Decision* and the *Opinion and Order* carefully to ascertain if the facts are sufficiently distinguishable to support issuance of this *Initial Decision* in light of the reversal in *Mavins*. She believes that they are. First, Employee in this matter followed the established procedure of notifying Ms. Brown of his unscheduled absence and explaining the reason for his absence to her. The employee in *Mavins* did not contact his supervisor or anyone at his agency directly the first day. Second, Employee in this matter was placed on sick leave for the first two days, although Employee did not explicitly request such leave and no Agency witness testified that he or she authorized such leave. Placement on sick leave supports Employee's position that he had a reasonable basis for believing that leave would be granted during his absence given his 200 days of combined leave. The employee in *Mavins* was immediately placed on AWOL status. Third, Agency in this matter contacted Employee and directed him to advise it if he intended to abandon his position. Employee responded in a timely manner. He advised Mr. Shaw and Ms. Goode several times of his status, and of when he anticipated he would be returning. No one told him that he needed to follow a specific procedure to request leave. No such letter was sent in *Mavins* and no such continued contact was maintained between Agency and the incarcerated employee. In addition, Employee's supervisor testified that he was a valuable employee and that he would have done all he could do to retain him as an employee if he had been aware of the problem.

In *Mavins,* Agency based its decision to terminate Employee, or at least considered in reaching its decision, that he had prior leave issues and did not have any leave to request upon his return. Further it considered the nature of Employee's offense and his past performance. *Opinion and Order,* p. 3, ft. 10. In this matter, Mr. Shaw testified that Employee had never had any leave problems, he had 200 hours of combined leave to use, and his past performance was considered exemplary. There was no information regarding the nature of his offense.

The District of Columbia Government does not prohibit the hiring, rehiring, election or re-election of individuals who have been incarcerated. Agency has not relied on any language in the DPM or the D.C. Code that mandates an agency to terminate an employee who has been detained for a relatively short period of time. Rather, agencies are tasked, in all but a few exceptional circumstances, to review each matter individually based on the unique

set of facts presented. Indeed, the young people who Employee supervised are young people who may have had involvement in the criminal justice system. Individuals should not give up the hope or expectation of a positive future, including employment with the District of Columbia Government, because of past mistake. If there is no prohibition to retain employees who are incarcerated, the issue is whether an employee has utilized the correct procedure for requesting leave. Obviously, a detained employee cannot request leave in advance. Under the circumstances, although Employee did not make an explicit request, he notified his supervisor as well as HR staff of his situation. He was aware he had been placed on sick leave. He responded to the letter from HR directing him to advise Agency of whether he was abandoning his position. His supervisor, an individual of 40 years of government employment, did not know the procedure. Ms. Goode, if she was aware of a procedure, did not so advise Employee. The Administrative Judge does not reverse this removal because Agency rejected Employee's incarceration as a basis for the AWOL charge. Rather, she reverses the removal, because under the unique circumstances of this case, Agency failed to notify Employee of the procedure for requesting leave.

Agency has the burden of proof in this matter. It must prove its case by a preponderance of evidence, which is defined as "that degree of relevant evidence which the 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). See also 5 C.F.R. § 1201.56(c)(2). There was insufficient evidence in the record that supported Agency's position that it terminated Employee because Employee abandoned his position, that his absence decreased Agency's ability to carry out it functions or that it diminished the public trust in employees who served DYRS youth. For these reasons, the Administrative Judge concludes that Agency did not meet its burden of proof, and that its decision to terminate Employee was arbitrary and constituted an abuse of discretion. She further concludes that Agency's decision should be reversed. *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985).

ORDER

It is hereby

ORDERED: Agency's removal of Employee from his position is reversed.

ORDERED: Agency is directed to reinstate Employee, issue him the back pay and benefits to which he is entitled beginning August 18, 2010, the effective date of his removal, no later than 45 calendar days from the date of issuance of this Initial Decision.

ORDERED: Agency may charge Employee with leave without pay, annual leave or sick leave, for the period he was charged with AWOL. It must inform Employee of its decision no later than 45 calendar days from the date of issuance of this Initial Decision.

ORDERED: Agency is directed to document its compliance with this Order, no later than 60 calendar days from the date of issuance of this Initial Decision.

FOR THE OFFICE:

LOIS HOCHHAUSER, ESQ.
Administrative Judge