

DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
LONNEL YOUNG)	OEA Matter No. 1601-0074-09
Employee)	
)	Date of Issuance: May 20, 2010
v.)	
)	Rohulamin Quander, Esq.
D.C. DEPARTMENT OF)	Senior Administrative Judge
TRANSPORTATION)	
Agency)	

Clifford Lowery, Employee representative
James E. Fisher, Esq., Agency representative

INITIAL DECISION

INTRODUCTION

Background

On January 29, 2009, Employee filed with the Office of Employee Appeals (the “Office” or “OEA”), a Petition for Appeal from Agency’s final decision, effective January 30, 2009, which terminated Employee from his position of Sign Painter with the D.C. Department of Transportation (the “Agency”), as a result of a charge of unauthorized absence of ten (10) or more days, which constitutes job abandonment. The matter was assigned to me on August 19, 2009. I convened an Evidentiary Hearing on December 17, 2009.

Agency’s witnesses were: 1) James Burney, a DDOT Engineering Supervisor for the Field Operations Division, and the proposing official; 2) Stacey Collins, Employee’s former supervisor; and 3) Alfonz Ruth, a Program Analyst for the D.C. Government, who also reviews and evaluates disciplinary actions and makes recommendations to management. Agency was represented by James E. Fisher, Esq., Assistant Attorney General.

Employee's witnesses were: 1) Danielle Young, wife of the Employee; and 2) Lonnel Young, the Employee. The Employee was represented by Clifford Lowery, union representative, AFGE Local 1975. The record is now closed.

ISSUES

The issues to be decided are:

1. Whether the evidence presented at the Evidentiary Hearing supports a finding that, pursuant to D.C. Personnel Regulation 1616.1, Agency had sufficient cause to terminate the Employee based upon proof of an act of unexcused absence for ten (10) consecutive days or more, job abandonment as defined by D.C. Personnel Regulation 1603.3; and
2. Whether Agency gave sufficient consideration to both the mitigating and aggravating factors and circumstances that existed, consistent with the provisions of DPM 1603.8.

Agency's case

An Evidentiary Hearing was convened in this matter on December 17, 2009. At that time, both Agency and Employee were accorded the opportunity to present their respective cases for the record. The essence of the respective testimony of each witness is stated as follows below.

James Burney, Hearing Transcript ("Tr. "), Pp 20 – 96

James Burney ("Burney"), DDOT Engineering Supervisor for the Field Operations Division, was the Employee's supervisor during the period in question. According to Burney, the Employee's attendance was not good over an extended period of time, and despite his and the Agency's efforts to help Employee face and correct the leave issue, Employee's pattern of unexcused absences and consistent tardiness remained. A meeting was convened among Agency officials, the Employee, and union officials, seeking to address the tardiness and attendance issues. However, it did not help or cure the problem. In an effort to accommodate Employee, who was a likable individual, Burney modified Employee's work schedule. Even this effort did not help to correct the problem. Employee made several excuses for the absences and his latenesses, but the excuses were not credible. Employee was offered counseling on several occasion, but the counseling did not change his sustained behavioral pattern.

Specifically during the period of October 14th through October 27th, 2008, the Employee did not notify him of his extended absences. After consulting with the DDOT Operations Manager Lasharn Hamilton, Burney determined that a removal action was warranted due to Employee sustained pattern of behavior, and proposed to Terry Bellamy, Deputy Director of the Agency, and the deciding official, that a termination action was allowable and consistent with the District Personnel Manual's table of penalties. Of major consideration, Burney testified that Employee and the position that he

encumbered, were important, with Employee officially categorized as an “emergency employee.” His timely presence and attendance at work was critical, as the Agency had a number of persons who, reliably, needed to be on the job in the event of a city-wide emergency, which events occurred periodically.

Burney testified that on the dates that the Employee was marked as AWOL, he never received a call from Employee or someone on his behalf, despite the fact that the Employee had both his desk number and his cell phone number.

Stacey Collins, Tr. Pp. 97 – 109

Stacey Collins (“Collins”) was the Employee’s immediate supervisor for approximately nine months to a year. She issued a letter of admonishment to the Employee due to issues related to his tardiness and poor attendance record. The letter of admonishment is a component of the progressive discipline process, and is designed to give an employee both a warning and opportunity to correct a job-related deficiency. Employee was deemed to be an essential person for the Agency, and the importance of his attendance, as an emergency employee, was significant in order for the Agency to function properly

Alfonz Ruth, Tr. Pp. 110 – 124

Dr. Alfonz Ruth (“Ruth”) testified about the disciplinary process, noting that removal was warranted based upon unauthorized absence for ten (10) or more consecutive days. Ruth also testified about the concept and the implementation of progressive discipline. Ruth used Employee’s case as an illustrative example, noting that the several step process began with informal counseling. Subsequently, the most typical steps, all of which were followed in this matter, were: a) a letter of admonishment; b) followed by formal counseling; c) followed by proposed removal; and d) followed by removal. All of the above-noted steps were illustrative of progressive discipline.

Employee’s case

Danielle Young, Tr. Pp. 126 – 145

Danielle Young (“Mrs. Young”) testified that the Employee, who is her husband, was incapacitated due to incarceration. However, she regularly called the Agency and spoke with a Ms. Pettus (“Pettus”), advising that Employee was unable to come to work. Ms. Young testified that she and the Employee had had a domestic dispute, and as a result of said dispute and incident, he was briefly incarcerated. Ms. Young acknowledged that, although she spoke with Pettus on occasion regarding Employee’s anticipated absence and requesting that he be placed on leave for the duty hours in questions, she was aware that Pettus was not the Employee’s supervisor. Ms. Young testified that, although she talked with Pettus and requested that Employee be granted leave, she did not know whether Pettus had the ability to authorize any such leave request. She did request that Pettus advise Burney of the leave requests, but Burney never called her back, nor gave

any indication whether the leave requests were specifically granted or denied. Upon inquiry from Senior Administrative Law Judge Quander, Ms. Young testified that the Employee was incarcerated between October 11, 2008, through the end of October 2008.

Lonnell Young, Tr. Pp. 145 – 181

Lonnell Young (“Mr. Young”) testified, and admitted that he did have an attendance problem. However, after he was given a letter of admonishment regarding his attendance, he made a conscious effort to upgrade all aspects of his job performance and reliability, including being both on time and present at work. One component of his effort was reflected in his annual performance evaluation, issued on April 30, 2008, which reflected favorably upon his overall job performance and the quality of his work product. *Employ. Exhib. #1.*

Despite a claim of having improved his performance, on cross examination Mr. Young admitted that he attended a union-initiated counseling session that was convened at the union building located on 14th Street, N.W. However, his testimony is conflicted as to the purpose of the meeting, despite his acknowledgement signature to the contrary. *Agency Exhib. #2.* He denied receiving any document(s) as a follow up to the convening of the meeting. Mr. Young testified that although Burney was the head of the unit where he worked, Angela Pettus was serving in a supervisory capacity. However, she was not formally designated as a supervisor in fact. Pettus’s general oversight responsibilities seemed to expand, as the previously designated supervisor, Stacey Collins, was no longer working at that job site.

FINDINGS OF FACT

1. Between March 4, 2007, and January 30, 2009, Employee was employed by the Agency as a Sign Painter, whose job duties included painting and repairing all DDOT (Agency) signage used in conjunction with road and traffic repairs. *Ag. Exhibs. #6 and #5.*
2. On November 19, 2007, Agency issued a Letter of Admonition to Employee, advising him concerning deficiencies regarding his attendance, and warning him that future violations would result in corrective or adverse action. *Ag. Exhib. #7.* Specifically, the letter admonished Employee for a pattern of tardiness in September and October 2007. Further, the letter noted two periods of absence without leave (AWOL), noted on September 14, 2007, and October 27, 2007, each constituting several hours beyond what was authorized.
3. On April 30, 2008, Agency issued a Performance Evaluation Statement for the period of April 1, 2007 – March 31, 2008. *Employ. Exhib. #1.* In the narrative section under the heading of “Work Habits,” Stacey Collins, Employee’s former supervisor, favorably commented upon both Employee’s work ethic and the good quality of his work. However, she also acknowledged that Employee was served with a letter of admonishment in November 2007, due to his job attendance record.
4. On October 1, 2008, Employee, in the company of Clifford Lowery and Dion

- James, union representatives, received counseling to discuss a pattern of abuse of annual and sick leave usage and other unrelated issues. *Ag. Exhib. #2*.
5. Despite the counseling and its intended purpose, a pattern of unauthorized absences from work emerged, with Employee being absent from work for ten (10) or more consecutive days, between October 14, and October 27, 2008. *Ag. Exhib. #3*.
 6. During this AWOL period, Employee's wife consistently called his office and frequently spoke with Pettus, requesting leave for her husband, who was allegedly unable to call on his own behalf. Pettus received and acknowledged the request, but since she was not Employee's supervisor, she did not have authority to either grant or deny his leave request.¹
 7. Employee's Position Description notes under "other significant factors" that the incumbent in the position that Employee occurred at the Agency was categorized as an "essential employee," whose presence was deemed necessary on regular occasion. *Ag. Exhib. #6*. However, his pattern of tardiness, exacerbated by his AWOL status, significantly reduced his level of reliability, despite any favorable comments noted in the 2007-2008 performance evaluation.
 8. On at least one occasion, for the dates of October 24, and 27, 2008, Ms. Young made a leave request on behalf of Mr. Young (the Employee). The request was denied. However, Employee still did not report to work, and was marked AWOL for those dates.
 9. On November 6, 2008, Agency provided Employee with a fifteen (15) days advance written notice of its proposal to remove him from his position for cause, pursuant to Chapter 16 of the District Personnel Manual ("DPM"), § 1608.1. *Ag. Exhib. #1*.
 10. The letter stated that the proposed termination action was taken for cause, pursuant to §§ 16 DPM 1603.2 and 1603.3, based upon Employee's "unauthorized absence: ten (10) consecutive days or more constitutes abandonment."
 11. On January 2, 2009, Diana Jordan, Agency's designated Administrative Review Officer, submitted a written report to Terry Bellamy, the deciding official. In her report she found and concluded that Agency had established that Employee had taken unauthorized absences of at least ten (10) consecutive days. She further recommended to the deciding official that Agency's initial proposal to terminate Employee should be upheld. *Ag. Exhib. #4*.
 12. On January 23, 2009, the Agency issued its Notice of Final Decision, effective January 30, 2009, sustaining its proposal to remove Employee from his position. *Ag. Exhib. #5*.

¹ Neither Agency nor Employee called Angela Pettus to testify during the Evidentiary Hearing. Therefore, this AJ does not have the benefit of her sworn testimony regarding the circumstances related to Employee and/or his wife's request for leave during the period in question.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Burden of Proof

In any disciplinary action, the District government will bear the burden of proving by a preponderance of the evidence that an action may be taken or, in the case of summary action, that the disciplinary action was taken for cause. Chapter 16 DPM § 1603.10. The issue, therefore, is whether the Agency can prove, by a preponderance of the evidence, that the disciplinary action was taken for cause as defined in the DPM. The Agency maintains that the facts show, by a preponderance of the evidence, that the Employee did commit the alleged acts and was therefore terminated for cause.

Legal Analysis

Section 1603.3 of the DPM defines cause as “[a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: unauthorized absence of ten (10) consecutive days or more constitutes abandonment” Chapter 16 DPM § 1603.3(f).

The Employee’s absences are well documented and fall squarely within the DPM’s definition of cause for termination. As described above, on October 14, 2008 through October 17, 2008, the Employee was absent from work between the hours of 7:30 – 4:00 p.m. without notifying his immediate supervisor, James Burney. Again on October 20, 2008 through October 23, 2008, the Employee was absent from work between the hours of 7:30 – 4:00 p.m. and failed to notify Burney. Finally, on October 24, 2008 and October 27, 2008, the Employee requested leave from work between the hours of 7:30 – 4:00 p.m. Although the Employee’s request was denied, the Employee failed to report for duty as required. Burney memorialized the Employee’s absences and issued a Notification of Charge to Absence without Official Leave (“AWOL”) to Employee. The documentation has been corroborated by witness testimony from Burney, as well as Ms. Young and Mr. Young. Notwithstanding the fact that efforts allegedly were made to inform Burney of the Employee’s absences, Burney did not receive adequate notice of the absences.² The onus is on the Employee to establish that he satisfied the notice requirement for requesting leave. The record does not reflect that the Employee did.

In support of the charges that gave rise to the Agency’s action, Agency witnesses provided credible testimony to corroborate the allegations. Specifically, Burney testified that he was the Employee’s supervisor, that he had problems with the Employee’s performance and his attendance and tardiness. The attempts to correct the Employee’s behavior were unsuccessful. Collins testified that during her period of supervision of the Employee, she issued a letter or admonition based on his tardiness and attendance. Collins further testified that the letter was a form of discipline. Ruth testified about the process of instituting progressive discipline in the case at bar. Ruth’s testimony made

² Burney testified that Employee had both his (Burney’s) direct telephone number, as well as his cell phone number, and should have directed his wife to use either or both, in order to make some direct contact.

clear that the Agency issued the requisite warnings, admonishment, counseling, and notice of disciplinary action before prescribing the ultimate penalty of removal. In sum, it is uncontested that the Agency met the requirements of the District Personnel Manual prior to its removal of the Employee.

Alternatively, the Employee offered testimony regarding his efforts to notify the Agency of his absences. There is no dispute that the Employee was absent from work on the dates in question. The record reflects that at no time during the period of absence, did the Employee speak with his supervisor and obtain the leave approval he was seeking. To further complicate this matter, the reason for the Employee's absences was due to incarceration. It is unfathomable that incarceration provides adequate justification for absences for work for a period of ten (10) consecutive days. Thus, the record clearly proves by a preponderance of the evidence that the Agency's action was warranted by Employee's actions. This Office has previously held that incarceration cannot be a basis for an excused absence, and this AJ likewise agrees. See *Employee v. Agency*, OEA Matter No. 1601-0009-88, 36 D.C. Reg. 7336 (1989). As well, Employee admitted to the basis for his extended absence from work. I conclude that the Agency acted appropriately in taking adverse action against him, resulting in his termination.

The penalty for the unauthorized absence for ten (10) consecutive days or more which constitutes abandonment is removal, even for a first offense. See 16 DPM § 1619.1. Here, the Agency instituted progressive discipline, although it was not required to do so. The Employee's classification as an emergency employee further underscores how detrimental the excessive absences were. Accordingly, the Agency has proven by a preponderance of the evidence that the Employee was removed from his position of Sign Painter for cause.

OEA has had several prior occasions to determine whether an agency's penalty was appropriate under the circumstances in other matters, and it has maintained that it is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."³ In *Employee v. Agency*, OEA Matter No. 1601-0012-82, 30 DC Reg. 352 (1983), the Office decided that the scope of review that the Office will undertake is limited to the appropriateness of a particular penalty, and whether the penalty is within the range allowed by law, regulation, or applicable table of penalties; whether the penalty is based upon a consideration of relevant factors; and whether there has been a clear error in Agency's judgment. See also *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985). Here, the penalty of removal is warranted for the charges specified by the Agency.

As referenced above, and based upon the evidence presented at the evidentiary hearing and the documents in the record, I conclude that the Agency has met its burden of proof and shown, by a preponderance of the evidence, that Employee was absent for ten (10) consecutive days, which action constituted abandonment. Through their own admission, neither the Employee nor his wife ever spoke with the Employee's supervisor

³ *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

during the period in question. The manner in which the Employee sought leave for his excessive absences was wholly inappropriate and cannot withstand the requirements of the District Personnel Manual. Accordingly, the Agency's asserted that its decision to terminate the employee from the position of Sign Painter was warranted, pursuant to the DPM and other applicable regulations. Agency completed both its written submissions and oral arguments and requested that the Employee's termination be sustained.

Although Employee underscored that the quality of his work product was excellent, this AJ determines that this consideration, when weighed against the nature of the total complaint regarding Employee's sustained absence and pattern of tardiness, was not a particularly significant grounds for mitigation. The AJ further concludes that the assessed penalty of termination was appropriate and should be sustained.

ORDER

The foregoing having been considered, it is hereby ORDERED that the Agency's action of removing the Employee is UPHOLD.

FOR THE OFFICE:

ROHULAMIN QUANDER. Esq.
Senior Administrative Judge