THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMORY MAVINS,	)	OEA Matter No. 1601-0202-09
Employee	)	
	)	Date of Issuance: March 19, 2013
	)	
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF TRANSPORTATION,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Emory Mavins ("Employee") worked as a Laborer with the Department of Transportation ("Agency"). On April 24, 2009, Agency issued an advanced notice of proposal to remove Employee, charging him with unauthorized absence for ten consecutive days or more.[1] Employee challenged his termination by filing a Petition for Appeal with the Office of Employee Appeals ("OEA") on August 13, 2009. He argued that he did not abandon his position and that Agency knew that he would be incarcerated and thereby, knew of his whereabouts.[2]

[1] Agency alleged that Employee was Absent Without Leave ("AWOL") for fourteen consecutive work days. It claimed that Employee failed to report to work or call-in to his supervisor to request leave during this period. Following an administrative review by a hearing officer, Agency issued its final decision to remove Employee from his position on July 14, 2009. *Agency Answer to Employee's Petition for Appeal,* Exhibits 1 and 3 (December 23, 2009).

[2] Employee explained that he was incarcerated for thirty days for a domestic dispute with his fiancé. He contended that his fiancé and brother both contacted his supervisor to inform him of his incarceration. However, upon his release, he returned to work, but he was immediately placed on administrative leave. *Employee's Petition for Appeal,* p. 7 (August 13, 2009).

Agency responded to Employee's Petition for Appeal by arguing that his termination was taken for cause pursuant to Chapter 16 of the District Personnel Manual ("DPM"). The cause was based on Employee's unauthorized absence for ten consecutive days, which constituted abandonment of his position. Agency reasoned that Employee was properly terminated because he did not report to work and failed to secure leave from his supervisor. Further, it was Agency's belief that summary removal was warranted due to Employee's misdemeanor assault conviction and incarceration. Therefore, Agency requested that the termination be sustained.[3]

After conducting an evidentiary hearing, the OEA Administrative Judge ("AJ") issued her Initial Decision. She found that, contrary to Agency's belief, Employee did not abandon his position. She reasoned that according to *Taylor v. District of Columbia Department of Employment Services*, 741 A.2d 1048 (D.C. 1999), abandonment suggests that an employee has made a voluntary decision to quit their position.[4] She held that although Employee was on unauthorized leave, it did not constitute an abandonment of his position. Additionally, she reasoned that since Agency knew that Employee could not have previously requested leave, due to his incarceration, it should have allowed him to do so upon his return to work.[5]

While being questioned during the evidentiary hearing, Agency asserted that it had a zero tolerance policy for assault convictions. However, the AJ held that there was no evidence to support that such policy existed or was implemented.[6] She further held that there was also no nexus between Employee's position and the assault charge.[7] In addition, the AJ found that

[3] *Agency's Answer to Employee's Petition for Appeal*, p. 2-4 (December 23, 2009).
[4] The AJ inadvertently cited this case as *Janine v. District of Columbia Department of Employment Services*, 741 A.2d 1999 (CADA 1999).
[5] *Initial Decision*, p. 8 (November 15, 2011).
[6] The AJ found that since Agency did not know the basis for the assault charge or for the conviction, Employee's charge and conviction were not considered when it made the decision to terminate him.
[7] Additionally, the AJ found that Agency's decision to terminate Employee lacked consistency because there were other employees who were incarcerated but were not removed from their position. The AJ stated that Employee ". . . testified with great credibility that . . . he was responsible for the circumstances which resulted in Agency's

Agency presented insufficient evidence to establish that it considered mitigating factors when it reached its decision to terminate Employee. Therefore, she ruled that Agency's action was arbitrary and an abuse of its discretion. Accordingly, Agency's decision was reversed, and it was directed to reinstate Employee with back pay and benefits.[8]

Agency filed a Petition for Review with the OEA Board on December 15, 2011, and a Supplemental Petition for Review on February 17, 2012. It argues that the Initial Decision is based on an erroneous interpretation of statute, regulation, or policy. Specifically, Agency believes that the AJ ignored the definition of abandonment as provided in the DPM, but she instead relied on the definition provided in *Taylor v. District of Columbia Department of Employment Services*, 741 A.2d 1048 (D.C. 1999). Agency asserts that the analysis of *Taylor* focuses on the definition of abandonment as it relates to unemployment benefits. However, the definition on which it relied is clearly presented in the DPM, which states that an unauthorized absence for ten consecutive workdays is abandonment of your position.[9]

Furthermore, Agency claims that the AJ substituted her judgment for Agency's in determining the appropriate discipline. Agency opines that the AJ also substituted her judgment when she ruled that it should have allowed Employee to request leave when he returned to work. Moreover, it reasons that the AJ failed to acknowledge its consideration of relevant factors.[10]

Finally, Agency believes that whether it had a zero tolerance policy for assault convictions is irrelevant. It explains that it never took the position that Employee was terminated because of a zero tolerance policy. It noted that the "zero policy" line of questioning originated

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actions [ ] and his great remorse."
[8] *Initial Decision*, p. 8-9 (November 15, 2011).
[9] *Agency's Supplemental Petition for Review*, p. 4 (February 17, 2012).
[10] According to Agency, those factors include testimony that Employee had prior leave issues and did not have any leave to request upon his return. Additionally, Agency argues that it considered the nature of the offense; Employee's past performance; and the burden of holding a vacant position of thirty consecutive days. *Id.*, 6-7.

with the AJ during the evidentiary hearing. Therefore, it requests that the Initial Decision be reversed.[11]

On April 11, 2012, Employee filed an Opposition to the Supplemental Petition for Review. He asserts that Agency incorrectly interpreted the meaning of abandonment. Employee notes that abandonment is referenced in the Table of Penalties for the cause of action taken against Employee. However, he explains that the Table of Penalties definition of abandonment connotes that there is an ". . . intentional or voluntary decision to be absent without authority" and that his absence was due to circumstances beyond his control.[12] Lastly, Employee contends that Agency's action of not allowing him to receive a pre-termination hearing was unconstitutional. Therefore, he seeks to have the Initial Decision upheld.[13]

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence or when the Initial Decision did not address all material issues of law and fact. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[14] After reviewing the record, this Board does not believe that the AJ's assessment of this matter was based on substantial evidence.

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[11] *Id.,* 7-9.
[12] Employee agrees with the AJ's finding that Agency did not consider mitigating factors. Employee believes that Agency's assertion that it does not condone leave for incarceration is unreasonable. *Memorandum of Points and Authorities in Support of Employee's Supplemental Petition for Review*, p. 4-6 (April 11, 2012).
[13] *Id.,* 5-9.
[14] *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).

In accordance with DPM § 1603.3(f)(1), Employee was removed on the basis of "any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include: unauthorized absence."[15] Agency clearly proved that the days Employee failed to appear at work from March 24, 2009 – April 10, 2009 were not authorized, and he did not request leave for this period.[16] OEA held in *Young v. Department of Transportation*, OEA Matter No. 1601-0074-09 (May 20, 2010) that "the onus is on the Employee to establish that he satisfied the notice requirement for requesting leave." Agency's policy was that employees were required to notify their supervisors at least 24 hours prior to their request for leave.[17] Employee did not secure leave from his supervisor for this time period, nor did he offer an excusable explanation for his absence during this time. The record reflects that he did request leave for March 16, 2009 – March 20, 2009, and this was the only leave approved by his supervisor.[18] Agency adequately proved, and Employee concedes, that he was not at work from March 24, 2009 – April 10, 2009, due to his incarceration.[19]

OEA has consistently held that incarceration is not an excusable explanation for an employee's absence. In *Hawkins v. Department of Public Works*, OEA Matter No. 1601-0054-06 (May 4, 2006) citing *Employee v. Agency*, OEA Matter No. 1601-0009-88, 36 D.C. Reg. 7336 (1989), OEA found that "incarceration cannot be a basis for an excused absence . . . ." Similarly, the AJ in *Young* ruled that "it is unfathomable that incarceration provides adequate justification

[15] The record is replete with documentation that this was the cause of action taken against Employee. Thus, we agree with Agency that it never took the position that Employee was removed because of a zero tolerance policy against assault convictions, as the AJ seems to contend in her Initial Decision. *Agency Answer to Employee's Petition for Appeal*, Exhibit #1 (December 23, 2009).
[16] *OEA Hearing Transcript*, p. 71-72 (August 10, 2011).
[17] *Id.*, 39-40.
[18] *Id.* at 49.
[19] Employee provides in his Petition for Appeal that on March 24, 2009, he was sentenced to thirty days at the District of Columbia Detention Center for a domestic dispute. *Petition for Appeal,* p. 7 (August 13, 2009).

for unauthorized absences for work for a period of ten (10) consecutive days."[20] This Board will adhere to the historical rulings of this office and find that incarceration is not an excusable absence for an unauthorized leave for ten days or more. Based on the aforementioned, it is clear that the AJ's ruling was not based on substantial evidence.

Appropriateness of Penalty

In 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).[21] According to the *Stokes* Court, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on relevant factors; and whether there is clear error of judgment by the agency.

Penalty within the Range Allowed by Law, Regulation, or 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. As Agency argued, Section 1619(6)(a) of the DPM states that "unauthorized absences [for] ten consecutive days or more constitutes abandonment."[22] Moreover, DPM § 1619(6)(a) provides that the penalty for the first offense of this charge is removal. The penalties for a second or third offenses are listed as "not applicable."

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[20] The AJ in *Young* noted that the agency implemented progressive discipline before removing the employee in that matter. However, he properly notes that progressive discipline is not a requirement for this cause of action because the penalty for the first offense for unauthorized absence for ten consecutive days is removal. Thus, contrary to Employee's contention, the facts of *Young* are squarely on point with those in the current matter. Consequently, we will apply the ruling in *Young* to this case.

[21] *Anthony Payne v. D.C Metropolitan*, OEA Matter No. 1601-00540-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter 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); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[22] This Board is unsure why the AJ chose to ignore the clear language of the definition of abandonment in this regulation.

Thus, it is clear that removal is the appropriate penalty, even for the first offense for unauthorized absence for ten consecutive days or more.

The Court in *Stokes* reasoned that 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."[23] OEA has previously held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[24] Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.

Love went on to provide the following:

> [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, it is 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)).

This Board believes that the AJ's ruling went beyond her authority, and therefore, requires a reversal. Agency properly exercised its authority to remove Employee for cause. The penalty of

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[23] Stokes v. District of Columbia, 502 A.2d 1006, 1010 (D.C. 1985).
[24] *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).

removal was within the range allowed by the regulation. The AJ erred in changing the penalty, which was clearly within Agency's discretion to invoke.

Consideration of Relevant Factors

The OEA Board held in *Holland v. Department of Corrections*, OEA Matter No. 1601-0062-08, *Opinion and Order on Petition for Review* (September 17, 2012), that an Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[25] In the current matter, the evidence did not establish an abuse of discretion by Agency. As presented above, the penalty for the first offense of unauthorized absence for ten consecutive days or more is removal. Additionally, Agency presented evidence that it considered relevant factors as outlined in *Douglas* when arriving at the decision to remove Employee.[26] Agency argued in its Petition for Review that it gave great weight to the fact that Employee had prior leave issues and did not have any leave to request upon his return; the nature

[25] This reasoning was also presented in *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C. Reg. 352 (1985).

[26] The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

(1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
(2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
(3) the employee's past disciplinary record;
(4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
(5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
(6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
(7) consistency of the penalty with any applicable agency table of penalties;
(8) the notoriety of the offense or its impact upon the reputation of the agency;
(9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
(10) potential for the employee's rehabilitation;
(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

of the offense; Employee's past performance; and the burden of holding a vacant position of thirty consecutive days.[27]

No Clear Error of Judgment

Based on the aforementioned, there is no clear error in judgment by Agency. Removal was a valid penalty under the circumstances. There was no evidence presented that Agency was prohibited by law, regulation, or guidelines from imposing the penalty of removal. The penalty was based on a consideration of the relevant factors as outlined in *Douglas*. Consequently, we must GRANT Agency's Petition for Review and REVERSE the Initial Decision.

[27] *Agency's Supplemental Petition for Review*, p. 7 (February 17, 2012) and *OEA Hearing Transcript*, p. 38-39 (August 10, 2011).

ORDER

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

FOR THE BOARD:

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William Persina, Chair

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Vera M. Abbott

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Sheree L. Price

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Necole Shaw

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Alvin Douglass

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.