THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ANNE M. FORD	)	
Employee	)	
	)	
	)	OEA Matter No. 1601-0138-96
v.	)	
	)	Date of Issuance: September 28, 2004
	)	
D.C. DEPARTMENT OF HEATH	)	
Agency	)	
	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Licensed Practical Nurse at D.C. General Hospital. During her tenure, Agency had repeatedly counseled Employee with respect to her absenteeism and had disciplined her on several occasions for this reason. At one point Agency suspended Employee for being absent without leave. Employee disclosed to Agency that her chronic absenteeism was due, at least in part, to a substance abuse problem and to the

death of several close family members within a span of three years, including the murder of her son.

Realizing that Employee's conduct was not improving, Agency issued to Employee a letter of direction dated April 18, 1996. The letter informed Employee that, *inter alia*, she was being placed under a leave restriction, that she was to request annual leave in advance, that she was to submit a medical certificate when she requested sick leave, and that she was to call in two hours before the start of her shift when requesting leave. Further, Agency stated in the letter that it would reevaluate Employee's performance after 90 days.

Notwithstanding Agency's directive that Employee was to improve her performance, Agency issued to Employee a proposed notice of removal six days after it had given her the Letter of Direction. Agency proposed removing Employee based on the charges of inexcusable absence without leave and insubordination. Agency claimed that from the period of March 10, 1996 to March 28, 1996, Employee was inexcusably absent for 64 hours. Specifically, Agency contended that on March 10, 15, 20, 22, 23, 26, 27, and 28, 1996, Employee failed to report to work. Further, according to Agency, on those dates Employee failed to comply with the procedures for requesting leave. Hence, Agency charged Employee with insubordination. Agency believed that the swift action was necessary because it could not risk patient care for an employee such as this. Thus Employee was terminated effective June 8, 1996.

Employee timely appealed Agency's action to this Office. In the Initial Decision issued March 29, 2002, the Administrative Judge found that Employee had been

inexcusably absent for only 32 of the 64 hours for which she was charged.[1] The Administrative Judge relied on the well settled principle that when an employee offers a legitimate excuse, such as illness, for being absent without leave, the absence is justified and thereby excused. (Citations omitted). In applying this principle to the facts elicited from the hearing conducted in this appeal, the Administrative Judge found that Employee's absences on March 10, 15, 20, and 22, 1996, were excused. Employee testified that on March 10, 1996, she called her supervisor, albeit late, to say that her child was sick and that, as a result, she would not be reporting to work. Employee provided a medical certificate to verify her child's treatment. Agency did not contradict this testimony. With respect to March 15, 20, and 22, 1996, Employee testified, and Agency admitted, that she called her supervisor to say that she would be out indefinitely to attend the trial of her son's accused murderer. Upon Employee's return to work, she presented to her supervisor, as had been requested, a court attendance slip. Agency testified that Employee may have complied with her supervisor's request by submitting a court attendance slip to substantiate her absence for those dates. Thus on March 10, 15, 20, and 22, 1996, Employee's absences were excused.

For the remaining dates the Administrative Judge held that Employee had indeed been inexcusably absent. Agency testified that on March 23, 1996, Employee called her supervisor two hours after the start of her shift to say that she would be late. Employee, however, never reported to work on that day. Thus the Administrative Judge held that

[1] The first Initial Decision pertaining to this appeal was issued February 8, 2002. The Administrative Judge found that Employee had been inexcusably absent for only 32 of the 64 hours for which she had been charged. As a result, the Administrative Judge remanded the appeal to Agency to determine what was the appropriate penalty under those circumstances. Agency responded that removal was nonetheless warranted.

Employee was inexcusably absent on March 23, 1996. With respect to March 26, 27, and 28, 1996, Agency testified that Employee did not call her supervisor nor did she report to work on those dates. Employee did not contradict this testimony. Hence, the Administrative Judge found that Employee had been inexcusably absent for 24 hours on those days.

As for the charge of insubordination, Agency testified that a nurse was to request unscheduled leave by calling the unit head within two hours of the start of one's shift. Because Employee failed to do this, Agency claimed that Employee had been insubordinate. As further evidence of Employee's insubordination, Agency claimed that because Employee had not followed the directives of the April 18, 1996 letter, she had been insubordinate. The Administrative Judge rejected this particular argument but nonetheless held that Employee had been insubordinate. Agency was not permitted to rely upon the letter because it was prepared and given to Employee after the time period upon which the charges were based. As a result, the Administrative Judge found that Employee was not under a leave restriction during the relevant time period nor was she required, pursuant to the letter, to call her supervisor two hours in advance to ask for leave. In spit of those findings, the Administrative Judge held that Employee did have a duty to obey Agency's orders regarding the procedures on leave and attendance. Employee testified that she knew what the proper leave procedures were during the relevant period. Thus the charge of insubordination was sustained. Based upon those findings, coupled with the fact that this was not the first time Agency had taken disciplinary action against Employee, the Administrative Judge upheld the removal.

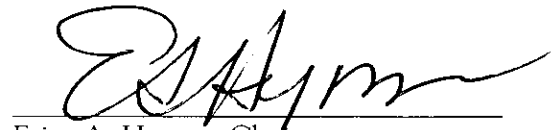
Employee has since timely filed a Petition for Review. In her Petition for Review Employee argues that Agency was legally bound to follow the directives it gave to Employee when it issued the April 18, 1996 letter of direction. Essentially Employee contends that Agency had a duty to allow for the expiration of the 90-day improvement period before it could propose her removal. In support of this argument Employee directs us to three Supreme Court cases. Two of the cases cited by Employee deal with persons discharged from federal government service pursuant to Executive Orders or federal laws and the regulations that were promulgated to implement those laws. The third case pertains to a deportation action brought under the federal Immigration Act of 1917. Clearly none of these cases is applicable to this appeal.

We believe, as Agency stated in its response to Employee's Petition for Review, that the April 18, 1996 letter of direction was nothing more than a communication to Employee directing her to act in conformance with the instructions set forth in the letter. The letter did not rise to the level of a procedure, rule, or regulation that Agency was duty bound to follow. We agree with the Administrative Judge's conclusion that Employee has not produced any law, rule, or regulation that obligated Agency to wait until the expiration of the 90-day improvement period before it could remove Employee. Because there is substantial evidence in the record to support the findings below, we will uphold the Initial Decision and deny Employee's Petition for Review.

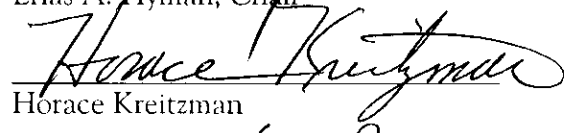
ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED.**

FOR THE BOARD:

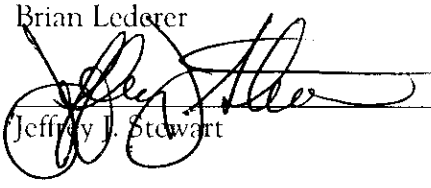


Erias A. Hyman, Chair



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.

CERTIFICATE OF SERVICE

I certify that the attached **OPINION AND ORDER** was sent by regular mail this day to:

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Katrina Hill
Clerk

September 28, 2004
Date