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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
BONNIE MURCHISON)	OEA Matter No. 1601-0257-95-R03
Employee)	
)	Date of Issuance: October 4, 2005
v.)	
)	Joseph E. Lim, Esq.
DEPARTMENT OF PUBLIC WORKS)	Senior Administrative Judge
Agency)	
_____)	

Bonnie Murchison, *Pro Se*
Kevin Turner, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

On September 12, 1995, Employee, a Clerical Assistant in the Design, Engineering and Construction Administration (DECA), filed a petition for appeal from Agency's final decision removing her for "Inexcusable absence without leave [AWOL]; to wit: Absence from duty without permission which was charged to 'absence without official leave' – Ten (10) consecutive workdays or more" and "any other period of absence charged to AWOL."

This matter was originally assigned to Judge Blanca E. Torres who held a hearing on February 20, 1997 and subsequently issued an Initial Decision on March 12, 1997. Judge Torres found that Employee's termination was not for cause. This Office upheld her decision in an Opinion and Order on Petition for Review issued July 15, 1998.

Agency appealed to the D.C. Superior Court and the court reversed this Office's decision stating that the administrative record before it contained no substantial evidence and no finding that Murchison's aggravated sinus condition was so debilitating that it prevented her from performing her clerical duties.

Employee then appealed to the D.C. Court of Appeals and the court remanded the matter to the Superior Court. Specifically, the D.C. Court of Appeals directed the Superior Court to remand the matter to the OEA for that body to make specific factual findings regarding whether,

1 to what extent, Murchison was incapacitated by her sinus ailments and unable to work at her job during her seven week absence without leave.

The matter was thus remanded to Judge Torres. Initially the parties engaged in mediation but the attempt to settle this matter failed. Judge Torres then held a hearing on April 7, 2004 but left the employ of this Office before rendering a decision.

The matter was then reassigned to me on May 22, 2005. I conducted a Prehearing Conference on June 3, 2005 and held a hearing on June 16, 2005. This decision is based on the stipulations of fact agreed to by the parties and the evidence offered at the hearing. The record is closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Code Ann. § 1-606.3 (1992 repl.).

ISSUES

1. Whether Agency's action was taken for cause.
2. If so, whether the penalty was appropriate under the circumstances.

FINDINGS OF FACTS

UNDISPUTED FACTS

1. Employee worked as a Clerical Assistant in the Design, Engineering and Construction Administration (DECA) branch of the Department of Public Works.
2. Prior to April 10, 1995, Administrative Director Gary Burch transferred Employee from the Reeves Center to Shepard Park to be supervised by Supervisor Jenkins.
3. At the Shepard Park office building, Employee began to suffer from a chronic sinus condition. She used a nose inhalation aerosol for her nausea and dehydration. Employee attributes her symptoms to the smell in the air outside the Shepard Park building which is across the highway from the District's Blue Plains Treatment Plant.
4. Employee requested a transfer from Supervisor Jenkins but was denied. Jenkins testified that he disbelieved Employee's illness stemmed from the environment because he never saw Employee gasping for breath and because no other employee experienced a similar problem.

5. Pursuant to a complaint filed by Employee regarding inadequate ventilation within the work area, the Occupational Safety and Health Administration (OSHA) conducted an investigation but found no OSHA violations.
6. Employee went on absence without leave from April 10, 1995 through May 13, 1995.¹ Employee's subsequent claim for worker's compensation for the same period was denied.
7. By advance notice dated June 13, 1995, Agency proposed to remove Employee from her position for "Inexcusable absence without leave [AWOL]; to wit: Absence from duty without permission which was charged to 'absence without official leave' – Ten (10) consecutive workdays or more" and "any other period of absence charged to AWOL."
8. Specifically, Agency charged that Employee was absent without permission or adequate justification for a total of two hundred seventy-three (272) hours. Agency charged that Employee was AWOL for 80 hours each for the pay periods ending May 13, 1995, April 15 and 29, 1995. Agency also charged that Employee was AWOL for 6 hours on March 27, 1995; 8 hours each on March 28 and 29, 1995; 3 hours on March 30, 1995, and 8 hours on March 31, 1995.
9. Disregarding the disinterested designee's recommendation that the discipline be rescinded, Agency removed Employee from service effective September 1, 1995.
10. On September 12, 1995, Employee filed a petition for appeal with this Office.
11. At the first prehearing conference held in this matter, Judge Torres informed the parties that AWOL's cited prior to April 10, 1995, were outside of the 45-day period within which Agency may impose discipline. *See* D.C. Code Ann. § 1-617.1 (b-1) (1). Therefore, she would only consider absences dated after April 10, 1995.
12. Judge Torres held a hearing on February 20, 1997 and issued an Initial Decision on March 12, 1997. She ruled that Employee was excusably absent without leave because of a sinus condition and ordered Agency to restore to Employee all pay and benefits lost as a result of its action and to expunge Employee's records of this adverse action.

¹ The parties stipulated to this fact at the June 3, 2005 prehearing conference.

13. Upon Agency's appeal, this Office upheld Judge Torres' decision in an Opinion and Order on Petition for Review issued July 15, 1998.

14. Agency appealed to the D.C. Superior Court and the court reversed the OEA decision stating that the administrative record before it contained no substantial evidence and no finding that Murchison's aggravated sinus condition was so debilitating that it prevented her from performing her clerical duties. There was no written transcript in this matter. Rather, the OEA hearing was on cassette tapes which could not be transcribed because of static and poor sound quality.

15. Employee then appealed to the D.C. Court of Appeals and the court remanded the matter to the Superior Court. Specifically, the D.C. Court of Appeals commented that there was no transcript of the hearing in this matter. The court stated:

We return this case to the Superior Court with directions to remand it to the OEA for that body to make specific factual findings regarding whether, and to what extent, Murchison was incapacitated by her sinus ailments and unable to work at her job during her seven week absence without leave. Once such findings are made, and a final OEA decision is rendered thereon, the losing party may - if so advised - challenge the findings for lack of substantial evidence to support them. In doing so, that party would be well advised to procure the transcript of the testimony on which the OEA relies.

16. The matter was thus remanded to Judge Torres. Initially the parties engaged in mediation but the attempt to settle this matter failed. Judge Torres then held a hearing on April 7, 2004 but left the employ of this Office before rendering a decision. The matter was then reassigned to me.

EVIDENCE ON DISPUTED FACTS

Employee testified (transcript p. 23 – 69) that she was not able to serve her doctor with a subpoena but admitted that she never asked for a postponement until the time of the hearing. However, Employee said her doctor did testify in the previous hearing held by Judge Torres and conceded that during that hearing her doctor would not state that she was medically incapacitated for work during her AWOL; only that she was under his care during the relevant time period of April 11, 1995 through May 13, 1995.

To support her claim of medical incapacity during the relevant time period, Employee submitted several documents. Employee exhibit 1 is a Kaiser Permanente document which indicates that on May 11, 1995, Employee was treated for chronic sinusitis and bronchitis which was aggravated by the air environment outside the Blue Plains Treatment Plant. However, the box that would indicate that the patient is unable to work was not checked.

Employee exhibit 3 merely indicates that Employee was on non-pay status pending resolution of her claim for Workmen's Compensation. Employee admitted that her claim had been denied. Employee exhibit 4 documents the Workmen's Compensation Examiner's determination that Employee's injury or disability was not established.

Employee exhibit 5 is a May 11, 1995 medical form filled out by Employee's treating physician, Dr. James Shafter, wherein the doctor unequivocally indicates that Employee is fit to return to work.

Without objections, Agency submitted 2 documents. Agency exhibit 1 documents Employee's March 17, 1995 detail to the Bureau of Transportation and Construction Services located at 4901 Shepherd Parkway effective March 20, 1995. Agency exhibit 2 documents Employee's refusal to take the detail. In her March 17, 1995 memo, Employee cites her lack of transportation to the new work site, the inconvenience of getting to her grandson's babysitter, and the difficulty her son would have in getting to his place of employment.

Employee admitted that she never asked her treating doctor for any medical reports indicating that she was medically incapacitated for work during the relevant time period. When pressed as to why she never asked her doctor for a note even after she was notified that she was going to be removed from her job for AWOL, Employee would not give a definite answer. (transcript page 64.)

Employee admitted that OSHA tested the air inside the Shepard Park office building where she was detailed and found no hazard. Employee replied that her complaint was with the air outside the building. She conceded that her work was entirely indoors.

ANALYSIS AND CONCLUSIONS

Whether Agency's action was taken for cause.

According to D.C. Code Ann. § 1-617.1 (1992 repl.), which was in effect at the time this matter arose, adverse actions must be taken for cause. Twenty-two (22) "causes" are set forth at § 1-617.1(d) of the Code. Among the causes listed is "Inexcusable absence without leave." See § 1-617.1(d)(9) of the Code. In an adverse action, this Office's Rules and Regulations provide that the agency must prove its case by a preponderance of the evidence. "Preponderance" is defined as "that degree of relevant evidence which a 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).

In AWOL cases such as this one, "[t]his Office has consistently held that when an employee offers a legitimate excuse, such as illness, for being absent without leave, the absence is justified and therefore excusable." *Employee v. Agency*, OEA Matter No. 1601-0137-82, 32 D.C. Reg. 240 (1985); *Tolbert v. Department of Public Works*, OEA Matter No. 1601-0317-94 (July 13, 1995), ___ D.C. Reg. ___ (). Further, when an Employee's absence is excusable, the

absence "cannot serve as a basis for adverse action." *Richardson v. Department of Corrections*, OEA Matter No. 1601-0249-95 (April 14, 1997), _ D.C. Reg. ____ (); *Spruiel v. Department of Human Services*, OEA Matter No. 1601-0196-97 (February 1, 2001),), _ D.C. Reg. __ ().²

As per instructions of the D.C. Court of Appeals, the sole factual issue to be determined by the OEA is whether Employee was medically incapacitated from working during the relevant days she was charged AWOL (April 11, 1995 through May 13, 1995). The parties stipulated to the fact that Employee was absent without leave during the relevant time period. The question is whether the absence was excusable due to a medically condition that warranted Employee's absence from work.

Employee could never establish that her treating doctor, or any doctor, indicated that she had a medical complaint severe enough to excuse her absence from work. Indeed, all the exhibits she submitted point to the opposite finding, that she was medically cleared to go back to work. I also note that even in the prior hearing under Judge Torres where Employee's doctor did testify, the doctor did not say that her condition rendered her unable to work.

In light of all the evidence presented, I therefore find that Employee was not medically incapacitated from working during the period of AWOL that served as the basis for her removal. Thus, I conclude that Employee's absence was inexcusable and therefore can serve as a basis for adverse action.

Whether Agency's penalty was appropriate under the circumstances.

When assessing the appropriateness of a penalty, this Office 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 When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is not clearly an error of judgment."⁴

The sole recommended penalty for a first offense of inexcusable absence without leave for ten consecutive workdays or more is removal.⁵ Considering that Employee was inexcusably AWOL for almost a month, I find no error in Agency's choice of removal as the penalty. Accordingly, I conclude that Agency's action should be upheld.

² This is so "even in the absence of contemporary documentation" of an employee's legitimate illness. See *Spruiel, supra*.

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

⁴ *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

ORDER

It is hereby ORDERED that Agency's action removing Employee is UPHOLD.

FOR THE OFFICE:



JOSEPH E. LIM, ESQ.

Senior Administrative Judge