

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
TESHOME WONDAFRASH,)	OEA Matter No. 1601-0126-96
Employee)	
)	Date of Issuance: April 14, 2008
)	
)	
DEPARTMENT OF HUMAN SERVICES,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Mr. Teshome Wondafrash (“Employee”) worked as a Senior Sanitarian at the Department of Human Services (“Agency”). On May 16, 1996, Employee received a notice of removal from Agency. The notice provided that he would be removed from his position for inexcusable neglect of duty.¹ The cause of removal was later amended to inexcusable absence without leave.²

On June 7, 1996, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”). He claimed that he submitted, by certified mail, copies of

¹ *Petition for Appeal*, attachment #3 (June 7, 1996).

² *Agency’s Answer to Employee’s Petition for Appeal*, Tab #6 (February 28, 1997).

his doctors' reports to Agency outlining his health condition.³ Therefore, he should not have been charged with inexcusable absence without leave. Employee requested that the OEA Administrative Judge ("AJ") reinstate him to his position.⁴

In a pre-hearing statement, Agency argued that Employee was absent from work without authorization from December 21, 1995 through May 20, 1996.⁵ It provided that Employee did not follow proper procedures for requesting and obtaining approval for leave during this period of absence. Agency claimed that Employee failed to fill out the proper Form 1199 request for advance leave, and he also failed to submit medical documentation to show his incapacity to work. Consequently, his failure to obtain approval for the period in question adversely impacted the day-to-day operations of the office. Therefore, Agency stated that its managerial discretion to remove Employee was legitimately invoked and properly exercised.⁶

After several days of testimony and reviewing post-hearing briefs from both parties, the AJ issued his Initial Decision on May 1, 2002. The AJ determined that the issues to be addressed in this case were whether Agency had cause to remove Employee and whether the penalty of removal was appropriate. In addressing the issue of whether Agency's action was taken for cause, the AJ had to determine if Employee was incapacitated and unable to work from February 5, 1996 through May 20, 1996 due to illness, and if he properly informed Agency of such incapacity during the period in question.

³ Employee suffered from a heart condition and depression.

⁴ *Petition for Appeal*, attachment #3 (June 7, 1996).

⁵ Employee was officially placed on absence without leave status on February 5, 1996. Therefore, the official AWOL period in question is from February 5, 1996 through May 20, 1996.

⁶ *Agency's Pre-hearing Conference Statement*, p. 3-5 (September 16, 1998).

The AJ found that it was undisputed that Employee suffered from coronary artery disease since 1990 and continued to suffer during the AWOL period in question. He relied on testimony by Dr. Dunn, one of Employee's doctors, that his heart condition in and of itself was sufficient to render Employee incapacitated for duty. He also held that Employee's depression exacerbated his heart problems and the combination rendered him incapacitated for work.⁷

Moreover, the AJ found that Employee properly informed Agency of his incapacity. He determined that Employee proved that he mailed copies of every document he received from his treating physicians and his clinical psychologist to his supervisor, Mr. Spencer. Employee provided compelling testimony that corroborated logs showing certified letters that were mailed to Agency on January 19, 1996. Additionally, Employee provided documents to the AJ that referenced telephone calls where Employee's supervisor acknowledged receiving his mailings. Furthermore, the AJ found Employee's AFL-CIO representative's testimony to be credible. She outlined the assistance that she provided to Employee to deliver all of his medical documentation to Agency.⁸

Because Employee adequately proved that his absence from work was due to a legitimate excuse, the AJ ruled that Agency's action was not taken for cause. Employee's illness was justified and excused. Therefore, the penalty of removal was inappropriate because his absence could not serve as a basis for the adverse action. Consequently, the AJ reversed Agency's action of removal. He ordered that Employee

⁷ *Initial Decision*, p. 16 (May 1, 2002).

⁸ *Id.*, 16-18.

be returned to the position he occupied at the time of his removal with back pay and benefits within 30 days.⁹

On November 13, 2002, Employee submitted a motion for compliance arguing that Agency failed to comply with the terms of the Initial Decision. On January 3, 2003, Agency filed its response to the compliance motion. It stated that on December 30, 2002, Employee was reinstated to a Sanitarian position and that it was in the process of finalizing his back pay and benefits. By April 25, 2003, Agency submitted calculations to Employee regarding his back pay amount. Employee disagreed with the amount, and the AJ referred the matter to OEA's Mediation and Conciliation Program. On March 8, 2005, the AJ ruled that Employee was properly reinstated to his Sanitarian position and received all the back pay to which he was entitled. Therefore, the compliance matter was dismissed.¹⁰

Employee filed a Petition for Review on April 21, 2005. He stated that Agency reinstated him to a Sanitarian position eight months after the AJ issued his Initial Decision. Employee argued that the position had a newly established position description, and Agency failed to provide him with evidence to support the establishment of the position in which he was reinstated. He also claimed that the position was scheduled to be abolished due to a reduction-in-force ("RIF"). Consequently, there was no work available for the sanitarian position. It was Employee's belief that Agency should have assigned him to another DS-12 position. Finally, Employee claimed that Agency failed to forward deposits for back pay earned to the Social Security

⁹ *Id.*, 18-19.

¹⁰ *Addendum Decision on Compliance*, p. 2-3 (March 17, 2005).

Administration.¹¹

Agency filed a Response to Employee's Petition for Review. It claimed that the arguments made by Employee were frivolous and lacked merit. Agency complied with the AJ's order by reinstating Employee to a Sanitarian position. It asserted that the argument regarding his position number is a mere accounting or budgetary feature that is not related to his duties and responsibilities. Furthermore, Agency provided documentation to the AJ regarding Employee's social security contributions from 1996-2003. Therefore, it reasoned that it complied with the AJ's order, and Employee's Petition for Review should be denied.¹²

This Board agrees with Agency and cannot find a basis on which to grant Employee's Petition for Review. The AJ ordered Agency to do two things in his Initial Decision. It was to return Employee to the position he occupied at the time of his removal with back pay and benefits and to show compliance within thirty days from the date of the decision.

In his Petition for Review, Employee does not argue that he failed to receive back pay and benefits, so we will assume that this is not an outstanding issue. The AJ's Initial Decision required that Agency return Employee to the position he occupied at the time of his removal. He was a Sanitarian at the time of his termination, and Agency reinstated him to a Sanitarian position. Although, he claims that he should be appointed to another DS-12 position because the Sanitarian position is scheduled to be RIFed, the RIF had not yet occurred. Therefore, this is a moot issue. Moreover, if the RIF does to occur,

¹¹ *Petition for Review*, P. 2-3 (April 21, 2005).

¹² *Agency's Response to Employee's Petition for Review*, p. 2-3 (May 26, 2005).

Employee must follow the appeal procedures established by the D.C. Official Code and OEA Rules by filing a Petition for Appeal with OEA. The case must then be assigned to an AJ where a decision would be made on the merits of that RIF case.

Employee's argument that the position code is different from the one he previously held is not enough to render a decision that Agency has not complied with the Initial Decision. We believe, as Agency presented, that the position number is a mere budgetary feature that is not related to Employee's duties and responsibilities. Additionally, based on the documents submitted by Agency, there appears to be no outstanding issues regarding payments to the Social Security Administration. Agency has adequately proved to the AJ and this Board that it complied with the Initial Decision. Therefore, Employee's Petition for Review is denied.

ORDER

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

FOR THE BOARD:

Sherri Beatty-Arthur, Chair

Barbara D. Morgan

Richard F. Johns

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.