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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
TERNESSUS BEDNEY)	
Employee)	
)	OEA Matter No.: 1601-0053-07
v.)	
)	Date of Issuance: April 5, 2010
DEPARTMENT OF PUBLIC WORKS)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Ternessus Bedney (“Employee”) worked as a Parking Control Officer for the Department of Public Works (“Agency”). Employee’s job required her to work outside and issue tickets for parking violations. On June 7, 2005, Employee reported that while disconnecting the gas pump after fueling her work vehicle at the start of her tour-of-duty, the pump made an explosive noise near her ear. After this incident, Employee began to complain of ringing in her ear, burning in her throat, and problems with swallowing.

Thereafter, Employee began to be absent from work for various periods of time. Employee was absent from July 15, 2005 through August 26, 2005. She presented

disability certificates signed by her doctor who stated that Employee could return to work on August 29, 2005. Employee was absent from September 23, 2005 to September 28, 2005 and again from October 11, 2005 to October 14, 2005. She presented disability certificates signed by her doctor covering both of those periods as well. On October 24 2005, Employee was absent from work and presented a medical excuse for that day. Employee was absent again from October 26, 2005 through February 1, 2006 and presented a disability certificate and a medical excuse for that extended period of time. Employee's last disability certificate was dated January 31, 2006 and covered the time period from January 31, 2006 through February 21, 2006. The doctor provided on that particular certificate that Employee could return to work on February 22, 2006 and provided further that Employee was limited to working only in a clerical position with no lifting and no outside work.

Based on Employee's limitations as mentioned in the January 31, 2006 medical certificate, Agency detailed Employee to another division where she worked inside at a desk. Agency made this detail available to Employee even though, by the terms of the collective bargaining agreement, Agency was under no obligation to do so. The detail ended shortly after it began and Agency thereafter placed Employee on administrative leave.

By letter dated June 15, 2006, Agency notified Employee that she could return to work, seek other employment, ascertain her eligibility for disability benefits, or apply for payments from her pension plan. The letter concluded by stating that if Employee did nothing, Agency would initiate a removal action. In another letter to Employee dated July 14, 2006, Agency informed Employee that it had no light duty assignments available

and that she could use any sick or annual leave she may have accumulated. The letter also provided that her placement on administrative leave would end on July 21, 2006.

In either September or October 2006, Employee returned to work. When an agency official informed Employee that no light duty assignment was available and that she should begin her duties, Employee left the work place. Employee continued to be absent from work from October 2, 2006 to October 13, 2006 and again from October 16, 2006 to October 27, 2006. As a result, on November 9, 2006, Agency issued to Employee an advance notice of its proposal to remove her for the cause of being inexcusably absent without official leave (“AWOL”). The removal took effect February 2, 2007.

Employee then filed a Petition for Appeal with the Office of Employee Appeals (“OEA”). By Initial Decision issued August 20, 2008, the Administrative Judge concluded that “after carefully considering all of the evidence, documentary and testimonial, and all of the arguments presented by the parties, . . . Agency [had] met its burden of proof by a preponderance of the evidence that the removal should be sustained.”¹ Therefore, Agency’s decision was upheld.

Subsequently, Employee filed a Petition for Review.² As grounds for the petition, Employee claims that the Initial Decision is based on an erroneous interpretation of statute, regulation, or policy, is not based on substantial evidence, and did not address all

¹ *Initial Decision* at 11.

² Agency filed a motion to dismiss Employee’s petition on the grounds that it was filed after the 35-day filing period and thus was not subject to our jurisdiction. Employee countered that the petition was timely because three days could be added to the filing period to account for the mailing of the document. In *Stevens v. Quick, et al.*, 678 A.2d 28 (D.C. 1996) and in *Bagenstose v. D.C. Office of Employee Appeals*, 888 A.2d 1155 (D.C. 2005), the D.C. Court of Appeals stated that when there is a jurisdictional issue not easily determined and the merits of a claim can be easily resolved against the party seeking to invoke the court’s jurisdiction, the court may rule on the merits without reaching the jurisdictional question. Because the underlying claim in this case will not be resolved in Employee’s favor, we will invoke that principle in this appeal and not make a ruling on the jurisdictional issue.

issues of law and fact properly raised in the appeal. Specifically, Employee claims that she had a disability which placed limitations on her ability to perform the duties of her job and that Agency was aware of her disability and the resulting limitations. Furthermore, according to Employee, Agency was obligated to provide a reasonable accommodation by reassigning her to a vacant dispatch position for which Employee claimed to have been qualified. Employee goes on to provide in her petition that because Agency failed to accommodate her disability, she was excused from duty until such a time as when Agency provided a reasonable accommodation. For these reasons, Employee believes the Initial Decision should be overturned.

In cases when employees are removed on AWOL charges, this 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). The cases further hold that if an employee’s absence is excusable, the absences “cannot serve as a basis for adverse action.” *Richardson v. Dep’t of Corrections*, OEA Matter No. 1601-0196-97 (February 1, 2002), ___D.C. Reg.____ (). Thus, the issue to be decided in this case was whether Employee was medically incapacitated from October 2, 2006 to October 13, 2006 and again from October 16, 2006 to October 27, 2006.

As mentioned earlier, Employee provided Agency with several disability certificates and medical excuses for various periods of absences. The last disability certificate submitted by Employee provided that she could return to work on February 22, 2006 in a clerical position that did not involve lifting or working outside. Employee did not provide a disability certificate or medical excuse to cover the time period for which

she was charged with AWOL. In fact in the last certificate provided by Employee, the doctor makes no mention as to what the disabling condition is nor is there any mention of how severe the condition may have been. Moreover, when Employee was deposed during a proceeding on this issue, she stated that she was not ill during the AWOL period and therefore, did not have a doctor's disability slip for that period. Even though Employee argues that she was excused from duty until Agency provided a reasonable accommodation for a disability, the law referenced by Employee does not support that conclusion. Because there is no evidence that Employee was medically incapacitated during the AWOL period, those absences cannot be excused. For these reasons, we are compelled to uphold the Initial Decision and deny the Petition for Review.

ORDER

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

FOR THE BOARD:

Sherrí Beatty-Arthur, Chair

Barbara D. Morgan

Richard F. Johns

Hilary Cairns

Clarence Labor, Jr.

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.