THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BOBBY HAYES,	)	
Employee	)	OEA Matter No. 1601-0108-07
	)	
v.	)	Date of Issuance: May 11, 2009
	)	
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF YOUTH	)	
REHABILITAION SERVICES,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge
	)	

Arthur P. Rogers, Esq., Employee Representative
Gail Elkins, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 8, 2007 Bobby Hayes ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the District of Columbia Department of Youth Rehabilitation Services ("the Agency") adverse action of removing him from service. Employee's last position of record was Aftercare Case Manager, DS-0101-09. According to the Agency, Employee was removed from service based on a charge of Unsatisfactory Performance. The effective date of Employee's removal from service was July 9, 2007. I was assigned this matter on or around October 11, 2007. From there, I held a Prehearing conference during which I determined that an Evidentiary Hearing was necessary in order to adduce the salient facts of this matter. Accordingly, an Evidentiary Hearing was held on February 12, 2008. In accordance with my instructions, the parties have submitted their written closing arguments. The record is closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > 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 629.3 *id.* states:

> For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

ISSUES

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

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

Summary of Relevant Testimony

Agency's Case in Chief

Bobby Hayes ("Employee")

Employee testified in relevant part that: his last position of record with the Agency was as an Intensive Aftercare Worker. He had held said position since June 2003. Further, Employee has worked for various agencies within the District government for approximately 15 years. Employee's work related duties include providing supervision for juveniles that are committed to the Agency by the District of Columbia Superior Court. Typically, the youths assigned to Employee have committed various misdemeanors and felonies including auto theft and unauthorized use of a vehicle. *See generally*, Tr. at 15 – 16.

Agency's Exhibit No. 1C is a memorandum dated June 4, 2004 which informed Employee that he was being placed on leave restriction. According to this memorandum, Agency's reason for imposing a leave restriction on Employee stemmed from five separate occurrences where it was alleged that Employee did not serve his entire tour of duty. Employee opted not to contest this leave restriction even though he disagreed with the allegations which formed the basis for the restriction. *See generally*, Tr. at 24 -25. Employee also alleged that on occasion, other colleagues followed a similar practice of

leaving early and suffered no ill repercussions. *See generally*, Tr. at 62 – 63. Employee could not recall whether or not he left early on the occasions alleged within Agency Exhibit No. 1C. *See generally*, Tr. at 62 – 64.

Employee denied seeing Agency's Exhibit No. 1D prior to his removal. It is a performance evaluation for Employee for the period of December 5, 2004 through March 31, 2005. According to this document, Employee's overall performance rating was unsatisfactory. I note that this document does not contain Employee's signature. *See generally*, Tr. at 25 – 26.

Employee's Exhibit No. 5 was introduced into evidence through Employee's testimony. It is a Notification of Charge of Absence Without Official Leave (AWOL) dated April 28, 2006. This document alleges that Employee was AWOL on March 27 and 28, 2006 for 8 hours apiece; April 24, 2006 for 8 hours; and March 29, 2006 for 4 hours. This notice was presented to Employee under authority from his then current supervisor Oluyemisi Odunjo ("Odunjo"). Employee noted that Odonjo levied most of these charges a few weeks after they allegedly occurred. He further noted that on March 27, 2006 he was late coming into work because he had to take care of his children. Further, after he arrived at work, he had Maria Mullins (acting supervisor in Odunjo's absence) sign his leave slip. On March 28, 2006 Employee alleges that he was at work for his full tour of duty and that he had a client meeting at 10:30 for which he was present for. On March 29, 2006 Employee explained that he was at a doctor's appointment and that he gave a leave slip to Maria Mullins ("Mullins"). Likewise on April 29, 2006 Employee allegedly was at another doctor's appointment. Employee presented Odunjo with a doctor's note in order to substantiate his claim that he was at a doctor's appointment. Employee then revealed that he suffers from Type II Diabetes. Employee offers this in way of explaining his frequent absences from work which is, in part, the basis for the instant matter. *See generally*, Tr. at 70 – 74. He also admitted that he did not share the existence of this ailment because he felt that it was "personal." *See*, Tr. at 73 – 74. I note that Employee did not proffer any of these purported doctor's note to the undersigned during the pendency of this matter.

Employee alleged that Odunjo told him on or around April 2007 that he "might want to start looking for another job." Tr. at 76. Further, Employee received a letter of warning after he filed an Equal Employment Opportunity Commission ("EEOC") complaint against the Agency. This letter of warning was received into the record as Employee's Exhibit No. 7. Employee noted that he received this letter on or around December 2006. Employee also asserted that he did not enjoy a collegial relationship with Odunjo. The relationship had degraded to the point that Odunjo refused to converse with Employee. *See generally*, Tr. at 74 and 81 – 84. Employee noted that he was removed from service after he filed said EEOC complaint against the Agency. *See*, Tr. at 86 – 87.

Oluyemisi Odunjo ("Odunjo")

Odunjo testified in relevant part that: she became Employee's supervisor in

December 2004. Odunjo has worked for the District Government since October 1986 and she currently holds the position of Correctional Program Officer with the Agency. Odunjo stated that Case Managers (like Employee) are responsible for supervising delinquent youth that are committed to the Agency's care through the Court system. Part of the supervision Case Managers are expected to provide include: conducting home visits, developing an individual service plan of the youths under their charge, and maintaining 'face to face' contact in the communities in which the youths reside. *See generally*, Tr. at 111 – 112. According to Odunjo, Case Managers are required to prepare written court reports of their caseloads. The typically caseload for a case manager is approximately 25 – 30 youths.

Odunjo had the opportunity to rate Employee's performance through three ratings period. During each rating period, she rated the Employee's performance as unsatisfactory. Some of the reasons that Odunjo gave to substantiate these ratings were:

> 1. After carefully reviewing the service plans that Employee created for each youth under his care, Odunjo noted that Employee's service plans were not specifically tailored to each youth. Each youth has different needs therefore Employee should have a unique individualized service plan for each youth under his care per Agency procedure. *See generally*, Tr. at 113 – 114.
>
> 2. Employee did not submit his court reports in a timely manner. Further, when he did submit said reports, they contained grammatical and punctuation errors. *See generally*, Tr. at 114 – 115.
>
> 3. Employee's had a poor attendance record. Further, Employee would circumvent established procedures for taking leave including not contacting his immediate supervisor (Odunjo) and neglecting to submit leave slips in a timely manner. *See generally*, Tr. at 115. Because of Employee's attendance problems he was put on leave restriction.

Odunjo asserted that she tried to work with Employee on number of occasions in an attempt to rehabilitate his work habits. *See generally*, Tr. at 119 and 142. Odunjo felt that one of the ways that she could help the Employee rehabilitate himself would be to reduce his workload. Odunjo felt that Employee was not receptive to her efforts to reduce his case load. She further alleged that Employee never approached her personally requesting that his work load be increased. However, Odunjo further asserted that if Employee had asked for an increase she would have denied his request. *See generally*, Tr. at 132 – 135.

Employee's failure to follow proper procedure in requesting leave resulted in him being place on leave restriction on June 4, 2004, as evinced by Agency Exhibit No. 1C. Employee's abuse of leave resulted in Odunjo sending an email to Employee on

December 20, 2004, reminding Employee of the proper procedure for requesting leave. *See,* Agency Exhibit No. 2B. Over time, Employee's work related performance continued to decline resulting in, *inter alia*, Odunjo issuing a letter of warning to Employee informing him that his job performance failed to meet the minimum requirements of his position. *See,* Agency Exhibit No. 2F.

Odunjo denied that any of her actions against Employee's interests were motivated by his filing an EEOC complaint against the Agency. *See*, Tr. at 136 – 137. In fact she denied even knowing that an EEOC complaint had been filed by Employee. In Odunjo's opinion, Employee had problems following Agency policy with regard to case management and case closure. In response, Odunjo issued a letter on November 14, 2006 outlining proper procedures relative to closing cases within the ambit of Employee's work related duties. This letter was introduced into evidence as Agency Exhibit No. 3D. Other documents were introduced into evidence through Odunjo's testimony including Agency Exhibit Nos. 2F3E, 3F, 3G, 3H, 3I, 3J, and 3K; which in the collective evinced several (seemingly failed) attempts by the Agency to notify Employee, in writing, of where his work related performance was lacking. *See generally*, Tr. at 146 – 159.

Randall Moore ("Moore")

Moore testified in relevant part that: at the time of the evidentiary hearing, he was employed by the Agency as Program manager, Judicial Processes under the Department of Rehabilitation Services. Moore has been employed by the Agency and its predecessors since 1974. *See*, Tr. at 184. It was he who ultimately proposed that Employee be removed from service. *See,* Tr. at 184.

According to Moore, youths under the care of the Agency are normally grouped into one of three tiers. Tier One youth have committed violent crimes. Tier Two youth have committed non-violent offenses but usual those offenses were felonies. Tier Three youth are first time offenders that have demonstrated very low risk. The bulk of the youth assigned to Employee fell within Tier One. *See,* Tr. at 186. Because of the classification of these youths, it is imperative that the case managers assigned to these youth "perform their jobs in a stellar manner." Tr. at 187. The following excerpt from the transcript succinctly states the reasoning behind Moore making the decision to remove Employee:

> Q: You proposed [Employee's] removal?
>
> A: Yes.
>
> Q: And what was the reason that you did that?
>
> A: Well, over time I really thought that he would improve and there was one specific case that an anguished parent called me and expressed real concerns about putting several calls to [Employee], pleading for his assistance. He felt that his son's behavior was

> deteriorating and by the time we could get an opportunity to develop an intervention strategy, he picked up new offenses and was subsequently locked up.
>
> The father explained to me that he really felt that if there had been stronger intervention, that there would be no need to lock his son up.
>
> I discussed the case with [Employee] and he did not feel, in his opinion, that this young person was as troubled as the record indicated. And I think at that point there was an epiphany.
>
> I just looked at that and I looked at the sort of history, the reduction in cases, the strategy that we have used, some of the discussions that I had had with him, and I realized that it wasn't going to take effect and we were going to have to make a decision. Tr. at 187 – 188.

Moore approved with Odunjo's various attempts at rehabilitating Employee's behavior. Of note, Moore related that he had informed Odunjo about Employee's EEOC complaint in or around January 2007. *See*, Tr. at 191 – 192. He was aware of Employee's attendance problems as well as the concerns that Odunjo had with managing Employee's personality. Further he had instructed all of the administrative assistants that "when [Employee] calls in, don't take the call. Direct it straight to my office so at least he goes into my voicemail or he talks to me or send it to his supervisor." Tr. at 195. Moore asserted that Employee's EEOC complaint was not considered when he proposed Employee's removal from service. *See*, Tr. at 196 and 204.

Employee's Case in Chief

Vanessa L. Jackson ("Jackson")

Jackson testified in relevant part that: in various capacities she has worked for the District government for 22 years. Currently, she works as a Program Monitor for the Agency. One of her primary duties is performing site visits at contracted shelter and group homes. Jackson knows Employee professionally in that they work for the same Agency and their paths would sometimes cross while in the performance of their respective duties. Before she became acquainted with Employee, Jackson would sometimes hear innuendo and conjecture around the Agency that Employee enjoyed a low case load. When she questioned Employee about his low case load he told her that he was not being assigned new cases. *See*, Tr. at 215 – 216.

Jackson was present when Employee received Employee's Exhibit No. 9, which was the notice that informed Employee that he was being placed on paid administrative leave pending the outcome of an administrative review regarding Employee's proposed removal. See, Tr. at 217 – 218.

Findings of Fact, Analysis and Conclusion

The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of Employee's appeal process with this Office. I utilized the opportunity presented the evidentiary hearing convened in the instant matter to examine and assess the poise, credibility, and demeanor of Employee, Odunjo, Moore, and Jackson. Generally speaking, I found the collective testimony of Odunjo and Moore to be more persuasive and credible than Employee's rendition of events, especially when it is juxtaposed with the voluminous amount of documentary evidence that was presented by the Agency in this matter.

As was stated previously, Employee was removed from service based upon a charge of unsatisfactory performance. According to Agency's 15 day advance notice of a proposal to remove Employee from service dated June 14, 2007, Agency defined unsatisfactory performance as "inefficiency, negligent or careless work performance and insubordination, failure or refusal to comply with written or direct orders by a superior." Agency, in an effort to buttress its decision to remove Employee from service proffered several documents which, in my estimation, tended to show, that Employee was given more than adequate opportunity to rehabilitate his job performance to a level that is commensurate with his position and Agency's expectations.

I find that the Agency proved by a preponderance of the evidence that Employee typically flouted Agency rules regarding the taking of leave. This is especially disconcerting given that Employee was explicitly placed and left on leave restriction for a good portion of the last few years he was in Agency's service. *See*, Agency Exhibits Nos. 1C, 2B, 2D, 2F, 3F, 3H, and 3I. To explain his taking of leave, Employee's proffered that his conduct was not any different from his fellow colleagues with respect to taking (or abusing) leave and his medical condition. Regardless of whether his colleagues abused leave is of no moment to the undersigned. Relative to the instant matter, I am only concerned with Employee's conduct, not that of his colleagues.

As for Employee's alleged medical condition, that may, under certain circumstances, grant him a reprieve from an allegation of leave abuse or AWOL. However, in those situations, more documentary evidence, typically in the form of doctor's notes, medical records, and/or testimony from a treating medical provider is needed. Further, Employee admitted that he did not share the existence of his medical condition with the Agency citing that said information was personal. *See*, Tr. at 73 – 74. In proceedings before the OEA, employees are generally under no obligation to share the minute details of their medical conditions with their employers. Generally, in the appeals where employees prevail, a paper trail verifying that said employee did in fact receive medical treatment and/or their fitness to perform their work related duties is usually present in the record. Employee has presented no documentary evidence to the OEA to substantiate that he required doctor's visits and/or was not cleared by his doctor to work on the dates and times that the Agency alleged that Employee was AWOL. I also take

note that Employee could not recall whether or not he left early from work on the occasions alleged within Agency Exhibit No. 1C. *See generally*, Tr. at 62 – 64.

Relative to Employee's work related performance issues, Odunjo and Moore testified collectively that they afforded Employee numerous opportunities to improve the efficiency and integrity of his work related duties, to no avail. To further assist Employee improvement, his caseload was lessened. Also, Employee was given several written notices which detailed Odunjo's and Moore's expectations relative to Employee's on the job performance. *See*, Tr. at 187 – 188. *See also,* Agency Exhibit Nos. 2F, 3E, 3F, 3G, 3H, 3I, 3J, and 3K; which in the collective evinced several (seemingly failed) attempts by the Agency to notify Employee, in writing, of where his work related performance was lacking. Employee presented no credible facts, circumstances, or argument that would reasonably tend to show that his numerous ratings of unsatisfactory performance were earned by anything but Employee's own lackluster performance.

I find that Agency has met its burden of proof in this matter. The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office. *See, Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), __ D.C. Reg. __ ( ); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994), __ D.C. Reg. __ ( ). Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

When an Agency's charge is upheld, this Office has held that it will leave the Agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. *See Stokes, supra*; *Hutchinson, supra*; *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (Feb.1, 1996), __ D.C. Reg. __ ( ); *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (Sept. 21, 1995), __ D.C. Reg. __ ( ). I conclude that, given the totality of the circumstances as enunciated in the instant decision, the Agency's action of removing Employee from service should be upheld.

ORDER

Based on the foregoing, it is ORDERED that the Agency's action of removing Employee from service is hereby UPHELD.

FOR THE OFFICE:

/s/
ERIC T. ROBINSON, Esq.
Administrative Judge