THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0035-17
DAVID DASILVA, Employee	
	Date of Issuance: November 13, 2017
v.	
	Arien P. Cannon, Esq.
D.C. DEPARTMENT OF MOTOR VEHICLES, Agency	Administrative Judge

David DaSilva, Employee, *Pro se*
Joseph Mokodean, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

David DaSilva ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on February 28, 2017, challenging the District of Columbia Department of Motor Vehicles' ("DMV" or "Agency") decision to remove him from his position, effective February 13, 2017. Agency filed its Answer, along with a Motion for Summary Disposition, on April 3, 2017.

A Prehearing Conference was convened in this matter on August 30, 2017. Agency's Motion for Summary Disposition was addressed at the Prehearing Conference. Based on the representations made by both parties, the undersigned afforded Employee the opportunity to respond to Agency's Motion in writing. Employee submitted his response on October 4, 2017. Agency submitted a sur-reply on October 11, 2017. Upon considerations of the filings submitted by both parties, I have determined that an evidentiary hearing is not warranted. The record is now closed.

JURISDICTION

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

ISSUE

Whether Agency is entitled to Summary Disposition; specifically, (1) whether Agency had cause to remove Employee for any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: Absence Without Official Leave ("AWOL") and Neglect of Duty, pursuant to DPM §§ 1603.3(f)(2) and (3), respectively; and (2) whether termination was appropriate under the circumstances.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Agency's Position

Agency asserts that over the past several years Employee struggled with attendance and repeatedly failed to adhere to attendance requirements. In the Advance Written Notice served on Employee in the instant action, Agency notes prior Absence Without Leave ("AWOL") actions taken against Employee. The prior actions include: an Admonition/Leave Restriction served on May 14, 2015, as a result of 69 AWOL hours; Final Notice of Reprimand served on July 18, 2015, as a result of 76 AWOL hours; Final Notice of Five (5) day Suspension served on March 19, 2016, as a result of 258 hours of AWOL; Final Notice of Fifteen (15) day Suspension served on July 5, 2016, as a result of 78 hours of AWOL; and a Final Notice of Decision on Thirty (30) day Suspension served on September 2, 2016, as a result of 24 hours of AWOL.

After serving his thirty (30) day suspension, Employee continued to struggle with being absent without leave. The instant action of removal stems from 38 hours of AWOL from October 6, 2016 to October 26, 2016.

Employee's Position

Employee asserts that his termination was unduly harsh and unreasonable based on 38 hours of AWOL, given that he had 12 years of service with Agency. Employee further asserts that despite seeking help for personal issues over the last couple of years, Agency continued to suspend him for absence without leave.

Discussion

Based on the documents of record, it seems that Employee's arguments assert that the Collective Bargaining Agreement ("CBA") with his Union was violated because Agency did not give the Union proper notice of his AWOL issues. In *Brown v. Watts*[1], the D.C. Court of Appeals held that OEA is not jurisdictionally barred from considering claims that an adverse action violated express terms of an applicable CBA. The Court explained that the Comprehensive Merit Personnel Act ("CMPA") gives this Office broad authority to decide and hear cases involving adverse actions, including "matters covered under [D.C. Code § 1-616.52(d)] that also falls within the coverage of a negotiated grievance procedure."

[1] 993 A.2d 529 (D.C. 2010).

Employee also seems to argue that Agency did not properly consider his mental health conditions when electing to terminate him based on the latest incident surrounding 38 hours of AWOL.[2] In Employee's Petition for Appeal form, he submits a letter from his Union which suggests that Agency violated Employee's Americans with Disabilities Act ("ADA") rights. As previously held, OEA does not have jurisdiction over claims for failure to accommodate under the ADA.[3] This is not to invalidate Employee's claims that he was aggrieved of any ADA rights, rather a finding that OEA is not the appropriate forum to bring this claim. Thus, I find that OEA is not the proper jurisdiction to address Employee's ADA issues.

Summary Disposition

OEA Rule 615, 59 DCR 2129 (March 16, 2012) provides that:

> If, upon examination of the record in an appeal, it appears to the Administrative Judge that there are no material issues of fact, that a party is entitled to a decision as a matter of law, or that the appeal failed to state a claim upon which relief can be granted, the Administrative Judge may, after notifying the parties and giving them an opportunity to submit additional evidence or legal argument, render a summary disposition of the matter without further proceedings.

Employee does not dispute that he struggled with his attendance over the last couple of years. In fact, in a statement Employee provided to Agency, he states that he "can assure management that [his] attendance will improve and the issues of AWOL and suspensions will not happen again…" as he continues to seek counseling for personal and medical issues.[4]

Neglect of Duty

Employee raises the argument that his conduct does not meet the definition of Neglect of Duty as provided under DPM §§ 1603.3(f)(2) and (3) (August 27, 2012)[5], which provides that a charge for Neglect of Duty includes: Failure to follow instructions or observe precautions regarding safety; failure by a supervisor to investigate a complaint; failure to carry out assigned tasks; and careless or negligent work habits. I disagree with Employee's assertion that his conduct does not fall within the definition of Neglect of Duty. It is clear that Employee had the obligation to be in attendance at work unless he was out on some type of approved leave. The record indicates that Employee was out from work intermittently on approved leave under FMLA for personal reasons beginning in May 2012.[6] As noted above, Employee was disciplined on numerous occasions for AWOL, dating back to at least May 2015. It is clear that Employee struggled with attendance over the last few years of employment with Agency, which seems to

[2] *See* Employee response to Agency's Motion for Summary Disposition (October 4, 2017).
[3] *Njideka Odiana v. District of Columbia Child and Family Services*, OEA Matter No. 1601-0269-10 (November 27, 2013).
[4] *See* Agency's Answer, Tab 14 April 3, 2017).
[5] *See also* DPM § 1619.1(6)(c) (August 27, 2012).
[6] *See* Agency Answer, Tab 2, at 3.

be attributed to Employee's personal issues. Accordingly, I find that Agency had cause to take adverse action against Employee for Neglect of Duty by failing to report to working during his scheduled tour of duty for a total of 38 hours during the time period of October 6, 2016 through October 26, 2016.

AWOL

DPM §1268.1 provides that "[a]n absence from duty that was not authorized or approved, or for which a leave request has been denied, shall be charged on the leave record as absence without leave (AWOL). The AWOL action may be taken whether or not the employee has leave to his or her credit." Section 1268.4 further provides that if it is later determined that the absence was excusable, or that the employee was ill, the charge to AWOL *may* be changed to a charge against annual leave, compensatory time, sick leave, or leave without pay, as appropriate. In *Murchinson v D.C. Department of Public Works*[7], the D.C. Court of Appeals held that an employee must be incapacitated by their illness and unable to work during the AWOL period for it to be deemed a legitimate excuse for that cause of action. A charge of AWOL can be defeated by the submission of medical evidence of incapacitation.[8]

Here, it is apparent that Employee had ongoing struggles with attendance at work. The record indicates that Agency took several measures to assist Employee during his time of his personal struggles, including allowing him to take FMLA leave. The record, however, does not contain any evidence submitted by Employee indicating that he was medically incapacitated at any time from October 6, 2016 to October 26, 2016. Thus, I find that Agency was within its discretion to charge Employee with AWOL and Neglect of Duty for failing to meet his obligation of being in attendance at work during his scheduled tour of duty without being on any type of approved leave.

Employee's assertion that Agency violated the CBA by not notifying the Union of his leave issues is directly controverted by an e-mail correspondence between a Union representative and Agency, informing the Union of the leave issues that Employee was facing over a six (6) month period.[9] Even if Employee's assertion is true, it does not change the fact that Employee was AWOL for 38 hours from October 6, 2016 to October 26, 2016, without proper authorization. It is apparent that Employee's AWOL issues were longstanding and ongoing given his prior disciplinary record surrounding other AWOL actions.[10] Here, Employee's assertion that Agency violated the CBA does not have any bearing on whether Agency had cause to initiate its adverse action.[11] Assuming *arguendo* that Agency did violate the CBA, it does not negate Employee's action of being AWOL during the October 6, 2016, through October 26, 2016 time frame. Thus, based on the evidence of record, I further find that Agency had cause to take adverse action against Employee for AWOL and Agency's alleged violation of the CBA is outside of OEA's jurisdiction.

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[7] 813 A.2d 203 (D.C. 2002).
[8] *See Grubb v. Department of Interior*, 96 M.S.P.R. 377 (2004).
[9] *See* Agency Answer., Tab 3 (April 3, 2017)..
[10] *See David DaSilva v. D.C. Department of Motor Vehicles*, OEA Matter No. 1601-02980-10 (December 5, 2013).
[11] *See Id.*

Appropriateness of penalty

Agency has the primary discretion in selecting an appropriate penalty for Employee's conduct, not the undersigned.[12] This Office may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.[13] When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.[14]

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors, and whether there is a clear error of judgment by agency. The Table of Appropriate Penalties, as set forth in Chapter 16 § 1619.1(6)[15], of the District Personnel Manual, provides that the appropriate penalty for a first time offense for Absence Without Official Leave ranges from a reprimand to removal. The appropriate penalty for a first time offense of Neglect of Duty ranges from a reprimand to removal.[16] Additionally, I find that Agency considered relevant *Douglas* factors in its decision to remove Employee.[17] Accordingly, I find that the penalty imposed against Employee was appropriate and that Agency did not exceed the limits of reasonableness when invoking its managerial discretion. Because no material issues of facts have been presented, I find that Agency is entitled to a decision as a matter of law.

ORDER

It is hereby **ORDERED** that Agency's Motion for Summary Disposition is **GRANTED**; it is further **ORDERED** that Agency's removal of Employee is **UPHELD**.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge

[12] *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).
[13] *See Id.*
[14] *See Id.*
[15] August 27, 2012
[16] DPM § 1619.6(b) (August 27, 2012).
[17] *See* Agency Answer, Tab 11 (April 3, 2017).