

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Bonnie Hough)	OEA Matter No. 1601-0099-07
Employee)	
)	Date of Issuance: November 7, 2008
v.)	
)	Sheryl Sears, Esq.
Department of Unified)	Administrative Judge
Communications)	
Agency)	

Bonnie Hough, Employee, *Pro Se*
Ross Buchholz, Agency Representative

INITIAL DECISION

INTRODUCTION

Bonnie Hough (“Employee”) was a Telecommunications Equipment Operator (“911 Operator”) in the Department of Unified Communications (“Agency” or “OUC”). On June 5, 2007, Kenneth Mallory, 911 Operations Manager, charged Employee with abandoning her position from February 14, 2007 to June 5, 2007, and notified her of Agency’s proposal to remove her. He alleged that Employee failed to report to or contact Agency for at least thirty (30) consecutive days. Agency alleged that Employee failed to present any medical documentation or communicate with Agency officials during her absence. By notice dated June 21, 2007, Everett D. Lott, Chief of Staff, informed Employee of Agency’s final decision to terminate her immediately.

On July 20, 2007, Employee filed an appeal with the D.C. Office of Employee Appeals (“the Office”). Employee does not dispute that she was absent from duty as charged. However, she maintains that she was incapacitated by health concerns for which she presented proper medical documentation to Agency officials. Employee contends that her absence should have been excused and seeks a decision from this Office reversing the removal.

The parties convened for a full evidentiary hearing in this matter on April 11, 2008. This decision is based on the documentary and testimonial evidence presented at that proceeding and the parties’ written briefs of their positions.

JURISDICTION

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

ISSUES

- I. Whether Employee was inexcusably absent from duty.
 - A. Whether Employee was incapacitated for duty by injury.
 - B. Whether Employee properly communicated with Agency officials during her absence.
- II. If Employee's absence was inexcusable, whether the penalty of removal was appropriate.

BURDEN OF PROOF

OEA Rule 629.3, 46 D.C. Reg. 9317 (1999) provides that “[f]or appeals filed on or after October 21, 1998, the agency shall have the burden of proof, except for issues of jurisdiction.” In accordance with OEA Rule 629.1, *id.*, the applicable standard of proof is by a “preponderance of the evidence.” OEA Rule 629.1 defines a preponderance of the evidence as “[t]hat 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.” Agency has the burden of proving, by a preponderance of the evidence, that Employee's absence from duty was inexcusable and that the penalty of removal was reasonable for that offense.

FINDINGS OF FACT

Agency alleges the following: Shortly after Employee completed training and started working as a 911 Operator, she began a pattern of excessive absences from duty that impacted the staff's ability to deliver services efficiently. Agency accommodated Employee's request for changes in her work schedule when she presented medical documentation, but her attendance did not improve. Several attempts to contact Employee during her extended absence generated no response from her. Employee failed to comply with office protocol for reporting to officials and providing health certificates from her doctor. Therefore, she was summarily removed.

Employee responds as follows: She properly reported to agency officials during her absence by calling Ed Washington, Unit Supervisor; Mr. Robert Sutton, Section Supervisor; and Mr. Mallory, Operations Manager. She also spoke with Ms. West-Marshall of Human Resources. When Employee was told, by agency officials, to let them know when her doctor cleared her for return to duty, she understood that to mean that she did not need to take any further action to be excused from duty. Agency officials did not use the phone numbers she had on record to advise her of their official concerns

or even to inquire about her well-being. Nor did they take corrective or adverse action against her to alert her of any problem with her leave usage or absences. Thus, she had no reason to know that her absence would be deemed inexcusable. When Employee received notice of the proposed removal, she presented medical documentation to cover her absences.

As a procedural matter, Employee claims that she was not afforded an opportunity to respond to the proposed notice by appearing at a hearing at the Agency level before the removal action became effective. That alleged harmful error was cured by the *de novo* hearing before this Office. At the hearing, the following witnesses testified and were questioned by both parties: Robert Sutton, Assistant Operations Manager of the Office of Unified Communications (Section Supervisor); Kenneth Mallory, Operations Manager; Richelle West-Marshall, Human Resources Manager; Andrea Anderson, Human Resources Manager; Employee and Edward Washington, Unit Supervisor.

Robert Sutton, Assistant Operations Manager

Mr. Sutton works as a Watch Commander where he supervises the call takers, dispatchers and supervisors working in Section B of the OUC. Every employee at the agency is categorized as “essential. That means that, no matter what the weather or if other government employees are off, the staff must report, sometimes on short notice. When a large group of protestors is present or a police shooting occurs, a 911 Operator can be called into work. In preparation for her duties, Employee was hired and trained for eight to twelve weeks in phone etiquette, interviewing techniques and prioritizing calls for police service. She was also briefed about personnel matters and benefits such as pay and retirement. When Employee completed her training in June or July of 2005, she was assigned to work under Mr. Sutton’s supervision. Sutton recounted that he was on the panel when Employee interviewed for the position. He recalled her as “excited and energetic.” (*Transcript, Page 65, Line 11*).

Mr. Sutton noticed that Employee had “some attendance issues” as early as September or October of 2005 (*Transcript (Tr.), Page 36, Lines 5 – 6*). Employee called often for unscheduled leave which was noted on the “sick book” (*Tr., Page 39, Line 7*). She was absent several times during her first four or five months for periods longer than three days at a time. During counseling with Employee after a period of sick leave, Mr. Sutton discussed Agency’s policy for presenting medical documentation. He told Employee that, although it is not mandatory for an absence of less than three days, except when an employee is on leave restriction, it might be in her best interest to present it. At OUC, when an employee gets to five unscheduled absences, he or she is placed on leave restriction. He cautioned Employee to avoid this because, as a probationary employee, it could have severe consequences. He reminded her that, during that year, she would not have union representation to help her defend against any adverse personnel action if one was effected. Sutton also advised Employee to save her leave in case of a serious personal situation and talked with her about doing her share of the work. Sutton explained that when “the other employees notice that one of their co-workers is not

coming in and not pulling their weight, there tends to be tension between employees.”
(*Transcript, Page 38, Lines 2 – 6*).

Sutton testified about Employee’s entries in the sick book. He referenced notations made by supervisors who took calls from employees. All of the supervisors work at the same desk and an employee calling in can talk with any one of them. Sometimes, a dispatcher will help at the supervisors’ desk by taking calls. There is a space for the name of the employee who called in sick, their section, the date and times of the work shift that they missed or from which they left and the date upon which they returned to duty. Mr. Sutton pointed out the following entries for Employee:

DATE OF EMPLOYEE’S CALL	TIME OF EMPLOYEE’S CALL	HOURS OF DUTY COVERED	SUPERVISOR MAKING NOTATION	DATE OF RETURN TO DUTY	NOTES
April 22, 2006	2300 hours (11:00)	12 hour shift	Barbara Hammett	No entry.	Employee attempted return on April 23 but was not able.
May 31, 2006	1600 hours (8:00)	12 hour shift (0600 to 1800)	Ms. Ribbon	No entry.	Employee left at 0400, 2 hours before end of shift.
June 10, 2006	1502 hours (3:02)		Signature illegible	No entry.	
June 24, 2006	1411 hours (2:11)		Ms. Pierce	June 26, 2006	Isabel Faizi notes that Employee submitted a doctor’s note upon return.
July 3, 2006	1641 hours (4:41)	12 hour shift	Ms. Ribbon	September 19, 2006, 1528 hours	
September 28, 2006	0444 hours (4:44)	12 hour shift	Calvin Williams noted first call.	No entry.	

			Joanna Hall Miller noted second call later same day.		
September 29, 2006	1800 hours (6:00)			Return date illegible.	
October 10, 2006	0621 hours (6:21)		Ms. Elma McCoy	November 17, 2006.	
November 20, 2006	1351 hours (1:51)		Elma McCoy	No entry.	

When they discussed his concerns about her attendance, she said, “I’m going to get my attendance together, I’m going to get myself together.” (Transcript, Page 64, Lines 6-8).” Employee explained that she’d been involved in a “scuffle” with her boyfriend. (Transcript, Page 65, Lines 20-21). Sutton promised to work with her on attendance. One evening, he excused her from duty even though she had no leave so that she could move her things out of her boyfriend’s apartment. Later she moved back in. Her living situation and attendance continued to be problematic.

In the Summer of 2006, Employee came to work with a winter scarf around her neck. He called her into his office where she showed him scratches on her neck. She said that her companion had grabbed her by the neck, choking and scratching her. In June and August of 2006, she began taking off sick for longer periods of time. Employee was sometimes absent for as many as fifteen (15) or thirty (30) days leaving Sutton short-staffed. He reported immediately to Human Resources when Employee was out for longer than three days and, in about December 2006, he referred her to Richelle West, the Human Resources Supervisor.

Employee presented a note from her doctor recommending that she work eight hour tours of duty so that she would not have to sit for any longer due to a back problem. With the approval of the Office of Human Resources, Mr. Sutton accommodated Employee’s request. Her new hours were 0700 to 1500 hours (7:00 – 3:00). She was also permitted a break every hour to walk.

Employee took off again. When she returned, she presented another doctor’s note stating that she should not work nights due to her medication. Sutton changed her shift again to 1500 hours to 2300 hours (3:00 – 11:00). Employee worked 8 hour tours of duty 5 days a week with Tuesdays and Wednesdays off. When Employee started missing work again, he carried her as absent without leave (AWOL). However, Ms. West explained to him that, if Employee’s absence was noted in the sick book, Agency would have to charge her absence to leave without pay (LWOP) rather than AWOL.

In spite of her attendance record, Sutton kept her on staff through the end of her probationary period. He didn’t get too many complaints on her work. In addition, at the

same time, the separate functions of the MPD and the Fire Department were combined into the OUC. During that transition, some personnel operations changed. New processes for effecting an adverse action were put in place. He initiated a leave restriction for Ms. Hough, but it was not finalized because, according to the Office of Human Resources, he had used the wrong form. He decided to wait until the new personnel processes were solidified to begin progressive disciplinary action against Employee.

On cross examination, Sutton acknowledged that Employee did present some doctor's slips for her absences. However, he said that she did not always return on the date of release. He recalled Ms. West reporting to him that Employee some times came back 4 or 5- -even up to 17 days after release. He did not recall telling Employee not to come back until the doctor had cleared her. He told her that if her paperwork did not cover her for the complete absence, she was subject to being disciplined for the time not addressed by the doctor's excuse. On redirect, Sutton testified that he believed that some of the doctor's notes Employee presented were altered.

Kenneth Mallory, Operations Manager

Mr. Mallory maintained staffing for 911 dispatch and call handling and created policies and procedures for employees and managers. The training process prepares 911 Operators to work in a stressful environment, how to handle calls, when to come to work, how leave is accrued and when an employee is allowed to use it, how seniority is determined and how break times are incorporated into the work day. Each operator gets training for either police or fire calls. Universal call takers handle all calls including those calling for emergency medical service. After training, call takers are sent to the floor to get acclimated while working with the team of other call takers, dispatchers and supervisors. They are evaluated throughout their one year probationary period. Mallory presented an employee training manual (that Employee denied receiving) as well as her position description. There are an average of 150 calls per individual per shift. When an employee does not come to work, it created an added burden for those who are present.

Mallory recalled that a general order circulated that was effective on June 19, 2006. It established that employees seeking leave without pay or advance leave must request it in advance. It was posted on a screen visible to all employees for about thirty (30) days after that. (Employee interjected that she refused to accept the order and did not sign for it and that, when it was issued, her unit was not housed in a space with a big screen). The Deputy Director, Everett Lott, was authorized to grant the leave.

Mr. Mallory explained that he proposed Employee's removal because of her history of absenteeism. In making that decision, he consulted with Ms. Richelle West-Marshall of Human Resources. Shortly before issuing the notice of proposed removal, he tried to call Employee but reached a non-working phone number provided by her supervisor. He explained that when an employee is absent in excess of three days, the supervisor is supposed to try to make contact with the employee to find out if they intend to come back to work and ask them to send documentation to justify their absences or the need to be

out for a longer period of time. If the employee does not respond, the official contacts the human resources manager to advise that the employee has been out in excess of three days and then it is handled from that division from there on.

In proposing Employee's removal, Mallory charged her as follows:

Abandonment of the position and employee's failure to report for duty when scheduled and a continued unauthorized absence for ten consecutive days without communications to the Agency where reasonable inquiry by the Agency has failed to disclose information indicating that the employee intends to return to duty in a reasonable time.

Mr. Mallory said that he could have accepted documentation from Employee showing that she was absent for health reasons, if she had turned it in prior to the absences. In the case of unscheduled absences due to illness, he follows the doctor's directives such as when they adjusted Employee's schedule. In making a determination on such matters as these, he refers to the American Disabilities Act and Family Medical Leave Act. In a dire medical circumstance, the agency should be able to reach an employee through their emergency contact.

Richelle West-Marshall, Human Resources Manager

Ms. West-Marshall was employed, from October 1, 2004 through about June 1, 2007, as the Human Resources Manager. She recalled, with some uncertainty, that Employee may have brought a medical certification in for a period prior to September 28, 2006, saying that she had been out and unable to return to work for a period of time. She recalled receiving a letter from Unity Health Care stating that Employee was seen on September 29, 2006. The letter was accompanied by a certificate of readiness indicating that Employee could return to duty without restriction. She also participated in the process by which Employee was granted accommodation for her health concerns. On October 11, 2006, pursuant to the Americans with Disabilities Act, she sent an inquiry to Employee's doctor along with Employee's position description for his review.

In a letter dated October 26, 2006, West-Marshall assigned Employee an eight hour shift, effective November 2, 2006, with Tuesday and Wednesday as her days off. Employee was directed to report to Ms. Barbara Stays, a watch commander on OUC's operations floor. In accordance with routine office procedure, the letter would have been sent, by her staff assistant, Devon Williams, to Employee (one copy certified mail and the other regular). Letters are sent to employees at their most recent address of record in the PeopleSoft personnel system. Employees are responsible for updating their contact information including address, telephone number, marital status, etc.

Ms. West-Marshall did not have any direct knowledge of whether Employee reported in a timely fashion pursuant to the letter. However, when Employee came in to

see Ms. West-Marshall in person on November 6, 2006, she told her that she never received the letter. On that day, she presented Employee with the letter and noted her initials on it. West-Marshall referred to the time and attendance payroll printout indicating that Employee did not report for work until on or around November 17, 2006. She tried to call her about two or three times with the telephone number of record, which was the telephone number in the HR system, in the PeopleSoft system. She vaguely remembered the phone being disconnected.

She found it unusual that, although Employee's doctor's certificate indicated that she had severe back problems, Employee came to the office in stilettos with three or four inch heels. She also found inconsistencies in the health certificates. She noted that Employee's certificates from Unity Health Care dated December 21, 2006; January 5, 2007; and February 23, 2007, did not have the customary "Unity Healthcare" stamp.

On cross-examination, the witness was asked whether she remember talking with employee on the telephone twice during her absence. She said that she did not.

Andrea Anderson, Human Resources Manager

Ms. Anderson testified in place of Everett Lott, the deciding official, about the documents generated in the process of effecting the adverse action. Ms. Anderson followed Ms. West-Marshall as the Human Resources Manager. Through Anderson, Agency introduced medical records for Employee that were produced by Unity Health Care for the period from February 1, 2007, through May 31, 2007.

Bonnie Hough, 911 Operator, Employee

Employee testified that she worked from 2004 until 2006 before her problems with leave started. She was in an abusive relationship and suffering from scoliosis. She acknowledged that Agency accommodated her need for an eight-hour shift in November of 2006. In December, she was assaulted by her partner and suffered a gash in her head and fractured ribs. As a result, she suffered physically and emotionally. When she first called after this, Mr. Ed (Washington) put her on the (sick) book. She did not tell him why she was absent because she feared that he would reveal it to others. She got a slip from her doctor to cover every absence and talked with Mr. Washington and Ms. West twice each. She stopped bringing slips in to the office when Mr. Sutton told her that she could not be on the premises while out sick. He told her not to come back to work until she was cleared for duty. When Agency initiated adverse action, her doctor was about to release her for duty.

Employee acknowledged that it was Agency policy for an employee to call in when absent due to illness and to present medical certification for absences longer than three days. Employee presented medical certificates that cover December 21 - 27, 2006; January 5 - 7, January 26 - 30, February 8 - 12, 2007, February 23 - 26 and March 9 - 13, 2007. She explained that she did not consistently present that documentation because she thought it would be alright to bring it all in, once she was cleared for duty. She also

thought that if a certificate covered a specific period of absence, her next period of absence would be excused by the next note even if it did not specify all of the dates in between.

For example, Employee presented a certificate for February 8 through the 12. However, Employee acknowledged that she did not provide a certificate for the period from February 14 to February 22, 2007, which falls during the time she was charged with AWOL. Employee explained that, because her next appointment was on February 23, 2007, she was not able to provide documentation for the period between February 12 and 23. Employee said that she had previously been allowed to return to work after an absence by presenting documentation that only covered part of the period she was out.

Agency questioned the authenticity of the certificate that says she was seen on February 23rd by noting that her medical records do not show a doctor's visit on the 23rd of February. Agency also highlighted a March 9, 2007, doctor's note that indicates "possible malingering" by Employee and the statement that her rib fracture should be healed by now. Her back pain, however, was noted along with a referral for physical therapy.

Edward Washington, Assistant Watch Commander

Mr. Washington testified that, in about November of 2006, when he assumed his position, he became Employee's immediate supervisor. By that time, her leave situation was in the hands of Mr. Sutton, his supervisor, and the human resources office pursuant to the established policy requiring referral of any employee absent for longer than three days. He referred the matter, by email. And after that, he was guided by their instructions. This procedure keeps him from getting bogged down with managing the time and attendance of the 53 employees under his supervision. He did remember talking with Employee's mother in January or February, 2007, in an effort to contact the employee. The mother advised that Employee was in the hospital and that she would be calling back to give further information.

ANALYSIS AND CONCLUSIONS

Whether Employee was inexcusably absent from duty.

There is no dispute that Employee was injured as the result of an assault by her boyfriend. Her medical certificates and records support this claim. Employee admits that she was absent from duty as charged. Agency has not disputed that, for some periods of time, Employee was incapacitated for duty. In fact, Agency accommodated, twice, adjustments in her work schedule to allow her to continue employment and follow her doctor's instructions.

Employee did not, however, follow Agency's policy requiring that she present documentation for the entire time of the absence pursuant to which Agency effected her removal. Agency charged Employee with absence from February 14, 2007, to June 5,

2007. Employee only presented medical certificates for February 8 - 12, February 23 – 26 and March 9 – 13, 2007. Employee's explanations for her failure to provide other certificates fail in the face of the evidence.

Employee claims that she was told that she did not need to bring them in until she was ready to return to work. This contradicts the weight of testimonial evidence indicating that, at agency, the policy is for an employee who is absent for more than three days to present documentation covering the entire period of absence. It is not logical that agency officials would tolerate the absence of an employee for an indefinite period of time with no reporting requirement.

Employee also reasons that she should be excused from presenting a certificate for any period during which she did not have a doctor's visit scheduled. However, the timing of her doctor's visits does not excuse Employee from any reporting requirement. Proper documentation from her doctors would have noted, in advance, that Employee would be absent for some reasonable time flowing from an injury or medical or provide an *ex post facto* explanation after such an absence. It was Employee's responsibility to get that documentation.

Employee, unfortunately, combined bad luck with bad judgement. While it is understandable that she was physically and emotionally traumatized, she had a responsibility to request leave for her periods of absence along with the proper medical documentation. It was not the responsibility of Agency officials to award her leave as a gift or to seek her out continually to see that she followed the procedures for requesting it.

Employee testified that she thought that, if there was a problem with her absence, someone would call her and tell her. There is some conflict in the evidence as to whether Agency officials called her at home. She says that they did not. However, Mr. Washington testified credibly that he talked with her mother. And Employee testified credibly that she talked with Ms. West-Marshall of Human Resources and Mr. Washington, her supervisor. However, neither Mr. Washington's enquiry of her mother nor her phone calls to Agency officials, excuse Employee from the requirement to properly request leave.

Employee's testimony seemed based in the belief that, for as long as she was suffering with a medical malady, her level of professional responsibility was diminished. And had she been incapacitated by the malady, it might have been. However, Employee was capable of going to the doctor, getting written certifications of absence due to health reasons and presenting them to Agency officials. Only her errant belief that Agency officials were responsible for assuring that she complied with established procedures kept her from doing so. And that is no excuse. It is the finding of this Judge that Employee was inexcusably absent from duty from February 14, 2007, to June 5, 2007.

“Cause” is defined in DC Government Personnel Regulations, Section 1603.3 (Chapter 16, Part I), *inter alia* as . . . *unauthorized absence*.” (Emphasis added). Clearly,

Employee's extended absences were unauthorized. Agency has demonstrated legal cause for the adverse action that is the subject of this appeal.

Whether the penalty of removal was appropriate.

The role of this Office, when reviewing the penalty imposed by an agency is to ensure that "managerial authority has been legitimately invoked and properly exercised." See *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (DC 1985), and *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915 (1985). Only in the case of an abuse of that discretion would modification or reversal of an agency imposed penalty be warranted. The penalty must be based upon a consideration of relevant factors. See *Employee v. Agency*, OEA Matter No. 1601-0012-82, 30 D.C. Reg. 352 (1983). This Office will leave an agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment." *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915, 2916 (1985).

Employee was a 911 Operator with the responsibility for emergency calls. She was an "essential" employee. However, her record of attendance was poor and contributed to staffing problems. Even so, Agency allowed her to continue working through her probationary period and adjusted her work schedule twice in order to accommodate her medical needs. Employee suggests that Agency should have waited, indefinitely, for her return to duty and excuse her from the requirement to fully document her absences. In fact, after Employee first absented herself from duty for extended periods of time providing only intermittent medical documentation, Agency officials waited for a significant period of time before taking action.

The District Personnel Manual, at § 1619.1, The Table of Appropriate Penalties, recommends a penalty ranging from reprimand to removal for a first offense of this kind. Employee had every reasonable opportunity to either report for duty or follow procedures for seeking leave to be absent for health reasons. She did neither. Taking all of the circumstances into account, it is the conclusion of this Judge that Agency acted lawfully and reasonably in choosing removal as the penalty for her inexcusable absence without leave.

ORDER

It is hereby ORDERED that Employee's suspension is UPHELD.

FOR THE OFFICE:

SHERYL SEARS, ESQ.
ADMINISTRATIVE JUDGE