

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Diarra Walton)	OEA Matter No. 1601-0066-09
Employee)	
)	Date of Issuance: July 22, 2009
v.)	
)	Joseph E. Lim, Esq.
District Department of Transportation)	Senior Administrative Judge
Agency)	
_____)	

Clifford Lowery, Employee Representative
James E. Fisher, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On January 6, 2009, Employee filed a petition for appeal with this Office for his June 8, 2007, removal by the agency for inexcusable absence without leave. At the July 1, 2009, Prehearing Conference, both parties agreed that the only outstanding issue was the appropriateness of the penalty. After both parties submitted their legal briefs by the July 15, 2009, deadline, the record was officially closed.

JURISDICTION

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

ISSUE

Whether Agency's penalty was appropriate under the circumstances.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

1. Diarra Walton ("Employee") was employed with the Agency as a Tree Trimmer and Remover.

2. Employee held the position that is the subject of this action since February 2, 2006, and had been employed with the Agency for approximately seven (7) years.

3. As a Tree Trimmer and Remover, Employee's job duties include trimming, felling, and topping trees, rigging and loading trees, and stump grinding. Oftentimes, the need for tree trimming services arises in an emergency such as power blackouts due to downed tree limbs on electric wires. The position is subject to criminal background checks and/or driving record checks, as well as random drug and alcohol testing pursuant to DC Act 15-620.

4. Employee made a request for leave without pay in order to serve a sixty-day sentence for violating his probation.

5. In accordance with the applicable provisions of the Collective Bargaining Agreement (CBA) between Agency and Employee's union, the AFGE Local 1975, and the District Personnel Manual (DPM), management denied Employee's request. Pursuant to DPM § 1267, leave without pay is granted at the discretion of the Agency with the following exceptions: requests made pursuant to the Family Medical Leave Act; requests made by a disabled veteran who is entitled to leave without pay; or requests made by a reservist and member of the National Guard who is entitled to leave without pay if necessary to perform military duties. It is undisputed that Employee was not entitled to leave without pay.

6. From October 6, 2008, through November 19, 2008, Employee failed to report to work for thirty-three (33) consecutive days.

7. On November 25, 2008, Agency provided the Employee with fifteen (15) days advance written notice of its proposal to remove him from his position of Tree Trimmer and Remover, pursuant to Chapter 16 of the District Personnel Manual ("DPM") section 1608.1.

8. The letter stated that the proposed action was taken against Employee for cause pursuant to 16 DPM §§ 1603.2 and 1603.3. Specifically, the cause for the proposed action was based on Employee's absence without official leave (AWOL).

9. On December 9, 2008, Ms. Diana Jordan, the Hearing Officer in this matter, submitted a written report to the deciding official in which she concluded that she found "written records sufficient to render a decision based on a preponderance of the evidence" and recommended that the deciding official accept the Agency's proposal to remove the Employee from his position of Tree Trimmer and Remover.

10. On December 19, 2008, the Agency issued its Notice of Final Decision sustaining its proposal to remove Employee from his position as Tree Trimmer and Remover.

11. On January 6, 2009, Employee filed a Petition for Appeal with the District of Columbia Office of Employee Appeals.

Employee does not deny any of the charges, but he argues that the ultimate penalty of removal is too severe for his actions. Because of Employee's admission, there was never any question that the agency had met its burden of establishing cause for taking adverse action. However, Employee asserts that his penalty should be overturned and that he should be returned to work. The sole basis for his assertion is that he had requested leave in advance of his absence.

As noted above, the only remaining issue is whether the discipline imposed by the agency was an abuse of discretion. Any review by this Office of the agency decision selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an 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 simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."¹ When the charge is upheld, this Office has held that it will leave 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."²

Section 1603.3 of the DPM defines cause for disciplinary action as any on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, including unauthorized absence and absence without official leave. 16 DPM § 1603.3. Section 1268 of the DPM provides that an 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)." 12 DPM § 1268.

Here, the record reflects that Employee failed to report to work for thirty-three (33) consecutive days. A request for leave without pay was properly denied by the Agency since the Employee was not entitled to a grant of leave without pay under DPM § 1267. As such, Employee's absence was unauthorized and Employee was charged on the leave record as being absent without official leave.

Pursuant to DPM § 1619.1.6(a)-(b), Employee's unauthorized absence from his tour of duty for a period of thirty-three (33) days without official leave constitutes the requisite cause for termination of employment. That Employee made a request for leave in advance is not a mitigating factor. Accordingly, the Agency's decision to remove Employee from the position of Tree Trimmer and Remover was not an abuse of discretion and should be upheld.

ORDER

¹ *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

² *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

It is hereby ORDERED that the agency action removing the employee is UPHELD.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge