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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
FRANCES WADE,)	
Employee)	OEA Matter No. 1601-0067-15
)	
v.)	Date of Issuance: February 27, 2018
)	
DISTRICT OF COLUMBIA)	Monica Dohnji, Esq.
DEPARTMENT OF BEHAVIORAL HEALTH,)	Senior Administrative Judge
Agency)	
)	
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Theresa Romanosky, Esq., Employee's Representative		
Frank McDougald, Esq., Agency's Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On April 29, 2015, Frances Wade ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Behavioral Health's ("DBH" or "Agency") decision to terminate her from her position as a Consumer Affairs Liaison effective April 7, 2015. Employee was charged with violating the following: any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operation: (1) Neglect of Duty;¹ (2) Unauthorized absence;² and (3) Absent without Official Leave ("AWOL"). On June 1, 2015, Agency submitted its Answer to Employee's Petition for Appeal.

Following a failed mediation attempt, this matter was assigned to the undersigned Administrative Judge ("AJ") on September 16, 2015. Following an extension request from Employee, a Status Conference was held in this matter on December 1, 2015, wherein, the parties requested that the matter be held in abeyance, pending the outcome of Employee's appeal to the Compensation Review Board. On August 4, 2016, Employee requested that OEA resume the proceedings in this case and refer the case to mediation. On August 17, 2016, the undersigned issued an Order scheduling a Status Conference for September 28, 2016. Per

¹ Failure to carry out assigned tasks by failing to report for duty.

² Ten days or more.

Employee's request, the September 28, 2016 Status Conference was rescheduled for November 16, 2016. Both parties were present for the scheduled Status Conference. On November 30, 2016, I issued a Post-Status Conference Order requiring the parties to submit written briefs addressing the issues in this matter. Both parties submitted their respective briefs. Upon review of the submitted documents, the undersigned determined that an Evidentiary Hearing was required in this matter. On June 20, 2017, I issued an Order Convening a Prehearing Conference for August 16, 2017. Both parties were present for the Prehearing Conference. On August 21, 2017, I issued an Order scheduling an Evidentiary Hearing for October 30, 2017. While both parties were present for the Evidentiary Hearing, the undersigned was informed that both parties did not have any witnesses. The exhibits and stipulations made by the parties were read and entered into the record. Subsequently, on December 18, 2017, I issued an Order providing the parties with a schedule for submitting their written closing arguments. Both parties have submitted their written closing argument. The record is now closed.

JURISDICTION

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

ISSUES

- (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: (a) Unauthorized Absence; (b) Absence Without Official Leave ("AWOL") and (c) Neglect of Duty, pursuant to DPM §§ 1603.3(f)(1)-(3); and
- (2) Whether termination was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) 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 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

According to the record, Employee was hired as a Consumer Affairs Liaison with Agency.³ On May 23, 2013, Employee was hit by a patient while working at the hospital. As a result, Employee filed a claim with the Public Sector's Worker's Compensation program on August 29, 2013. Her claim was accepted and Employee was out of work on worker's compensation. On January 29, 2015, Employee was notified by the D.C. Office of Risk Management that effective August 14, 2014, Employee was released to return to work full duty by an independent doctor with no restrictions, thereby terminating her worker's compensation benefits as of January 29, 2015.

Thereafter, Agency issued a "Return to Work Notice" to Employee on February 2, 2015, informing Employee that since she was cleared to return to work by the D.C. Office of Risk Management, Employee was expected to return to work on February 9, 2015.⁴ Employee did not return to work. On February 18, 2015, Agency issued a "Return to Duty" letter to Employee informing Employee that since she had failed to return to work, she was placed on AWOL pay status effective February 9, 2015.⁵ Employee did not respond to the letter.

On March 1, 2015, Agency issues an Advance Written Notice of Proposed Removal charging Employee with violating District Personnel Manual ("DPM").⁶ Employee was charged with being AWOL from February 9, 2015 through February 27, 2015.⁷ Employee replied to the March 1, 2015, letter noting that she was suffering from Post-Traumatic Stress Disorder ("PTSD") as a result of the May 2013 assault at work.⁸ The Hearing Officer assigned to this matter issued their report and recommendation on March 25, 2015, upholding Agency's decision.⁹ On March 31, 2015, Agency issued its Final Decision Notice terminating Employee effective April 7, 2015.¹⁰

Agency's Position

Agency asserts that Employee failed to return to work on February 9, 2015, despite being advised to do so in a letter dated February 2, 2015. Agency also notes that despite being informed in the February 18, 2015, letter that she had been placed on AWOL and the accumulation of AWOL charges may lead to disciplinary action, Employee again failed to return to work. Agency argues that the Verification of Treatment forms presented by Employee failed to show that she was incapacitated during the period from February 9, 2015 through February 27, 2015.

³ Agency's Response to Petition for Appeal at Tab 14 (June 1, 2015).

⁴ *Id.* at Tab 5.

⁵ *Id.* at Tab 7.

⁶ *Id.* at Tab 8.

⁷ *Id.*

⁸ *Id.* at Tab 9.

⁹ *Id.* at Tab 11.

¹⁰ *Id.* at Tab 12.

Relying on *Murchison v. District of Columbia Department of Public Works*,¹¹ Agency argues that the medical evidence provided by Employee fails to support her contention because the evidence is inadequate and does not relate to the relevant time frame of February 9, 2015 through February 27, 2015. Agency argues that the Verification of Treatment form dated August 21, 2014 is irrelevant as it does not cover the AWOL period. Additionally, this form fails to specify the nature of Employee's illness. Agency also argues that the September 5, 2014, Verification of Treatment form is inadequate in that, it fails to explain the nature of Employee's illness and is also irrelevant as it is unrelated to the AWOL period of February 9 through February 27, 2015. In addition, Agency notes that the May 5, 2015, Verification of Treatment form does not state or otherwise indicate that Employee was incapacitated for the period of February 9 to February 27, 2015, therefore, it does not cover the relevant AWOL period. Agency additionally explains that the May 5, 2015, form was advising Employee not to return to work at the present time, and does not apply to February 2015; hence, no weight should be accorded this form.

Agency contends that Employee never filed a Workers' Compensation claim for PTSD. Agency also asserts that Employee did not follow the proper procedure for requesting leave. Agency explains that there is no evidence that Employee requested leave during the relevant period. In addition, Agency claims that Employee neglected her duties during the relevant period. Agency notes that Employee was AWOL from February 9 through February 27, 2015, as such; she did not fulfill the duties required of her as a Consumer Affairs Liaison. And such a failure clearly shows that Employee neglected her duties during the relevant period. Agency also states that Employee's admitted absences for the period of February 9 to February 27, 2015, constituted an unauthorized absence, and therefore the record of evidence shows that she abandoned her position.

With regards to penalty, Agency explains that the penalty for "Unauthorized absence: Ten (10) consecutive days or more constitutes abandonment" is removal, and the penalty for AWOL is reprimand to removal. Accordingly, Agency asserts that under the Table of Appropriate Penalties, the penalty imposed in this matter is appropriate.¹²

Employee's Position

Employee does not dispute Agency's assertion that she was out of work from February 9, 2015 through February 27, 2015. She, however, notes that her absence should be excused because she was suffering from Post-Traumatic Stress Disorder ("PTSD") as a result of the May 2013 assault at work. Employee argues that she was under continuous care of various physicians from 2013 through the relevant AWOL period. Consequently, her termination while she was ill was illegal. Employee asserts that she provided Agency with ample notice as well as documentation to excuse her absence from work during the AWOL period. Specifically, Employee explains that after being diagnosed on September 5, 2014, with PTSD by her psychiatrist, Dr. Faheem Moghal, her attorney, Mr. Andrew Hass, sent over Dr. Moghal's Verification of Treatment to Dr. Mary Campbell-Harris, Agency's Risk Manager and ADA

¹¹ 813 A.2d 203, 206 (D.C. 2002).

¹² Agency's Closing Argument (January 24, 2018).

Coordinator. Employee further explains that Mr. Hass sought to work with Dr. Campbell-Harris on an accommodation that would allow her to return to work.

Relying on *Butler v. District of Columbia Office of Aging*,¹³ Employee states that her absence for the period of February 9 through February 27, 2015, is excusable under DPM 1268.4 and *Butler*, as Agency was repeatedly notified that Employee was undergoing medical treatment directly related to the 2013 workplace assault. Employee also states that it provided Agency with Verification of Treatment via Ms. Carter on March 16, 2015, documenting that Employee had been receiving psychiatric care since July 1, 2013.

In addition, Employee argues that Agency knew of her medical condition and therefore, she did not fail to follow proper procedure for leave request and approval. Employee also asserts that she did not neglect her duties because her absence was excused under District law, and she timely presented Agency with documentation establishing that she was ill and receiving continuing care during the relevant period.¹⁴

1) Whether Employee's actions constituted cause for discipline

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Because the cause of action in this matter arose in 2015, the 2012 DPM will be used in determining if Agency had cause to discipline Employee.¹⁵ DPM § 1603.2 provides that disciplinary action against an employee may only be taken for cause. Under DPM §§1603.3(f)(1)–(3), the definition of “cause” includes: any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include: (1) unauthorized absence; (2) Absent without authorized leave (“AWOL”); and (3) Neglect of Duty. Here, Employee’s removal from her position at Agency was based upon a determination by Agency that Employee was absent from work without authorization for the period of February 9 – February 27, 2015.

Unauthorized Absence and Absent Without Authorized Leave (AWOL)

In the instant case, the undersigned must determine if the evidence that Employee was absent from work for ten (10) or more consecutive day is adequate to support Agency’s decision to terminate Employee. In such cases, “[t]his 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.”¹⁶ Additionally, if the employee’s absence is excusable, it “cannot serve as a basis for adverse action.”¹⁷ The relevant time period in this matter is February 9, 2015

¹³ OEA Matter No. 1601-0132-14. It should be noted that *Butler* was remanded by the OEA Board and is currently pending before the undersigned SAJ.

¹⁴ Employee’s Closing Argument (January 24, 2018).

¹⁵ The DPM was updated in February of 2016.

¹⁶ *Murchinson v. Department of Public Works*, OEA Matter No. 1601-0257-95R03 (October 4, 2005); citing *Employee v. Agency*, OEA Matter No. 1601-0137-82, 32 D.C. Reg. 240 (1985); *Tolbert v. Department of Public Works*, OEA Matter No. 1601-0317-94 (July 13, 1995).

¹⁷ *Murchison, supra*, citing *Richard v. Department of Corrections*, OEA Matter No. 1601-0249-95 (April 14, 1997); *Spruiel v. Department of Human Services*, OEA Matter No. 1601-0196-97 (February 1, 2001).

through February 27, 2015. Employee does not dispute that she was absent from work during this period. She has however provided several doctors' notes in justification for her illness. Employee further notes that Agency was aware of her condition as she provided Agency with several Verification of Treatment forms, stating that she was suffering from PTSD as a result of the May 2013 incident that occurred on the job.

Through the course of this appeal, Employee has provided several doctors' notes and/or Verification of Treatment forms filled by her treating physician, Doctor Faheem Moghal. Although these documents were completed either before or after the relevant timeframe of February 9, through February 27, 2015, they are helpful in determining if Employee had a legitimate reason for being absent from work from February 9, through February 27, 2015.

September 5, 2014, Visit Summary/Verification of Treatment

Doctor Moghal diagnosed Employee with PTSD and scheduled a follow up visit for around October 3, 2014. The Doctor noted in the September 5, 2014, Verification of Treatment form that "Ms. Frances Wade underwent a medical evaluation on 9/5/2014. Due to her persisting medical condition. Ms. Wade is ill and unable to return to work at this time."¹⁸

May 5, 2015 Verification of Treatment form

Doctor Moghal stated in this Verification of Treatment form that "Frances Wade has been under my psychiatric care since 7/1/2013. She sought treatment for anxiety due to being assaulted at work on 5/24/2013. Ms. Wade continues to have nightmares, flashbacks, hypervigilance, and insomnia related to the incident. Based on these symptoms, I have diagnosed Ms. Wade with Posttraumatic Stress Disorder (PTSD), and I am treating her accordingly with medication and counseling. At this time, I have advised Ms. Wade not to return to work."¹⁹

November 12, 2015 Verification of Treatment form

Doctor Moghal stated in this Verification of Treatment form that "Frances Wade has been under my psychiatric care since 7/1/2013. She sought treatment for anxiety due to being assaulted at work on 5/24/2013. Ms. Wade continues to have nightmares, flashbacks, hypervigilance, and insomnia related to the incident. Based on these symptoms, I have diagnosed Ms. Wade with Posttraumatic Stress Disorder (PTSD), and I am treating her accordingly with medication and counseling. At this time, I have advised Ms. Wade not to return to work."²⁰

According to the September 5, 2014, Verification of Treatment and Visit Summary provided by Doctor Moghal, Employee was suffering from PTSD, she was under the doctor's care, and she was advised not to return to work "at this time." Doctor Moghal also requested a follow up visit for around October 3, 2014. However, there is no evidence in the record to prove that Employee indeed visited Doctor Moghal in October. While I agree with Agency's argument that the individual Verification of Treat forms are outside of the relevant timeframe of February

¹⁸ Employee's Closing Argument, *supra*, at Exhibit C.

¹⁹ *Id.*

²⁰ *Id.*

9, through February 27, 2015, collectively, they provide an insight into Employee's illness. Doctor Moghal noted in all three (3) forms that Employee was unable to return to work due to her medical condition – PTSD. At no time from September 5, 2014, through November 12, 2015, did Doctor Moghal clear Employee to return to work. Consequently, it can be deduced that Employee was excused from work for the period of July 13, 2013, onwards, including the relevant time period of February 9, through February 27, 2015, due to an illness – PTSD. Agency was on notice of Employee's condition as early as September 5, 2014.

I disagree with Agency's argument that Doctor Moghal was speaking of the present when he noted in the Verification of Treatment forms that "at this time." The primary purpose of an evidentiary hearing is to assess witness credibility with respect to the actors that either viewed and/or in some fashion participated in the events that lead to an employee's removal. Agency had the opportunity to call Doctor Moghal to the stand to testify and clarify what he meant by "at this time" but it chose not to do so. Also, Agency failed to provide this Office with any evidence to contradict Doctor Moghal's assessment, diagnosis and treatment plan of Employee. Agency utterly failed in its burden to produce any witness to support its point of view or refute Employee's rendition of events. Agency has the burden of proof in this matter, and I find that it has not met that burden by a preponderance of the evidence.

As previously stated, at no time did Doctor Moghal release Employee to return to work from when he started treating her in 2013, up until she was terminated in 2015. He consistently noted that Employee was advised not to return to work. Relying on Doctor Moghal's professional experience, I conclude that, Employee's medical condition provided her with a legitimate excuse for being absent from work without leave.

There is sufficient evidence in the record to prove that Employee's mental condition was so debilitating that it prevented her from performing her duties during the relevant time frame. I find that, unlike in *Murchison*, here, the record shows that Employee and her psychiatrist, Dr. Moghal, submitted sufficient documentations to address the severity of her mental condition and the extent to which it was exacerbated by her work condition. The record shows that: (1) Employee was hurt on the job in May of 2013; (2) She started visiting Doctor Moghal in July of 2013; (3) she was diagnosed with PTSD in September of 2014; (4) the doctor prescribed medication for her condition; (5) her condition was a result of the on-duty incident of May 2013; (6) Employee had nightmares, flashbacks, hypervigilance and insomnia related to the 2013 assault at work; (7) The Doctor advised that she should not return to work; (8) Doctor Moghal never released Employee to return to work from the time he started treating Employee in 2013, up until 2015; (9) Employee notified Agency of her diagnosis in September of 2014;²¹ and (10) there is no evidence in the record to show that Agency made any changes to accommodate Employee following her diagnosis.

Based on the record and the foregoing, I find that Employee's absences from February 9 2015, through February 27, 2015, is excusable because of her illness, and she has provided sufficient documentation to establish a continued impairment that prevented her from carrying

²¹ There are multiple email exchanges between Employee's previous attorney Andrew Hass, and Mar Campbell-Harris, Agency's Risk Manager and American with Disabilities (ADA) Coordinator regarding Employee's health and her return to work status dating back to August 2014.

out her essential job functions. Accordingly, I further find that Agency has not met its burden of proof with regards to this cause of action; therefore, I conclude that, this cause of action should be overturned.

Furthermore, DPM § 1268.2 provides that “[a]n agency head is authorized to determine whether an employee should be carried as AWOL.” Additionally, DPM § 1268.4 highlights that, “[i]f 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.” Here, Employee was AWOL for the period of February 9 2015 through February 27, 2015. However, given the record, I find that Employee’s absence was justified by her mental illness; and therefore excusable. In accordance with DPM § 1268.4, Agency had the discretion to change the AWOL charge to Employee’s sick leave, annual leave, compensatory leave or leave without pay, once it was informed of Employee’s illness, yet, it chose to terminate, which is in violation of District of Columbia laws, rules and regulation.

Neglect of Duty

Because Employee’s absence for the period of February 9, 2015, through February 27, 2015, is excusable for health reasons, Agency cannot charge Employee with Neglect of Duty for the same time period. Accordingly, I find that Agency does not have cause to take adverse action against Employee for Neglect of Duty because of her failure to carry out assigned tasks by failing to report to work during the relevant timeframe.

2) Whether the penalty of removal is within the range allowed by law, rules, or regulations.

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).²² 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 (“TAP”); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency. In the instant case, I find that Agency has not met its burden of proof for the above-referenced charges, and as such, Agency cannot rely on these charges in disciplining Employee.

²² See also *Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

CONCLUSION

As noted above, I CONCLUDE that Agency did not meet its burden of proof in this matter. Considering as much, I further conclude that Employee was improperly terminated.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of separating Employee from service is **REVERSED**; and
2. Agency shall reinstate Employee to her last position of record; or a comparable position; and
3. Agency shall reimburse Employee all back-pay and benefits lost as a result of the separation; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Senior Administrative Judge