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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
KHALAF JOHNSON,	)	
Employee	)	OEA Matter No. 1601-0162-09
	)	
v.	)	Date of Issuance: October 14, 2010
	)	
DEPARTMENT OF HEALTH,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge

Brenda Zwack, Esq., Employee Representative
Andrea Comentale, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 26, 2009, Khalaf Johnson ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the Department of Health's ("DOH" or "the Agency") adverse action of removing him from service. Employee's last position of record with DOH was Pest Controller. Agency predicated Employee's removal action on charges of an on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operation, Absences Without Official Leave ("AWOL"). The effective date of his removal was March 9, 2009. I was assigned this matter on or around March 1, 2010. On March 1, 2010, I issued an Order requiring Employee to address whether the OEA may exercise jurisdiction over this matter due to the inordinate amount of time between his removal and when he filed his petition for appeal with the Office. After considering the Employee's response, I decided to convene a Status Conference ("SC") on April 13, 2010. However, Employee had just retained the services of Brenda Zwack, Esq., so I decided to continue the SC until April 22, 2010, via telephone. During the SC, several issues were discussed including: the jurisdiction of this Office, whether Agency had cause to remove Employee from service, and whether DOH committed harmful procedural error in effectuating Employee's removal. In order to fully understand both parties contentions, I ordered the parties to file legal briefs on the following issues:

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

After considering their responses, including Employee's Motion to Strike, which shall be discussed in further detail below, I convened another SC on July 1, 2010. During this SC, I inquired as to why Employee's counsel opted not to discuss the aforementioned issues as noted above and instead focused her argument solely on whether Employee received the proposed notice of removal and the subsequent final notice of removal at his address of record. She then indicated that this fact, if found in Employee's favor, was dispositive and that no other discussion of any other issues was necessary. She then asked that I make a ruling both on her Motion to Strike as well as render an Initial Decision in this matter. The record is now closed.

JURISDICTION

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

ISSUE

Whether Agency's action of separating Employee from service was done in accordance with all applicable laws, rules, or regulations.

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.

FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS

The following findings of facts, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of the Employee's appeal process with this Office.

Agency's Position

According to Employee's Advanced Written Notice of Proposed Removal dated January 29, 2009, Employee was charged with AWOL for approximately 16 days spanning from December 17, 2008 through January 16, 2009. This notice was addressed to Employee at 1719 27th Street SE, Apt. 202, Washington, DC 20020 ("27th Street"). The Amended Advanced Written Notice of Proposed Removal and the Final Notice of Proposed Removal were sent to the same address. In its brief, dated May 7, 2010, Agency contends that:

> Employee did not report to work for his scheduled tour of duty from December 17, 2008 through January 16, 2009. During this time, Employee was not on authorized or approved leave of any kind (i.e. annual, sick, or leave without pay). Therefore, by definition, Employee was in an absence without leave status for sixteen (16) days. *See* District Personnel Manual ("DPM"), Chapter 12, Part I, Sections 1268 and 1299 attached hereto as Exhibit 3. To date, Employee admits that he was not in a duty status during the period for which he was charged AWOL and has failed to provide any explanation that would excuse his absence. *See* Employee's Petition for Appeal and Brief in Support of OEA's Jurisdiction and Motion for Summary Reversal on the Pleadings.
>
> Agency Brief at 3.

Agency admits that it sent the Amended and Proposed Notice of Removal to the 27th Street address. Agency further argues in its June 4, 2010, Reply to Employee's Brief that the 27th Street address was the last known address of record with the District of Columbia Department of Corrections and the District of Columbia Superior Court. *See* Agency's Reply at 2. DOH further contends that Employee in fact received both notices sent to the 27th Street address. DOH argues that even if I decide that the notices were sent to the wrong address, that:

1. Agency had cause to institute the instant adverse action.

2. Agency properly exercised its managerial discretion when it removed Employee.

3. That Employee due process rights were not violated in that he has the opportunity, before the OEA, in a *de novo* proceeding, to challenge whether Agency had cause to remove him from service.

4. Employee admitted that he was not in duty status during the period of time in question and refuses to proffer any explanation for his absence.

Employee's Position

Employee insists that his address of record with DOH has always been 7 Adams Street, NW, Washington, DC 20001 ("Adams Street"). In his brief dated May 21, 2010, Employee

argues the following:

> The District of Columbia Court of Appeals recognizes and follows the Supreme Court's unequivocal ruling that "notice and a pretermination opportunity for a hearing were required to satisfy due process where an employee has a constitutionally protected property interest in employment." *Henderson v. District of Columbia*, 493 A.2d 982, 995-96 (D.C. 1985) (citing *Loudermill v. Cleveland Board of Education*, 470 U.S. 532 (1985))…
>
> Mr. Johnson's protected property interest is rooted in D.C. Code § 1-616.51, which guarantees employees of the District of Columbia Government the right to prior written notice of the grounds for any proposed disciplinary action and an opportunity to be heard before the action becomes effective. The United States Court of Appeals for the D.C. Circuit has held that the CMPA creates a protected property interest in the jobs of Career Service employees who may not be removed from their employment without receiving due process. *Thompson v. District of Columbia*, 530 F.3d 914, 918 (D.C. Cir. 2008). Similarly, the OEA itself has held that "employees in the Career Service are afforded due process rights in recognition that their employment is a property right…Prior written notice is required for any adverse action, and an opportunity to be heard within a reasonable time after any action is proposed." *Robin Hoey v. Metropolitan Police Department*, OEA Matter No. 1601-0074-07, 55 D.C. Reg. 3026 (Dec. 14, 2007) (citing D.C. Code § 1-616.52).
>
> Employee's Brief at 5 – 6.

The crux of Employee's argument is that, since DOH allegedly failed to mail the aforementioned notices to his proper address, which he contends is the aforementioned Adams Street address, I should reverse Agency's removal action against him. For various reasons that will be explained more fully *infra*, I disagree.

Discussion

Jurisdiction

Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA") modified certain sections of the Comprehensive Merit Personnel Act ("CMPA") pertaining to this Office. Of specific relevance to this matter is § 101(d) of OPRAA, which amended § 1-606.3(a) of the Code (§ 603(a) of the CMPA) in pertinent part as follows: "Any appeal [to this Office] shall be filed within 30 days of the effective date of the appealed agency action."

"The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 753, 756 (1975). "A statute that is

clear and unambiguous on its face is not open to construction or interpretation other than through its express language." *Caminetti v. United States*, 242 U.S. 470 (1916); *McLord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980); *Banks v. D.C. Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992), _ D.C. Reg. __ ( ). Further, "[t]he time limits for filing with administrative adjudicatory agencies, as with the courts, are mandatory and jurisdictional matters." *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991); *White v. D.C. Fire Department*, OEA Matter No. 1601-0149-91, *Opinion and Order on Petition for Review* (September 2, 1994), _ D.C. Reg. __ ( ).

As was stated previously, OPRAA "clearly and unambiguously" removed appeals filed more than 30 calendar days after the effective date of the action being appealed from the jurisdiction of this Office. "Further, the 30-day filing deadline is statutory and cannot be waived." *King v. Department of Human Services*, OEA Matter No. J-0187-99 (November 30, 1999), __ D.C. Reg. __ ( ). As noted above, Employee filed his petition for appeal on July 26, 2009. The effective date of his removal from service was March 9, 2009. This is well past the 30-day deadline discussed *supra*. However, Employee effectively argued that his appeal should be allowed to continue on its merits before the OEA due to the confusion related to whether he timely received both his proposed and advanced notice of removal at the proper address of record. After considering the record as a whole, I find that Employee's appeal should proceed on its merit in this matter.

Whether Agency's adverse action was taken for cause

Contrary to Employee's selective reading of various statutes and cases relative to this matter, a more circumspect inspection reveals that Employee's Constitutional due process rights in the instant matter were not violated. DC Official Code § 1-616.51 provides as follows:

> The District of Columbia government finds that a radical redesign of the adverse and corrective action system by replacing it with more positive approaches toward employee discipline is critical to achieving organizational effectiveness. To that end, the Mayor, the District of Columbia Board of Education, and the Board of Trustees of the University of the District of Columbia shall issue rules and regulations to establish a disciplinary system that includes:
>
> (1) A provision that disciplinary actions may only be taken for cause;
>
> (2) A definition of the causes for which a disciplinary action may be taken;
>
> (3) Prior written notice of the grounds on which the action is proposed to be taken;
>
> (4) Except as provided in paragraph (5) of this section, a written opportunity to be heard before the action becomes effective, unless the

> agency head finds that taking action prior to the exercise of such opportunity is necessary to protect the integrity of government operations, in which case an opportunity to be heard shall be afforded within a reasonable time after the action becomes effective; and
>
> (5) An opportunity to be heard within a reasonable time after the action becomes effective when the agency head finds that taking action is necessary because the employee's conduct threatens the integrity of government operations; constitutes an immediate hazard to the agency, to other District employees, or to the employee; or is detrimental to the public health, safety or welfare.

"Property interests are not created by the Constitution. Instead, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *McManus v. District of Columbia*, 530 F.Supp2d 46, 72 (2007). (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). Employee, through counsel, argues that his due process right to notice, as provided for pursuant to DC Official Code § 1-616.51 (3) and (4), were violated because he did not receive the various written notices that warned and then effected his removal. As noted *supra*, the aforementioned statute recognizes an exception delineated in DC Official Code § 1-616.51 (5). I note that Employee, has not, to date, refuted in any manner whatsoever, that he was AWOL on the dates in question. I find that in the instant matter Employee's failure to report to his duty station for his appointed tour of duty without first procuring authorized or approved leave threatens the integrity of government operations. I further find that this satisfies the exception to receiving prior written notice as provided for pursuant to DC Official Code § 1-616.51 (4) and (5).

Employee argues that his last address of record with the Agency is Adams Street. He contends that since DOH failed to mail the proposed and final notice of removal to said address that Agency's action must be reversed on Constitutional grounds. However, what Employee fails to realize is that the Agency sent the aforementioned notices to the Employee's last address of record with the District of Columbia government, conceivably in a good faith attempt to ensure that Employee received said documents in a timely manner. While it is debatable whether or not Employee received said documents that were sent to the 27th Street address, what is not debatable is the fact that Employee had a fair opportunity to address whether or not DOH had *cause* to institute the instant adverse action. As was stated previously, Employee opted not to address said issue.

Employee's Motion to Strike

In his June 11, 2010, Motion to Strike, Employee argues that "[t]he Agency's exhibits are untimely, unauthenticated, irrelevant, unduly prejudicial, and presented for the first time in a reply brief. Moreover, the Agency has waived the right to present new evidence pertaining to [Employee's] address of record." Employee Motion to Strike at 1. Employee contends that my March 1, 2010, Order regarding whether this Office may exercise jurisdiction precluded Agency

from submitting any other documents relevant to whether Employee received his proposed and adverse notice of removal. However, I find that Agency did not submit its Reply Brief, and the attached exhibits, in response to whether this Office may exercise jurisdiction over the instant matter. Rather, it was submitted in response to my Order dated April 26, 2010, which required the parties to address the issue of whether Agency had cause to remove Employee from service. Seemingly, Employee's understanding of the jurisdiction of this Office over the instant matter is flawed. It should be noted that on issues regarding the jurisdiction of this Office, Employee has the burden of proof. Agency submitted its reply brief replete with documents that would tend to establish that Employee was under the jurisdiction of the Department of Corrections, when the aforementioned removal notices were sent. These documents were submitted to rebut Employee's allegation that he was denied his due process right to notice – which Employee proffered relative to whether Agency's adverse action should be reversed. I find that Agency was within its right to submit the contested Reply Brief in response to Employee's arguments relative to the issue of cause[1]. I find that Employee's other arguments proffered in this matter are so misplaced and unpersuasive that they are of no moment. Accordingly, I find that Employee's motion to strike should be denied.

Whether the penalty of terminating Employee was appropriate given the circumstances

I find that DOH, nor any other agency for that matter, cannot carry out its appointed mission when its employees fail to report for duty or at least notify said agency of their absence. Failing to report to duty for sixteen consecutive days and then failing to establish a valid exception for said absence cannot be condoned. For example, if employee was incapacitated and unable to report for duty as provided for pursuant to DPM 1242 *et al*, may be credited as a valid excuse for absence. However, such was not the case in the instant matter. Employee's adamant refusal to offer a response as to why he did not report for duty on the dates in question, particularly when confronted squarely with the question by the undersigned was both vexing and ultimately to his detriment. *See generally* Order dated April 26, 2010 at 1. According to my Order dated April 26, 2010, Employee was required to address whether the Agency had cause to institute the instant adverse action. *Id*. at 1. Instead of proffering an exculpating explanation, Employee instead focused his argument on perceived violations of his due process rights relative to his receiving notice. The United States Supreme Court held in *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599 70 S.Ct. 870, 873, that "…it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination." (Citations Omitted). I find that Employee was afforded a full and fair opportunity, before the undersigned, to be heard on the merits of this matter. Further, Employee neglected to consider that the OEA was created, in part, to preserve and protect the due process rights of the various District government employees who are unfortunate enough to be in the dire circumstances that invoke this Office's jurisdiction. Employee, through counsel, refused to discuss the issue of cause and, to his detriment, instead focused on the prior written notice clause of DC Official Code § 1-616.51 (3). I find that in this matter, the culmination of Employee's Constitutional due process right was the opportunity to proceed *de novo* before the undersigned

[1] I agree with Employee that Agency's Brief should not be considered solely when addressing the issue of whether the OEA may exercise jurisdiction over the instant matter, because at that juncture in this matter, Agency did not proffer said evidence in response.

on the issue of whether Agency had cause to institute the instant adverse action.

Based on the preceding, I find that Employee violated Agency procedures when he failed to report for duty on the dates in question. I further find that the Agency has met its burden of proof in this matter and that the instant adverse action was taken for cause. 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 the Employee from service should be upheld.

ORDER

Based on the foregoing, it is hereby ORDERED that:

1. Employee's Motion to Strike is DENIED; And,

2. Agency's action of removing Employee from service is UPHELD.

FOR THE OFFICE:

_____
ERIC T. ROBINSON, ESQ.
ADMINISTRATIVE JUDGE