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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	
EMPLOYEE <sup>1</sup> ,	)	OEA Matter No. 1601-0035-21
	)	
v.	)	Date of Issuance: February 7, 2024
	)	
UNIVERSITY OF THE DISTRICT OF COLUMBIA,	)	MONICA DOHNJI, ESQ.
Agency	)	Senior Administrative Judge
	)	
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Marc L. Wilhite, Esq., Employee's Representative		
Anessa Abrams, Esq., Agency's Representative		

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL HISTORY

On June 28, 2021, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the University of the District of Columbia’s (“UDC” or “Agency”) decision to terminate her from her position as a Police Officer, effective May 31, 2021. Employee was charged with job abandonment.<sup>2</sup> On July 20, 2021, OEA issued a Request for Agency Answer to Employee’s Petition for Appeal. Thereafter, on August 11, 2021, Agency filed a Motion for Extension of Time to Respond to Employee’s Petition for Appeal up to September 20, 2021. Agency filed its Answer to Employee’s Petition for Appeal on September 20, 2021.

Following a failed attempt at mediation, this matter was assigned to the undersigned Senior Administrative Judge (“AJ”) on January 6, 2022. On January 13, 2022, the undersigned issued an Order scheduling a Status/Prehearing Conference for February 7, 2022. Subsequently, on February 3, 2022, Agency filed a Consent Motion to Extend Discovery Deadline to April 22, 2022. The undersigned issued an Order on February 7, 2022, extending the discovery deadline and rescheduling the Status/Prehearing Conference for April 28, 2022. Agency filed another Consent Motion for Extension of Time to Complete Discovery on April 22, 2023, requesting an extension to a date after June 30, 2022. The undersigned issued another Order on July 6, 2022, extending the discovery deadline and rescheduling the Status/Prehearing Conference for July 8, 2022. Agency filed a third Consent Motion for Extension of Time to Complete Discovery and Continue Telephonic

<sup>1</sup> Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

<sup>2</sup> Agency noted in its May 24, 2021, letter to Employee that it accepted Employee’s resignation.

Status/Prehearing Conference on July 18, 2022. Agency requested that the scheduled conference be continued to September 30, 2022. This Motion was granted in an Order dated July 28, 2022, and the scheduled conference was rescheduled for October 12, 2022. On September 15, 2022, Agency filed a fourth Consent Motion for Extension of Time to Complete Discovery and Continue Telephonic Status/Prehearing Conference. Agency requested that the scheduled conference be extended to November 30, 2022. This Motion was granted in an Order dated October 7, 2022, and the Status/Prehearing Conference was rescheduled to December 7, 2022. On November 28, 2022, Agency filed a fifth Consent Motion for Extension of Time to Complete Discovery and Continue Telephonic Status/Prehearing Conference to January 17, 2023. The undersigned granted this Motion in an Order dated December 13, 2022, and the scheduled Status/Prehearing Conference was continued to January 23, 2023. Both parties attended the scheduled conference. Thereafter, on February 1, 2023, the undersigned issued an Order scheduling a Prehearing Conference for March 6, 2023. Both parties submitted their Prehearing Statements as required and were present for the scheduled Prehearing Conference.

Following the Prehearing Conference, the undersigned determined that an Evidentiary Hearing was required in this matter. On March 8, 2023, the undersigned issued an Order scheduling an Evidentiary Hearing for May 2, 2023. On April 21, 2023, Agency filed a Motion to Continue the May 2, 2023, Evidentiary Hearing to August 2023. The undersigned issued an Order on April 24, 2023, granting Agency's Motion and rescheduled the Evidentiary Hearing to August 30, 2023. On May 3, 2023, Agency filed a second Consent Motion to Continue the August 30, 2023, Evidentiary Hearing to September 2023. On May 23, 2023, the undersigned granted Agency's Motion and the Evidentiary Hearing was continued to October 18, 2023. Both parties were present for the Evidentiary Hearing held on October 18, 2023. Subsequently, the undersigned issued an Order on November 21, 2023, requiring the parties to submit written closing arguments. On December 8, 2023, Agency filed a Motion for an Extension of Time to file Closing Arguments. This Motion was granted in an Order dated December 12, 2023, making the written closing arguments due on or before February 2, 2024. Both parties have now filed their respective closing arguments. The record is now closed.

### **JURISDICTION**

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

### **ISSUES**

- 1) Whether Agency had cause to institute the current adverse action against Employee for job abandonment; and if so,
- 2) Whether the penalty of termination is appropriate under applicable District laws, rules, regulations and the Table of Illustrative Action.

### **SUMMARY OF MATERIAL TESTIMONY**

The following represents a summary of the relevant testimony given during the Evidentiary Hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding.

**Agency's Case in Chief**

Katherine Bruce ("Ms. Bruce") Tr. pgs. 24-164.

Ms. Bruce has been employed by Agency since January of 2016. Her current position is Manager of Employee and Labor Relations. She has been in this position since March of 2021. Prior to this role, she was the Employee and Labor Relations Specialist from 2016 to 2021. Ms. Bruce explained that in her current position, she advises managers and employees on the Collective Bargaining Agreements ("CBA"), performance management, progressive discipline, Family Medical Leave Act ("FMLA") and Paid Family Leave ("PFL"). Ms. Bruce also highlighted that she was responsible for Agency's administration of leave policies in 2020 and 2021, prior to it being turned over to the Benefits Department a few months before the date of the instant Evidentiary Hearing. Ms. Bruce affirmed that she assisted employees submit leave without pay requests during that period. Tr. pgs. 24 – 26, 81.

Ms. Bruce acknowledged that she knew Employee as a former Agency employee. She also affirmed that Employee was a member of a bargaining unit – American Federation of State, County and Municipal Employees ("AFSCME") Local 2087 while employed at Agency and the terms and conditions of her employment were covered by the CBA between Agency and Employee's union. Ms. Bruce identified Agency's Exhibit 1 as the CBA between Agency and Employee's union which was in effect from October 1, 2016, to September 30, 2019. She affirmed that this CBA carried over after September 30, 2019, and it governed Employee's separation from Agency. Tr. pgs. 26 – 30.

Ms. Bruce affirmed that in late 2020, Employee requested FMLA. She identified Agency's Exhibit 2, as the medical document completed by healthcare providers and which employees are required to submit with their FMLA request. Ms. Bruce acknowledged that Employee submitted this document to Agency. Referencing Question 1, under Part A of Agency's Exhibit 2, Ms. Bruce noted that Employee's condition started around 2011. She also highlighted that Question 10, Part C of Agency's Exhibit 2 stated that "Due to the condition, the employee is not able to perform one or more of the essential functions." Tr. pgs. 30 – 34.

Ms. Bruce identified Agency's Exhibit 3 as the Form 4 Agency used to summarize the exact leave Employee was approved for. Ms. Bruce affirmed that she completed Employee's Form 4, and she identified her signature on the form. Ms. Bruce asserted that Agency approved Employee's 640 hours FMLA, which was equivalent to sixteen (16) weeks of leave. She affirmed that Employee used all her approved 640 hours of FMLA leave. She noted that Employee did not return to work after she exhausted all her FMLA leave. Ms. Bruce highlighted that Employee requested additional leave. Tr. pgs. 34 – 37.

Ms. Bruce identified Agency's Exhibit 5 as the document prepared by Employee's healthcare provider for FMLA leave. She noted that Employee's physician did not answer the question on Part C referencing whether or not Employee could perform the essential functions of her position. Ms. Bruce noted that Agency did not approve this FMLA request because Employee did not meet the requirements to qualify for FMLA – employees can only get 640 hours of leave to be used over a two (2) year period and work 1,250 hours in the past year. Ms. Bruce identified Agency's Exhibit 6, as the letter Agency sent to Employee denying her request for FMLA leave through September 1, 2021. Ms. Bruce testified that she had talked to Employee about the possibility of getting additional FMLA leave; however, when she did an audit on how much leave Employee had left and how many hours

she had worked, she discovered that Employee had not worked the required 1,250 hours, so she included this information in the FMLA leave denial request. Tr. pgs. 38 – 43.

Ms. Bruce testified that after Employee's FMLA leave was denied, Employee requested 744 hours of leave without pay. She affirmed that Agency had a leave without pay policy and that there was a form that had to be completed to apply for it. She noted that Agency had regulations on leave without pay. Ms. Bruce asserted that it was within the manager's discretion to grant leave without pay requests. Ms. Bruce identified Agency's Exhibit 22 as the regulation governing leave without pay and Agency's Exhibit 7 as the form Employee used to apply for 744 hours of leave without pay to cover the period of April 23, 2021, to September 1, 2021. She stated that Employee listed medical leave as the reason for her request. She affirmed that Employee indicated on the form that she had zero sick and annual leave. Ms. Bruce testified that the form required applicants to include a medical certificate from their physician with form 1199 if their request for leave without pay was for medical reasons. She stated that Employee did not submit a medical certificate and she did not check the box indicating that she had submitted one. Ms. Bruce asserted that she requested that Employee submit a medical certificate and she informed Employee that the approval of the leave without pay was within the discretion of Employee's manager, Mr. Orlando Treadwell. Tr. pgs. 44 – 51.

Ms. Bruce identified Agency's Exhibit 8 as an email she sent to Employee along with paperwork for her healthcare provider to complete and a medical release form for Employee to sign and return to Agency. She explained that the paperwork is generally sent to employees who have exhausted their FMLA leave and want more leave as medical accommodation. Ms. Bruce stated that these medical forms required more detail than what is requested for FMLA leave forms. Ms. Bruce testified that she emailed the forms to Employee on Tuesday, May 4, 2021, and requested that Employee return the forms to her by Friday, May 7, 2021. She noted that Employee did not contact her or return the forms by the May 7, 2021, due date. Ms. Bruce affirmed that she followed up with Employee. She identified Agency's Exhibit 9 as an email she sent to Employee on May 10, 2021, informing Employee that she had not received the medical documents and that Employee should provide her with an update. Tr. pgs. 52-56.

Ms. Bruce testified that she reached out to Employee's union president, LaVerne Gooding-Jones ("Ms. Gooding-Jones") and they had a meeting with Employee present. She testified that she asked the union if they would help in getting the requested documents. When asked if there was any discussion during the meeting about Agency's leave without pay policy and whether the policy was mandatory or discretionary, Ms. Bruce said "no". She asserted that she provided Employee with additional time (May 14, 2021) to submit the medical documents. Employee did not submit the additional documents by May 14, 2021. She affirmed that Employee contacted her on May 14, 2021, stating that she was taking the documents to the doctor that day. Ms. Bruce noted that she informed Employee that if she did not submit the requested document, her leave without pay would not be submitted to her supervisor for review. Upon refreshing her recollections, she stated that she informed Employee on May 14, 2021, that she would speak with Ms. Deb Sullivan ("Ms. Sullivan"), the VP of HR, about the next steps. Ms. Bruce averred that she did not recall following up with Employee or the union after May 14, 2021, and she did not hear back from Employee after May 14, 2021. She noted that Employee never provided the requested medical documentation. She identified Agency's Exhibit 11 as the email she sent to union President, Gooding-Jones, to update her on the matter. Tr. pgs. 56-63, 68.

Ms. Bruce affirmed that the May 18, 2021, email in Agency's Exhibit 11 reflects the status of Employee's submission of the requested document. She acknowledged that as of May 18, 2021, she had not received the requested medical documents from Employee and her department had not approved Employee's 744 hours of leave without pay. Ms. Bruce explained that she provided the union with information about Employee because Employee was represented by the union. Ms. Bruce identified Agency's Exhibit 10 as a notice from Acting Chief Orlando Treadwell, denying Employee's request for leave without pay. She explained that Agency denied Employee's request because she was an essential employee, and they needed her at work. Tr. pgs. 63-65, 67.

Ms. Bruce identified Agency's Exhibit 12, as a May 24, 2021, document she drafted and that was signed by Ms. Sullivan explaining Employee's status to her. She stated that Ms. Sullivan told her what to include in the document. She agreed that as of the date of the May 24, 2021, letter, Agency had not received the requested medical documentation. Ms. Bruce testified that Employee ran out of FMLA leave on April 21, 2021, and has not returned to work since then even though her subsequent request for FMLA leave and leave without pay were both denied. Ms. Bruce affirmed that the May 24, 2021, letter contained in Agency's Exhibit 12, was Employee's separation letter. She noted that the letter did not indicate that Employee was terminated, but rather that Employee resigned or abandoned her job. Ms. Bruce testified that Ms. Sullivan was her supervisor and she made the decision to charge Employee with job abandonment because Employee did not return to work. She affirmed that she informed Ms. Sullivan that Employee had not submitted the requested medical documentation and that her request for leave without pay had been denied. Tr. pgs. 69-74, 83-84.

Ms. Bruce identified Agency's Exhibit 13 as a personnel action form that is completed at the end of the employment period. She testified that No. 45 of this document lists the reason for Employee's termination as 'job abandonment Employee may be entitled to lump sum payment of any unused annual leave balance'. She explained that because Employee's job abandonment is a voluntary resignation, it is far less serious. She also noted that Ms. Sullivan was good friends with Employee, and she was trying to protect her by not making it a harsh termination. Ms. Bruce maintained that Employee was not terminated but rather she abandoned her job, and this was considered a voluntary resignation. Tr. pgs. 75 – 78, 153-154.

When asked if she received a resignation letter from Employee, Ms. Bruce said 'it was not required that she submit one.' Ms. Bruce stated that Employee's separation was classified as a 'resignation' in Employee's Notice of Personnel Action form – Standard Form-50 ("SF-50"). Upon refreshing her recollection with Employee's SF-50 box 6B, she affirmed that the 'nature of action' is classified as 'termination'. She however explained that the word 'termination' was a generic term used in the SF-50 to mark the end of Employee's employment. She noted that the 'remark' section provides the specific reason for the termination, which is 'job abandonment'. She noted that the word 'resignation' is not used in the SF-50. Tr. pgs. 154, 156-159.

Ms. Bruce identified Agency's Exhibit 1, Page 22, Section 9 as Post-Termination Conference. She noted that this section did not apply to Employee because she voluntarily resigned, and she was not terminated. She also noted that Section 7 on page 22 also did not apply to Employee because she was not terminated. Tr. pgs. 78 -79.

Ms. Bruce averred that she has assisted other employees, not necessarily police officers with their leave without pay request. She noted that Employee's leave without pay request would be the third one she has been involved with, since her tenure with Agency. She does not recall assisting

Employee with adjusting her previously approved FMLA to leave without pay status. She affirmed that Employee applied for 640 hours of FMLA at the end of 2020, which was approved and exhausted in 2021. She acknowledged that upon notification that she was close to exhausting her FMLA leave, Employee filed a second FMLA leave request. Ms. Bruce recalled a conversation with Employee wherein, she informed Employee she could get more leave. Ms. Bruce testified that when she talked to Employee about requesting additional FMLA leave with documentation from her medical provider, she had not done an audit of how much leave Employee had used nor an audit of how many hours Employee had worked in the past year. She explained that after she completed her audit, she discovered that Employee had used up all her leave, and she was not eligible for any more leave since she had not worked the required 1250 hours in the year. Tr. pgs. 87-93, 113.

Ms. Bruce affirmed that Employee's request for leave without pay was for medical reasons. Ms. Bruce identified Employee's Exhibit 6, as Employee's request for leave without pay.<sup>3</sup> She noted that the request is dated April 26, 2021. While referencing Employee's Exhibit 4, Ms. Bruce cited that the doctor's note submitted in support of Employee's second FMLA request was dated April 16, 2021.<sup>4</sup> She affirmed that Employee had provided Agency with a medical note from her healthcare provider along with her second FMLA request, which was ten (10) days prior to submitting a request for leave without pay. Tr. pgs. 96-99, 101-102.

Ms. Bruce identified Employee's Exhibit 7 as an email she authored on May 4, 2021, to Employee.<sup>5</sup> She affirmed that the May 4, 2021, email required Employee to complete the attached medical release form and send a copy to Ms. Bruce and to the healthcare provider, along with the attached medical information. Ms. Bruce identified the Employee Medical Release Form as part of Employee's Exhibit 7. Tr. pgs. 105 – 106. Ms. Bruce explained that employees are asked to sign a medical release whenever Agency is requesting medical information from a healthcare provider because if Agency has questions for the doctor, they can call and talk to them since they now have permission from the employee to do so. Tr. pgs. 107-109.

Ms. Bruce acknowledged that Agency had received medical documentation from a healthcare provider that was completed in conjunction with the second FMLA request. Referencing Employee's Exhibit 10 - Standard Benefit Administrators and Mental Health Provider Report, dated April 21, 2021, Ms. Bruce highlighted that she has not seen this document before. She explained that this was not an Agency document, but rather, a standard benefit administrator document, used for short term disability employees and Agency does not receive or get a copy of this document. Tr. pgs. 109 – 111.

Ms. Bruce testified that when an employee is denied leave such as FMLA for medical reasons, they can suggest that the employee apply for accommodation in the form of leave without pay. Tr. pg. 114. Ms. Bruce affirmed that Employee contacted her on May 14, 2021, to advise her that she was taking the medical form to her doctor on May 14, 2021. Ms. Bruce noted that Employee was not copied on her May 18, 2021, email to the union president. Ms. Bruce asserted that she was trying to do everything to help Employee complete the documentation, so she reached out to the union president because the union was Employee's representative to see if they could encourage Employee to get the paperwork completed before they would have to commence any disciplinary

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<sup>3</sup> This Exhibit was previously marked and entered into the record as Agency's Exhibit 7.

<sup>4</sup> This Exhibit was previously marked and entered into the record as Agency's Exhibit 5.

<sup>5</sup> This Exhibit was previously marked and entered into the record as Agency's Exhibit 8.

action against Employee. She further maintained that Employee was not copied on the email because Agency had not discussed what disciplinary action, if any, would be taken. Tr. pgs. 118-124.

Ms. Bruce cited that there was no discussion with Employee regarding the leave without pay policy. She stated that Agency had the discretion to approve or deny the leave without pay request. If leave without pay is denied, the employee must return to work. When asked if Agency notified Employee that her leave without pay request was denied and that she had to return to work on a particular date and time, or else her absence will be considered as job abandonment, Ms. Bruce stated that 'I don't know.' She explained that the police department would have sent Employee something like that, and not HR. Tr. pgs. 126 -129.

When asked if Employee's official denial of the leave without pay as found in Agency's Exhibit 10 was dated, Ms. Bruce said 'no'. Additionally, when asked if the document had a transmittal form or any evidence to show how this document was communicated to Employee, Ms. Bruce said that there were no transmittal forms. Tr. pgs. 130 – 133.

Ms. Bruce identified Employee's Exhibit 11, as Employee's Time Sheet. She stated that she did not prepare the document. Upon review of the document, Ms. Bruce affirmed that Employee was carried on 'family leave without pay' for April 22, 2021. She also affirmed that Employee's leave status for April 23, 2021, stated that she was approved for 'leave without pay'. Tr. pgs. 139 – 145. Ms. Bruce explained that Employee entered her time in the timesheet as leave without pay, and it was approved by Employee's department. Tr. pgs. 145-146.

Ms. Bruce identified Employee's Exhibit 8 as Employee's Separation letter, dated May 24, 2021.<sup>6</sup> She affirmed that nothing in the Separation letter indicated that Employee was sent an official notification stating that her leave without pay application was denied. Ms. Bruce is not aware if anyone contacted Employee to inform her that her leave without pay application was denied. She noted that Employee was terminated because she failed to submit the requested medical documents to support her leave without pay application. Tr. pgs. 147 -151.

### **Employee's Case in Chief**

#### **Employee – Tr. pgs. 172-269**

Employee worked for Agency from May 1, 2008, to May 31, 2021, as a Police Officer, within Agency's Department of Public Safety. Employee testified that her duties as a Police Officer were to protect and serve the University, its surrounding community, as well as educate faculty, staff, and students on safety. Tr. pgs. 173 – 174.

Employee affirmed that she applied for FMLA in 2020 for medical reasons. She stated that Ms. Bruce was Agency's FMLA coordinator who assisted her with the process. She asserted that Ms. Bruce asked her to take a medical form to her healthcare provider to complete, and then return the completed form to Ms. Bruce. She affirmed that Employee's Exhibit 2, was the medical form to be completed by her healthcare provider. She noted that her healthcare provider completed and signed the form on November 30, 2020. Tr. pgs. 174 – 177. Employee affirmed that she was approved for

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<sup>6</sup> This Exhibit was previously marked and entered into the record as Agency's Exhibit 12.

640 consecutive hours of FMLA leave in 2020 and that the FMLA leave was effective January 3, 2021. She noted that she did not return to work from January 2021 to April 2021. Tr. pgs. 182 -183.

Employee testified that on April 14, 2021, she was informed by manager Cetrina Smith (“Ms. Smith”) that her FMLA leave would end on April 22, 2021, and she was advised that if she needed more time, she had to complete a doctor’s note and a new set of FMLA paperwork. Employee averred that the new FMLA paperwork was emailed to her by either Ms. Smith or Ms. Bruce, as they were both handling her FMLA. Employee asserted that upon receipt of the emailed documents, she made an appointment to see her doctor on April 16, 2021. During the appointment, she was examined by her primary care physician, and the doctor completed the paperwork. Tr. pgs. 184 – 188. Employee explained that after the examination, the doctor decided that Employee was not ready to return to work and she extended her return-to-work date from June 1, 2021, to September 1, 2021. Tr. pgs. 190 – 191, 248-249. Employee noted that she intended to be out of work consecutively for that period. Employee asserted that after her doctor completed the paperwork, she physically took the paperwork to Ms. Smith at her office at Agency on April 19, 2021. She stated that while she was there, Ms. Smith contacted Ms. Bruce via Microsoft Teams. Employee cited that they had a Teams meeting wherein Ms. Bruce stated that she had done a leave audit and Employee did not have any more FMLA leave left because she had not worked enough hours within the past year. Employee cited that Ms. Bruce advised her to apply for leave without pay since she had no more FMLA leave. Tr. pgs.194 – 196, 198, 248.

Employee identified Employee’s Exhibit 5, as a document from Ms. Bruce to Employee, dated April 22, 2023. She affirmed that it was the notification of denial of FMLA. Tr. pgs. 196 -197, 248. Employee affirmed that Ms. Bruce sent her the leave without pay paperwork. She stated that she completed the paperwork and returned it to Ms. Bruce. Employee noted that she requested leave without pay on April 26, 2022. Tr. pgs. 198 – 200, 248. Employee stated that she was not paid by Agency while she was on FMLA leave on January 3, 2021, which continued to when she went on leave without pay. She cited that she was paid under short term disability. Employee affirmed that Employee’s Exhibit 6 was prepared by Ms. Bruce for Employee’s review and signature. Employee said there was a discussion with regards to the requested number of hours, during the Teams meeting with Ms. Smith. Employee affirmed that her request was for medical leave without pay. She acknowledged that the leave without pay form required a submission of a medical certification for leave requests for medical reasons. Tr. pgs. 201 – 204. Employee testified that she did not submit the medical certificate because she had already submitted medical documentation on April 19, 2021, which was completed and signed by her healthcare provider on April 16, 2021. Tr. pgs. 204 – 205, 250.

Employee identified Employee’s Exhibit 10 as the Standard Benefits Administration form that her healthcare provider completed for her disability. Employee affirmed that the mental health provider report was part of the documents submitted for her disability application. Employee stated that she submitted the document to Agency’s Human Resources, where Ms. Bruce works, and to the Standard Benefits Administration. Tr. pgs. 205 – 206. Employee could not remember to whom she sent the document in Agency’s human resources. Employee acknowledged that Agency’s Human Resources received the mental health provider report from her psychiatrist's office, dated April 21, 2021. Employee noted that she had been seen by her mental health provider since October of 2020. Tr. pgs. 208-211, 250 - 252.



Referencing section six, number 2A of Employee's Exhibit 10, Employee affirmed that after submitting her request for leave without pay, Ms. Bruce requested that Employee submit additional documentation. Employee explained that she did not take the paperwork to her healthcare providers because upon reading the paperwork, she felt that it was very intrusive. She also noted that she did not know why Agency needed extra paperwork completed when it already had information about her illness since it was an ongoing illness, and nothing had changed. Employee testified that one of the documents required her to give Agency permission to speak with her doctors, which she found intrusive and a violation of her Health Insurance Portability and Accountability Act ("HIPAA")<sup>7</sup> rights. Tr. pgs. 212-214.

Employee affirmed that about a week after receiving Agency's request for additional documentation, she had a meeting with Ms. Bruce and Ms. Gooding-Jones, her union president. Employee affirmed that she was a member of AFSCME local 287, and she is covered by a Collective Bargaining Agreement between the union and Agency. Employee noted that she had contacted Ms. Gooding-Jones sometime after May 4, 2021, to request a meeting with Agency. She later received an email with date, time, and place of the meeting. She stated that the meeting was virtual, via Teams. Employee noted that the reason for the meeting was to discuss potential HIPAA violations, and that was the main discussion at the meeting. Employee testified that she did not understand why Agency wanted to speak with her physician. She stated that when she was diagnosed with a terminal illness in the past and she was out on FMLA, when she exhausted her FMLA, she was automatically rolled over to leave without pay. She averred that Agency never asked to speak with her physician at that time nor was she required to complete a leave without pay application. Employee affirmed that she was informed by Ms. Bruce that the medical forms were required to process her leave without pay application. Tr. pgs. 214 – 217, 244, 258.

Employee stated that despite her HIPAA violation concerns, she was told during the meeting that the paperwork had to be submitted. Employee affirmed that Ms. Gooding-Jones explained to her during the meeting that Agency's request was not a HIPAA violation. Employee stated that she also asked why the paperwork was not discussed during the April 19, 2021, meeting. She testified that during the April 19, 2021, meeting, Agency made it seem as if the paperwork she submitted on that date was sufficient and Employee just had to submit a leave without pay application to be approved. But a week later, on May 4, 2021, they emailed her the leave without pay paperwork, and additional paperwork for her doctor to complete. Employee acknowledged that she did not contact Ms. Bruce or submit the requested documentation by May 14, 2021. Employee explained that since it was during COVID-19, she could not go into the doctor's office to request that documentation be completed. Employee testified that she explained to Agency that because her doctor did not have a private practice, but worked at a hospital, she could not come and go into the hospital as she pleased and that the process of obtaining this documentation was costly to her. Employee does not recall Ms. Bruce or Gooding-Jones' response to her concerns, but she noted that she did not speak with Ms. Gooding-Jones again until she got the discipline letter from Ms. Bruce. Tr. pgs. 218 – 220, 257 - 259.

Referring to Agency's Exhibit 11, Employee affirmed that Ms. Gooding-Jones forwarded an email from Ms. Bruce to Ms. Gooding-Jones to Employee on May 18, 2021, indicating that Agency had not approved Employee's request for leave without pay and that Agency was moving to a final

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<sup>7</sup> HIPAA is a federal law that requires the creation of national standards to protect sensitive patient health information from being disclosed without the patient's consent or knowledge.

discipline action. Employee noted that prior to receiving the forwarded email on May 18, 2021, there had been no discussions about discipline for failure to provide the requested leave without pay paperwork. Tr. pgs. 222 – 224. When asked if anyone from Agency notified her prior to May 24, 2021, that her request for leave without pay was denied, Employee said ‘no’. Employee affirmed that she did not contact Ms. Bruce or anyone at Agency after she received the forwarded email from Ms. Gooding-Jones. Tr. pgs. 225, 259 – 260, 263.

Employee identified Employee’s Exhibit 11, as her Time Sheet from PeopleSoft. Employee stated that she downloaded all her time sheets from Agency on May 31, 2021, a few days after she received her separation notice. Employee testified that the time sheet was completed by her department’s timekeeper, Ms. Smith, and it showed that Employee was on FMLA without pay from January 18, 2021, to May of 2021. Tr. pgs. 225 -228. Employee asserted that if she was at work, she would input her time into PeopleSoft, and it would go to Ms. Smith for approval and then forwarded to Wanda Pittman (“Ms. Pittman”) for transmittal to the main D.C. Human Resources office. She stated that the timesheet is kicked back if there are any discrepancies. Employee testified that her timesheet was approved after going through three (3) people. Tr. pgs. 229 – 230.

Employee testified that her last day on FMLA leave was April 22, 2021. She stated that she went into leave without pay status on April 23, 2021, and it is reflected on her timesheet as approved. Employee cited that she was in ‘approved leave without pay’ status from April 23, 2021, to May 14, 2021. Tr. pgs. 231-232.

Employee recalled receiving a letter of separation on May 24, 2021, via email from Ms. Bruce or Ms. Sullivan. Employee asserted that she immediately called Ms. Sullivan after she received and read the separation letter and left her a voice message. Ms. Sullivan called her back on May 27, 2021. She stated that she told Ms. Sullivan that she turned in all the required documents. Tr. pgs. 233 – 236, 260-261.

Employee testified that she did not understand why Agency stated that she resigned when she did not give them any written documentation, nor did she make any oral statement to that effect. Employee asserted that she did not understand how Agency would charge her with job abandonment when per her timesheet, she had requested leave without pay and when she was in approved leave without pay status up to May 14, 2021, and then nothing else was entered. When asked if she received any calls from Agency notifying her that her leave without pay application had been denied and that she was being classified in a ‘job abandonment’ status, Employee said ‘no’. Employee noted that prior to receiving the May 24, 2021, separation letter, she did not receive any proposal of discipline for failing to provide medical documentation communication from Agency Tr. pgs. 238 – 240. Employee said no one from Agency discuss the leave without pay regulations with her. When asked if anyone from Agency requested that she return to work since her leave without pay request had been denied, Employee said ‘no’. Tr. pg. 241.

Referencing Agency’s Exhibit 2, Employee affirmed that Agency approved her 2020 request for FMLA leave in November 2020 for a total of 640 hours, with an FMLA effective date of January 3, 2021. Employee stated that she was told by Ms. Bruce that she exhausted the 640 hours leave on April 22, 2021. Employee highlighted that after exhausting her FMLA leave, she told her doctor that she needed to stay out of work, and the doctor made the decision of how long Employee should be out of work. Tr. pgs. 245-248.

Employee affirmed that she was employed by American University in August of 2022, and she is currently at the same job. Employee affirmed that Agency's Exhibit 21, is the transcript of the January 12, 2023, deposition conducted in this matter. Referring to page 142, line 6 of Agency's Exhibit 21, Employee affirmed that she noted during the deposition that she did not want to be reinstated to her prior position. However, Employee testified that she wanted to be reinstated to her previous position of record. Tr. pgs. 263 – 266, 268 - 269.

Adrian Blackmon ("Mr. Blackmon") Tr. pgs. 271-285.

Adrian Blackmon ("Mr. Blackmon") previously worked for Agency as a Lieutenant in the Office of Public Safety and Emergency Management from 2011 to 2022. Mr. Blackmon supervised Employee while they were both employed at Agency. Mr. Blackmon testified that he was conducting roll call in May of 2021, when he was informed by his supervisor, Deputy Chief Ronald Culmer, that Employee had been terminated from her position at Agency. He explained that he was further instructed that if anyone asked for Employee, he should state that Employee resigned. Mr. Blackmon stated that he contacted Employee and she explained the circumstances of her separation. Tr. pgs. 271-276, 281-282.

Mr. Blackmon asserted that he never had any issue with Employee when he supervised her. He stated that Employee was reliable, she came in when she was physically able, and conducted her duties as required. When asked if prior to her separation from Agency, Employee had ever indicated to Mr. Blackmon that she was considering resigning, Mr. Blackmon said 'no'. Tr. pgs. 277 – 278. Mr. Blackmon was not aware that Employee had exhausted her FMLA leave or that she had applied for leave without pay. He had no personal knowledge of Agency's decision to separate Employee. Tr. pgs. 280.

### ***Agency's Rebuttal Witness***

Cetrina Smith ("Ms. Smith") Tr. 287-299.

Cetrina Smith ("Ms. Smith") has been employed by Agency for approximately fifteen (15) years. She is currently a manager, responsible for administrative tasks at Agency. Ms. Smith was initially hired by Agency in November 2008 as a Lieutenant. Four (4) years later, she was promoted to Captain, where she remained for years, until she was reclassified as a civilian employee. Tr. pgs. 287 -289. Ms. Smith testified that as an Agency manager, she is responsible for business licenses; renewal of Agency's commission; Human Resources ("HR") liaison; internal investigation; attendance; and scheduling report approvals. Tr. pgs. 290.

Ms. Smith affirmed knowing Employee. She also affirmed that Employee was on FMLA leave in 2021 and had exhausted that leave. Ms. Smith affirmed receiving Agency's Exhibit 12 on May 24, 2021. She highlighted that prior to that date, she had not received any documentation from Agency indicating that Employee was approved for any type of leave. Ms. Smith testified that after Employee exhausted her FMLA leave, she was instructed by HR to place Employee on leave without pay status for time and attendance reasons. She explained that something had to be entered into Employee's timesheet as it could not be left blank. She affirmed that when she placed Employee on leave without pay, she was aware that Employee had applied to be placed on leave without pay. Tr. pgs. 290 -295.

Referencing Employee's Exhibit 11, Ms. Smith acknowledged it was around the period of April 23, 2021, that she was notified to place Employee on leave without pay status. When asked if Employee returned to work after she exhausted her FMLA leave in April of 2021, Ms. Smith said 'no'. Ms. Smith testified that when she's working on an employee's time sheet with a 'time reporting code' already on the timesheet, she approves that timesheet, so the employee has a status and gets paid. Ms. Smith highlighted that she was not aware if Employee's leave without pay request was approved or denied by Agency and she did not communicate the time entry approval process to Employee. Tr. pgs. 293 – 295, 297 – 299.

### FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW<sup>8</sup>

Pursuant to OEA Rule § 631.2, Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. The District Personnel Manual ("DPM") regulates the manner in which agencies in the District of Columbia administer adverse and corrective actions. DPM § 1602.1 provides that disciplinary action against an employee may only be taken for cause. Agency terminated Employee for job abandonment; however, it did not list the specific code provision where this cause of action is found. Agency further avers that because Employee was a member of the American Federation of State, County, and Municipal Employees District Council 20, Local 2087 ("Union" or "AFSCME"), the Collective Bargaining Agreement ("CBA") between the Union and Agency govern the terms and conditions of Employee's employment.<sup>9</sup> It should be noted that the CBA does not provide a list of adverse actions and associated penalties, therefore, the undersign will revert to Agency's governing authority found in Chapter 8-B District of Columbia Municipal Regulations ("DCMR") § 1503 - Misconduct and Performance Deficiencies. Specifically, 8-B DCMR § 1503 provides a list of classes of conduct and performance deficiencies which constitute cause and warrant disciplinary action. 8-B DCMR § 1503.4(f)(2) addresses Attendance-related offenses – unauthorized absence. Because 8-B DCMR does not include a table of penalty, the undersigned will rely on the table of penalty governing all adverse actions within the District of Columbia government found in Chapter 6-B DCMR §1607. Pursuant to 6-B DCMR §1607.6(a), the description of unauthorized absence includes being absent for ten (10) consecutive days or more, and it is considered *abandonment*. (Emphasis added).

#### **1) *Whether Agency had cause to charge Employee with job abandonment***

Pursuant to 8-B DCMR § 1503.4 and its corresponding provision under the Table of Illustrative Actions ("TIA") - 6-B DCMR §1607.6(a), to be charged with job abandonment, an employee must be absent for ten (10) or more consecutive days.

Here, Employee was charged with job abandonment from April 22, 2021, to May 24, 2021. Pursuant to the record, Employee was on approved FMLA leave which expired on April 22, 2021. Agency's representative, Ms. Bruce contacted Employee on April 14, 2021, to inform her that her current FMLA leave would expire on April 22, 2021, and she advised Employee to apply for additional FMLA leave. Employee complied with Ms. Bruce's request and applied for additional FMLA on April 19, 2021. Employee was informed on the same day by Ms. Bruce and in a

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<sup>8</sup> Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. See *Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

<sup>9</sup> Agency's Answer, *supra*.

subsequent letter dated April 22, 2021, that her request for additional FMLA was denied because she had not worked enough hours within the past year. Employee was later advised by Ms. Bruce to apply for Leave without Pay (“LWOP”). On April 26, 2021, Employee applied for LWOP to cover the period of April 23, 2021, to September 1, 2021. Employee’s request for LWOP was for medical reasons. Accordingly, on May 4, 2021, Ms. Bruce emailed medical forms to Employee, and requested that Employee submit a medical certificate in support of her application, by May 7, 2021. Ms. Bruce also explained to Employee that the approval of the leave without pay was within the discretion of Employee’s manager, Mr. Orlando Treadwell. Employee did not provide the requested medical forms by the May 7, 2021, deadline. Employee explained that she informed Agency that since it was during COVID-19, she could not go into the doctor’s office to request that documentation be completed because her doctor did not have a private practice, but worked at a hospital. As such, she could not come and go into the hospital as she pleased and that the process of obtaining this documentation was costly to her.

Ms. Bruce followed up with Employee via email on May 10, 2021, about the status of the medical forms and she requested that Employee submit the forms by May 14, 2021. However, Employee did not comply with this new deadline. Employee contacted Ms. Bruce on May 14, 2021, stating that she was taking the documents to the doctor that day. Ms. Bruce noted that she informed Employee that if she did not submit the requested document, her LWOP would not be submitted to her supervisor for review. She also informed Employee that she would speak with Ms. Deb Sullivan (“Ms. Sullivan”), the VP of HR, about the next steps. Employee did not submit the requested medical forms by the prescribed deadline. Thereafter, Ms. Bruce emailed Employee’s union President, Gooding-Jones, on May 18, 2021, informing her that Agency had denied Employee’s LWOP request and would commence adverse action against Employee.

During the Evidentiary Hearing, Ms. Bruce identified Agency’s Exhibit 10 as a notice from Acting Chief Orlando Treadwell, denying Employee’s request for leave without pay. However, the record is void of any evidence that this document was ever transmitted to Employee. When asked if Agency notified Employee that her LWOP request was denied and that she had to return to work on a particular date and time, or else her absence will be considered as job abandonment, Ms. Bruce stated that ‘I don’t know.’ She explained that the police department would have sent Employee something like that, and not HR. Tr. pgs. 126 -129. When asked during the Evidentiary Hearing if Employee’s official denial of the LWOP as found in Agency’s Exhibit 10 was dated, Ms. Bruce said ‘no’. Additionally, when asked if the document had a transmittal form or any evidence to show how this document was communicated to Employee, Ms. Bruce said there were no transmittal forms. Tr. pgs. 130 – 133. Employee testified that she only found out on May 18, 2021, from the union President that Agency had not approved her LWOP. When asked if anyone from Agency notified her prior to May 24, 2021, that her request for LWOP was denied, Employee said ‘no’. Tr. pgs. 225, 259 – 260, 263.

The record supports Employee’s assertion that she was in ‘approved leave without pay’ status from April 23, 2021, to May 14, 2021. Tr. pgs. 231-232.<sup>10</sup> Ms. Smith testified that after Employee exhausted her FMLA leave, she was instructed by HR to place Employee on leave without pay status for time and attendance reasons. She affirmed that when she placed Employee on LWOP, she was aware that Employee had applied to be placed on LWOP. Tr. pgs. 290 -295. Ms. Smith highlighted

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<sup>10</sup> See. Employee’s Exhibit 11.

that she was not aware if Employee's LWOP request was approved or denied by Agency. Tr. pgs. 293 – 295, 297 – 299.

Based on the foregoing, I find that Employee applied for LWOP to cover the period of April 23, 2021, to September 1, 2021. Employee was required to submit medical documentation in support of her request by May 14, 2021. Following her failure to submit the requested medical documentation, Ms. Bruce emailed Employee's union president on May 18, 2021, to inform her that Employee had not submitted the requested medical documents and that Employee's LWOP request had been denied. Employee was not copied on this email from Ms. Bruce to the union president. The union president forwarded the email to Employee on the same day. On May 24, 2021, Agency notified Employee that she was charged with job abandonment and her termination was effective on May 31, 2021. Additionally, the alleged denial of the LWOP notice signed by Employee's supervisor was never transmitted to Employee, it was undated, and it did not provide Employee with a 'return to work date' following Agency's denial of her LWOP request. Moreover, the PeopleSoft record and Ms. Smith's testimony provides that Employee was carried on an 'approved LWOP' status from April 23, 2021, to May 14, 2021. Consequently, I further find that Agency cannot charge Employee with job abandonment for the period of April 23, 2021, to May 14, 2021. I further find that because (1) Agency was aware of Employee's intentions and efforts to secure additional leave; (2) Agency was in receipt of Employee's LWOP application on April 23, 2021; (3) Agency did not transmit its denial of LWOP notice to Employee prior to its issuance of the May 24, 2021 termination letter; and (4) Agency did not provide Employee with a 'return to work date', which Employee failed to comply with, Agency cannot charge Employee with job abandonment.

Assuming *arguendo* that Agency's May 18, 2021, email to the union president constituted notice of Agency's denial of Employee's LWOP application, I still conclude that Agency cannot charge Employee with job abandonment because Employee was not absent for ten (10) or more consecutive days when Agency issued the May 24, 2021, separation letter to Employee. May 18, 2021<sup>11</sup>, to May 24, 2021<sup>12</sup>, is seven (7) days and pursuant to 6-B DCMR §1607.6(a), an employee can only be charged with job abandonment if they are absent for ten (10) or more consecutive days. Therefore, I find that Agency cannot charge Employee with job abandonment based on the aforementioned facts.

Agency additionally stated in its May 24, 2021, letter to Employee and throughout the course of this matter that Employee's termination was considered a resignation. Agency has not submitted any credible evidence in support of this assertion. Agency attempts to equate 'job abandonment' to a 'resignation' based on Employee's failure to return to work, absent an actual return to work date. Ms. Bruce noted during the Evidentiary Hearing that Employee voluntarily resigned or abandoned her job. She explained that Employee's job abandonment is a voluntary resignation, which is far less serious than a termination. When asked if she received a resignation letter from Employee, Ms. Bruce said 'it was not required that she submit one.' Tr. pgs. 154, 156-159. Employee testified that she did not understand why Agency stated that she resigned when she did not give them any written documentation, nor did she make any oral statement to that effect. I find that Agency's use of the term 'voluntary resignation' in this instance is misguided.

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<sup>11</sup> The date Agency informed the union president that Employee's LWOP was denied, and the union president forwarded Agency's email to Employee.

<sup>12</sup> The date Agency notified Employee she was being terminated for being absent from work and the last unauthorized absence date it cited in its letter.

Pursuant to the DPM<sup>13</sup>, “[r]esignations are initiated when *an employee informs their manager or HR representative that they are leaving District government employment...* Regardless of how an employee resigns, the employing agency *must* explain in writing their understanding of the resignation and provide the employee an opportunity to correct any misunderstandings.” (Emphasis added). Pursuant to the record, Employee did not inform Agency or any of its representatives that she intended to leave her District government employment. On the contrary, Employee was working with Ms. Bruce to seek additional leave so she could continue her employment with Agency. Furthermore, Agency did not explain its understanding of Employee’s alleged resignation in writing or provide Employee with the opportunity to correct any misunderstandings regarding the alleged resignation. Therefore, I conclude that Agency’s assertion that Employee voluntarily resigned is without merit.

Employee asserted during the Evidentiary Hearing that prior to receiving the May 24, 2021, separation letter, she did not receive any proposal of discipline for failing to provide medical documentation communication from Agency. Tr. pgs. 238 – 240. Agency on the other hand contended that because Employee was not terminated, but rather voluntarily resigned, the CBA provisions applicable to terminated employees did not apply to Employee. Tr. pgs. 78 -79. Pursuant to Article 27 – Discipline, of the CBA, Section 5 – Advance Notice Period, “[t]he University *will provide advance notice of fifteen (15) calendar days to employees of the effective date of the implementation of discipline* (emphasis added).”<sup>14</sup> Here, Agency did not provide Employee with an Advance Notice of proposed discipline. Instead, Agency issued a final notice to Employee on May 24, 2021, informing her that she will be terminated effective May 31, 2021, for job abandonment.<sup>15</sup> Even assuming that the May 24, 2021, notice was the Advance Notice, I still find that it was not in compliance with Article 27, Section 5 of the CBA, as Employee’s termination effective date was less than the fifteen (15) calendar days prescribed by the CBA. Moreover, as previously stated, there is no record of Employee’s alleged resignation, and the current action is considered an adverse action of termination. Accordingly, I find that Agency did not provide Employee with any advance notice of termination as required by the CBA between Agency and Employee’s Union.

## ***2) Whether the penalty of termination is appropriate under District law, regulations or the Table of Illustrative Actions***

Here, because I find that Agency has not met its burden to establish cause for the adverse action in this matter, I conclude that Agency cannot rely on this cause of action to discipline Employee. Employee did not notify Agency in writing or orally that she intended to resign during the relevant period of April 23 – May 24, 2021. Also, Agency (1) failed to transmit its notice of denial of LWOP to Employee; (2) the notice was undated; (3) Agency did not provide Employee with a return to work date after it denied Employee’s LWOP request; (4) Agency’s payroll system – PeopleSoft listed Employee’s employment status from April 23, 2021 to May 14, 2021, as LWOP; and (5) Employee only found out about Agency’s denial of her LWOP request via email from her Union President on May 18, 2021. Moreover, May 18 – May 24, 2021, is less than the ten (10) or more consecutive days prescribed by 6-B DCMR §1607.6(a) for a charge of job abandonment. Accordingly, I further find that Agency’s penalty of termination must be reversed.

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<sup>13</sup> See. E-DPM Issuance I-2022-16 Voluntary Separations (Resignations and Retirements) effective October 31, 2022. [E-DPM | Issuance | Voluntary Separations \(Resignations and Retirements\) \(dc.gov\)](#), retrieved on January 29, 2024.

<sup>14</sup> See. Agency’s Exhibit 1, at pg. 21.

<sup>15</sup> See. Agency’s Exhibit 7.

**ORDER**

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

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

FOR THE OFFICE:

/s/ Monica N. Dohnji  
MONICA DOHNJI, Esq.  
Senior Administrative Judge