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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of: )
)
EMPLOYEE[1] )
)
v. ) OEA Matter No.: 1601-0036-19
)
) Date of Issuance: June 30, 2022
DEPARTMENT OF )
YOUTH REHABILITATION SERVICES, )
Agency )
)

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Youth Development Representative ("YDR") with the Department of Youth Rehabilitation Services ("Agency"). Employee sustained injuries while on duty in 2009, 2015, and 2017. During the 2017 incident, she suffered cervical and lumbar injuries while saving the life of a "court-involved youth" ("CIY") who was attempting to commit suicide.[2] On June 6, 2018, Employee submitted a Request for Leave or Leave Without Pay ("LWOP") from June 5, 2018, through August 19, 2018, because she was unable to return to work as a result of her lower back injury. On August 29, 2018, Agency notified Employee that she had "neither returned to work, nor submitted medical documentation to substantiate [her] time off" after the LWOP period

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] Agency serves CIY remanded to its custody.

ended on August 19, 2018. Thereafter, on September 10, 2018, Agency issued a Notification of Charge of Absence Without Official Leave ("AWOL"), charging Employee with AWOL for eight hours on August 20th and 21st and August 24th through August 26th, for a total of forty hours. The notice provided that Employee's LWOP was exhausted on August 19, 2018, and that she "[had no approved leave, her return-to-work date [was] not known, [and] she did not call out or report for her scheduled tour of duty on the dates noted." Agency subsequently issued an Advance Written Notice of Proposed Removal on November 28, 2018, charging Employee with inability to carry out responsibilities or duties and attendance-related offenses: unauthorized absence. After Agency conducted an administrative review of the charges, a Final Written Notice of Proposed Removal was issued on January 29, 2019. The two charges against Employee were sustained and the effective date of her termination was January 31, 2019.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on February 28, 2019. In her appeal, Employee argued that she was under the medical care of a physician at the time she was charged with being AWOL. Employee also contended that she was in contact with Agency regarding her medical status. As a result, she requested that OEA reverse Agency's termination action.[3]

Agency filed a Motion to Dismiss and Answer to Employee's Petition for Appeal on April 1, 2019. It contended that Employee's petition should be dismissed for lack of jurisdiction because she previously filed a grievance with Agency to challenge her removal on February 19, 2019. Alternatively, it suggested that Employee's termination should be upheld because it established the requisite cause to discipline and remove Employee for attendance-related offenses. Consequently, Agency asked that Employee's petition be dismissed.[4]

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[3] *Petition for Appeal* (February 28, 2019).
[4] Agency withdrew its motion to dismiss on February 11, 2020, and relied solely on its answer.

An OEA Administrative Judge ("AJ") was assigned to the matter in April of 2019. A prehearing conference was held on November 12, 2020, to address the parties' arguments.[5] During the conference, the AJ determined that the contested issues warranted an evidentiary hearing. Therefore, a hearing was held on July 21, 2021, wherein the parties presented testimonial and documentary evidence in support of their positions.

The AJ issued an Initial Decision on February 3, 2022. Regarding the AWOL charge, she held that it was undisputed that Employee failed to report to work on the five dates cited by Agency. However, the AJ gleaned that the issue was whether Agency was aware of Employee's medical condition and her inability to report to work during this time. According to the AJ, Agency had ample documentation and information regarding Employee's medical incapacity well before November 28, 2018, when it issued the Advance Written Notice of Removal. Specifically, on August 31, 2019, Employee responded to Agency's directive to notify it no later than August 31, 2018, of her intention to return to work or risk disciplinary action. Additionally, the AJ determined that Agency received medical reports regarding Employee's medical incapacity and inability to return to work from her treating physician, Dr. Tansinda, who noted that Employee's anticipated return-to-work date was February 19, 2019. Moreover, citing to the holding in *Murchison v. Department of Public Works*, OEA Matter No. 1601-0275, *Opinion and Order on Petition for Review* (July 15, 1998), the AJ provided that an AWOL charge may also be reversed if an employee presents sufficient evidence of illness or disability at the time covered by the AWOL charge. Since Employee presented documentary and testimonial evidence supporting her medical incapacitation during the forty-hour period for which she was charged, the AJ held that Agency

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[5] *Prehearing Conference Order* (November 5, 2020).

failed to meet its burden of proof in establishing that Employee was AWOL during the relevant time period.[6]

With respect to the charge of "inability to carry out assigned responsibilities," the AJ provided that it was undisputed that at the time Agency proposed removal, Employee could not meet the physical requirements of the YDR position. She reasoned that it was essential for all YDRs, even those assigned to non-contact duties, to meet all physical requirements since they must respond to emergencies which require the use of physical force to ensure the safety of CIY and Agency staff. As a result, the AJ concluded that Agency met its burden of proof that Employee was unable to carry out her assigned duties at the time of proposed removal.[7]

Concerning the penalty, the AJ highlighted the holding in *Lovato v. Department of the Air Force*, 48 M.S.P.R. 198 (1991), which provided that an agency's selection of a penalty cannot be disturbed if the agency weighed relevant factors in a fair and unbiased manner. According to the AJ, Employee's termination was based on two separate charges; however, Agency did not argue or present evidence that it would have proposed removal solely based on Employee's inability to perform her duties as a YDR. She explained that both the proposing and deciding officials only referred to the AWOL charge to support Agency's selection of the penalty. Since the AWOL charge was reversed, the AJ concluded that the matter must be remanded to Agency to determine what penalty, if any, is appropriate based on the remaining charge (inability to carry out assigned duties).

As an alternative basis for remanding the matter to Agency, the AJ relied on the holding in *Roebuck v. D.C. Office of Aging*, Case No. 17-CV-246 (D.C. 2019), wherein the District of Columbia Court of Appeals held that in selecting a penalty, an agency must perform an assessment

[6] *Initial Decision* (February 3, 2022).
[7] *Id*.

of the *Douglas*[8] factors and decide if a fact mitigated and could reduce the penalty, point in a different direction, or was neutral, or inapplicable. The Court went on to state that OEA was tasked with reviewing the quality and scope used by the agency to determine the penalty, and if it determined that the process did not meet the required standards, to remand the matter to the agency with specific information to enable it to meet those standards on remand. After reviewing the process used in determining the penalty, the AJ concluded that Agency failed to consciencely consider significant mitigating factors which may have led it to impose a less severe penalty than Employee's removal. Citing to Chapter 20B of the District Personnel Manual ("DPM"), the AJ stated that Agency should have considered the multiple injuries sustained in the performance of Employee's duties, her citations for reliability, job performance, and specific acts of courage.[9] In sum, the AJ held that Agency failed to meet its burden of proof regarding the AWOL charge; therefore, the charge was reversed. Therefore, she instructed that the matter be remanded to Agency with directions to propose a penalty, if any, based on the inability to perform duties charge because Agency failed to consider all relevant factors when it selected the penalty of termination.

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[8] *See Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters: 1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; 3) the employee's past disciplinary record; 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties; 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; 7) consistency of the penalty with any applicable agency table of penalties; 8) the notoriety of the offense or its impact upon the reputation of the agency; 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; 10) potential for the employee's rehabilitation; 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[9] Section 2006.2 provides that, inter alia, if an employee becomes permanently incapable of performing even one essential job function, then the personnel authority would be required to determine whether a reasonable accommodation can be made or if he or she can be non-competitively reassigned to another position for which they are qualified. If the employee cannot be reasonably accommodated, the provision states that the employee must be advised of the applicable disability and retirement programs, and the eligibility requirements.

Agency was further directed to immediately restore Employee to LWOP status retroactive to August 19, 2019; restore any benefits to which she was entitled; and submit documentation to the AJ of its compliance within thirty calendar days of the date of issuance of the Initial Decision.[10]

Agency disagreed and filed a Petition for Review with the OEA Board on March 10, 2022. It asserts that the AJ properly determined that Employee was unable to carry out her assigned duties; therefore, she should have left the removal action undisturbed. Additionally, it posits that OEA lacks jurisdiction to review whether Agency engaged in disability discrimination, namely whether Employee should have been offered a vacant position as a reasonable accommodation. Alternatively, it opines that even if this Office has jurisdiction to consider whether Employee should have been offered a vacant position, it should not disturb the removal action because the evidence does not show that there was a vacancy. Agency also submits that the AJ was not permitted to grant interim relief – restoration of Employee's LWOP status and benefits – before the Initial Decision becomes final. Further, it disagrees with the AJ's supposition that 6-B, Section 2006.2 of the D.C. Municipal Regulations ("DCMR") should have been utilized prior to removing Employee because the section cited in the Initial Decision did not become effective until May 10, 2019, months after the occurrence of the instant personnel action. Lastly, Agency believes that this Office lacks jurisdiction to make findings related to worker's compensation claims. Therefore, it asks this Board to reverse the Initial Decision and uphold its removal action.[11]

In response, Employee asserts that Agency's petition should be denied because it fails to meet the applicable standards for review as matter of law; Agency has mischaracterized the facts and decisions of the AJ; and Agency's arguments constitute mere disagreements with the AJ's findings. Employee reiterates that she was terminated while she was on short-term disability and

[10] *Id*.
[11] *Petition for Review* (March 10, 2022).

that she was under the continued care of a physician during the relevant time period. She also highlights her performance evaluations and service accomplishments during her tenure. Employee believes that Agency unjustly discriminated against her; therefore, she asks that her termination be reversed.[12]

Substantial Evidence

Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. Under OEA Rule 628.1, 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.

Discussion

As controlling authority for remanding the matter to Agency for reconsideration of the assessment of Employee's penalty, the AJ relied on the D.C. Court of Appeal's holding in *Roebuck, supra*. In *Roebuck*, the employee was terminated from the Office of Aging for her failure to report earnings in her applications for unemployment compensation. On appeal, the employee argued that OEA erred in finding that the agency appropriately considered mitigating factors in deciding to terminate her. The Court, relying on the twelve factors identified by the Merit System Protection Board in *Dougla*s, held that several factors may weigh in favor of lessening the penalty in a particular case, including, but not limited to, mitigating circumstances surrounding the offense, the potential for the employee's rehabilitation, the employee's past disciplinary record, and the employee's past work record. The *Roebuck* Court further provided that "[i]f the agency fails to show that it 'consciencely' weighed the relevant factors, the OEA's duty is to 'specify how the

[12] *Employee's Response to Petition for Review* (April 13, 2022).

agency's decision should be corrected' and remand the matter to the agency for the necessary consideration."[13]

The primary discretion in selecting a penalty has been entrusted to agency management, not the OEA.[14] This Office's review of an agency's selection of penalty is to "assure that the agency did consciencely consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness."[15] Further, the selection of an appropriate penalty must "involve a responsible balancing of the relevant factors in the individual case." In *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), OEA held the following with respect to the review of an agency's selected penalty:

> [OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. (citing *Douglas v. Veterans Administration,* 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981)).

Moreover, in *Barry v. Department of Public Works*, OEA Matter No. 1601-0083-14, *Opinion and Order on Petition for Review* (July 11, 2017) (citing *Holland v. Department of Corrections*, OEA Matter No. 1601-0062-08, *Opinion and Order on Petition for Review* (September 17, 2012), the OEA Board held that an Agency's penalty decision will not be reversed unless it failed to consider relevant factors, or the imposed penalty constitutes an abuse of discretion. After reviewing the

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[13] *Roebuck* at 10.
[14] *Stokes v. District of Columbia*, 502 A 2.d 1006 (D.C. 1985).
[15] *Id*. at 1011.

administrative record, this Board finds that the AJ's decision to remand the matter to Agency for reconsideration of the penalty is based on substantial evidence.

In her analysis, the AJ provided that she carefully reviewed the process utilized by Agency in determining the penalty. She noted that both the proposing and deciding officials only referred to the AWOL charge to support Agency's termination action because Employee's unauthorized absences interfered with the efficiency and integrity of operations and impacted Agency's ability to provide services to CIY. Since the AWOL charge was reversed, the AJ decided that the matter must be remanded to Agency for reconsideration of the penalty. Moreover, The AJ stated that the only information provided by Agency regarding how it determined the relevant *Douglas* factors was provided by the Deciding Official ("DO") during the evidentiary hearing. The DO testified that his customary practice is to review the *Douglas* factors cited by Agency in the Advance Written Notice of Proposed Removal, then perform an independent assessment of the factors before reaching a decision.[16] However, the DO attested that he could not conduct an independent assessment of the *Douglas* factors in this matter since Employee did not submit a response to the proposed notice. This Board agrees with the AJ's conclusion that Agency failed to conduct a sufficient and reasoned review of the relevant mitigating factors prior to selecting a penalty. The AJ provided a reasoned analysis of the relevant case law and pertinent fact of this case. She could not reasonably conclude; however, that Agency consciously considered all relevant information that was duly available to it at the time of the proposed removal action. We find that the AJ provided a rational basis for arriving at this conclusion. Thus, we find no credible reason for disturbing her decision to remand the matter to Agency.

[16] *Evidentiary Hearing Transcript*, 83-85 (July 21, 2021).

It should be noted that the AJ's ruling is consistent with similar decisions by OEA to remand a matter to the agency upon finding that it failed to weigh relevant factors in selecting a penalty. In *Randolph v. Department of Motor Vehicles*, Case No. 2014 CA 007688 P(MPA) (D.C. Super Ct. September 3, 2015), the Superior Court for the District of Columbia remanded the employee's appeal to OEA for the purpose of remanding it to the agency to consider whether Employee's self-defense claim was supported by the record and whether any applicable mitigating circumstances existed. Additionally, in *Johnson v. University of the District of Columbia*, OEA Matter No. 1601-0016-07 (November 8, 2007), the OEA AJ remanded the matter to the agency after determining that it failed to consider significant factors before determining the penalty, including the employee's job performance, disciplinary history, and length of service. Like the instant matter, the AJ in *Johnson* relied on holdings in *Lovato* and *Stokes* as a basis for concluding that the agency failed to properly invoke its managerial discretion in selecting a penalty.

Based on the foregoing, we find that the AJ's conclusions are supported by the record. Employee provided unrefuted evidence that she was unable to report to work due to illness during the period in which she was charged with being AWOL. Because both the AWOL charge and the inability to perform duties charge were based on the same set of facts supporting the basis of Employee's appeal, it was reasonable for the AJ to conclude that the remaining charge – inability to carry out assigned duties – required reconsideration. However, this Board does agree with Agency's position that it was not required to utilize the provisions of 6-B, Section 2006.2 of the DCMR prior to removing Employee because it did not become effective until May 19, 2019, after the personnel action at issue occurred. Notwithstanding, there remains a rational basis for remanding this matter to Agency in accordance with the guidance provided in the Initial Decision. Lastly, the AJ's order, relying on the holding in *Covert v. Department of the Navy*, 31 M.S.P.R.

376 (1986), directed Agency to immediately restore Employee to LWOP status retroactive to August 19, 2018, and to retore any benefits to which she is entitled. However, unlike the Merit Systems Protection Board's rules of procedure, there is no language within OEA's rules which authorizes an AJ to grant interim relief prior to the issuance of a final decision. Consequently, we must deny Agency's Petition for Review.

## ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **DENIED**. Employee's AWOL charge is **REVERSED,** and the matter is **REMANDED** to Agency to propose a penalty, if any, based on the remaining charge of Inability to Carry Out Assigned Duties.

_________________________________
Clarence Labor, Jr., Chair

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Patricia Hobson Wilson

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Jelani Freeman

_________________________________
Peter Rosenstein

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Dionna Maria Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.