THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0068-17
JANEKA REED, Employee	
	Date of Issuance: February 26, 2019
v.	
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Janeka Reed ("Employee") worked as a Bus Attendant with the Office of the State Superintendent of Education ("Agency"). On November 29, 2016, Employee received an Advance Written Notice of Proposed Removal based on charges of any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: unauthorized absence; absence without official leave ("AWOL"); and neglect of duty.[1] On June 23, 2017, Agency issued its Notice of Final Decision on Proposed Removal, sustaining the charges against Employee. The effective date of her termination was June 23, 2017.

[1] According to Agency, on September 27, 2016, Employee requested a leave of absence from August 23, 2016 through November 17, 2016. Employee's request was partially approved for August 23, 2016 until October 19, 2016. Agency mailed a follow-up letter on October 14, 2016, reminding Employee that she was expected to return on October 20, 2016. Employee did not report for duty on the specified date.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on July 12, 2017. In her appeal, Employee explained that she was out of work because of a medical condition and had issues with reasonable accommodations after returning to work. She argued that the work conditions exacerbated her medical condition, but Agency did not attempt to resolve the accommodation issues. As a result, Employee requested that Agency reinstate her with back pay and a promotion to a bus driver position.[2]

Agency filed its response on August 16, 2017. It disagreed with Employee's assertions and contended that she was provided with two reasonable accommodations for her medical condition. Moreover, it stated that Employee was appropriately terminated because she failed to return to duty for more than ten days. Therefore, Agency opined that removal was within the range of penalties allowed under District law. Consequently, it requested that Employee's termination be upheld.[3]

On December 5, 2017, an OEA Administrative Judge ("AJ") issued an Order Convening a Prehearing Conference to assess the parties' arguments.[4] The parties were subsequently ordered to submit written briefs addressing whether Agency had cause to take adverse action against Employee for unauthorized absence; absence without official leave; and neglect of duty.[5]

In its brief, Agency asserted that Employee was notified that her request for a leave of absence was granted from August 23, 2016 until October 19, 2016. However, it explained that Employee was not eligible to take leave under the D.C. Family Medical Leave Act ("FMLA") because she did not work for the requisite 1,000 hours in the previous year. According to Agency, Employee did not return to duty on October 20, 2016; thus, she was deemed AWOL for

[2] *Petition for Appeal* (July 12, 2017).
[3] *Agency Answer to Petition for Appeal* (August 16, 2017).
[4] *Prehearing Conference Order* (December 5, 2017).
[5] *Post-Prehearing Conference Order* (January 31, 2018).

ten or more consecutive days. It reasoned that Employee's prolonged absence served as a basis for charging with her with neglect of duty because she failed to resume her duties as a Bus Attendant on the specified date. Agency further reiterated that Employee was provided with reasonable accommodations for her medical issues in May of 2015 and September 14, 2016. Lastly, it noted that Employee was previously disciplined for absenteeism and tardiness in August of 2014. Therefore, Agency posited that removal was the appropriate penalty under the circumstances and requested that its termination action be upheld.[6]

In her brief, Employee argued that her rights were violated under the Americans with Disabilities Act ("ADA"). She echoed her previous sentiment that Agency was obligated to provide her with the proper accommodations at work. Employee also disagreed with Agency's assertion that she was previously suspended for tardiness, stating that a previously proposed suspension was never effectuated.[7]

The AJ issued his Initial Decision on August 1, 2018. He noted that Employee's brief did not directly address her absences from October 20, 2016 through November 21, 2016, but instead raised several arguments regarding Agency's duty to provide her with reasonable accommodations. Conversely, the AJ stated that Agency offered sufficient background information relating to Employee's work history to demonstrate pattern of absenteeism. He agreed with Agency's position that Employee was absent without leave after October 20, 2016 because her request for leave was only partially granted for August 23, 2016 through October 19, 2016. Additionally, the AJ concluded that Employee's arguments pertinent to the ADA were outside the purview of OEA's jurisdiction.[8]

[6] *Agency Brief in Support of Termination* (February 22, 2018).
[7] *Employee Brief* (March 26, 2018).
[8] *Initial Decision* (August 1, 2018).

Regarding the penalty, the AJ relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985), in which the D.C. Court of Appeals held that OEA is tasked with determining whether the penalty imposed was within the range allowed by law, regulation, and any applicable Table of Appropriate Penalties. He provided that under Chapter 6, Section 1619.6 of the D.C. Municipal Regulations ("DCMR"), an appropriate penalty for a first time offense of unauthorized absence is removal, and that first time offenses of AWOL and neglect of duty carry penalties ranging from reprimand to removal. Based on a review of the record, the AJ concluded that Agency's termination action was within the penalties allowed under District law. Consequently, Employee's termination was upheld.

Employee disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on August 30, 2018. She argues that Agency erred by claiming that she was on leave restriction. Employee also contends that she was never suspended for ten days during her tenure. Additionally, she states that Agency was contractually required to engage in an interactive process to address the leave issue. Finally, Employee asserts that many of the dates Agency referenced were inaccurate and reiterates that her rights were violated under the ADA because Agency refused to provide her with reasonable accommodations. Therefore, she asks that the Board grant her Petition for Review.[9]

Standard of Review

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

> The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:

[9] *Petition for Review* (August 30, 2018). Agency did not file a response to Employee's petition.

(a) New and material evidence is available that, despite due diligence, was not available when the record closed;

(b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;

(c) The findings of the Administrative Judge are not based on substantial evidence; or

(d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

Discussion

OEA Rule 628.2 provides that Agency has the burden of proof in establishing, by a preponderance of the evidence, that the proposed disciplinary action was taken for cause. On Petition for Review, this Board is tasked with determining whether the AJ's findings were based on substantial evidence in the record. The Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[10] Employee's submission does not raise any of the arguments contemplated in OEA Rule 633.3 as a basis for granting her Petition for Review. However, this Board nonetheless finds that the AJ's findings were based on substantial evidence.

With respect to the AWOL specification, DCMR § 1268.1 provides that an absence from duty that was not authorized or approved, or for which a leave request has been denied, shall be charged on the leave record as absence without leave. The AWOL action may be taken whether or not the employee has leave to his or her credit. DCMR § 1268.4 provides that if it is later

[10]*Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

determined that the absence was excusable, or that the employee was ill, the charge to AWOL may be changed to a charge against annual leave, compensatory time, sick leave, or leave without pay, as appropriate. Similarly, Section 1619.1 of the District Personnel Manual ("DPM") provides that an unauthorized absence for ten consecutive days or more constitutes job abandonment.

In this case, on September 27, 2016, Agency's Human Resource department submitted a Leave of Absence ("LOA") request to the Associate Director of Bus Operations on Employee's behalf because of her medical condition.[11] The LOA requested leave from August 23, 2016 through November 17, 2016. On September 28, 2016, Agency's Director of Human Resources and Labor Relations, Quiyana Hall, informed Employee that the request was partially approved. The notice stated that Employee was expected to return to work without restriction on October 20, 2016.[12]

The record reflects that Employee failed to return to duty on October 20, 2016 and did not contact Agency until after she was served with an Advance Written Notice of Proposed Removal. On March 25, 2016, Employee requested FMLA leave. However, her request was denied because Employee only worked 588 of the 1000 hours required under the Act in the previous twelve months.[13] Thus, Employee was not eligible to take FMLA leave, and under DCMR § 1268.1, her absence from work after October 20, 2016 was neither authorized nor approved. As a result, Employee was absent from work for more than ten consecutive days and was considered AWOL under District law. Consequently, the AJ did not err in concluding that Agency met its burden of proof that Employee was AWOL during the relevant time period.

[11] *Agency Answer to Petition for Appeal*, Exhibit C.
[12] *Id*.
[13] *Agency Brief in Support of Termination of Employee* (February 22, 2018).

As it relates to the neglect of duty charge, DPM § 1619.1(6) provides that neglect of duty includes the failure to follow instructions or observe precautions regarding safety; failure by a supervisor to investigate a complaint; failure to carry out assigned tasks; or careless or negligent work habits. As previously stated, Employee was AWOL as of October 20, 2016, and was not present to perform the essential duties of her position. Accordingly, this Board finds that there is substantial evidence in the record to support a finding that Employee neglected her duties by failing to report for duty after her leave request expired. [14]

Regarding the appropriateness of Agency's penalty, the D.C. Court of Appeals in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985) held that OEA must determine whether the penalty imposed was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency. As the AJ noted, Employee was previously disciplined for attendance issues in May of 2014 and August of 2014. While Employee contests the second instance of discipline, Agency asserts that she served a ten-day suspension beginning on August 5, 2014 based on charges of AWOL and neglect of duty. Notwithstanding the parties' disagreement regarding whether Employee actually served the suspension, DPM § 1619.1(6)(a) establishes that the appropriate penalty for a first offense of unauthorized absence is removal. Moreover, first time charges of AWOL and neglect of duty carry penalties ranging from reprimand to removal.[15] Thus, the charges forming the basis of the instant adverse action authorize termination for first-time offenses. In reviewing the record, we find that there was no clear error by the AJ in concluding that Agency selected the appropriate penalty of termination.

---

[14] *See also Wako v. Office of the State Superintendent of Education*, OEA Matter No. 1601-0134-14 (August 28, 2015) (holding that the agency established cause to initiate an adverse action when the employee was approved for annual leave from December 23, 2013 to January 10, 2014, but did not report for duty after being denied a subsequent request to extend his initial leave request.)

[15] DPM §§ 1619.1(6)(b) and (c).

Conclusion

Based on the foregoing, this Board finds that the Initial Decision is based on substantial evidence. Agency met its burden of proof in establishing that Employee's conduct constituted "any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: unauthorized absence; AWOL; and neglect of duty." Additionally, the record supports a finding that termination was the appropriate penalty under the circumstances. Lastly, Employee's arguments pertinent to reasonable accommodations constitute grievances which are outside the scope of OEA's jurisdiction. For these reasons, we must deny Employee's Petition for Review and uphold the Initial Decision.

ORDER

Accordingly, it is hereby ordered that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

_____
Clarence Labor, Chair

_____
Vera M. Abbott

_____
Patricia Hobson Wilson

_____
Jelani Freeman

_____
Peter Rosenstein

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.