Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
DARLENE REDDING Employee	
v.	OEA Matter No.: 1601-0112-08R11
DEPARTMENT OF PUBLIC WORKS Agency	Date of Issuance: April 30, 2013

OPINION AND ORDER ON REMAND

Darlene Redding ("Employee") worked as a Parking Enforcement Officer for the Department of Public Works ("Agency"). On June 26, 2008, Agency issued a notice of final decision to terminate Employee, charging her with inexcusable absence without leave ("AWOL").[1] Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on July 10, 2008. She claimed that she was absent from work because she was sick and under her doctor's care. Employee alleged that she called her supervisor and made her aware that she was under doctor's care.[2]

[1] According to Agency, Employee was absent from work February 14, 2008 through April 18, 2008, amounting to 400 duty hours.
[2] *Petition for Appeal,* p. 3 (July 10, 2008).

Agency filed its response to Employee's Petition for Appeal on August 12, 2008. It explained that Employee was absent from work without obtaining advanced approval for leave or notifying her supervisor of her status. Agency claimed that during the time of Employee's absence, she had sixteen hours of annual leave and eight hours of sick leave available. Subsequently, Agency was provided a document from Employee's psychiatrist dated May 28, 2008, which stated that she was under his care from March 15, 2008 through April 2008. However, according to Agency, Employee failed to submit the required medical documentation to establish that her absence was excusable.[3]

The OEA Administrative Judge ("AJ") issued his Initial Decision on August 6, 2009. He held that it is well established that illness is a defense for an AWOL charge where the illness is incapacitating and the severity of the illness is established. The AJ found that Employee suffered from schizophrenia and was unable to work from February 14, 2008 until April 2008. He further reasoned that although Employee could have better documented the treatment during her absence between February 14 and March 15, 2008, she credibly testified that she suffered a medical relapse between February 14 and March 14, 2008. Accordingly, he reversed the action against Employee and ordered Agency to reinstate Employee to her position.[4]

Agency filed a Petition for Review with the OEA Board on October 9, 2009. In its petition, Agency argued that the Initial Decision should be reversed because it was not supported by substantial evidence. It contended that none of the documentation provided by Employee established that she was incapacitated due to her health problems from February 14, 2008 until April 18, 2008. Employee provided documentation showing that she was treated by a doctor from March 15 through April 2008. However, Agency explained that even those documents did

[3] *Agency Answer,* p. 2-4 (August 12, 2008).
[4] *Initial Decision,* p. 15-21 (August 6, 2009).

not establish that her symptoms were incapacitating. As a result, Agency requested that the Initial Decision be reversed.[5]

The OEA Board issued its Opinion and Order on March 15, 2011. The Board relied on the D.C. Court of Appeals' ruling in *Murchison v. D.C. Department of Public Works*, 813 A.2d 203 (D.C. 2002) in making its decision.[6] The Board held that ". . . in order to excuse an extended period of absence, an employee must prove that [he or she] had a legitimate medical illness that rendered him or her incapacitated and thus [,] unable to perform his or her work duties." Applying the legal standard of *Murchinson*, the Board realized that it was unable to make a determination in the current matter because the record was incomplete.[7] It held that more evidence was needed to determine whether Employee's mental condition was so severe to deem her incapacitated and unable to perform her duties from February 14, 2008 through April 18, 2008. Therefore, it granted Agency's Petition for Review, vacated the Initial Decision, and remanded the matter to the AJ to make the appropriate factual findings. [8]

On remand, the AJ ordered Employee to submit two affidavits. The first was to be from her primary care physician. The other affidavit was required from her psychiatrist, which

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[5] *Memorandum of Points and Authorities in Support of Petition for Review*, p. 3-8 (October 9, 2009).

[6] The AJ in *Murchinson* held that because Employee had established adequate justification for her absences, those absences were excusable. The OEA Board affirmed this ruling, and Agency appealed OEA's decision to the Superior Court of the District of Columbia ("Superior Court"). The Superior Court reversed the Board's ruling, holding that the administrative record lacked substantial evidence to support the Board's findings and that there had been no finding as to whether Employee's aggravated condition was so debilitating as to prevent her from performing her duties. The D.C. Court of Appeals reversed the lower court and remanded the case to OEA, finding that because the administrative record was incomplete on the issue of whether Employee was incapacitated by her condition, it could not make a ruling on that issue.

The Court explained that the doctor's reports Employee submitted did not address the severity of her condition or the extent to which it was exacerbated by her working conditions. OEA was instructed to make specific factual findings regarding whether, and to what extent, Employee was incapacitated by her condition and unable to work during her prolonged absence without leave.

[7] The Board found that the May 12, 2008 statement explained the reason for Employee's absence for part of the time period for which she was charged with being AWOL. However, the statement was silent as to whether the worsening symptoms caused Employee to be absent from work.

[8] *Darlene Redding v. Department of Public Works*, OEA Matter 1601-0112-08, *Opinion and Order on Petition for Review*, p. 3-5 (March 15, 2011).

needed to address the severity of her condition during February 14, 2008 through April 18, 2008, and whether it rendered her incapacitated to the extent that she was unable to perform her work duties.[9]

Employee submitted that her treating physicians no longer worked for the District government, and she was unable to obtain their contact information. Additionally, she provided that her new psychiatrist could not testify to her prior medical condition and that the Medical Records Department could not locate the records from her treating physicians. Instead, she provided a letter dated October 29, 2008, from a Clinical Care Manager with the D.C. Department of Health; a letter dated November 1, 2011, from a doctor who had been treating her since 2003; and two medical reports which provided a summary of Employee's medical history.[10]

In an Addendum Decision on Remand, the AJ held that none of the documents presented by Employee addressed the severity of her mental condition during the relevant time period, nor did they provide the extent to which her medical condition was exacerbated by her working condition. The reports described that Employee was mildly depressed and not psychotic. Thus, the AJ ruled that the documents did not offer any evidence that Employee's condition was debilitating. Accordingly, she upheld Agency's decision to terminate Employee, ruling that her absences were inexcusable.[11]

Employee filed a Petition for Review of the Addendum Decision on Remand with the OEA Board on January 17, 2012. She claims that she was discriminated against on the basis of a disability. She contends that she was subjected to disparate treatment, retaliation, a hostile work environment, sexual harassment, assault, and rape because of her sex. Employee explains that

[9] *Order Requesting Sworn Statements* (October 14, 2011).
[10] *Response to Order for Statement of Good Cause* (November 15, 2011).
[11] *Addendum Decision on Remand*, p. 4-6 (December 12, 2011).

Agency's alleged misconduct evokes malice and reckless indifference to her protected Federal and District rights. Finally, she asserts that as a result of Agency's conduct, she suffered emotional pain, mental anguish, loss wages and benefits.[12]

The Opinion and Order on Petition for Review of the OEA Board narrowed the issue to be addressed by the AJ on remand. The AJ was specifically tasked with determining if Employee's illness was so debilitating to have rendered her incapacitated to perform her work duties. Employee does not address this issue or any of the findings raised in the Addendum Decision on Remand in her Petition for Review. Instead, she presents arguments of disparate treatment, hostile work environment, rape and sexual harassment. These issues are clearly outside the scope of those to be addressed on remand. In accordance with OEA Rule 634.3, the Board may grant a Petition for Review when the petition establishes that:

> (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.

Employee offers none of the above-mentioned reasons as a basis for her appeal. Moreover, OEA Rule 634.4 provides that "any . . . legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board." At no point did Employee raise the arguments presented in her Petition for Review during the remand period. Thus, this Board will not address these issues.

The OEA Board has previously held in *Teshome Wondafrash v. Department of Human Services*, OEA Matter No. 1601-0126-96, *Opinion and Order on Petition for Review* (April 14,

[12] *Petition for Review* (January 17, 2012).

2008) and *Victor Hines v. Department of Transportation*, OEA Matter No. 1601-0116-05, *Opinion and Order on Petition for Review* (February 25, 2009) that when an employee offers a legitimate excuse, such as incapacitation due to illness, for being absent without leave, the absence is excusable, and therefore, cannot serve as a basis for an adverse action. On remand, the AJ ordered Employee to provide documentation from her physicians outlining the severity of her condition during February 14, 2008 – April 18, 2008. In her Addendum Decision on Remand, she correctly found that none of the documentation presented by Employee offered any insight into the seriousness of her illness during this period.

The physicians' notes, provided by Employee, describe that she was a patient since 2003 who suffered from shortness of breath and was diagnosed with a mild case of depression. There were no notes recovered from her medical records which illustrated the nature and severity of her condition.[13] If Employee's condition was debilitating, as she alleges, it is extremely unfortunate that she cannot produce proof of such. However, given the documents that were provided, it is clear to this Board that Employee's illness did not rise to the level of incapacitation. Accordingly, we must uphold the AJ's Addendum Decision on Remand and DENY Employee's Petition for Review.

[13] *Response to Order for Statement of Good Cause* (November 15, 2011).

ORDER

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

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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Necola Y. Shaw

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Alvin Douglass

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.