Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. 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:	)	
	)	
EMPLOYEE[1]	)	
	)	OEA Matter No. 1601-0035-21
v.	)	
	)	Date of Issuance: July 11, 2024
UNIVERSITY OF THE DISTRICT OF	)	
COLUMBIA,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Police Officer with the University of the District of Columbia ("Agency"). On May 24, 2021, Agency issued a notice to Employee informing her "that [she was] being separated from employment . . . due to job abandonment." The notice provided that Employee had been on unapproved leave since April 22, 2021; that she had exhausted her family medical leave; and that her request for leave without pay ("LWOP") was denied because she was an essential employee. Agency noted that it would accept this as Employee's resignation. As a result, the effective date of Employee's separation was May 31, 2021.[2]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] *Petition for Appeal*, p. 5 (June 28, 2021).

June 28, 2021. In her petition, she asserted that she was wrongfully terminated; she did not abandon her job; and she did not resign from her position. Employee explained that she applied for LWOP to cover a period from April 22, 2021, to September of 2021. She contended that Agency was aware that she was on extended leave until September 1, 2021. However, she claimed that she did not receive notification of an approval or denial of her LWOP request. Additionally, Employee contended that the medical information that Agency requested for the LWOP form was provided in previous submissions by Employees weeks before. Finally, she argued that pursuant to Article 27 of the Collective Bargaining Agreement ("CBA"),[3] Agency should have provided her with notice of a proposed termination, and it should have conducted a post-termination meeting. Employee claimed that neither happened. As a result, she requested that she be reinstated with back pay and benefits and that the adverse action be removed from her personnel file.[4]

On September 20, 2023, Agency filed its Answer to the Petition for Appeal. It asserted that Employee's separation was warranted because she abandoned her job. Agency explained that on April 22, 2021, it informed Employee that she exhausted her Family and Medical Leave Act ("FMLA") entitlement of 640 hours within a 12-month period and that she had not worked the requisite 1,250 hours within the past 12 months to qualify for additional FMLA. Subsequently, Agency requested that Employee apply for LWOP and submit a medical release form and a medical information request form by May 7, 2021. It provided that Employee failed to submit the requested documents by the prescribed deadline, and she did not return to work. As a result, Agency requested that Employee's petition be dismissed.[5]

After holding an evidentiary hearing and receiving written closing arguments, the OEA

[3] The CBA was between the University of the District of Columbia and the American Federation of State, County, and Municipal Employees District Council 20, Local 2087.
[4] *Petition for Appeal*, 2-8 (June 28, 2021).
[5] *Agency's Answer to Employee's Petition for Appeal*, p. 2-7 (September 20, 2021).

Administrative Judge ("AJ") issued an Initial Decision on February 7, 2024. She held that the record supported Employee's contention that she was on approved leave without pay after her FMLA was exhausted. Additionally, she found that Agency could not charge Employee with job abandonment because: (1) it was aware of Employee's efforts and intention to secure additional leave; (2) it was in receipt of Employee's leave without pay application when her FMLA leave was exhausted; (3) it did not provide its denial of leave without pay to Employee prior to it issuing its termination letter; and (4) it did not provide Employee with a return-to-work date for which she could comply. Additionally, the AJ ruled that Agency did not provide any credible evidence to support its assertion that Employee voluntarily resigned. She reasoned that Employee was working with Agency to seek additional leave to continue her employment and at no time did she inform Agency that she intended to leave District government employment. Moreover, the AJ found that Agency failed to provide an advance notice of proposed discipline as required by Article 27, Section 5 of the CBA. Accordingly, she ruled that Agency lacked cause to take the adverse action against Employee. Therefore, she ordered that the penalty of termination be reversed and that Employee be reinstated to the same or comparable position with reimbursement for back pay and benefits.[6]

Agency filed a Petition for Review with the OEA Board on March 13, 2024. It argues that the Initial Decision is based on an erroneous interpretation of statute, regulation, or policy and that the AJ's findings were not based on substantial evidence. It is Agency's position that the AJ erroneously determined that an employee must be absent for ten consecutive days in order to have been deemed to have abandoned their job. Specifically, it argues that its regulations do not specify the length of time which an employee should be disciplined for an unauthorized absence.

[6] *Initial Decision*, p. 12-16 (February 7, 2024).

Additionally, Agency contends that the AJ incorrectly relied on 6-B DCMR § 1607, as that regulation is not applicable to Agency's policies. Agency opines that there is substantial evidence to support that Employee abandoned her position because she failed to submit the requested medical documentation. Moreover, Agency argues that Employee's PeopleSoft records and witness testimony are not substantial evidence that Employee was on approved leave without pay. Finally, Agency provides that Employee did not assert in her Petition for Appeal that Agency violated Article 27, Section 5 of the CBA. Accordingly, it requests that the Initial Decision be reversed.[7]

On April 17, 2024, Employee filed her Response to Agency's Petition for Review. She asserts that the AJ's decision is based on substantial evidence. Employee argues that she was never served with a notice proposing discipline. Additionally, she maintains that she did not abandon her position, nor did she voluntarily resign. Employee contends that she never tendered a resignation letter to Agency. She further asserts that Agency failed to provide her with notice of its decision to deny her LWOP; it also failed to provide a return-to-work date, which violated her due process rights. Employee argues that Agency did not provide her with an opportunity to respond to the action or to present her position.[8] Further, Employee explains that she raised in her Petition for Appeal that Agency violated of Article 27, Section 7 of the CBA, which requires that Advance Notice be given pursuant to Article 27, Section 5. Therefore, she requests that the Initial Decision be denied.[9]

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[7] *Agency's Petition for Review of Initial Decision*, p. 11-24. (March 13, 2024).
[8] Employee explains that she provided a new medical report signed by her physician which made it clear that she was still experiencing the same challenges and extended her need to recover before returning to work on September 1, 2021. It is her position that between the short-term disability form and her supplemental medical documentation that Agency had a complete medical basis to approve her LWOP request.
[9] *Employee's Opposition to Agency's Petition for Review of Initial Decision*, p. 16-21 (April 17, 2024).

Substantial Evidence

According to OEA Rule 637.4(c), the Board may grant a Petition for Review when the AJ's findings are not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), found 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]

Resignation/Termination

Agency argues that Employee abandoned her job, and as a result, it treated her actions as a voluntary resignation. The OEA Board, in *Catherine Duvic v. Department of Behavioral Health,* OEA Matter Number J-0012-15, *Opinion and Order on Petition for Review* (September 13, 2016) and *Debra Johnson v. D.C. Public Schools*, OEA Matter No. 1601-0037-13, *Opinion and Order on Petition for Review* (December 19, 2017), relied on *District of Columbia Metropolitan Police Department v. Stanley*, 942 A.2d 1172, 1175-1176 (D.C. 2008) to determine the voluntariness of resignations. In *Stanley*, the D.C. Court of Appeals held that the test to determine voluntariness is an objective one that, where considering all the circumstances, the employee was prevented from exercising a reasonably free and informed choice. The Court reasoned that as a general principle, an employee's decision to resign is considered voluntary "if the employee is free to choose, understands the transaction, is given a reasonable time to make his choice, and is permitted to set the effective date."

In the current case, the record is void of any letter of resignation from Employee.

[10] *Black's Law Dictionary*, Eighth Edition; *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).

Moreover, the Manager of Employee and Labor Relations, Katherine Bruce, testified that at no time did Agency receive a letter of resignation from Employee.[11] Similarly, Employee testified that she did not submit any documents indicating that she was resigning from Agency.[12] Former Agency Lieutenant Blackmon also testified that he was informed by his supervisor, Deputy Chief Culmer, "that [Employee] was terminated . . . [but] if anyone asked, [he was to inform them] that she resigned.[13] Furthermore, Agency's notice provided that Employee was ". . . being separated from employment . . . ."[14] Agency's Standard Form 50, Notification of Personnel Action, provided that the nature of action was "termination," and it provided the "reason for termination" as job abandonment.[15] Considering the holding in *Stanley*, Employee was not free to choose to resign from her position. Agency provided that it would, on its own, accept its denial of Employee's LWOP request as her resignation. This occurred without any input from Employee that this was her choice. Likewise, she was not allowed a reasonable time to evaluate this as an option and make an informed choice. Moreover, Employee did not set a resignation date. As a result, there was not a voluntary resignation by Employee.

Although there is no proof of Employee submitting a resignation letter that met the *Stanley* court's requirements, in *Debra Johnson v. D.C. Public Schools*, OEA Matter No. 1601-0037-13, *Opinion and Order on Petition for Review* (December 19, 2017), the OEA Board held that failure to report to work *after notice* shall be deemed a voluntary resignation due to abandonment of position, and it shall not be considered an adverse action (emphasis added). Thus, if Agency could show that Employee failed to report to work after providing notice then it would be considered

[11] *OEA Hearing Transcript* at 154 (October 18, 2023).
[12] *Id*. at 238.
[13] *Id*., 273-274.
[14] *Id.*, Agency Exhibit #12 (October 18, 2023).
[15] *Id*., Agency Exhibit #13.

abandonment, and the abandonment would not be considered an adverse action. The record in this matter clearly shows that Agency provided no notice to Employee that her failure to report to work, after her LWOP request was denied, would result in job abandonment. Agency's notice of separation did not offer any language that Employee should return to work by a certain date or that failure to report to work would result in abandonment. Agency's witness, Katherine Bruce, testified that she was not aware if Agency informed Employee that she needed to return to work, or it would consider her absence as job abandonment.[16] The *Stanley* court held that ". . . an employee's resignation may be involuntary if it is induced by the employer's application of duress or coercion, time pressure, or the misrepresentation or withholding of material information." Because Agency did not inform Employee that her failure to return to work would result in abandonment, it withheld material information. Accordingly, the AJ's decision that Employee did not voluntarily resign is based on substantial evidence.

<u>Cause</u>

Because Employee did not voluntarily resign, Agency had to show that it had cause to remove Employee from her position. In its notice, Agency did not offer any rules, regulations, laws, or CBA language related to its claim of abandonment.[17] Chapter 8-B of the District of Columbia Municipal Regulations ("DCMR") applies to employees of the University of the District of Columbia. Chapter 8-B DCMR § 1503.4 provides a list of performance deficiencies that constitute cause. As the AJ offered in her Initial Decision, it appears that unauthorized absence is the most applicable cause related to abandonment/unauthorized leave. This Board notes that unauthorized absence is provided in 8-B DCMR § 1503.4(f)(2).

Chapter 8-B DCMR § 1508 provides the following steps that Agency must take when

[16] *OEA Hearing Transcript*, p. 128, 148-151 (October 18, 2023).
[17] *OEA Hearing Transcript*, Agency Exhibit #12 (October 18, 2023).

imposing an adverse action.

> 1508.3 Except in the case of summary disciplinary actions in accordance with §1510, the Proposing Official will issue a Notice of Proposed Adverse Action, which will inform the employee of the following:
> (a) The type of proposed adverse action (suspension of ten (10) days or more, demotion, or termination);
> (b) The nature of the proposed adverse action (days of suspension, demotion, or removal);
> (c) The specific performance or conduct at issue;
> (d) The ways in which the employee's performance or conduct fails to meet appropriate standards;
> (e) The name and contact information of the Deciding Official; and
> (f) The employee's right to:
> (1) Review material upon which the proposed adverse action is based;
> (2) Prepare a written response to the notice; and
> (3) Be represented by an attorney or other representative.
>
> 1508.5 The employee to whom a Notice of Proposed Adverse Action is issued will be asked to acknowledge its receipt in writing. If the employee refuses to acknowledge receipt in writing, a witness to the refusal will provide a brief written statement that the employee refused to acknowledge receipt in writing, and that statement will be signed and dated by the witness.
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> 1508.6 The material upon which the Notice of Proposed Adverse Action is based, and which is necessary to support the reasons given in the Notice, will be assembled and provided to the employee along with the Notice, unless impractical. If the materials cannot be provided at the time of Notice, they will be made available to the employee for his or her review, upon request.
>
> 1508.7 Within fifteen (15) days of receipt of the Notice of Proposed Adverse Action, an employee may elect to submit a written response to the Deciding Official.
> (a) An employee's written response may clarify, expand on, or take exception to the statements or conclusions made in the Notice of Proposed Adverse Action. Once submitted, the response will be maintained and treated as an attachment to the Notice of Proposed Adverse Action.

Additionally, CBA, Article 27, Section 5 provides that "the University will provide advance notice of fifteen (15) calendar days to employees of the effective date of the implementation of discipline." Article 27, Section 7 states the following:

> In the case of an employee termination, the University shall provide the following information to the Union within three (3) business days from the date that the employee is notified of his or her termination:
>
> (a) a copy of the employee's official personnel file excluding any information related to employee benefits;
> (b) letter of termination;
> (c) notices of any prior discipline relied upon for the termination;
> (d) all bargaining unit employee statements relied upon in connection with the investigation giving rise to the termination; and
> (e) the employee's attendance records for the time period of attendance was in whole or in part of the reason for the termination.

Finally, Article 27, Section 9 provides that a post-termination conference between Agency and the Union may take place within five (5) working days of the employee's termination for the parties to discuss the matter.

The record shows that none of the above-mentioned actions occurred in the current case. Agency failed to issue a notice of proposed action or advance notice.[18] Employee was not provided an opportunity to respond to the proposed action. Additionally, there is no evidence that Employee was provided with the requirements outlined in Section 7 of Article 27 in the CBA. The record is also void of any proof of a post-termination conference. As a result, the requirements of Chapter 8-B DCMR § 1508 and Article 27 of the CBA were not followed in this case. Consequently, there is substantial evidence to uphold the AJ's ruling that Agency lacked cause to remove Employee from her position.

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[18]The record reflects that Employee never received notice that her LWOP request was denied prior to her notice of separation. Agency's May 24, 2021, notice informed Employee that she was being separated from employment; that she has been on unapproved leave since April 22, 2021; that her request for LWOP was denied; and that Agency considered that as her resignation. *Petition for Appeal*, p. 5 (June 28, 2021). Additionally, the record includes Agency's time reporting for Employee. These reports and their respective pay stubs show that from April 23, 2021, through May 14, 2021, Employee was on approved LWOP. *Employee's Exhibit List*, Exhibit #11 (March 28, 2024). Furthermore, Agency's witness, Cetrina Smith, testified that after Employee exhausted her FMLA leave, she was instructed by human resources to input Employee's time as LWOP status. *OEA Hearing Transcript*, p. 292-293 (October 18, 2023). Thus, there is substantial evidence in the record to support the AJ's finding that Employee was on approved LWOP from April 23, 2021, through May 14, 2021.

Factors Considered Before Imposing Penalty

Chapter 8-B DCMR Section 1504.2 provides the factors that Agency must demonstrate and include in its final agency decision on adverse action. Section 1504.2 provides the following:

> For all disciplinary actions, supervisors must be prepared to demonstrate that the following factors were considered:
>
> a) The nature and seriousness of the misconduct or performance deficiency, and its relationship to the employee's duties, position, and responsibilities, including whether the offense was intentional, technical or inadvertent; was committed maliciously or for gain; or was frequently repeated;
> b) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
> c) The employee's past disciplinary record;
> d) The employee's past work record, including length of service, performance on the job; ability to get along with fellow workers, and dependability;
> e) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect on the supervisor's confidence in the employee's ability to perform assigned duties;
> f) The consistency of the penalty with those imposed upon other employees for the same or similar offenses;
> g) The consistency of the penalty with any table of disciplinary and adverse actions the University may decide to issue;
> h) The notoriety of the offense or its impact upon the reputation of the University or the District Government;
> i) 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;
> j) The potential for the employee's rehabilitation;
> k) The mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, bad faith, malice, or provocation on the part of those involved in the matter; and
> l) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

The record does not provide any analysis by Agency of any of the factors provided in Section 1504.2. Additionally, Agency's notice is void of any reference to these factors. Therefore, Agency failed to consider the requisite factors before imposing a penalty of removal in this case.

Conclusion

There is substantial evidence in the record to uphold the AJ's ruling that Employee did not voluntarily resign in this matter. Additionally, there is substantial evidence that Agency lacked cause and failed to consider the factors provided in Chapter 8-B DCMR Section 1504.2 before imposing its termination action. As a result, Agency's Petition for Review is denied. The AJ's order reversing Agency's removal action and reinstating Employee to a comparable position with back-pay and benefits is upheld.

ORDER

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

FOR THE BOARD:

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Clarence Labor, Jr., Chair

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Peter Rosenstein

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Dionna Maria Lewis

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Arrington L. Dixon

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.