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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. 1601-0058-20
v.	)	
	)	Date of Issuance: November 15, 2021
DISTRICT DEPARTMENT OF	)	
TRANSPORTATION,	)	
Agency	)	
	)	MONICA DOHNJI, Esq.
		Senior Administrative Judge
Employee, <i>Pro se</i>		
Cheri Staples, Esq., Agency Representative		

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL HISTORY

On August 13, 2020, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the District Department of Transportation’s (“DDOT” or “Agency”) decision to terminate him from his position as a Traffic System Operator, effective July 10, 2020. Employee was charged with violating the following: (1) Attendance-related offense, Unauthorized absence of five (5) workdays or more;<sup>2</sup> and (2) False Statements: Misrepresentation, falsification or concealment of material facts or records in connection with an official matter, including investigations.<sup>3</sup> On March 18, 2021, Agency filed a Motion to Extend Time to Answer. Subsequently, on April 26, 2021, Agency submitted its Answer to Employee’s Petition for Appeal.

Following a failed mediation, this matter was assigned to the undersigned Senior Administrative Judge (“SAJ”) on July 1, 2021. A Status Conference was held in this matter on August 3, 2021. Both parties were present for the scheduled Status Conference. Thereafter, I issued a Post-Status Conference Order on August 5, 2021, requiring the parties to submit written briefs addressing the issues raised at the Status Conference. Both parties submitted their respective briefs. Upon further review of the record, on October 1, 2021, I issued an Order

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<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> District Personnel Manual (“DPM”) §§1605.4(f) and1607.2(f)(4).

<sup>3</sup> DPM §§1605.4(b)(2) and 1607.2(b)(2).

requesting that Agency address the issue of Employee's Family and Medical Leave status at the time of the alleged incident. Employee also had the option to submit a reply brief. Both parties complied with the October 1, 2021 Order. After considering the parties' arguments as presented in their submissions to this Office, I have decided that there are no factual issues in dispute, and as such, an Evidentiary Hearing is not required. The record is now closed.

### JURISDICTION

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

### ISSUES

- 1) Whether Employee's actions constituted cause for adverse action; and
- 2) Whether Agency violated the Collective Bargaining Agreement; and
- 3) Whether the penalty of removal is within the range allowed by law, rules, or regulations.

### FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

According to the record, Employee was a Transportation Engineer/Traffic System Operator at the time of his termination which was effective on July 10, 2020. He was a member of the AFGE Local 1975 Union. On July 17, 2019, Employee informed his supervisor via email that he was sick and would like to take sick leave for the day.<sup>4</sup> On July 25, 2019, Employee proactively submitted an "Excuse Slip" from Capitol Hill Medical Clinic to Agency, which noted that Employee was seen at the Clinic on July 17, 2019 and was released to return to work July 30, 2019.<sup>5</sup> The bottom of the Excuse Slip contained the following information: "#13152 – © Medical Arts Press® 1-800-328-2179". The Excuse Slip did not have the name of the treating physician or any other physician at the clinic or the clinic address. Employee returned to work on July 30, 2019. Apart from sending the Excuse Slip, Employee did not contact Agency from July 17, to July 30, 2019. In an email dated July 30, 2019, Agency informed Employee that it was unable to ascertain the validity of the Excuse Slip submitted on July 25, 2019. Employee responded to Agency's email inquiry on July 31, 2019, providing a phone number and the following information - Kaiser Permanente Capitol Hill Medical Center, located at 700 2<sup>nd</sup> St, N.E. Washington, DC 20002.<sup>6</sup> On August 8, 2019, Agency faxed over a request for medical documentation for Employee to Kaiser Permanente. This fax was received by Kaiser Permanente on August 9, 2019. On August 14, 2019, Kaiser Permanente submitted Verification of Treatment Contact Form, noting that "the Member/Patient did not sign an authorization to release this information."<sup>7</sup>

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<sup>4</sup> Agency's Answer at Exhibit 2 (April 26, 2021).

<sup>5</sup> *Id.* at Exhibit 4.

<sup>6</sup> *Id.* at Exhibit 6.

<sup>7</sup> *Id.* at Exhibit 7.

Agency emailed Employee twice, prior to an October 18, 2019, meeting, to remind him to bring his Union representative to the meeting.<sup>8</sup> Agency emailed a recap of the October 18, 2019, meeting wherein, it stated that during the meeting, Employee was informed that he had forty-five (45) days to provide Agency with an acceptable treatment and/or medical form for the period he was out on Unscheduled Sick Leave in July 2019.<sup>9</sup> The email also stated that Employee was informed that the forty-five (45) day deadline would expire on December 2, 2019, and his failure to submit the requested document could result in disciplinary action. Employee did not provide the requested documentation by the December 2, 2019, deadline. Agency scheduled a meeting with Employee and his Union representative on December 12, 2019, wherein, Agency informed Employee that the forty-five (45) days had elapsed, and it was not able to verify Employee's absence in July of 2019, as excused.<sup>10</sup> Employee's timesheet for the period of July 17 – July 26, 2019, was marked "Unscheduled Sick Leave".<sup>11</sup>

On January 9, 2020, Agency issued a Notification of Charge to Absence Without Leave (AWOL) to Employee, notifying Employee that he would not receive pay for the period of: July 17, 2019 – July 21, 2019; and for July 23, 2019 – July 26, 2019.<sup>12</sup> Agency also stated that the reason for the action was Employee's failure to provide sufficient medical documentation for an excused absence. Agency further noted that Employee was out sick for three (3) consecutive days and the documents he provided did not justify nor account for applying sick leave to his PeopleSoft timesheet (Agency's time keeping software). Therefore, Agency decided that Employee was subject to disciplinary action.<sup>13</sup>

Agency also included an email dated March 04, 2019, sent to Employee's supervisor, informing him that Employee was approved for the Paid Family Leave ("PFL") program and D.C. Family and Medical Leave program, effective February 10, 2019, and expiring February 9, 2020, for a total not to exceed 620 hours.<sup>14</sup> The PFL and D.C. FMLA was for the birth of Employee's child. The document further noted that Employee's PFL would expire on April 7, 2019; his D.C. Family and Medical Leave ("D.C. FMLA") and Federal Family and Medical Leave ("FMLA") would both expire on February 9, 2019.<sup>15</sup> Agency also included a record of Employee's PFL usage which covered the period of February 12, 2019, to April 5, 2019; then September 19, 2019, for a total of 320 hours.<sup>16</sup>

On March 25, 2020, Agency issued an Advanced Written Notice of Proposed Removal ("Proposed Removal") to Employee for: (1) Attendance-related offense: Unauthorized absence of five (5) workdays or more; and (2) False Statements: Misrepresentation, falsification or concealment of material facts or records in connection with an official matter, including investigations.<sup>17</sup> This matter was referred to a Hearing Officer. On April 17, 2020, Employee,

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<sup>8</sup> *Id.* at Exhibit 8.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at Exhibit 9.

<sup>11</sup> *Id.* at Exhibit 3.

<sup>12</sup> *Id.* at Exhibit 10.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at Exhibit 11.

<sup>15</sup> *Id.* DCFMLA and FMLA will be used interchangeably throughout this decision.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at Exhibit 1.

through his representative, filed a response to the Proposed Removal.<sup>18</sup> The Hearing Officer issued an Amended Hearing Officer's Report/Recommended Decision on May 26, 2020, upholding the proposed removal.<sup>19</sup> Agency issued a Notice of Final Decision for Proposed Removal on July 1, 2020, terminating Employee effective July 10, 2020.<sup>20</sup>

### ***Employee's Position***

Employee does not deny that he was absent from work for the period of July 17, 2019 through July 26, 2019. However, Employee notes that his absence was excusable since he was under a doctor's care and FMLA. He explained that he followed Agency's unscheduled leave procedure by seeking medical treatment and documentation from a doctor's office. He also explained that he provided the documentation to his managers, and this document covered his unscheduled leave for the period of July 17-30, 2019. He noted that he had a sinus infection.<sup>21</sup>

Employee asserted that Agency's delay in commencing the adverse action greatly hindered his ability to gather the type of documentation that Agency was requesting. Employee explained that when he returned in October of 2019 to the Capitol Hill medical clinic located on MLK Ave., where he was examined by a medical provider on July 17, 2019, to collect the requested documents, he discovered that this facility was closed. He further asserted that the closure was probably due to construction and the facility was no longer seeing patients. Employee reiterated that the months that went by between July and part of October of 2019, when his manager requested additional medical documentation to prove the July 2019 incident, hindered his ability to obtain the requested documentation. He maintained that if Agency had acted in a timely manner and asked him to obtain more medical documentation in July or August of 2019, he might have been able to satisfy their request, as the medical clinic might have still been operational then.<sup>22</sup>

Additionally, Employee stated that his supervisor, Charles Tenbrook ("Tenbrook"), violated procedural standards in handling the instant adverse action. Employee explained that Tenbrook scheduled a meeting with him on October 18, 2019. He asserted that he was informed of the meeting twenty (20) minutes prior to the scheduled start time. When he asked Tenbrook via email to explain the purpose of the meeting, Tenbrook, did not provide a clear response. Employee also noted that Tenbrook did not allow him to have a Union representative present at this meeting. Employee explained that he asked Tenbrook if he should bring a Union representative with him to the meeting and Tenbrook said no. However, to cover his track, Tenbrook later sent out an email after the meeting that Employee could have brought a Union representative to the meeting, but he chose not to do so.<sup>23</sup> Employee maintained that because he was given such short notice of the meeting, he was not able to request a union representative.<sup>24</sup> Employee further noted that during the second meeting he had with Tenbrook and Tapp (Employee's union representative), Tenbrook informed Tapp that the issue regarding

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<sup>18</sup> *Id.* at Exhibit 12.

<sup>19</sup> *Id.* at Exhibit 13.

<sup>20</sup> *Id.* at Exhibit 14,

<sup>21</sup> Employee's Brief (August 26, 2021). *See also*, Employee's Reply to Employer's Brief (September 30, 2021).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Employee's Reply to Employer's Brief, *supra*.

Employee's attendance record and medical documentation was resolved and that Employee would keep his job with DDOT.<sup>25</sup>

Employee also contended that the penalty taken against him was not appropriate for the circumstances. He explained that he had been a very diligent employee at Agency and had followed employee rules and DDOT policies. He noted that many other lesser penalty options could have been chosen such as counseling or suspension, especially considering his good government service record of twelve (12) years.<sup>26</sup> Employee also acknowledged that perhaps, the doctor's note could have been more detailed. However, he explained that at the time, he was upset about his mother's recent cancer diagnosis, so he was distracted and did not remember to ask the doctor to write a more specific note when he was at the clinic on July 17, 2019.

Furthermore, Employee argued that his manager, Tenbrook and/or Agency Human Resources ("HR") personnel could have assisted him better by informing him that he could use FMLA for the period of July 17 to July 26, 2019. Employee explained that he already had FMLA approved and on file in April 19, 2019. Employee asserted that if the FMLA on file did not cover his sinus condition, which happened in July of 2019, his manager or HR personnel should have informed him and requested that he submit additional FMLA paperwork.<sup>27</sup>

Employee contended that Agency did not meet its burden of proof with regards to the false statement charge. He explained that he tried to go back to the medical clinic at MLK Avenue several months later to obtain additional medical documentation; but discovered that the clinic was permanently closed. He then visited the affiliate Kaiser Permanente clinic located at 700 2nd St., NE, Washington, DC. Employee argued that Agency did not provide any tangible evidence to support their claim that he did not really go to the medical clinic located at MLK Ave. in July of 2019 and/or that he fabricated the doctor's note. Employee asserted that the Agency made guesses about what really happened and these guesses amounted to subjective and biased opinions.<sup>28</sup>

Employee concluded that Agency did not have proper authority to terminate him because he was genuinely sick, he sought medical treatment at the Capitol Hill Medical Clinic located on MLK Avenue, and he obtained a doctor's note for work. He noted that the medical clinic was a walk-in type clinic, similar to an urgent care center, where patients see whoever is the medical provider on duty (Medical Doctor, Physician's Asst., or Nurse Practitioner). Employee stated that he made every effort to comply with his job's unscheduled leave policy.<sup>29</sup>

In his October 29, 2021, brief, Employee stated that he was aware that his FMLA leave was specifically designated for the birth and care of his child, thus, the reason he requested to use

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<sup>25</sup> *Id.*

<sup>26</sup> Employee's Brief, *supra*.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

his sick leave for his July 2019, illness.<sup>30</sup> Employee also requested an Evidentiary Hearing in connection with his appeal.<sup>31</sup>

### ***Agency's Position***

Agency asserted that it has met its burden of proof in this matter, and as such, OEA should sustain its termination action against Employee. Agency stated that on July 17, 2019, Employee contacted his supervisory chain of command via electronic mail to inform them that he was not feeling well and wished to utilize sick leave for that day's tour of duty. However, Employee missed nine (9) scheduled workdays from July 17, 2019, through July 26, 2019, and did not contact the Agency regarding his absence at any other time. It noted that Employee entered the compensable leave type of "Unscheduled Sick Leave" in his timesheet for the July 17th through July 26th period. Agency stated that Employee should also have contacted the Agency at a minimum of two hours prior to each tour of duty to request additional time off from work for each day of unscheduled leave.<sup>32</sup>

According to Agency, sending a single email notifying Agency that he would be out for the remainder of one day did not justify Employee's absence for nine (9) days without any further communication from him during this time. Agency explained that during this time frame, Employee did not contact or request any time of unscheduled leave or inform management of the expected duration of his continued absence. Agency highlighted that this period of unexcused absence required Employee to provide validation for its medical basis.<sup>33</sup>

Agency noted that Employee submitted a purported medical form stating he underwent treatment at Capitol Hill Medical Clinic. It explained that the form lacked any detail such as a medical professional's name, title, or authority, which were required for Agency to accept it as valid. Agency also noted that the form listed two different locations, but the specific location at which Employee allegedly underwent treatment was not listed. Agency further explained that the form had non-functional facsimile number, and two telephone numbers, only one of which was functional. When the Agency dialed the sole functional telephone number, the number provided only a voice recording indicating the caller had contacted "Capitol Hill Community Health Center." Agency reiterated that the Excuse Slip Employee submitted was insufficient to validate Employee's claimed illness and did not qualify Employee to be excused from duty.<sup>34</sup>

Agency disputed Employee's claim that Agency waited several months to notify him that the medical documentation was insufficient. In reality, Employee was notified within five (5) days, specifically on July 30, 2019, that the medical documentation he provided on July 25, 2019, was insufficient. Agency informed Employee that it was unable to ascertain the validity of the form Employee provided, as it could not tell the specific facility at which Employee had undergone treatment. Employee responded to Agency's inquiry by stating that he received treatment at Kaiser Permanente, Capitol Hill Medical Center. However, when Agency contacted

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<sup>30</sup> Employee's Reply to Agency's Response to Judge's Order (October 29, 2021).

<sup>31</sup> *Id.*

<sup>32</sup> Agency's Brief in Response to Post Status/Prehearing Conference Order (September 16, 2021).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

Kaiser Permanente on August 14, 2021, via facsimile, to verify if Employee underwent treatment at that facility, Kaiser Permanente would not verify treatment, because Employee had not submitted a written authorization for Agency to obtain this information. Agency concluded that Employee was required to provide proof of the reason for his absence from duty in excess of three days, but he failed to do so.<sup>35</sup>

Agency further contended that contrary to Employee's allegation, it informed Employee it would meet with him on October 18, 2019, to discuss the situation, and advised Employee of his right to have union representation present at the meeting. Employee declined to bring a representative to the meeting. Further, during the meeting, Agency provided Employee an additional forty-five (45) days to provide an acceptable medical certificate or other medical form and warned that failure to do so could result in disciplinary action. The forty-five (45) day period expired on December 2, 2019, and a follow-up meeting was held on December 12, 2019, where Employee's union representative was present. Agency reiterated that, Agency and OEA have provided Employee with numerous opportunities to provide medical documentation justifying his absence and to clarify the inconsistent and unverifiable information Employee provided, to no avail. Additionally, Agency noted that as recently as August 5, 2021, an order was issued by the undersigned which afforded Employee an additional opportunity to further address his absence by providing an affidavit from his physician and Employee failed to do so.<sup>36</sup>

Additionally, Agency argued that the relevant *Douglas* factors<sup>37</sup> support Employee's removal. Agency concluded that it acted within its discretion in removing Employee from his position and has acted in accordance with all applicable laws and regulations. Agency maintained that the DPM provides that an employee can be removed from his position for both of the noted disciplinary offenses on the first offense. Accordingly, Agency contended that Employee's removal in this matter was proper, as the Agency has established by a preponderance of the evidence that Employee's absences from duty were unauthorized and that Employee made false statements.<sup>38</sup>

With regard to Employee's assertion that he was under PFL and FMLA during the period of the alleged incident, Agency acknowledged that Employee was approved for PFL and D.C. FMLA for the period of February 9, 2019, to February 10, 2020, for the birth of his daughter and not for his own medical condition. Agency also provided that Employee's PFL expired on April 7, 2019.<sup>39</sup> Agency noted that Employee did not use any of his approved FMLA hours. Agency explained that Employee did not state that his absence from work between July 17 – July 26, 2019, was related to the birth of her daughter. Instead, Employee notified Agency that his absence during the alleged period was a result of his own health condition – specifically, to seek treatment for his sinus infection. Agency further asserted that Employee was not eligible to use the balance of the FMLA approved for the birth of his daughter as medical leave for his personal self-care.<sup>40</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Citing Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981).

<sup>38</sup> *Id.*

<sup>39</sup> Agency's Brief in Response to Order dated October 1, 2021, Order (October 7, 2021).

<sup>40</sup> *Id.*

***1) Whether Employee's actions constituted cause for discipline<sup>41</sup>***

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Furthermore, 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. Employee was terminated for (1) Attendance-related offense: Unauthorized absence of five (5) workdays or more; and (2) False Statements: Misrepresentation, falsification or concealment of material facts or records in connection with an official matter, including.

**Unauthorized absence of five (5) workdays or more:**

In the instant case, the undersigned must determine if the evidence that Employee was absent from work for five or more consecutive workdays is adequate to support Agency’s decision to terminate Employee. In such cases, “[t]his Office has consistently held that when an employee offers a legitimate excuse, such as illness, for being absent without leave, the absence is justified and therefore excusable.”<sup>42</sup> Additionally, if the employee’s absence is excusable, it “cannot serve as a basis for adverse action.”<sup>43</sup> The relevant time period in this matter is July 17, 2019 to July 26, 2019. Employee was absent from work during this period, for a total of nine (9) workdays. Employee notified his supervisor on July 17, 2019, that he would be out sick for the rest of that day. Employee did not contact Agency anytime thereafter, while he was out, and he only returned to work on July 30, 2019.

Employee does not dispute Agency’s allegation that he was absent from work between July 17-July 26, 2019. He however alleges that his absence was excused as he was out sick. Pursuant to DCMR 1242.7 “[f]or an absence in excess of three (3) workdays, or for a lesser period when determined necessary by an agency, the agency may require a medical certificate, or other administratively acceptable evidence as to the reason for the absence.” Here, on July 25, 2019, Employee proactively submitted an “Excuse Slip” from Capitol Hill Medical Clinic to Agency, which noted that Employee was seen at the Clinic on July 17, 2019, and was released to return to work July 30, 2019. However, in an email dated July 30, 2019, Agency informed Employee that it was unable to ascertain the validity of the Excuse Slip submitted on July 25, 2019. Employee responded via email on July 31, 2019 and provided a phone number and an address to “Kaiser Permanente Capitol Hill Medical Center, located at 700 2<sup>nd</sup> St, N.E. Washington, DC 20002.” On August 8, 2019, Agency faxed a request for medical documentation for Employee to Kaiser Permanente. This fax was received by Kaiser Permanente on August 9,

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<sup>41</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>42</sup> *Murchinson v. Department of Public Works*, OEA Matter No. 1601-0257-95R03 (October 4, 2005); citing *Employee v. Agency*, OEA Matter No. 1601-0137-82, 32 D.C. Reg. 240 (1985); *Tolbert v. Department of Public Works*, OEA Matter No. 1601-0317-94 (July 13, 1995).

<sup>43</sup> *Murchison, supra*, citing *Richard v. Department of Corrections*, OEA Matter No. 1601-0249-95 (April 14, 1997); *Spruiel v. Department of Human Services*, OEA Matter No. 1601-0196-97 (February 1, 2001).



2019. On August 14, 2019, Kaiser Permanente submitted a Verification of Treatment Contact Form, noting that “the Member/Patient did not sign an authorization to release this information.”

Agency further argues that the Excuse Slip lacked any detail such as medical professional's name, title, or authority, which were required for Agency to accept it as valid. Agency also noted that the form listed two different locations, but the specific location at which Employee allegedly underwent treatment was not listed. Agency further explained that the form had a non-functional facsimile, and two telephone numbers, with only one of them being functional. When the Agency dialed the sole functional telephone number, the number provided only a voice recording indicating the caller had contacted “Capitol Hill Community Health Center.” Agency reiterated that the Excuse Slip Employee submitted was insufficient to validate Employee's claimed illness and did not qualify Employee to be excused from duty. Because Employee was absent from work for more than three (3) workdays, I find that Agency was within its rights to require a medical certificate or other administratively acceptable evidence as to the reason for Employee's absence, in compliance with DCMR 1242.7.

Upon review of the Excuse Slip submitted by Employee on July 25, 2019, I agree that it was lacking relevant details needed by Agency to decide the legitimacy of Employee's sick leave request – the street address, suite number, name and title of the treating physician or any physician associated to the practice was missing. Employee was required by Agency to provide a medical certificate or other administratively acceptable evidence. Apart from the deficient July 25, 2019, Excuse Slip, there is no other medical certificate in the record provided by Employee in justification for being absent from July 17 to July 26, 2019. Based on the record, I further find that Employee has not provided Agency with the administratively acceptable evidence as it had requested.

Additionally, after Employee provided Agency the contact information for Kaiser Permanente via email on July 31, 2019, Agency attempted to contact Kaiser Permanente to get a Verification of Treatment (“VOT”) for Employee, covering the period in question. Kaiser Permanente responded that Employee did not authorize the release of the requested information. Also, in October of 2019, Agency provided Employee an additional forty (45) days to provide an administratively acceptable medical certificate; again, Employee did not comply. The undersigned also provided Employee with additional time during the adjudication process to obtain an affidavit from the treating physician and again, Employee did not comply. He stated that the clinic was closed. The record is void of any concrete evidence to justify Employee's assertion that he was treated at the Capitol Hill Medical Clinic on July 17, 2019, or the Kaiser Permanente Clinic. Once an employee is absent from work for more than three (3) workdays, the employee has the burden to provide the agency with the administratively acceptable evidence to justify their absence. Here, Employee's failure to provide an administratively acceptable medical certificate as requested after being absent from work for more than three (3) workdays constitutes justification for an adverse action against Employee.<sup>44</sup>

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<sup>44</sup> Employee also submitted Excuse Slips from prior years that he submitted to Agency to justify prior absences. The Excuse Slips from the previous years are identical to the July 25, 2019, Excuse Slip and are from the same medical clinic. However, I conclude that Agency's decision to accept the previous Excuse Slips at the time, without questions has no bearing on the validity of the July 25, 2019, Excuse Slip.

Employee contends that Agency's delay in requesting the medical certificate affected his ability to obtain an acceptable medical certificate. He explained that had Agency requested the information in July or August 2019, he might have been able to obtain the information before the medical facility close. He noted that when he returned to the medical facility in October of 2019, after the meeting with Agency, he found out that the clinic where he was seen on July 17, 2019, had closed and was no longer seeing patients. I find Employee's argument to be disingenuous. According to the record, Agency informed Employee on July 30, 2019, (five days after Employee submitted the Excuse Slip) that it was unable to ascertain the validity of the Excuse Slip. Instead of going back to the clinic to obtain another note which included all the information Agency requested, Employee responded to Agency's email by providing information related to a different medical facility on July 31, 2019. Therefore, I conclude that Employee was put on notice with regards to the validity of his July 25, 2019, Excuse Slip as early as July 30, 2019. Consequently, his contention that Agency's delay in requesting the medical certificate affected his ability to obtain an acceptable medical certificate is without merit.

Employee was absent from work for a period of more than three (3) workdays, and pursuant to DCMR 1242.7, Agency was within its discretion to require Employee to provide a medical certificate or other administratively acceptable evidence as to the reason for his absence. Employee provided Agency with an Excuse Slip; however, upon review of the Excuse Slip, Agency notified Employee that it needed additional information to verify the validity of the Excuse Slip Employee submitted. Employee was provided multiple opportunities to provide the requested information and/or document, but he failed to do so. The undersigned also requested that Employee provide a sworn affidavit from his treating physician covering the period of absence. Again, Employee did not comply. Consequently, I find that the reason for Employee's absence from work between July 17, to July 26, 2019, cannot be substantiated and as such, his absence is not excusable and can serve as a basis for adverse action. Accordingly, I find that Agency has sufficiently established cause to support this cause of action.

**False Statements: Misrepresentation, falsification or concealment of material facts or records in connection with an official matter, including investigations:**

Agency also charged Employee with False Statements: Misrepresentation, falsification or concealment of material facts or records in connection with an official matter, including investigations pursuant to DPM §§1605.4(b)(2) and 1607.2(b)(2). Agency provided a detailed explanation of the process of buying a similar Excuse Slip online by any member of the public. Upon review by the undersigned, the website selling the excuse slips is designed specifically for medical offices to order forms and office supplies. Thus, I find that Agency's argument with regards to this issue is inconsequential as Agency has not provided any credible evidence indicating that the July 25, 2019, Excuse Form was purchased online by Employee and not by Capitol Hill Medical Clinic for its business use.

In addition, Agency states that the July 25, 2019, Excuse Slip contained noticeable discrepancies. Agency asserts that Employee provided inconsistent and unverifiable documents to justify his unauthorized absence from work for nine (9) workdays so he could be compensated for unscheduled sick leave. It explained that the note lacked standard and expected identifying information which consistently appeared on administratively acceptable documents such as: who

signed the note; their title/position; and the specific address of the medical office (such as building number, suite, street address, city, state and zip). Agency also noted that the phone and fax numbers provided were not in working order.<sup>45</sup> Agency noted that Employee provided the information of a different medical provider when he was asked to provide clarifying information as to the Capitol Hill Medical Clinic location that purportedly issued the July 25, 2019, Excuse Slip. Specifically, Employee provided the address and phone information for Kaiser Permanente in response to Agency's July 30, 2019, email. Agency explains that the information was different and inconsistent with the information provided in the July 25, 2019, Excuse Slip. Agency further noted that Employee provided inconsistent and unverifiable information to create the impression that he had visited medical providers during the time of his absence.

Agency also avers that Employee received compensation for Sick Leave based on the inconsistent and unverifiable documents he submitted. Agency explains that Employee attempted to evade accountability by misleading management because he took compensated leave for unscheduled absence on the pretense of illness.<sup>46</sup> Employee argues that Agency did not meet its burden of proof with regards to this cause of action. He states that he tried to get the requested information several months later only to discover that the clinic was permanently closed, and then went to the affiliate Kaiser Permanente. It should be noted that Employee provided the information for Kaiser Permanente just six (6) days, after submitting the July 25, 2019, Excuse Slip, and not months late as he alleges. Therefore, I find that Employee has not provided this Office with any credible evidence to contradict Agency's assertion that he misrepresented, falsified or concealed material facts in connection with an official record or investigation.

Agency also stated that during the January 7, 2020, meeting, Employee attempted to mislead Agency's management by stating that he was under PFL during the time of his absence, despite being aware that he did not have any approved PFL. Agency maintains that Employee's assertion of PFL was again an attempt by Employee to evade accountability and mislead Agency. While Employee did not specifically address Agency's allegation that he claimed he was on PFL during the January 7, 2020, meeting, Employee noted in his brief that his absence was excusable since he was under a doctor's care and approved FMLA. Consequently, the undersigned issued an Order requiring Agency to provide information about Employee's FMLA status during the period of July 17 to July 26, 2019. Agency noted in its October 12, 2021, brief that Employee was indeed covered by FMLA during that period, however, it was approved for the birth of his daughter and not Employee's own medical issue. Moreover, Employee did not provide any information to refute Agency's assertion that he claimed he was covered by PFL during the January 7, 2020, meeting. Consequently, I find that Agency has met its burden of proof with regard to this cause of action.

### **Collective Bargaining Agreement**

As a member of the AFGE Local 1975 union, Employee is covered by the Collective Bargaining Agreement ("CBA") between Agency and the Union. Employee argues that Agency violated procedural standards as he was not allowed to bring his union representative to the October 18, 2019, meeting. Employee states that he asked Tenbrook if he could bring his union

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<sup>45</sup> Agency Answer, *supra*, at Exhibit 1.

<sup>46</sup> *Id.*

representative to the meeting and Tenbrook said no. Employee explains that to cover his tracks, Tenbrook sent out an email after the meeting stating that Employee could have brought his union representative, but he chose not to.<sup>47</sup> I find this argument unpersuasive. According to the record, in an email from Tenbrook, dated October 18, 2019, with a 10:18 a.m., time stamp, Tenbrook informed Employee that they had a meeting on the same day at 1:00 p.m. He also stated in the email that “if you wish, *you can have your union representative present at the meeting.*” (Emphasis added).<sup>48</sup> Tenbrook sent out another email to Employee at 12:07 p.m. on the same day, reminding him of their scheduled meeting and emphasizing that “...you have the right to have your union rep present. *Please notify your union if you need them...* (emphasis added).”<sup>49</sup> Contrary to Employee’s assertion, both emails were sent out prior to the scheduled meeting. Employee seems to focus on the email Tenbrook sent at 3:22 p.m., which provided a recap of the scheduled meeting. Tenbrook correctly reiterated in the recap that before the meeting, Employee was informed that he had the right to have union representation.<sup>50</sup> Tenbrook also requested that Employee reply to the email sent on October 18, 2019, at 3:22 p.m., if Tenbrook made “errors or discrepancies of our discussions.”<sup>51</sup> There is nothing in the record indicating that Employee responded to this email implying that Tenbrook inaccurately narrated what was discussed at the October 18, 2019, meeting with Employee.<sup>52</sup> Because Employee completely disregarded the two (2) emails sent prior to the start of the scheduled meeting, I find his claim regarding the notification of his right to union representation utterly disingenuous. Based on the above, I find that Agency did not violate Employee’s right to union representation at the October 18, 2019, meeting.<sup>53</sup>

### **Evidentiary Hearing**

Employee asserts that an Evidentiary Hearing is necessary “to assert my rights and have all arguments heard and all evidence presented.” OEA Rule 624.1 provides that a “party may request the opportunity for an evidentiary hearing to adduce testimony to support or refute any fact alleged in a pleading.” OEA Rule 624.2 further provides that OEA rule provides that, “[i]f the Administrative Judge grants a request for an evidentiary hearing, or makes his or her own determination that one is necessary, the Administrative Judge will so advise the parties and, with appropriate notice, designate the time and place for such hearing and the issues to be addressed.” Therefore, it the Administrative Judge’s prerogative to hold an evidentiary hearing when it is deemed necessary. Here, the parties do not dispute that Employee was out of the office from July 17 to July 26, 2019. The crux of the matter is whether Employee’s absence is excused due to an illness. The only witness to credibly testify to this issue is Employee’s treating physician on July 17, 2019. However, all attempts to secure this witness has been futile. Employee has failed to

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<sup>47</sup> *Id.*

<sup>48</sup> Agency Answer, *supra*, at Exhibit 8.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Employee also stated that he was informed of the meeting 20 minutes before the scheduled meeting, as such, he was not able to request a union representative. Again, as noted above, the first email referencing the meeting was sent by Tenbrook at 10:18 a.m. on the day of the meeting, and the meeting was scheduled for 1:00 p.m. This is more than two hours’ notice and not 20 minutes notice as Employee claims.

<sup>53</sup> Employee asserted during the course of his appeal at the Agency level that Agency violated the 90-day rules as provided in the CBA. However, he did not raise this argument before this tribunal. As such, this issue will not be addressed by the undersigned.

provide this Office with the physician's name or any other information that can be used to secure the physician's presence and testimony at an Evidentiary Hearing. Consequently, the undersigned finds that an Evidentiary hearing is not warranted in this matter, as the main witness – Employee's physician has not been identified.

**2) *Whether the penalty of removal is within the range allowed by law, rules, or regulations.***

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).<sup>54</sup> According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Illustrative Actions ("TIA"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency. In the instant matter, Employee avers that he should have been levied a lesser punishment such as counseling or suspension if Agency found that his absence during the alleged incident was not excusable, especially given his unblemished twelve (12) years of service. Employee explains that he was distracted by his mother's recent cancer diagnosis, and this prevented him from requesting a more specific doctor's note. Employee asserts that the penalty taken against him was unfounded and not appropriate under the circumstances. Citing to *Stoke, supra*, Employee asserts that Agency's decision to remove him from his position exceeds the scope of reasonableness, and as such, he should be reinstated.<sup>55</sup> Agency on the other hand argues that it has met its burden of proof with regards to both causes of action, and the TIA allows for removal for a first offense for the asserted causes. Agency provided a *Douglas* factor analysis for the instant matter and avers that these factors support Employee's removal. Agency maintains that it acted within its discretion to remove Employee from his position of Traffic System Operator, and in accordance with all applicable laws and regulations.<sup>56</sup>

I find that Agency has met its burden of proof for the charges of: (1) Attendance-related offense: Unauthorized absence of five (5) workdays or more; and (2) False Statements: Misrepresentation, falsification or concealment of material facts or records in connection with an official matter, including investigations. Consequently, I conclude that Agency can rely on these charges to discipline Employee.

With regards to the Attendance-related offense - Unauthorized absence of five (5) workdays or more, the record shows that this was the first time Employee violated this cause of action. Pursuant to the TIA, the penalty for a first offense for this cause of action is removal. For the charge of False Statements: Misrepresentation, falsification or concealment of material facts

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<sup>54</sup> See also *Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

<sup>55</sup> Employee's Brief, *supra*.

<sup>56</sup> Agency's Answer, *supra*.

or records in connection with an official matter, including investigations, the record shows that this was the first time Employee violated this cause of action. Pursuant to the TIA, the penalty for a first offense for this cause of action ranges from reprimand to removal. Employee acknowledges that the penalty for a first offense for five (5) or more days of unauthorized absence is removal pursuant to the Table of Illustrative Actions.<sup>57</sup>

As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.<sup>58</sup> When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment.

#### Penalty Based on Consideration of Relevant Factors

An Agency's decision will not be reversed unless it failed to consider relevant factors, or the imposed penalty constitutes an abuse of discretion.<sup>59</sup> Employee argues that Agency did not engage in progressive discipline, and its penalty of removal exceeded the scope of reasonableness. He asserts that Agency could have counseled or suspended him. He avers that his twelve (12) years of good government service should have been considered. I disagree with Employee's assertion. Pursuant to the TIA, the only penalty available to Agency for the first offense of unauthorized absence of five (5) or more workdays is removal, which is what Agency levied against Employee. The cause of action does not provide for a lesser penalty such as counseling or suspension as stated by Employee. Moreover, I find that despite his twelve (12) years of government service, Employee did not exercise diligence or put the amount of effort required in the handling of the instant matter. He was provided with multiple opportunities over an extended period of time to cure the defect with the July 25, 2019, Excuse Slip and he failed to do so. Consequently, I conclude that Agency's decision to remove Employee from his position did not exceed the scope of reasonableness.

In *Douglas*, the court held that "certain misconduct may warrant removal in the first instance." In reaching the decision to remove Employee, Agency included its analysis of the *Douglas* factors to its submission to this office.<sup>60</sup> Employee's twelve (12) years of good government service was considered Neutral under *Douglas* factor number 4.<sup>61</sup> Agency concluded

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<sup>57</sup> Employee's Brief, *supra*.

<sup>58</sup> *Love* also provided that "[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 (1981).

<sup>59</sup> *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C. Reg. 352 (1985).

<sup>60</sup> Agency's Answer, *supra*, at Exhibit 1.

<sup>61</sup> The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

that termination was the appropriate penalty. Accordingly, I conclude that Agency has properly exercised its managerial discretion and its chosen penalty of removal is reasonable. Consequently, I further conclude that Agency's action should be UPHELD.

ORDER

It is hereby **ORDERED** that Agency's action of removing Employee is **UPHELD**.

FOR THE OFFICE:

/s/ Monica N. Dohnji

MONICA DOHNJI, Esq.  
Senior Administrative Judge

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- 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 the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.