THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ANGELITA BUCKMAN	)	OEA Matter No. 1601-0215-04
Employee	)	
	)	Date of Issuance: March 14, 2006
v.	)	
	)	Lois Hochhauser, Esq.
DEPARTMENT OF HUMAN SERVICES	)	Administrative Judge
Agency	)	

Kevin Turner, Esq., Agency Representative
Angelita Buckman, Employee

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Employee filed a petition with the Office of Employee Appeals (OEA) on August 20, 2004, appealing Agency's final decision to remove her from her position as an Investigator with Agency's Income Maintenance Administration. The effective date of the removal was July 23, 2004. At the time of the removal, Employee was in permanent, career status and had been employed at Agency for approximately two years.

The matter was assigned to this Administrative Judge on March 17, 2005. A prehearing conference took place on April 13, 2005 and a status conference was held on September 13, 2005. An evidentiary hearing took place on November 17, 2005. At the hearing, the parties were given full opportunity, and did in fact, present testimonial and documentary evidence and arguments in support of their positions.[1] By "Order" dated January 12, 2006, the parties were advised that closing briefs were due on February 13, 2006 on which date the record closed.

[1] The transcript is cited at "Tr" followed by the page number.

JURISDICTION

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

ISSUE

Did Agency meet its burden of proof regarding its removal of Employee?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The advance notice of Agency's proposal to terminate Employee, dated April 9, 2004, states:

> In accordance with personnel regulations, absence from duty, ten (10) consecutive days or more without permission may be a basis for removal. Despite numerous attempts to assist you in complying with the procedures for requesting leave, you have failed to contact the office since September 27, 2003. By letters dated August 22, 2003 and September 26, 2003 . . . you were informed of the procedures for requesting extended leave and of the documentation necessary to support that request. However, to date you have not formally requested extended leave nor have you provided the necessary documentation to support your absence. You have been absent from work without approved leave since January 5, 2004 and have accumulated 504 hours of AWOL.[2]

The advance notice gave Employee the opportunity to review the material upon which the action was based, provide a written response and have an administrative review. Employee submitted a written response to a Hearing Officer on April 26, 2004. Agency issued its final decision on July 13, 2004. In the decision, Yvonne Gilchrist, Director, stated she had reviewed the evidence as well as the Administrative Report and determined that Employee should be removed based on the AWOL charge, with an effective date of July 23, 2004.

Employee does not dispute that she was not at work on the dates specified by Agency. She asserts however, that Agency would not accommodate her need to work "light duty". Employee stated that due to her condition, she could not perform duties which require walking up stairs and conducting home studies where the home might be on multiple levels. (Tr, 23). She said that although Agency told her it did not have any light duty jobs, there

[2] Absence Without Official Leave.

were other employees on light duty. (Tr, 7).

Employee testified that on April 8, 2003, she notified Toxi Clark, Chief of Eligible Review and Investigations, that she had a high risk pregnancy and needed to be on light duty. She stated she gave Ms. Clark a medical statement at that time. Employee testified Ms. Clark told her she "couldn't afford to have anyone else go out on light duty". (Tr, 14). She then wrote a letter to Ms. Clark and when she did not hear back from her, Employee asked her supervisor, Renee Ashton, if she knew the outcome of her request. Ms. Ashton did not. Approximately three days later, Employee received an assignment, which she was able to do, and she worked on this assignment for several days. At that time, she started having additional medical problems, and was placed on bed rest on or about April 24, 2003. (Tr, 48).

Employee testified she "constantly called in or asked" about the status of her request for light duty. On May 8, 2003 she stated she received a letter from Agency stating that it did not have light duty assignments. She said she knew this was not true. (Tr, 17). Employee stated she spoke with EEO staff as well as with the Union representative, Ms. Bailey,[3] who spoke with Ms. Clark. (Tr, 19).

Employee stated that she miscarried in May 2003, and then shortly thereafter she fell, and as a result, she claims she still required light duty status. She submitted a Medical Certificate from Dr. Jennifer Keller of George Washington University Hospital which stated that she had been treated for "medical problems" and was placed on "no work" from July 14 to July 17 and on light duty from July 18 to July 21. The limitations were "no climbing, walking or strenuous activity". She was to return to "regular work" beginning July 21, 2003. (Ex E-3).

Employee also submitted a certificate from John Vandam, M.D., dated May 8, 2003, stating she had been under his care from May 12 to June 3. On the portion of the "Certificate to return to work" entitled "will be able to return to work", the doctor wrote in "medical office visit".[4]

On June 12, 2003, Chester DiLallo, M.D., of Greater Metropolitan Orthopedics, sent Employee a letter stating that she was scheduled for surgery on July 11 due to a "torn lateral meniscus" and that she would be out of work a maximum of six weeks. Employee stated she

[3] Employee also contended in the petition for appeal that Agency told her that she was not a member of the collective bargaining unit and that this harmed her because the Union did not have her included as a member and therefore did not assist her. However, she testified that she did receive Union assistance, and in any event, did not pursue this argument at the proceeding. It is therefore not addressed in this Decision.

[4] The Administrative Judge could not discern what was written in the portion "nature of illness or injury" It appears to read "advised patient home rest . . . scheduled".

had the surgery.

Employee was directed to submit a letter addressing her capacity to return to work prior to July 11, 2003. The July 17, 2003 letter from Dr. DiLallo states:

> This is in clarification to the duty slip dated 5-6-03[5] . . . Desk work means no climbing, no stooping, bending, no prolonged walking or standing. [Employee] was again seen on May 22, 2003. At that time we were preparing to schedule her surgery. Unfortunately, due to medical reasons, her surgery had to be postponed. These restrictions are in effect until [Employee] has surgery. (Ex E-2).

On June 24, 2003, Employee wrote to Ms. Clark requesting that she be provided with the reason that Dr. DiLallo's letters were insufficient. On June 30, Ms. Clark responded that Dr. DiLallo's letter did not address Employee's capacity or inability to "currently" return to work. The memorandum states in pertinent part:

> In response to your letter faxed to me on June 25, 2003, I re-iterate that, after reviewing your statements provided from Dr. Chester DiLallo, neither statement addresses your capacity or inability to return to work currently.
>
> The certificate of disability that we received on June 3, 2003 and dated May 6, 2003 from Dr. DiLallo cites that you may return to work on May 6, 2003 with a deskwork only restriction. This doctor's certificate does not indicate a period for deskwork. The second letter from Dr. DiLallo, dated June 10, 2003, does not indicate any restrictions or limitations for deskwork until after your surgery.
>
> In your request for Family Leave or Advanced Leave, your doctor must indicate that you have been unable to return to work for a specific time period. The doctor must also indicate if there are any restrictions or limitations to performing your duties as an investigator before your surgery, July 11, 2003.

Employee stated she had surgery in July 2003, and was not able to return to work, but still had not heard from Agency regarding her request for light duty. On July 22, 2003, she submitted a note from Dr. Niles dated July 21, 2003 stating "Advised to be off work from 7/23 to 7/30/03". Employee submitted an "Excuse Slip" from John Niles, M.D., dated July

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[5] Dr. DiLallo had submitted a "Certificate of Disability" on that date stating that Employee had been under his care with knee derangement since April 15, 2003 and could return to work on May 6, 2003 on light duty with the following restriction "desk work only" However, Ms. Clark refers to the July 11 surgery in her memorandum which is not mentioned in the May 6 statement.

30, 2003, stating she was unable to work due to "medical reasons" for the period between July 27 and August 10, 2003.

Employee stated that despite her requests, she never received anything from Agency permitting her to return to work on light duty. She only received communications that Agency did not consider the medical statements to be sufficient. She questioned how she could be considered AWOL when Agency never informed her that she could return to work. (Tr, 24).

Employee stated she last contacted Agency in December 2003 when she received her first notice placing her on AWOL status. (Tr, 25). She testified she spoke with Ms. Ashton and asked how she could be placed on AWOL status when she had submitted medical statements. She said Ms. Ashton told her that the statements were not sufficient. Employee stated she did not submit anything further because she was told "if that was all [she] had, there's no need to submit anything else to the Agency". (Tr, 27). Employee stated she had medical documentation showing she could not work after she was notified she was being placed on AWOL in January 2004, but she had not submitted it to Agency. The document was dated April 4, 2005. (Tr, 29).[6] Employee testified she had several miscarriages between April 2003 and February 2004 and was pregnant in January 2004 and placed on limited duty. (Tr, 47).

Brenda Wheeless testified that she was a co-worker of Employee's and that she was placed on light duty when she was injured on the job. She stated that she provided documentation from her physician that she was required to be on light duty. (Tr, 12). She further testified that she was aware of two other employees who were placed on light duty, but who were not injured on the job (Tr, 10).[7]

Agency's position is that Employee never established that she was incapacitated during the period she was charged with AWOL.[8] According to Agency, only employees who are injured on the job are eligible for light duty assignments if those assignments are available. Therefore, Employee was not eligible for light duty assignments. (Tr, 41).

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[6] Employee sought to submit this document - a Disability Certificate from Dr. Rankin of Rankin Orthopedic and Sports Medicine Center, dated April 4, 2005, into evidence. Agency objected stating Employee had not disclosed the document as required or when Agency representative had subsequently spoken with her. Employee stated she did not disclose it because she did not think her current medical condition was relevant. The Certificate states that Employee is disabled from April 4, 2005 indefinitely but was "sufficiently recovered" to return to work with the limitations of no standing, climbing or walking distances. Essentially, Employee wants the document admitted as rebuttal evidence. It is admitted for that purpose.

[7] Employee also submitted a letter from Carolyn Jackson, a co-worker, stating that she was placed on light duty due to a physical impairment before she retired in 2003, but Ms. Jackson does not state if she suffered from a job-related injury. (Ex E-1).

[8] Agency's request for summary judgment was denied. (Tr, 32).

Toxi Clark testified that Agency was concerned about Employee's unexplained absences. She stated that although asked to do so, Employee never submitted acceptable medical documentation that justified her absences. (Tr, 34). Ms. Clark also testified that Employee was given special assignments to accommodate her request for light duty, but that she left work shortly thereafter. Ms. Clark stated the doctors' statements submitted by Employee did not provide any information regarding the medical condition that required her to limit her duties (Tr, 39).

In cases where employees are removed on AWOL charges, this 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". *Employee v. Agency*, OEA Matter No. 1601-0137-82, 32 D.C. Reg. 240 (1985). In reviewing the testimonial and documentary evidence, the Administrative Judge finds that Employee submitted medical excuses in 2003 that at least put Agency on notice that she had medical conditions that impacted on her attendance. Agency does not dispute receiving those reports, but contends that they were insufficient. If Agency terminated Employee for unexcused absences in 2003, the Administrative Judge might be called upon to determine the sufficiency of those notes. However, Employee was terminated for absences beginning in 2004. There is nothing in the record that supports the conclusion that Employee was unable to work between August 10, 2003 (Dr. Niles's medical excuse, Ex E-4) and April 4, 2005 (Dr. Rankins' disability certificate, Ex E-5).

Employee relies on two cases that she claims support her position that Agency's action should be reversed: *Tywania Nesmith v. Department of Human Services*, OEA Matter No. 1601-0116-02, (March 12, 2004), ____ D.C.Reg. ____ ( ) and *Teshome Wondafrash v. Department of Human Services*, OEA Matter No. 1601-0126-96 (May 1, 2002), __ D.C.Reg. ____ ( ). The Administrative Judge has reviewed both decisions carefully, and while both decisions are informative, they are distinguishable from Employee's case. In *Nesmith*, the employee was on either AWOL or LWOP[9] for several months. The agency proposed removing the employee but had not initiated any action and kept her on active status. In April 2002, the employee contacted the agency in order to return to work, but the agency refused to allow her to return to work. The agency then initiated its removal action based on AWOL and inexcusable neglect of duty for the period from May 5, 2002 until June 6, 2002. Judge Sheryl Sears concluded that "because Agency did not remove or suspend her [before the date she attempted to return to work], Employee's right to report for duty was never interrupted". Judge Sears found that Employee's absence from May 5 to June 6 was in accordance with Agency's directive. Such is not the case in the instant matter, since there is no evidence that Employee attempted to return to work in 2004 and was refused the right to do so by Agency. As noted above, there is no medical documentation in the record that arguably would excuse Employee from work between August 10, 2003 and April 4, 2005.

[9] Leave Without Pay.

In *Wondafrash*, the employee presented his primary care physician and his psychologist as witnesses. Both testified that the employee was unable to work during the time that formed the basis for his removal. In this matter, Employee presented no witnesses to support a conclusion that her medical condition was sufficiently serious that she was unable to work during the period that formed the basis for her removal. Employee testified that she had several miscarriages until February 2004, and that she was pregnant in January 2004 and placed on limited duty. However, no medical evidence was presented to support Employee's testimony, and Employee's testimony by itself is insufficient to support the conclusion that she was unable to perform her duties.

The Administrative Judge accepts Employee's representations that she performed her duties well when she was at work, that she received laudatory evaluations, and that she wanted to keep her job with Agency. The Administrative Judge also accepts Employee's representations that she had significant health issues during a large part of 2003. However, although the Administrative Judge may sympathize with the problems that Employee was experiencing, Employee must still establish that she was having significant health problems that prohibited her from working during 2004, the period that forms the basis for her removal. *Murchison v. District of Columbia Department of Public Works*, OEA Matter No. 1601-0257-95-R03 (October 4, 2005), _ D.C. Reg. _____ ( ). By Employee's own testimony, she did not submit anything further to Agency after her conversation with Ms. Ashton in December 2003. Therefore, between August 10, 2003 when Dr. Niles authorized her to return to work and April 4, 2005 when Dr. Rankin determined she was disabled, other than Employee's testimony that she was pregnant and had several miscarriages during this period, there is no medical evidence in the record that she was unable to work. Employee's argument that she did not return to work because Agency did not offer her light duty must fail for several reasons. First, Employee did not establish that she was entitled to light duty. The testimony of her own witness supported Agency's argument that light duty was only available to employees injured on the job. Second, Employee did not attempt to return to work in 2004 or submit documentation that she was able to return to work, albeit on a limited basis. In sum, the record does not support the conclusion that Employee had one or more medical conditions that prohibited her from returning to work in 2004.

After carefully considering all of the evidence, documentary and testimonial, and all of the arguments of the parties, the Administrative Judge concludes that Agency met its burden of proof by a preponderance of the evidence that the removal should be sustained.

This Office defers to agencies in matters of discipline. Agency is the entity with the primary responsibility for managing its employees. Within that responsibility is the decision regarding the appropriate discipline to impose. *See, e.g., Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), ____ D.C.Reg. ____ ( ). This Office has long held that it will not

substitute its judgment for that of the agency when determining if a penalty should be sustained. Its review is limited to determining whether "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia,* 502 A.2d 1006, 1009 (D.C. 1985). A penalty will not be disturbed if it comes "within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment". *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C.Reg. 2915 (1985). The Administrative Judge concludes that in this instance managerial discretion was legitimately invoked and properly exercised. There is no range of penalties imposed by law, and no prohibition in law, regulation or guideline that bars Agency from removing Employee. Agency has presented sufficient evidence to establish that its decision was not an error of judgment.

ORDER

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

FOR THE OFFICE:

Lois Hochhauser/dff

LOIS HOCHHAUSER, Esq.
Administrative Judge