

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
)
Joseph Brown) OEA Matter No. 1601-0104-11
Employee)
) Date of Issuance: January 31, 2014
v.)
) Senior Administrative Judge
Department of Mental Health) Joseph E. Lim, Esq.
Agency)

Joseph Brown, Employee *pro se*
Kevin Turner, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND BACKGROUND

On May 6, 2011, Employee, a Recovery Assistant, DS-0640-08, filed a Petition for Appeal (“PFA”) of the Department of Mental Health’s (“Agency”) April 26, 2011, action to remove him effective May 11, 2011.

This matter was assigned to this Judge on July 30, 2012. I convened a Status Conference and ordered the parties to submit legal briefs on the issues. The parties have complied. The record is closed.

JURISDICTION

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

ISSUES

Whether Agency’s removal of Employee should be upheld.

STATEMENT OF FACTS

The following facts are undisputed:

1. Agency employed Employee as a Recovery Assistant, DS-0640-08 at Agency’s Saint Elizabeth’s Hospital. *See* Agency Exhibit 1.
2. Employee’s position description required him to have the ability to physically confront, control, or defend against emotionally ill patients, and assist patients in their daily living activities. *See* Agency Exhibit 2.
3. On March 6, 2006, Employee sustained a work related injury. Employee applied for and was awarded worker’s compensation benefits in the form of Temporary Total Disability (“TTD”) compensation payments by the Office of Risk Management from the date of his injury through at least December 29, 2012. *See* Agency Exhibit 3.

4. In accordance with the District Personnel Manual (DPM), Employee was carried in a Leave Without Pay (“LWOP”) status while he received workers’ compensation benefits.
5. On May 11, 2009, Agency sent Employee a letter advising him that he had exceeded the two year period that Agency was required to carry him in a LWOP status. Agency requested Employee to confirm his disability status. *See* Agency Exhibit 4.
6. On September 9, 2010, Agency sent Employee a second letter reminding him about his LWOP status, and provided information about his rights and responsibilities while in a LWOP status. *See* Agency Exhibit 5.
7. On January 20, 2011, Agency issued an Advance Notice of Proposed Removal informing employee that he would be removed from his position due to (1) Incompetence: medical inability to perform the duties of his position; and (2) Neglect of Duty: failure to carry out assigned tasks by failing to report for duty. On September 24, 2010, Employee requested, and was subsequently granted, a medical diagnostic examination to determine his medical restrictions for any possible light-duty position. However, Employee never followed up and never returned to work. *See* Agency Exhibit 6.
8. Following the pre-termination administrative review, on April 26, 2011, Agency issued a Decision on the Proposed Notice of Removal informing Employee that he would be removed effective May 11, 2011. *See* Agency Exhibit 7.
9. Effective May 11, 2011, Agency terminated Employee’s employment.
10. On May 6, 2011, Employee filed the instant appeal of Agency’s termination of his position.

ANALYSIS AND CONCLUSIONS

D.C. Official Code §1-616.51 (2001) requires the Mayor, for employees of agencies for whom he is the personnel authority, to “issue rules and regulations to establish a disciplinary system that includes,” *inter alia*, “(1) A provision that disciplinary actions may only be taken for cause; [and] 2) A definition of the causes for which a disciplinary action may be taken.” The action herein is under the Mayor’s personnel authority.

On September 1, 2000, the D.C. Office of Personnel (DCOP), the Mayor’s designee for personnel matters, published regulations entitled “General Discipline and Grievances” that meet the mandate of § 1-616.51. *See* 47 D.C. Reg. 7094 *et seq.* (2000). Section 1600.1, *id.*, provides that the sections covering general discipline “apply to each employee of the District government in the Career Service who has completed a probationary period.” It is undisputed that Employee falls within this statement of coverage.

Section 1603.3 of the District of Columbia Personnel Manual (“DPM”) regulations, 46 D.C. Reg. at 7096, sets forth the definitions of cause for which a disciplinary action may be

taken.¹ Here, Employee was removed for “Incompetence.” “Incompetence” is one of the causes set forth in DPM § 1603.3. Incompetence is defined as the physical inability to satisfactorily perform the major duties of his or her position.

In an adverse action, this Office’s rules and regulations provide that an agency must prove its case by a preponderance of the evidence. “Preponderance” is defined as “that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.” OEA Rule 628.1, 59 DCR 2129 (March 16, 2012).

The DPM §827 Restoration to Duty, in relevant part, states:

827.1 The provisions of this section shall apply to the following:

(b) An employee holding any type of appointment in the Career Service who is receiving disability compensation under Title 1, Chapter 6, Subchapter XXIV, D.C. Code (1981); and . . .

827.3 An agency shall carry an employee covered by § 827.1(b) on leave without pay for two (2) years from the date of commencement of compensation, or from the time compensable disability recurs if the recurrence begins after the employee resumes full-time employment with the District government, or, in the case of an employee holding a term, temporary, or TAPER appointment, until the expiration of the appointment, whichever shall occur first. . .

¹The entire list of causes in § 1603.3 is as follows:

[A] conviction (including a plea of *nolo contendere*) of a felony at any time following submission of an employee’s job application; a conviction (including a plea of *nolo contendere*) of another crime (regardless of punishment) at any time following submission of an employee’s job application when the crime is relevant to the employee’s position, job duties, or job activities; any knowing or negligent material misrepresentation on an employment application or other document given to a government agency; any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of the law; any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations; and any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious. This definition includes, without limitation, unauthorized absence, negligence, incompetence, insubordination, misfeasance, malfeasance, the unreasonable failure to assist a fellow government employee in performing his or her official duties, or the unreasonable failure to give assistance to a member of the public seeking services or information from the government.

827.5 At the end of the two-year (2-year) period specified in § 827.3, an agency shall initiate appropriate action under chapter 16 of these regulations.

The DPM **requires** an agency to commence disciplinary action against an employee who remains in a LWOP status more than two years after an employee begins to receive workers' compensation. (Emphasis added.)

Agency states that Employee has remained disabled for more than two years and has been unable to satisfactorily perform one or more of the major duties of his position. Agency states that Employee was in a leave without pay status for more than two years. Agency removed Employee for (1) Incompetence: medical inability to perform the duties of his position, and (2) Neglect of Duty: failure to carry out assigned tasks by failing to report for duty. Agency contends that Employee was removed for cause pursuant to D.C. Official Code provisions and thus, its action should be upheld.

Employee does not deny that he had presented medical evidence to the Office of Worker's Compensation to show that he was totally disabled from the date of his injury to the date of his May 11, 2011, termination and beyond. Nor does he deny at the prehearing conference that he is still currently receiving and claiming disability payments. Nonetheless, in his brief, he contends that Agency should return him to its payroll because Agency lied about his inability to work, his failure to return to work or his failure to notify his supervisor, and contends that Agency fabricated misleading information about him. Employee also complains that Agency failed to help him find employment and that he was discriminated against. However, Employee does not cite any statute or regulation that obligates Agency to find employment for a disabled employee. In addition, this Office is not the proper forum for his discrimination claim.²

None of Employee's assertions relate to the crucial facts that are relevant to whether Agency's action to remove him should be upheld. Agency carried Employee in a LWOP status for more than two years while he received TTD benefits. In fact, Employee remains totally disabled and received TTD benefits even beyond the date of his termination. Employee's

² Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, restricted the Office's jurisdiction to the following: 1) a performance rating which results in removal of the employee; 2) an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more; or 3) a RIF. Further, since the passage of OPRAA, this Office has consistently held that grievances are not within our jurisdiction. See, e.g., *Young-Wester v. D.C. Public Schools*, OEA Matter No. J-0002-02 (July 17, 2002); *Scott v. D.C. Public Schools*, OEA Matter No. J-0005-02 (July 17, 2002); *Logan v. D.C. Public Schools*, OEA Matter No. J-0006-02 (July 17, 2002); *Meyers v. Department of Consumer and Regulatory Affairs*, OEA Matter No. J-0033-00 (April 27, 2000); *Shields et al. v. Department of Human Services*, OEA Matter Nos. J-0082-00 et al. (March 7, 2000); *Farrell v. Department of Health*, OEA Matter No. J-0077-99 (June 1, 1999); *Anthony v. Department of Corrections*, OEA Matter No. J-0093-99 (June 1, 1999); *Phillips-Gilbert v. Department of Human Services*, OEA Matter No. J-0074-99 (May 24, 1999); *Brown et al. v. Metropolitan Police Department*, OEA Matter Nos. J-0030-99 et seq. (February 12, 1999).

disability prevents him from performing the essential tasks of his position, and therefore, Employee did not report for duty during the time he received TTD benefits and was carried in a LWOP status.

Accordingly, Employee is medically incompetent and neglected his duty by failing to report for work. Agency initiated the removal action against Employee when the District Personnel Manual (DPM) contained a two-year provision. Based on a review of the entire record, this Judge concludes that Agency's removal action must be upheld.

ORDER

Based on the foregoing, it is hereby ORDERED that Agency's action of removing Employee from service is UPHELD.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge