THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of: BRUCE NOZARI Employee v DISTRICT OF COLUMBIA NATIONAL GUARD - GOVERNMENT OPERATIONS DIVISION Agency	OEA Matter No. 1601-0066-14 Date of Issuance: August 3, 2016 Lois Hochhauser, Esq. Administrative Judge

Rahsaan Dickerson, Esq., Agency Representative
Celio Young, Esq., Employee Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Bruce Nozari, Employee, filed a petition with the Office of Employee Appeals (OEA) on March 19, 2014, appealing the decision of the District of Columbia National Guard–Government Operations Division, Agency, to terminate his employment as Senior Project Manager, effective October 1, 2012.[1]

The appeal was assigned to this Administrative Judge (AJ) on February 13, 2015. At the March 30, 2015 prehearing conference, the matter was referred to mediation at the agreement of the parties. Following notification on or about June 5, 2015 that mediation was not successful, I issued an Order scheduling the evidentiary hearing for October 6, 2015. On August 5, 2015, I granted a consent motion extending certain deadlines, based on the parties' contention that extending discovery would "likely lead to settlement." On September 16, 2016, I granted Agency's unopposed request for a continuance of the October 6, 2015 hearing date, rescheduling it for January 20, 2016.

[1] A decision was made prior to assignment to this AJ, to excuse the late filing for good cause shown.

At the January 20, 2016 evidentiary hearing, the parties were given full opportunity to, and did in fact, present testimonial and documentary evidence and arguments in support of their positions.[2] The record closed on March 31, 2016.[3]

Throughout the proceedings, Employee was represented by Celio Young, Esq., and Agency was represented by Rahsaan Dickerson, Esq.[4]

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Code Ann. §1-606.3 (1999 repl.).

ISSUES

Did Agency meet its burden of proof regarding its decision to terminate Employee? Is there any basis for disturbing the penalty imposed by Agency?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Undisputed Findings of Fact[5]

1. Agency is part of the D.C. National Guard (DCNG) which consists of Active Guard Reserve employees, uniformed federal employees, and Agency employees. (Tr, 49). Although employees from the three sectors may work together, each sector is responsible for the personnel decisions, including leave and adverse actions, of its employees.

2. Herman Preston has been Agency Director since 2010. (Tr, 50).

3. Cynthia Coleman has served as Agency Human Resources Specialist (HRS) since 2008, and is responsible for timekeeping, payroll and disciplinary matters related to Agency employees. (Tr, 92-93, 99-100).

4. Employee began his employment with Agency as a Senior Project Manager, DS-15, with the Office of Construction and Facility Management (CFMO) in February 2009, and remained in this position throughout his employment. His duty station was the D.C. Armory. Employee's designation of "DS", *i.e.*, District Services, identifies him as a District of Columbia employee. (Tr, 98).

5. As Senior Project Manager, Employee served as a "technical advisor for architectural design, engineering and facility maintenance management." (Ex A-2).

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[2] Witnesses testified under oath and the proceeding was transcribed. The transcript is cited as "Tr" followed by the page number. Exhibits (Ex) are identified by "A" if introduced by Agency or "E" if introduced by Employee, followed by the exhibit number.

[3] The initial deadline for submitting closing briefs was extended from March 18, 2016 to March 31, 2016 at the unopposed request of Employee. On April 8, 2016, Employee, through counsel, emailed me that he was not filing a closing brief. Therefore, only Agency submitted a closing brief.

[4] Mr. Dickerson began representing Agency on October 7, 2015.

[5] These findings are based in part on joint stipulations submitted by the parties on January 7, 2016. The stipulations are cited as "JS" followed by the number of the stipulation.

His responsibilities included federal projects, and he worked with employees from other sectors. (Tr, 53).

6. Employee alleged that at a meeting he attended on May 25, 2011 with about five other individuals, he was threatened by Major Harrison, a non-DC employee, who also attended the meeting. According to Employee, Major Harrison would have attacked him if other attendees had not restrained him and escorted him from the building. Employee stated that he reported the matter to the federal sector Human Resources Officer (HRO), but did not contact Mr. Preston or any Agency employee. Major Harrison's office was located next to Employee's office.

7. Employee continued to work at the Armory. After the incident, Major Harrison reported to Andrews Air Force Base. (Tr, 20).

8. On July 5, 2011, Major Harrison returned to work at the Armory. (*Id*). After seeing Major Harrison at work, Employee left the building. He texted Colonel Wellons, who was not an Agency employee, to tell him that he was leaving work, and would not return while Major Harrison remained in the next office. (Tr 129; JS-3). Employee did not contact Mr. Preston or any Agency employee about this matter. (Tr, 129).

9. Employee submitted notes from Dr. Didace Kabatsi to Agency regarding his absences. The first, written on July 6, 2011, stated in pertinent part:

> Bruce Nozari is excused from the workplace for a period of four weeks due to stress. It was brought to my attention by Mr. Nozari that his life was threatened…at the workplace. Mr. Nozari may continue to carry out his duties remotely. (Ex A-1).

Employee submitted similar notes from Dr. Kabatsi to Agency on August 1, 2011, for the period through September 12, 2011; September 12, 2011 for the period through October 11, 2011; October 10, 2011 for the period through November 7, 2011; and on November 7, 2011 for the period through January 7, 2012. (Ex A-1).

10. By letter dated November 22, 2011 about his absences, Agency Director Preston informed Employee him that he might be eligible for benefits pursuant to the Family and Medical Leave Act [FMLA]." The letter stated in pertinent part:

> You have been absent from duty due to written physician notices, stating that you were under physician care from July 6, 2011. On 6 July 2011, we received notice that you would be absent from July 6, 2011 through August 1, 2011, then we received another notice from August 1, 2011 through September 12, 2011, then we received another notice from September 12, 2011 through October 11, 2011, then we received another notice from October 10, 2011 through November 7, 2011, then we received another notice from November 7, 2011 for additional 8 weeks due to…your own serious health condition.

The letter included instructions and forms that needed to be completed to determined FMLA eligibility. Employee was directed to submit the completed paperwork by December 15, 2011. (Ex A-2).

11. Employee did not respond by the deadline. His first response was on January 3, 2012,

when he informed Cynthia Coleman, Agency HRS, by email, that he would submit his doctor's note the following day, explaining that the doctor had been on vacation. On January 4, 2012, he emailed Director Preston stating that his doctor was drafting the letter. In an email sent on January 5, 2012, Director Preston referenced a telephone call he had with Employee that day, and extended the filing deadline to January 6, 2012. On January 6, 2012, Director Preston again emailed Employee stating that Employee had not submitted any documents. (Ex A-3).

12. By letter dated February 7, 2012, Mr. Preston notified Employee that he had been absent from work since July 6, 2011. He stated that Employee had not submitted the required documents despite several extensions. He said that it was "imperative" that Employee submit the completed paperwork by February 22, 2012 "to avoid the denial of FMLA benefits, and/or other adverse actions." Mr. Preston informed Employee that he had been placed on leave without pay (LWOP) status. (Ex A-4).

13. On May 14. 2012, Mr. Preston wrote Employee. After summarizing Agency's efforts to communicate with Employee and the FMLA process, he concluded:

> As a result of your failure to…submit the completed… FMLA… documents, and sufficient medical certification…your FMLA request may be denied and therefore your leave status changed to abandonment of your position, and you may be placed in an Absent Without Official Leave (AWOL) status; or other adverse actions may be taken.
>
> Mr. Nozari based on your current leave status you are required to return to your assigned work location by…May 24, 2012. Your failure to return to duty will leave me no other alternative then to proceed with the recommendation for other disciplinary actions. (Ex A-5).

14. On June 4, 2012, Employee emailed Ms. Coleman that he was submitting his doctor's note. On June 5, 2012, Mr. Preston emailed Employee, directing him to return to work by June 6, 2012. (Ex A-6).

15. Employee did not respond, and did not return to work on June 6, 2012.

16. On August 21, 2012, Director Preston issued the Advance Written Notice of Proposed Removal which stated in pertinent part:

> In accordance with section 1608 of Chapter 16 of the D.C. personnel regulations, General Discipline and Grievances, this constitutes the fifteen-day (15 day) advance written notice on a proposal to remove you for cause from your position of Project Manager (Senior)…in the District of Columbia National Guard.
>
> **The cause(s) charge(s) for this proposed adverse action is/are:**
> **1. Unauthorized absence**
> **2. Absence without official leave**
>
> Cause(s): Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, specifically: Unauthorized absence, Absence without official leave. [See section 1619.6 (c) (d) (e) (f) of Chapter 16 of the regulations.]

Specification(s):

1. On November 22, 2011, Notice of Eligibility and Rights and Responsibilities Pursuant to the Family and Medical Leave Act notice of eligibility letter, along with the Certification of Health Care Provider for Employee's Serious Health Condition documents were sent to you via certified mail, the FMLA eligibility rights and requirements forms were to be returned to my office on or before…December 15, 2011, you failed to return the documents on the requested deadline return date and instead forwarded a scanned copy of a disability certificate from your physician to cover the period of January 3, 2012 through February 3, 2012. I contacted you on January 3, 2012 by telephone [and] informed you that your failure to return the above documents by the deadline date may be grounds for the denial of your FMLA leave, you responded via email on January 4, 2012 stating (quote): "that your doctor was in the process of drafting a letter that I will send you as soon as I receive it." I thanked you for the update, and I agreed to extend the deadline…to return the FMLA documents to January 6, 2012.

2. On January 6, 2012 after extending the deadline date for you to return your FMLA documents, the requested documents were still not completed by you, your physician, and returned to my office, instead I again received a scanned copy of another disability certificate from your physician [covering] the period of time between February 6, 2012 through March 2, 2012.

3. On February 7, 2012, a second certified letter was sent to you indicating that you had been absent from the performance of your duties since July 6, 2011, and as of February 7, 2012, your leave status is being reported as unexcused leave without pay. You were given a suspense date of February 22, 2012 to return the FMLA documents to my office and I still have not received the documents.

4. On March 5, 2012, I sent an email to you instructing you to report for duty on June 6, 2012 to avoid any adverse action. To date you have not reported for duty nor have you returned the required FMLA…documents, in lieu of all of my attempts to communicate with you, you have not provided any of the requested documents you continue to only submit disability certificates from your physician to cover 30 day periods of time. (Ex A-7).

17. The Notice of Final Decision on Proposed Removal[6] was issued on October 1, 2012. (Ex E-8).

Positions of the Parties and Summary of Evidence

Agency's position is that it properly initiated this adverse action and that the penalty pf removal is appropriate under the circumstances. (Tr, 14). It maintains that it stayed in contact with Employee, allowed him to exhaust leave, and extended deadlines, all in an effort to maintain his employment. (Tr, 15). It contends that Employee never informed Agency that his failure to return to work was based on safety concerns, but rather he submitted medical certificates indicating that his absences were health-related. Agency notes that it initiated the adverse action after Employee had been on leave without pay status for more than a year. (Tr, 16).

[6] Mr. Preston served as both the proposing and the deciding official consistent with District Personnel Manual, Chapter 16, Section 1607.3.

Agency Director Preston testified that Agency administers personnel and disciplinary matters for all Agency employees employed at DCNG. He stated that Agency may consult with federal supervisors, as appropriate, but Agency has authority only over its own employees. (Tr, 53).

The witness stated that he first became aware of Employee's absences after Employee had been absent for at least four months. He said that based on the review of Employee's timesheets and medical certificates, Agency determined that Employee was absent for medical reasons, and that he could be eligible for FMLA. He said Agency provided the documents to Employee by letter dated November 22, 2011 letter, in which it also granted him additional sick leave. He was directed to submit the completed FMLA documents by December 15, 2011 but did not. The witness said that he continued to "reach out" to Employee by telephone, letter and email. (Tr, 57, 60; Exs A-2, A-3). He said that Employee did not respond until early January 2012, and his response was only that his doctor had been on vacation and that he would forward his doctor's note the following day. Mr. Preston testified that Employee submitted a "doctor's slip" not the FMLA forms (Tr, 61). The witness said he emailed Employee, thanking him for the "updates" and extending the deadline for submitting the completed FMLA packet to January 6, 2012. (Tr, 62). Mr. Preston testified that although Employee did not meet this deadline, Agency "continued to…email [Employee] to try to get him to talk to us or even call us." (Tr, 63).

Mr. Preston stated that he wrote Employee on February 7, 2012, due to Employee's continued failure to respond or provide the completed FMLA documents. He said he included another set of the FMLA documents and set a deadline of February 22, 2012. (Tr, 64; Ex E-4). He testified that Employee did not submit the required documents, but only submitted more doctor statements stating "he could return back to work and then another doctor statement saying he was out for another 30 days." (Tr, 65). He noted that by February 2012, Employee had exhausted all leave and had been placed on leave without pay status. (*Id*).

The witness testified that because he was still uncertain of Employee's medical condition, he again wrote him on May 10, 2012. He stated that in the letter he told Employee that his continued failure to respond or return to duty by May 24, 2012, would result in a recommendation for disciplinary action. (Tr, 67; Ex A-5). Mr. Preston stated that Employee neither responded nor returned to work by the deadline; but that on or about June 4, 2012, Employee submitted a doctor's note by email to Ms. Coleman. In response, Mr. Preston said he emailed Employee on June 5 directing him to report to work on June 6, 2012. (Ex A-6). The witness explained that he extended the deadline from May 24, 2012 to June 6, 2012; because he was still trying to "reach…out to Employee." (Tr, 69). Mr. Preston testified that neither Employee nor any doctor contacted Agency after June 4, 2012. (Tr, 70). He noted that by the time the proposed notice was issued, Employee had not reported to work for more than a year. (Ex A-7).

Mr. Preston testified that neither Employee nor anyone else reported the May 25, 2011 incident or any event related to the incident to him or to any Agency employee. (Tr, 80). He said that Employee should have reported the incident to Agency, and that Agency would have then investigated the matter. (Tr, 75-76). He stated that Agency was not contacted by the federal HRO, explaining that each sector works independently. He did not know what, if anything, had been done by that office. (Tr, 78). He noted that he spoke with Employee's supervisor, a federal sector employee, several times between May 2011, and May 2012 about Employee's "conduct or performance or anything of that nature," and that the supervisor never mentioned the May 25 incident or subsequent events. (Tr, 80, 82).

Cynthia Coleman, Agency HRS, testified that personnel matters, including disciplinary actions, are "very complicated" because Agency employees may have federal or military supervisors. She stated that only the Agency Director can initiate disciplinary action for Agency

employees. (Tr, 101-102). Ms. Coleman said that she became aware of Employee's absences from Agency timekeeper and had reviewed the supporting documentation which she described as a written statement from Employee's doctor stating that Employee "was to be out for an undetermined amount of time." (Tr, 95). She testified that Employee was permitted to exhaust his sick leave (128 hours) and annual leave (121 hours); and that after both were exhausted on or about September 10, 2011, he was placed on LWOP. (Tr, 96; Ex A-9).

Employee's position is that he should not have been terminated since Agency "failed to provide him with a safe workplace as required by OSHA regulations." He maintains that his termination should not "stand as a matter of public policy." (Tr, 25-26).

Employee testified that he was responsible for all capital construction projects, budget allocation and federally funded projects. He stated that he reported to federal and military authorities, and that the "D.C. Government only processed the paper." (Tr, 115). Employee stated that Major Harrison started his employment about a month after Employee began, and that initially the two had a cordial relationship, but that Major Harrison "started to be very hostile" toward Employee because Colonel Wellons, their superior, began to rely more on Employee than on Major Harrison. (Tr, 119).

Employee testified that on May 25, 2011, he attended a meeting with five other individuals, including Major Harrison and Colonel Wellons. (Tr, 123). He stated that after it "became apparent" at the meeting that Employee had been successful in securing "millions of dollars" for "major projects" while Major Harrison had failed to do so, Major Harrison "got very, very angry and …rushed toward [Employee] violently." He said that if others had not restrained Major Harrison, he could have hit Employee. Employee testified that Major Harrison told him that he would "take care of [him] outside, that he was packing," which Employee interpreted as meaning that Major Harrison had a gun in his car. Employee stated that he feared for his life. (*Id*). Employee testified that after Major Harrison was escorted out of the building, Employee immediately reported the matter to the federal HRO, which he stated, was "the only HRO that we have." (Tr, 121). He testified he was informed by HRO that Major Harrison would "never return" to the D.C. Armory. (Tr, 122). Employee did not report the incident to the police. (Tr, 33). Employee stated that he had no interaction with Mr. Preston or anyone at Agency. He considered the function of Agency as "only process[ing] papers," noting that his reports went to the federal government.

Employee testified that when he reported to work on July 5, 2011, he was surprised to find "without warning" that Major Harrison had returned to work at his office at the D.C. Armory. He stated that when he passed Major Harrison that day, Major Harrison "was so angry and… gave [Employee] a death stare and he shook his head." (Tr, 128). He described a "death scare," as "[v]ery cold," and said that he was concerned that if Major Harrison was angry, he would harm him. (*Id*). Employee said he notified his superior and "immediately vacated the office for fear of his life." (Tr, 20). Employee contended he felt unsafe working near Major Harrison, and refused to return to work while the two were assigned to work in proximity.

Employee maintained that Agency did not assess the risk that Major Harrison posed to Employee and failed to follow its policies regarding workplace violence (Tr, 23, 26). He stated that his doctor diagnosed him with stress, caused by "the circumstances where Major Harrison continued to work next to his office." (*Id*). He agreed that his doctor was a general practitioner, and that he never saw a mental health specialist during this time period. (Tr, 33). Employee faulted Agency with refusing to allow him to work from home arguing that other employees telecommute and that he could have been harmed if he reported to work. (Tr, 28).

Analysis, Findings and Conclusions

The District Personnel Manual, Chapter 16, Part I, Section 1603, Definition of Cause; General Discipline includes, among the actionable behavior, "unauthorized absence." An employee who has not been granted leave for his or her absence from duty is absent without authorization.

In his opening argument, Employee, through counsel, stated that his objection to the removal was based on Agency's failure to provide him with a safe environment, and not any reason related to his health. The AJ gave Employee and counsel the opportunity to confer to ensure that this was Employee's position. Employee confirmed that he had not been ill or otherwise unable to work during his absences. He said that he was not eligible for FMLA. He stated that although he may have initially challenged the removal for medical reasons, he no longer held that position. His sole challenge to the removal was "workplace violence" stating:

> [W]ell [the medical reason] was [our] position at first and…we can see that there might be something wrong with it but we initially were looking at the medical issue and the medical records issue and, of course, we switched our position to this workplace violence issue. (Tr, 38).

Employee stated that the "stress" he experienced was based on his concern for his safety, but it was not disabling and was not the reason for his absences. He explained that he did not submit the FMLA paperwork because he was not eligible for FMLA. (Tr, 31). Employee agreed that Dr. Kabatsi was a general practitioner, and that he never saw a mental health specialist during this time period. (Tr, 33). He did not argue or present evidence that he reported to work despite being ordered to do so, or that he was ill or otherwise disabled during this period. *Murchison v. District of Columbia Department of Public Works*, 813 F.2d 203 (D.C.C.A. 2002).

Pursuant to OEA Rule 629.3, 46 D.C. Reg. 9317 (1999), Agency has the burden of proof in adverse action appeals. OEA Rule 629.1 requires that the burden be met by "a preponderance of the evidence," which is defined as "[t]hat 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." After carefully considering the documentary and testimonial evidence and arguments presented by the parties, for the reasons discussed herein, the Administrative Judge concludes that Agency met its burden of proof by a preponderance of the evidence that Employee was absent from work without authorization. The undisputed evidence presented by Agency supports the findings that Employee did not report to work on the dates charged by Agency, that he was given numerous opportunities and extensions to explain the reasons for his absences but failed to do so, and that his absences were not a result of a physical or emotional illness.

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 this matter, Employee argues that Agency's failure to ensure a safe environment constitutes a "legitimate excuse" and should invalidate the removal. Therefore, Employee's contention must be assessed to determine if his absences were justified.

Employee maintains that he properly refused to return to work until he was provided with a safe work environment. In support of his position, Employee stated that at the May 25 meeting, Major Harrison became very angry at him and could have attacked him if not restrained by other attendees. He further stated that Major Harrison told him that he would "take care" of him and "was packing," which he interpreted to mean that Major Harrison had a weapon in his car that he could use on Employee. Employee stated that he was fearful and report the matter to the federal

HRO. He said he was told that Major Harrison would be relocated and never return to the Armory. (Tr, 121). Employee explained that he reported the incident to federal HRO and not to Agency, because he had "no interaction" with Agency, which he considered primarily as "processing papers."

Employee testified that he was not told that Major Harrison had returned to the Armory when he reported to work on July 5; and that when he saw him that day, Major Harrison appeared angry, shook his head and gave Employee a "death stare," He said that he became fearful, and advised his superior that he was leaving work and would not return as long as Major Harrison continued to work in the office next to his. He did not communicate any information or concern to Mr. Preston or anyone at Agency. (Tr, 129).

Employee offered no documentary or testimonial evidence to support his position regarding Major Harrison's conduct and words on May 25, 2011. He testified that there were other attendees who witnessed Major Harrison's behavior and also that he met with the federal HRO and filed a complaint. He offered no support for his position with documentary and testimonial evidence from individuals who witnessed the events or handled his complaint.

Employee testified that the only action he took on May 25, was to report Major Harrison's conducts and threats to the federal HRO. Over the objection of Agency, Employee relied on the federal Human Resources Reference Guide to support his position that there is a "zero tolerance policy" regarding "threats and violence in the workplace." (Ex A-2). However, the AJ accepted the document into evidence since prohibitions against threats and violence in the workplace are mandated by federal and local laws as well as public policy. In accordance with the Guide, HRO was required to investigate the matter. (*Id*). However, Employee offered no testimonial or documentary evidence that the matter was investigated or the outcome of the investigation. Employee's testimony that Major Harrison's conduct and threats, particularly his concern that Major Harrison threated to use a weapon on him, caused him great fear for his safety, was undermined by the fact that he did not report this conduct to the police or any entity that could take immediate action to ensure his physical safety. It would have been reasonable for Employee to have done so, since HRO could only investigate the matter. It could not protect Employee.

Further Employee failed to offer any evidence that he made any effort to ascertain the status of the investigation, particularly after Major Harrison returned to the D.C. Armory. The reasonable assumption for Major Harrison's return to the Armory would be that the investigation had been completed and a determination had been made, that there was no reason that Major Harrison could not work at his office at the D.C. Armory. This would significantly undermine Employee's position about the threat posed by Major Harrison and Employee's safety concerns. However, Employee presented no evidence, testimonial or documentary, about the outcome of the investigation. Given his safety concerns, it would have been reasonable for him to have challenged the decision to have Major Harrison return. But Employee presented no evidence that he did anything, except leave after receiving the "death stare," which made him so fearful for his safety that he immediately left work. However, other than notifying his supervisor that he was leaving and would not return while Major Harrison worked next to him, Employee presented no evidence that he reported the "death stare" to HRO or Agency, either as a new threat or a continuation of the May 25 incident. Employee offered no evidence that he made any effort to ascertain the status of the investigation or initiate a new complaint, particularly after Major Harrison returned to the D.C. Armory.

Employee stated that due to his safety concerns he refused to return to work while Major Harrison remained in the next office, but did not explain why merely moving offices would ensure his safety or allay his fears, since he would have continued to work with Major Harrison, who he testified earlier, had the same supervisor and attended meetings with him.

It is undisputed that Employee never reported his concerns to Mr. Preston, Ms. Coleman or any Agency employee. Although Employee knew, or certainly should have known, that he was an employee of the District of Columbia Government, the AJ understands that Employee may have initially thought he could report the matter to federal HRO since he worked with and reported to non-Agency staff. However, Mr. Preston was in contact with Employee for more than a year before initiating the adverse action. The contact, by letter, telephone and email, was almost always initiated by Mr. Preston, who granted him extensions, even when they weren't requested. Employee was aware that Mr. Preston was Agency Director, and at the top of his chain-of-command. He continued to submit medical slips to Agency. He knew or should have known that Agency understood that Employee was absence for medical reasons. Employee is a well-educated and intelligent individual. At some point, after receiving numerous contacts from Agency and not from the federal sector, he reasonably should have recognized that Agency was handling this matter. Yet, he never advised Mr. Preston or any Agency employee, even after receiving the FMLA packet and a number of extensions to submit the completed packet, that his absences were unrelated to any medical condition. Indeed, his response, after missing two deadlines, was to advise Agency in January 2012 that his failure to provide the documentation was based on fact that his physician had been on vacation.

Employee argues that he should not have been removed based on Agency's failure to provide him with a safe environment. However, he does not dispute that he never notified Mr. Preston or any Agency employee of the May 25 and July 5 incidents or of his safety concerns. He charges Agency with failing to address his safety concerns, but never allowed it to address those concerns. The record is replete with the numerous contacts from Mr. Preston, who was identified in all correspondence, as Agency Director or Interim Director. Agency made every effort to retain Employee, granting leave, extending deadlines, and most important, requesting that Employee communicate. It is also evident that Agency reasonably thought that Employee was out due to medical reasons. Although Dr. Kabatsi's notes mentioned the May 25 incident, they focused on the resulting stress to Employee, a medical reason. Employee did not inform Agency that the reason that he was refusing to report to work was unrelated to any medical reason, but rather had to do with concerns for his safety.

It is reasonable to assume that there could be some confusion about chains-of-command given the fact that employees of the three entities which constitute the DCNG often worked together. Although Employee stated that the only knowledge of Agency was that it processed paper, by late 2011, he had been contacted multiple times by Mr. Preston, and was aware, or should have been aware, that Mr. Preston was Agency Director. Yet, although Employee argues that he should not have been fired based on Agency's failure to provide him with a safe environment, he never notified Mr. Preston or any Agency personnel of his safety concerns so as to allow Agency to address those concerns. He continued to allow Agency to believe that he was failing to report to work for health-related reasons, although he states that was not true...

Employee argues that he should have been allowed to work from home, since other employees were permitted to do so. However, "coming to work regularly" is an "essential function" of employment. *Carr v. Reno*, 23 F3d 525, 529 (D.C. Cir. 1994). It is a discretionary decision made by management and not an entitlement for employees. Agency was under no obligation to allow Employee to work from home, and given Employee's description of his many responsibilities, it would appear reasonable to require his presence at the work site. However, even this argument must fail, since Employee testified that he made the request of Mr. Wellons, not of Mr. Preston.

Based on this analysis, the Administrative Judge concludes that Employee did not present sufficient evidence of a "legitimate" reason to excuse his absences. There was insufficient evidence to support Employee's position that his safety was in jeopardy if he returned to the D.C. Armory to work. There was also no evidence that Agency violated its duty to provide him with a safe environment for two reasons – first, as previously stated, there was insufficient evidence that Employee's safety was in jeopardy; and second, Employee did not notify Agency of his safety concerns.

With regard to the penalty, this Office has long recognized that an agency has the primary responsibility for managing its employees, and that part of that responsibility is determining 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). The Administrative Judge cannot substitute her judgment for that of Agency when determining if the penalty should be sustained. Her review is limited to determining that "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). Chapter 16 of the District Personnel Manual permits removal for a first offense of being absent for more than ten consecutive days. It permits a penalty of reprimand to removal for a charge of AWOL. Agency presented sufficient evidence to establish that its action was not arbitrary or capricious, and that it was not an error of judgment. Of particular note to the Administrative Judge, was that during extensive period of time that Agency was in contact with Employee, and trying to offer him various types of leave to retain him as an employee based on its reasonable assumption that he had a medical condition, Employee never advised Agency of the "real" reason he was not returning to work. It never gave Agency the opportunity to investigate the matter, or to offer alternatives that may have satisfied Employee.

The Administrative Judge concludes that Agency presented sufficient evidence and argument that the penalty of removal is permitted under the circumstances presented, and that its decision to terminate Employee was not arbitrary or an error of judgment.

ORDER

It is hereby:

ORDERED: Agency's decision is upheld. Employee's appeal is dismissed.

FOR THE OFFICE: _____
Lois Hochhauser, Esq.
Administrative Judge