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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JAMES WASHINGTON,	)	OEA Matter No. 1601-0292-10
Employee	)	
v.	)	Date of Issuance: December 10, 2014
D.C. PUBLIC SCHOOLS, DIVISION OF TRANSPORTATION,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

James Washington ("Employee") worked as a Bus Attendant with D.C. Public Schools, Division of Transportation ("Agency"). On March 25, 2010, Agency issued a notice to Employee which provided that he was removed in accordance with chapter 16 of the District Personnel Manual ("DPM) for job abandonment.[1] Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on April 5, 2010. He argued that he was removed after using five days of sick leave due to a mental illness. Employee contended that he was removed despite providing documentation to Agency from his doctor. Therefore, he requested that he be transferred to another agency and awarded back pay from the time he was wrongfully removed.[2]

Agency responded to Employee's appeal by arguing that he failed to report to work on September 8, 2009, and he never returned. Accordingly, Agency removed Employee for "any on

[1] *Response to Statement of Good Cause,* p. 7 (July 27, 2012).
[2] *Petition for Appeal,* p. 3 (April 5, 2010).

duty or employment-related act or omission that interferes with the efficiency (a) unauthorized absence: ten (10) consecutive days or more constitutes abandonment." It asserted that Employee abandoned his job for approximately six months before he was removed. Agency explained that removal was within the range of penalties for abandonment. As a result, it requested that Employee's appeal be denied.[3]

The OEA Administrative Judge ("AJ") held an evidentiary hearing on April 25, 2013. Soon after the hearing, the AJ issued her Initial Decision on July 31, 2013. She found that Employee was granted leave from June 4, 2009 through August 18, 2009. However, the AJ determined that Employee was on leave without pay on August 31 and September 1, 2009; he received regular pay from September 2-4, 2009; Employee got holiday pay on September 7, 2009; and he was on leave without pay again from September 8, 2009 through April 12, 2010. The AJ noted that present in the record was a note from the Veteran's Hospital stating that Employee could return to work at full-duty with no restrictions dated August 18, 2009. Similarly, there was another note, dated September 15, 2009, from the Veteran's Hospital providing that Employee was seen on that date, and there were no restrictions on him returning to work. [4]

The AJ ruled that Agency adequately proved that Employee was on unauthorized absence for ten consecutive days and that Employee's absences were well documented. She also found that Agency's witnesses offered credible testimony to corroborate Employee's unauthorized absences. Because Employee failed to return to work after September 8, 2009, the AJ held that he was absent for more than ten consecutive days which constitutes abandonment of his job. The AJ explained that Employee failed to provide any evidence to support his claims that he was

[3] *The Office of State Superintendent of Education's Answer to James Washington's Petition for Appeal,* p. 2-3 (September 11, 2012).
[4] *Initial Decision*, p. 4-5 (July 31, 2013).

denied by Agency to return to work. She reasoned that Employee's conflicting testimony and lack of supporting documentation also undermined his position that he attempted to return to duty on October 15, 2009. The AJ opined that the notes from the Veteran's Hospital were not authenticated by any witnesses, and she found their probative value to be diminutive compared to Agency's evidence and witness testimony.[5]

Furthermore, the AJ found that the penalty of removal was appropriate under the circumstances. As for Employee's claims of discrimination, the AJ held that OEA was not the proper venue to consider the merits of such claims. Therefore, Agency's removal action was upheld.[6]

Employee disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on September 4, 2013.[7] He argues that one of Agency's witnesses' testimony was not relevant because she was not employed by Agency during the time of his removal. Employee further claims that another Agency witness offered false testimony. He asserts that he made numerous attempts to return to work from September 15 through October 2009, but those attempts were denied by Agency. As for the authenticity of the notes from the Veteran's hospital, Employee provided another note stating that the previous two notes were authentic and written by Clinical Psychologist Vanessa L. Moore. Accordingly, Employee requests that the OEA Board reverse the Initial Decision.[8]

Agency filed its Response to Employee's Petition on September 18, 2013. It submits that Employee was provided several opportunities within a six-month period to resolve his employment issues. However, he never provided Agency with any documentation from his

[5] *Id.* at 7.
[6] *Id.*, 7-8.
[7] Although the document is captioned "Petition of Appeal," this Board considers it a Petition for Review.
[8] *Petition of Appeal* (September 4, 2013).

doctor showing that he could return to work. It contends that because Employee was away from his position for one hundred and thirty-six days without authorization, he neglected his duties and failed to carry out tasks assigned to him.[9]

Cause of Action

Agency charged Employee with any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operation, to include, unauthorized absence. DPM § 1603.3(f)(1) provides that ". . . cause for disciplinary action for all employees covered under this chapter is defined as . . . any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operation, to include, unauthorized absence." Moreover, DPM § 1619(6)(a) provides that unauthorized absence for ten consecutive days or more constitutes abandonment. Agency provided Employee's timesheets which show that Employee was on leave without pay from September 8, 2009 through September 11, 2009. Furthermore, from September 14, 2009 through April 4, 2010, there were no hours reported on his timesheets.[10] Because abandonment only requires a showing of ten consecutive days of absences, Agency adequately proved that Employee abandoned his position in this case.

Appropriateness of Penalty

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). According to *Stokes*, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties. The Court in *Stokes* reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure

[9] *Office of the State Superintendent of Education Response to Employee's Petition of Appeal*, p. 1-2 (September 18, 2013).
[10] *The Office of State Superintendent of Education's Answer to James Washington's Petition for Appeal,* Exhibit C (September 11, 2012).

that "managerial discretion has been legitimately invoked and properly exercised."[11] As a result, OEA has held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.

Penalty within the Range Allowed by Law, Regulation, or Applicable Table of Penalties

Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District Government employees. DPM §1619.1(6)(a) lists the penalties for the charge of unauthorized absence for ten consecutive days or more. As the AJ correctly held, the penalty for a first offense of this charge is removal. In accordance with *Love v. Department of Corrections,* OEA Matter No. 1601-0034-08R11 (August 10, 2011) selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.[12]

This Board believes that Agency's decision was reasonable under the circumstances. It is Agency's job to manage its own workforce. Agency's judgment did not exceed the limits of reasonableness. It properly exercised its authority to remove Employee for cause, and the penalty of removal was within the range allowed by the regulation.

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[11] *Stokes v. District of Columbia,* 502 A.2d 1006, 1010 (D.C. 1985).
[12] *Love* held 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, it is 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, 5 M.S.P.R. 280 (1981)).

Witness Credibility

On Petition for Review, Employee challenged the testimony of two of Agency's witnesses. However, as this Board has held in previous cases, it lacks the authority to question an AJ's credibility determinations.[13] The Court in *Metropolitan Police Department v. Ronald Baker,* 564 A.2d 1155 (D.C. 1989), provided that great deference to any witness credibility determinations are given to the administrative fact finder. Similarly, the courts in *Raphael v. Okyiri*, 740 A.2d 935, 945 (D.C. 1999) (quoting *Kennedy v. District of Columbia,* 654 A.2d 847, 854 (D.C.1994); *Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services,* 683 A.2d 470, 477 (D.C.1996); and *Kennedy, supra,* 654 A.2d at 856, provided that due deference must be accorded to the Administrative Judge's credibility determinations, both by the OEA, and by a reviewing court. The Court in *Raphael v. Okyiri* held that the Administrative Judge's findings of fact are binding at all subsequent levels of review unless they are unsupported by substantial evidence. This is true even if the record also contains substantial evidence to the contrary. Thus, although it is hard for this Board to determine how much weight the AJ gave to each witness' testimony, after a review of the hearing transcript, a reasonable mind would accept the credibility determinations the AJ made as adequate to support her conclusion.

Attempts to Return to Duty

As for Employee's claims that he attempted to return to work but was rebuffed by Agency, as the AJ held, there is no evidence in the record to substantiate this claim. Employee

[13] *Ernest H. Taylor v. D.C. Fire and Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 2007); *Larry L. Corbett v. D.C. Department of Corrections,* OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September, 5, 2007); *Paul D. Holmes v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009); *Anita Staton v. Metropolitan Police Department,* OEA Matter No. 1601-0152-09, *Opinion and Order on Petition for Review* (July 16, 2012); and *Ronald Wilkins v. Metropolitan Police Department,* OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013).

provided two documents from the Veteran's hospital. One letter, dated September 15, 2009, provided that "[Employee] reports he is ready to return to work after having been off for the past week." The other letter is dated October 2, 2009, and provides the identical statement. Additionally, this letter provides that Employee is "cleared to return to work without the imposition of any restrictions."[14] Although, the October 2, 2009 letter indicates that the physician has cleared Employee to return to work, the record does not show that Employee ever provided this documentation to Agency. Moreover, Agency argued that Employee offered no documentation to it during the six months he failed to come to work.[15] Thus, this Board agrees with the AJ's assessment that Employee failed to provide evidence that he attempted to return to duty in October of 2009.

Authenticity of Documentation

In accordance with OEA Rule 623.1(c), the Administrative Judge may convene a Pre-hearing Conference to consider the authenticity of documents. In this matter, Employee could have offered an affidavit from Clinical Psychologist Vanessa L. Moore, or he could have had the AJ subpoena her to testify during the evidentiary hearing. However, Employee failed to do either to authenticate the medical documents upon which he relied. Furthermore, the document that Employee provides with his Petition for Review does little to bolster his claims that the previous documents were authentic. The letter attached to his Petition for Review is dated September 3, 2013. It provides that the September 15 and October 2, 2009 letters were drafted by Vanessa L. Moore. However, the letter is unsigned. Therefore, this Board agrees with the AJ's determination that the documents were not authenticated in this matter.

[14] *James Washington Employee Pre-hearing Statement* (January 28, 2013).
[15] *Office of State Superintendent of Education Closing Statement,* p. 2 (July 18, 2013).

Conclusion

The AJ's determinations regarding the cause of action and penalty were based on substantial evidence. Moreover, it was within her authority to make witness credibility determinations and decisions regarding the authenticity of documents. As a result, we must deny Employee's Petition for Review.

ORDER

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

FOR THE BOARD:

_____
William Persina, Chair

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Sheree L. Price, Vice Chair

_____
Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.