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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	
VICTOR HINES,	)	OEA Matter No. 1601-0116-05
Employee	)	
	)	Date of Issuance: February 25, 2009
	)	
DEPARTMENT OF TRANSPORTATION,	)	
Agency	)	
	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Victor Hines (“Employee”) worked as an Engineering Technician with the Department of Transportation (“Agency”). On July 6, 2005, Employee received a notice of removal from Agency. The notice stated that he was removed because of “inexcusable absence without leave (“AWOL”) and absence from duty without permission and without adequate justification.”<sup>1</sup>

On August 8, 2005, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”). He provided that he took a medical leave of absence from work and that he submitted several documents to his supervisor requesting the leave. Employee contends that the leave was approved by his supervisor. He also provided that

<sup>1</sup> *Petition for Appeal*, p. 17 (August 8, 2005).

he made numerous requests that his sick leave be extended.<sup>2</sup> However, Agency failed to respond to his requests until it provided its final notice removing Employee from his position. Employee asserted that he had enough leave to cover his medical absence during the alleged AWOL period.<sup>3</sup>

Agency filed its response to Employee's Petition for Appeal on September 6, 2005. It argued that from February 24, 2005 through April 15, 2005, Employee accumulated 292 hours of absence without leave. It claimed that during this period, Employee failed to contact his immediate supervisor to request the official leave.<sup>4</sup> Agency further argued that Employee took no steps to acquire advanced leave even after it notified him of his lack of leave days. Moreover, Agency provided that it received no doctor's notes excusing Employee from work. Therefore, an adverse action was taken against Employee, and he was properly removed from his position.<sup>5</sup>

On August 22, 2006, the OEA Administrative Judge ("AJ") issued his Initial Decision. He held that it is a well-settled principal in AWOL cases that an employee's absence is justified when they offer a legitimate excuse, like illness, for their absence. Therefore, the absence is excused. The AJ relied heavily on Employee's doctor's testimony that due to angina, hypertension, anxiety, and depression, Employee was unable to return to work. Employee's doctor even went a step further and provided that if

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<sup>2</sup> Enclosed with his Petition for Appeal are three letters to Agency requesting extensions of leave. Employee also submitted a Form 1199 to formally request leave from February 24, 2005 through August 24, 2005. Additionally, he provided doctor excuses that were enclosed with each letter. Employee and his union representative also submitted several letters to Agency during the AWOL period in question.

<sup>3</sup> *Petition for Appeal* (August 8, 2005).

<sup>4</sup> Agency alleged that it received none of the notices that Employee included as attachments in his Petition for Appeal. They further alleged that he offered no proof to support that he sent the letters to Agency or that Agency received them.

<sup>5</sup> *Answer to Employee's Petition for Appeal*, p. 1-3 (September 6, 2005).

Employee returned to work, he could suffer a heart attack or stroke. The AJ found that Employee provided Agency with doctor notes which stated that he was under doctor's care for the medical problems cited. Because Employee was absent without leave as the result of an illness, the AJ found that Agency did not prove that the adverse action taken against him was for cause. Therefore, the AJ ruled that Employee's removal be reversed and that he be reinstated to his position of record with all back pay and benefits.<sup>6</sup>

Agency disagreed with the Initial Decision and filed a Petition for Review with the OEA Board. It argued that the AJ's findings that Employee had a legitimate medical excuse for his absence, was not supported by substantial evidence. It also provided that had Employee returned to work, his duties could have been modified to accommodate any limitations that existed. For example, Agency asserted that Employee could have been given a desk job that had no physical requirements other than walking around the work area. Agency also argued that Employee's doctor did not identify any specific activities that Employee was unable to perform due to his medical condition. Therefore, Agency requested that the Initial Decision be reversed.<sup>7</sup>

On October 26, 2006, Employee filed his response to Agency's Petition for Review. He argued that the AJ properly ruled that the adverse action was without cause because Employee was incapacitated at the time that he was charged with AWOL and because he submitted documentation substantiating his incapacitation. Employee claimed that Agency offered no evidence to contest his doctor's testimony that he was incapacitated during the AWOL period. He also alleged that as the fact finder, the AJ

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<sup>6</sup> *Initial Decision*, p. 13-14 (August 22, 2006).

<sup>7</sup> *Agency's Petition for Review*, p. 3-4 (September 26, 2006).

was within his authority to draw factual conclusions about his doctor's credibility. Finally, Employee argued that a change in his duties had no bearing on whether Agency properly removed him on the ground of being AWOL.

The D.C. Court of Appeals found in *Murchinson v. D.C. Department of Public Works*, 813 A.2d 203 (D.C. 2002), that an employee must be incapacitated by their illness and unable to work during the AWOL period for it to be deemed a legitimate excuse for that cause of action. In addressing the issue of whether Agency's action was taken for cause, the AJ had to determine if Employee was incapacitated and unable to work from February 24, 2005 through April 15, 2005, due to illness. He also had to decide if Employee properly informed Agency of such incapacity during the period in question.

This Board believes that the AJ's decision that Employee had a legitimate medical excuse during the AWOL period was based on substantial evidence. As did the AJ, we found the doctor's testimony compelling when she stated that due to Employee's illness he was unable to perform *any* type of work. In *Teshome Wondafrash v. Department of Human Services*, OEA Matter No. 1601-0126-96, Opinion and Order on Petition for Review (April 14, 2008), \_\_\_ D.C. Reg. \_\_\_\_ ( ), the AJ and the OEA Board held that Mr. Wondafrash was not AWOL because he was incapacitated due to illness. The facts in Wondafrash and the current case are uncanny because like Mr. Hines, Wondafrash suffered from chest pains, anxiety, and depression. Similarly, Wondafrash's doctor, as Mr. Hines' doctor, testified about the illness and how it affected his ability to work. Therefore, we support the AJ's reliance on Mr. Hines' doctor's testimony that he could suffer a heart attack or stroke because of his illnesses as proof that he was

incapacitated.<sup>8</sup>

Moreover, as the AJ pointed out in his Initial Decision, Agency offered no evidence to contradict Mr. Hines' doctor's testimony. It could have offered its own expert witness or documents to prove that the conditions suffered by Employee were not enough to incapacitate him from his duties. However, it did not.

As for the issue of documentation, we find no reason to disturb the AJ's finding that Employee properly informed Agency of his illnesses by submitting medical documentation to cover the AWOL period in question. As previously noted, Employee and his union representative provided several letters to Agency which outlined his illnesses.<sup>9</sup> Additionally, several of the letters provided notes from his doctor which not only outlined Employee's conditions but also his inability to return to work.<sup>10</sup>

As we held in *Wondafrash*, when an employee offers a legitimate excuse, such as illness, for being absent without leave, the absence is justified and, therefore, excusable because the absence cannot serve as a basis for an adverse action.<sup>11</sup> Employee adequately proved that his absence from work was due to a legitimate medical excuse. Therefore, Agency did not have cause to remove him from his position for absence without leave, making the penalty of removal inappropriate. Accordingly, Agency's Petition for Review is **DENIED**.

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<sup>8</sup> Employee correctly points out that the AJ, as the fact finder, was within his authority to draw factual conclusions on his doctor's credibility. OEA has consistently relied on the ruling in *Metropolitan Police Department v. Ronald Baker*, 564 A.2d 1155 (D.C. 1989) which found that great deference to any witness credibility determinations are given to the administrative fact finder. Accordingly, we support the AJ's assessments regarding the doctor's credibility because he was present to hear this witness testify and observe her demeanor.

<sup>9</sup> All of the letters were properly addressed to Agency.

<sup>10</sup> *OEA Hearing Transcript*, Employee Exhibits 2-8 (February 7, 2006).

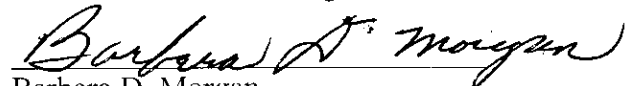
<sup>11</sup> *Initial Decision for Teshome Wondafrash*, OEA Matter No. 1601-0126, p. 18.


**ORDER**

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

FOR THE BOARD:

  
\_\_\_\_\_  
Sherri Beatty-Arthur, Chair

  
\_\_\_\_\_  
Barbara D. Morgan

  
\_\_\_\_\_  
Richard F. Johns

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.