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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
VERONICA BUTLER,)	
Employee)	
)	OEA Matter No.: 1601-0132-14
v.)	
)	Date of Issuance: April 18, 2017
DISTRICT OF COLUMBIA)	
OFFICE ON AGING,)	
Agency)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Veronica Butler (“Employee”) worked as a Special Assistant to the Executive Director with the Office on Aging (“Agency”). On September 3, 2014, Agency notified Employee that she was being terminated from her position based on “any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: absence without official leave (“AWOL”) and unauthorized absence.” According to Agency, Employee failed to respond to an official notification concerning her failure to submit certain medical documentation. Specifically, she was required to provide Agency with documents from a

physician to explain her absence from work from July 28, 2014 through August 8, 2014. The effective date of Employee's termination was September 3, 2014.¹

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on September 25, 2014. In her appeal, Employee argued that her due process rights were violated because Agency did not provide her with an advance written notice of the charges against her. Employee further stated that Agency did not establish that it had cause to discipline her for being absent from work. She also contended that Agency terminated her in retaliation for filing a discrimination complaint with the Equal Employment Opportunity Commission ("EEOC"). Employee, therefore, requested that she be reinstated with back pay and benefits.²

Agency filed an Answer to Employee's Petition for Appeal on November 13, 2014. It argued that Employee's due process rights were not violated because she was provided with multiple notices concerning her unauthorized absences. Agency also stated that she was afforded numerous opportunities to submit the appropriate documentation in order to restore her absences from unauthorized leave to approved leave. In addition, Agency provided that Employee was properly removed for cause based on her failure to report to work. Lastly, it stated that her removal did not constitute retaliation for having filed a discrimination complaint with the EEOC. Accordingly, Agency opined that the matter should be decided on the documents of record. In the alternative, it requested that OEA conduct an evidentiary hearing.³

The case was assigned to an OEA Administrative Judge ("AJ") on April 2, 2015. On July 15, 2015, the AJ held a Status Conference to assess the parties' arguments. The parties were subsequently ordered to submit written briefs that addressed whether Employee was AWOL for

¹ *Agency Answer to Petition for Appeal*, Exhibit 17 (November 13, 2014).

² *Petition for Appeal* (September 25, 2014).

³ *Agency Answer to Petition for Appeal* (November 13, 2014).

the period of July 28, 2014 through August 8, 2014; whether Agency's termination action was retaliatory; and whether removal was appropriate under the circumstances.⁴

In its brief, Agency claimed that Employee was removed for cause because it was uncontroverted that she was absent from work from July 28, 2014 through August 8, 2014. It stated that Employee failed to submit the appropriate medical documentation to prove that her illness rendered her unable to perform the functions of her position during the relevant time period. Moreover, Agency asserted that the penalty of termination was appropriate under the Table of Appropriate Penalties provided in Chapter 16 of the District Personnel Manual ("DPM"). Consequently, it maintained that Employee's termination should be upheld.⁵

In response, Employee argued that her absences during the relevant time period were not unauthorized because she was unable to work due to depression, anxiety, and stress caused by a hostile work environment. According to Employee, Agency was aware of her circumstances because she submitted at least four letters from her treating psychiatrist regarding the status of her medical condition. She also stated that Agency violated Section 1608 of the DPM by failing to provide her with at least fifteen days' notice of the adverse action. Employee further reiterated that Agency discriminated against her because of her age. She also submitted that the penalty of removal was not appropriate because Agency did not meet its burden of proof in establishing that she was AWOL. Therefore, Employee argued that her removal should be overturned.⁶

An Initial Decision was issued on October 27, 2015. First, the AJ held that Agency was adequately apprised of Employee's ongoing medical treatment, as evidenced by several letters from her treating psychiatrist. She stated that Employee submitted documentation to prove that her illness was a result of job-related stress and a hostile work environment. Next, the AJ

⁴ *Post-Status Conference Order* (July 15, 2015).

⁵ *Agency Brief* (August 12, 2015).

⁶ *Employee Brief* (September 8, 2015).

determined that Employee's absences from July 28, 2014 through August 8, 2014, were excusable because of her illness. Therefore, she concluded that Agency did not have cause to charge Employee with AWOL and Unauthorized Absence.

With respect to the due process argument, the AJ held that Employee was required to be provided with at least fifteen (15) days' advance written notice of her termination under DPM §1608.1. However, the AJ highlighted *Aygen v. District of Columbia Office of Employee Appeals*, wherein the District of Columbia Superior Court held that when an employee is not on duty, "the notice of the final decision must [be] delivered to the employee on or before the time the action is effective, with a request for employee to acknowledge it."⁷ According to the AJ, Agency's first attempt to deliver Employee's final notice of termination via FedEx was insufficient to prove that it complied with the notice requirements of DPM §1608 and the holding in *Aygen*. In addition, she held that Agency's second attempt to deliver the notice via the U.S. Postal Service was insufficient because Employee was only provided with fourteen days' notice.

Lastly, the AJ held that Employee failed to make a prima facie showing that her termination was retaliatory in nature. She further stated that Employee's arguments relevant to discrimination were outside the purview of OEA's jurisdiction. After reviewing the record, the AJ concluded that Agency did not meet its burden of proof to sustain the charges against Employee. As a result, Agency's termination action was reversed, and Employee was reinstated to her position of record with back pay and benefits.⁸

⁷ 2009 CA 008063 (D.C. Superior Ct. April 5, 2012). The Court further stated that in cases where an employee is not in duty status, the notice must be sent to his or her last known address by courier, certified or registered mail, return receipt requested.

⁸ *Initial Decision*. (October 27, 2015).

Agency disagreed with the AJ's findings and filed a Petition for Review with OEA's Board on December 1, 2015. It contends that the AJ's decision to forego an evidentiary hearing was arbitrary, capricious, and an abuse of discretion. According to Agency, there are genuine issues of material fact at issue which cannot be decided based on the record alone. Agency further argues that the AJ erred in finding that Employee was not served with the Advance Written Notice of Proposed Removal in accordance with the applicable regulations. Therefore, Agency requests that this Board grant its Petition for Review and remand the matter to the AJ for the purpose of conducting an evidentiary hearing.⁹

Employee filed a response to Agency's Petition for Review on January 5, 2016. She believes that the AJ correctly determined that an evidentiary hearing was unwarranted in this case. According to Employee, the medical reports, affidavits, and doctor's notes are sufficient to establish that her absences were excused. Moreover, Employee reiterates her argument that the AJ did not err in concluding that Agency failed to comply with the notice requirements of DPM §1608. Consequently, she requests that the Board deny Agency's Petition for Review and uphold the Initial Decision.¹⁰

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:

- (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
- (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;

⁹ *Petition for Review* (December 1, 2015).

¹⁰ *Answer to Agency's Petition for Review* (January 5, 2016).

- (c) The findings of the Administrative Judge are not based on substantial evidence; or
- (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

Evidentiary Hearing

Agency argues that the arguments presented in the parties' submissions raise material and factual disputes that warrant an evidentiary hearing. Moreover, it opines that if a hearing were held, the AJ would have been afforded an opportunity to clarify the inconsistencies in the medical documentation produced by Employee and her psychiatrist. This Board agrees and finds that the AJ abused her discretion by failing to conduct an evidentiary hearing because the issue germane to this matter—whether Employee was medically incapacitated during the relevant period in question—could not be decided solely on the record.

Under OEA Rule 620.2, an Administrative Judge has the discretion to require an evidentiary hearing, if appropriate. OEA Rule 616.1 provides that “[i]f, upon examination of the record in an appeal, it appears to the Administrative Judge that there are no material and genuine issues of fact, that a party is entitled to a decision as a matter of law, or that the appeal fails to state a claim upon which relief can be granted, the Administrative Judge may...giv[e] them an opportunity to submit additional evidence or legal argument, render a summary disposition of the matter without further proceedings.”

However, in *Dupree v. D.C. Office of Employee Appeals*, 36 A.3d 826, 832 (D.C. 2011), the D.C. Court of Appeals held that the OEA AJ abused his discretion by failing to conduct an evidentiary hearing where the employee contesting the government's decision to terminate his employment “raised several issues that required clarification and could not be decided solely on

the documentary evidence in the administrative record.”¹¹ The Court in *Dupree* further stated that an evidentiary hearing was warranted because a “...review of the administrative record reveals that the documents...obfuscated rather than clarified the material issues, rendering it very difficult to decide [the]...issues on the record.”¹²

Here, the AJ determined, based solely on the record, that Employee’s absences were excused from July 28, 2014 through August 8, 2014, as a result of her medical incapacitation. In support thereof, the AJ referenced several documents wherein Employee’s psychologist, Dr. Rama Prayaga, provided Agency with the status of her medical condition. For example, on July 1, 2014, Dr. Prayaga sent Agency a letter stating that Employee was “under his medical care and is released from returning to work from June 26, 2014 until further notice....[Employee] is able to work from home....”¹³ On July 14, 2017, Dr. Prayaga sent a second note to Agency stating that “[Employee] will remain in my care until further notice....I remain guarded, but I do not believe the symptoms will return. Therefore, I will be releasing her to return to work on Monday, July 21, 2014.”¹⁴ However, approximately nine days later, Dr. Prayaga sent another notice to Agency, which provided that “[Employee] was advised not to return to work on Monday July, 28, 2014, as had been stated. Please note that a non-hostile working environment and the absence of unhealthy stress [are] imperative upon her return. She remains in my care until further notice.”¹⁵

In her analysis, the AJ concluded that both the July 14, 2014, and the July 23, 2014 letters from Dr. Prayaga collectively provided a legitimate excuse for Employee to be absent from work. This Board does not believe that the AJ was able to sufficiently and reliably determine that

¹¹See also *Colton v. District of Columbia Department of Employment Services*, 484 A.2d 550 (D.C. 1984).

¹²*Dupree*, 36 A.3d at 832.

¹³*Agency Answer to Petition for Appeal* (November 13, 2014).

¹⁴*Id.* at 7.

¹⁵*Id.* at 9.

Employee was medically incapacitated based on the record alone. Similar to the holding in *Dupree*, the documents of record in this case seem to obfuscate, rather than clarify, the material issues of fact. There are inconsistencies in the documents submitted by Employee which the AJ relied on in her decision. For example, the AJ unilaterally concluded that one of the dates referenced in Dr. Prayaga's July 23, 2014 note constituted a typographical error. Yet, the parties were not given an opportunity to resolve this inconsistency by way of testimonial evidence. In addition, as Agency noted in its pleadings, Employee's doctor released her to resume working on July 21, 2014. However, approximately nine days later, Dr. Prayaga rescinded Employee's release note without explanation, stating that she could not resume her duties. Whether Employee was truly incapacitated during the time period in question is relevant to the disposition of this case. The documents of record in this case contain inconsistencies which raise disputed issues of material fact. Thus, the parties should be afforded an opportunity to contest and/or clarify the medical documentation submitted by Employee and her doctor. Accordingly, this Board must remand the matter to the AJ for the aforementioned purpose.¹⁶

¹⁶ Agency argues that the AJ's finding that it did not properly serve Employee with the Advance Written Notice of Proposed Removal is erroneous and not in accordance with the applicable law. Since this matter is being remanded for the purpose of conducting an evidentiary hearing, the parties will also be given an opportunity to address their arguments pertinent to the notice requirement at that time.

ORDER

Accordingly, it is hereby ordered that Agency's Petition for Review is **GRANTED**, and the Initial Decision is **REMANDED** to the Administrative Judge for further consideration.

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.