THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
FRANCES WADE,	)	
Employee	)	OEA Matter No. 1601-0067-15R18
	)	
v.	)	Date of Issuance: April 5, 2019
	)	
DISTRICT OF COLUMBIA	)	Monica Dohnji, Esq.
DEPARTMENT OF BEHAVIORAL HEALTH,	)	Senior Administrative Judge
Agency	)	
	)	

Theresa Romanosky, Esq., Employee's Representative
Frank McDougald, Esq., Agency's Representative

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL BACKGROUND

On April 29, 2015, Frances Wade ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Behavioral Health's ("DBH" or "Agency") decision to terminate her from her position as a Consumer Affairs Liaison, effective April 7, 2015. Employee was charged with violating the following: any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operation: (1) Neglect of Duty;[1] (2) Unauthorized absence;[2] and (3) Absent without Official Leave ("AWOL"). On June 1, 2015, Agency submitted its Answer to Employee's Petition for Appeal.

This matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on September 16, 2015. Several Status/Prehearing conferences were held in this matter. Thereafter, an Evidentiary Hearing was held on October 30, 2017. While both parties were present for the Evidentiary Hearing, the undersigned was informed that neither party was presenting witnesses. The exhibits and stipulations made by the parties were read and entered into the record. Subsequently, on December 18, 2017, I issued an Initial Decision ("ID") on February 27, 2018, reversing Agency's decision to terminate Employee.

[1] Failure to carry out assigned tasks by failing to report for duty.
[2] Ten days or more.

Agency filed a Petition for Review with the OEA Board. On December 18, 2018, the OEA Board granted Agency's Petition for Review noting in pertinent parts as follows: "[b]ased on the record in its current state, the Board cannot satisfactorily conclude that the Initial Decision was based on substantial evidence." Citing to *Murchison v. District of Columbia Department of Public Works*,[3] and other cases, the Board explained that "… we believe the administrative record in the case at bar is not complete… there is no decisive evidence in the record to support a finding that Employee was medically incapacitated during the period in which she was charged as AWOL, or that she was able to perform the duties of her position at that time. This Board cannot simply surmise that Employee established a legitimate excuse for being AWOL in the absence of clear and complete supporting medical evidence. Whether Employee was medically incapacitated during the relevant period in question is a matter germane to this appeal. In light of the foregoing, this Board is compelled to grant Agency's Petition for Review, and remand this matter to the Administrative Judge to make the appropriate factual finding."[4] The OEA Board also noted that the issue of whether Employee admitted that she was AWOL during the relevant period "must be resolved for the purpose of determining whether Agency met its burden of proof, or whether Employee's affirmative defense of PTSD is supported by a preponderance of evidence."[5]

Consequently, the AJ issued an Order requiring the parties to submit additional documentation. Employee's brief was due on or before February 4, 2019, Agency's brief was due on or before February 25, 2019, and Employee had the option to submit a reply brief on or before March 15, 2019. Both parties have submitted their respective briefs. The record is now closed.

JURISDICTION

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

ISSUES

(1) Whether Employee was medically incapacitated during the period in which she was charged as AWOL; and

(2) Whether Employee's affirmative defense of PTSD is supported by a preponderance of the evidence.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

[3] 813 A.2d 203, 206 (D.C. 2002).
[4] *See Frances Wade v. Department of Behavioral Health*; OEA Matter No. 1602-0067-15, Opinion and Order on Petition for Review (December 18, 2018).
[5] *Id*. at footnote 16.

> 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 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

According to the record, Employee was hired as a Consumer Affairs Liaison with Agency.[6] On May 23, 2013, Employee was hit by a patient while working at the hospital. As a result, Employee filed a claim with the Public Sector's Worker's Compensation program on August 29, 2013. Her claim was accepted and Employee was out of work on worker's compensation. On January 29, 2015, Employee was notified by the D.C. Office of Risk Management that effective August 14, 2014, Employee was released to return to work full duty by an independent doctor with no restrictions, thereby terminating her worker's compensation benefits as of January 29, 2015.

Thereafter, Agency issued a "Return to Work Notice" to Employee on February 2, 2015, informing Employee that since she was cleared to return to work by the D.C. Office of Risk Management, Employee was expected to return to work on February 9, 2015.[7] Employee did not return to work on the prescribed date. On February 18, 2015, Agency issued a "Return to Duty" letter to Employee informing Employee that since she had failed to return to work, she was placed on AWOL pay status effective February 9, 2015.[8] Employee did not respond to the letter.

On March 1, 2015, Agency issues an Advance Written Notice of Proposed Removal charging Employee with violating District Personnel Manual ("DPM").[9] Employee was charged with being AWOL from February 9, 2015 through February 27, 2015.[10] Employee replied to the March 1, 2015, letter noting that she was suffering from Post-Traumatic Stress Disorder ("PTSD") as a result of the May 2013 assault at work.[11] The Hearing Officer assigned to this matter issued their report and recommendation on March 25, 2015, upholding Agency's decision.[12] On March 31, 2015, Agency issued its Final Decision Notice terminating Employee effective April 7, 2015.[13]

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[6] Agency's Response to Petition for Appeal at Tab 14 (June 1, 2015).
[7] *Id*. at Tab 5.
[8] *Id*. at Tab 7.
[9] *Id.* at Tab 8.
[10] *Id*.
[11] *Id*. at Tab 9.
[12] *Id*. at Tab 11.
[13] *Id*. at Tab 12.

Agency's Position

In response to the undersigned AJ's January 2, 2019, Order requiring the parties to submit additional documentation. On January 11, 2019, Agency filed its Objection to and Motion for reconsideration of January 2, 2019 Order. Agency asserted that the AJ's January 2, 2019 Order "is beyond the remand of the Board, which required the SAJ to make findings based upon the existing record." Agency explained that Employee had three experienced and competent attorneys who clearly knew the established law regarding AWOL and incapacitation and the evidence required by the established law to demonstrate that an individual was incapacitated during an AWOL period. Agency further explained that there is no reason why the evidence now being requested by the SAJ could not have been produced before the record closed in this matter.[14] Consequently, Agency notes that, "it can only be anticipated that Dr. Mongal [sic] will present an affidavit, which will not be subject to cross-examination, that will surely state the obvious: Employee was incapacitated and could not perform her duties during the period February 9, 2015 to February 27, 2015. Thus, Employee will be provided a 'second bite at the apple' … The Board's decision did not contemplate this proposed course of action, which will be clearly unfair to Agency." [15]

Thereafter, on February 27, 2019, Agency filed its Response to Employee's Request for Leave to Submit Affidavit. Agency pointed out that contrary to the very specific requirements set forth in the January 2, 2019, Order, Employee submitted an unsworn statement of Dr. Moghal purporting to address the period of February 9, 2015 to February 27, 2015. Agency Argues that Employee's request for leave to submit additional notarized affidavit is misleading because the initial statement of Dr. Moghal was unsworn. Thus, the submission for which leave is requested is not an "additional notarized affidavit."[16] Agency also argues that Employee did not provide an explanation in support of its request to submit the additional notarized affidavit. Agency further argues that Employee's brief did not mention that a sworn statement of Dr. Moghal would be forthcoming. Agency maintained that Employee's "request should be denied because in submitting the unsworn statement, despite the clear language of the Order that was recited in Employee's Brief, Employee has not complied with the Order and has offered no explanation for failing to do so. More importantly, the affidavit of Dr. Moghal, as was his unsworn statement, constitute inadmissible hearsay."[17] Agency additionally notes that Employee could have presented Dr. Moghal at the evidentiary hearing but failed to do so. Thus, Agency was denied the opportunity to cross-examine Dr. Moghal and the SAJ was unable to assess his credibility.

On February 25, 2019, Agency filed its brief in response to the January 2, 2019 Order. Agency again argued that the Board's remand did not, in any way provide that the SAJ could reopen and add to the record that was closed on February 27, 2018. Agency contends that the Board's remand required the SAJ to make findings of fact as to whether Employee was incapacitated during the relevant period based solely on the record that closed on February 27, 2018. Agency states that the Board remanded the matter because the Board could not make factual findings. It further states that the January 2, 2019, Order re-opens the record and violates

[14] Agency's Objection to and Motion for Reconsideration of January 2, 2019 Order (January 11, 2019).
[15] *Id.*
[16] *Id.*
[17] *Id.*

the Board's remand and the District of Columbia Administrative Procedures Act ("DCAPA). Agency maintains that the exclusive record in this matter was established when the record was closed on February 27, 2018.[18]

In addition, Agency contends that the unsworn statement of Dr. Moghal is new evidence that should not be considered because it was available when the record closed. As such, it does not meet one of the criteria for considering new evidence since it was available before the record closed. Agency argues that Employee has not produced any explanation as to why the unsworn statement of Dr. Moghal was not produced on or before February 27, 2018. Agency further argues that if the unsworn statement is accepted, Agency should be allowed to depose Dr. Moghal or present him with interrogatories because Agency cannot cross-examine an unsworn statement. Agency avers that the unsworn statement should be accorded no weight. It argues that while the unsworn statement highlights that Employee was seen by Dr. Moghal on February 27, 2019, it is not accompanied or supported by a medical record that would show that he saw and treated Employee on February 27, 2015.[19]

Furthermore, Agency contends that it has proven by a preponderance of the evidence that Employee was AWOL without leave for the period of February 9, 2015 to February 27, 2015. Agency explains that it is undisputed that Employee was not at work during the relevant period and her absences were not authorized.[20]

Employee's Position

In response to Agency's January 11, 2019, Objection to the January 2, 2019, Order, Employee asserts that Agency's motion should be denied because the January 2, 2019 Order complies with the requirements of the December 18, 2018 remand Order; the administrative record is not complete, and Agency cannot object to additional evidence being admitted when the burden of proof in this case lies with Agency.[21] Employee highlights that the remand Order required the SAJ to do two things: (1) order the parties to submit evidence to prove that Employee was incapacitated from February 9, 2015 to February 27, 2015; and (2) resolve the issue of whether the Agency met its burden of proof. Employee maintains that Agency's argument regarding the January 2, 2019, Order is beyond the remand of the Board is not supported by the language in the Remand Order. Employee explains that, because the Board found that the administrative record in the case at bar was not complete and there was no decisive evidence in the record to support the SAJ's findings, the remand Order required that the SAJ reopens the record and order the parties to submit additional evidence. Employee also maintains that since the Initial Decision was remanded, opening the record to allow further evidence is allowed by OEA rules.[22]

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[18] Agency's Response to Employee's Brief in Response to January 2, 2019 Order (February 25, 2019).
[19] *Id.*
[20] *Id.*
[21] Employee's Answer to Agency's Objection and Motion for Reconsideration of January 2, 2019 Order (January 22, 2019)
[22] *Id.*

In addition, Employee asserts that Agency's argument that the information requested by the SAJ could have been produced before the record closed with the exercise of due diligence is misdirected. Employee explains that her medical documentation already on record demonstrate that she was medically incapacitated during the period of alleged AWOL and she did not bear the burden in this matter. Employee further maintains that Agency had the opportunity to cross-examine Dr. Moghal as it has the burden of proof in this case to examine Dr. Moghal or produce its own witness to rebut Dr. Moghal's claims. Employee concluded that because the January 2, 2019, Order is consistent with the Remand Order which requires additional evidence to complete the record, Agency's objection and motion to reconsider should be denied.[23]

Along with its February 4, 2019, brief, Employee submitted an unsworn statement by Dr. Moghal. Employee notes in her brief that she was not AWOL during the period of February 9, 2015 to February 27, 2015 because she suffered from severe Post-Traumatic Stress Disorder ("PTSD") as a result of the May 2013 assault at work. Employee explains that her PTSD rendered her incapacitated during the period of February 9, 2015 to February 27, 2015, such that she was unable to perform her work.

Employee maintains that Agency's continued assertion that she was AWOL is unsupported by the record. Employee highlights that she provided Agency with several Verification of Treatment ("VOT") forms and Doctor's Visit summaries to establish that (1) she was diagnosed with PTSD; (2) the PTSD was caused by her workplace assault; (3) she was advised not to return to work by her doctor; and (4) she was treated for hypervigilance and insomnia during the period at issue.[24] Employee also asserts that Agency was fully aware of her condition no later than September 2014, and on multiple occasions, was provided subsequent documentation from Employee's doctor that she was still under his care in March 2015. Employee asserts that her absence for the period of February 9, 2015, to February 27, 2015, is excusable under DPM section 1268.4 and case law.

Employee argues that Agency has not met its burden of proof. She explains that in order to refute the claim that her absence was excused, Agency stated that Employee admitted she was AWOL, and misstated its burden to demonstrate preponderance of the evidence that Employee was AWOL during the relevant period. Employee maintains that she never admitted that she was AWOL during the relevant period. She only stated that she did not work between February 9, 2015 and February 27, 2015. This is not an admission of AWOL and Agency's continued assertion that it is are baseless. Employee vehemently denies that she was AWOL and submits an affidavit in support of her contention that her absence was excusable due to her medical condition caused by the workplace assault. Accordingly, she did not admit that she was AWOL during the relevant period and the burden of proof remains with Agency.[25] Employee further concludes that Agency has not provided any documentation or testimony to contest that Employee's assertion that her absence was excusable due to illness. Employee states that Agency had the opportunity to call Dr. Moghal to the witness stand to clarify the record, but it chose not

[23] *Id.*
[24] Employee's Brief in Response to January 2, 2019 Order (February 4, 2019).
[25] *Id.*

to. Moreover, Agency has failed to provide this Office with any evidence to contradict Dr. Moghal's assessment that she was unable to return to work.[26]

On February 22, 2019, Employee filed a notarized copy of Dr. Moghal's affidavit from Kaiser Permanente. Employee requested leave to submit the additional notarized affidavit.[27]

In its March 11, 2019, submission to this Office, Employee argues that Agency's objection to Employee's February 22, 2019, submission should not be given any weight because her delay in submitting the affidavit was a result of Agency's meritless objections and Kaiser Permanente's policy regarding sworn statements. Employee further explains that Agency did not suffer any harm from the delay and Agency had the opportunity and responsibility to subpoena Dr. Moghal to testify during the evidentiary hearing, since it carried the burden, but chose not to. Employee further explained that the unsworn statement and the sworn statement are substantially similar. Accordingly, Agency was not prejudiced by the filing of the second affidavit. Moreover, both affidavits were signed by the same physician and covered the same substance and facts. Employee also states that Agency was served with both documents prior to its February 27, 2019, deadline to respond. Employee explains that Agency could have responded to the notarized affidavit in its Response Brief, which it filed the same day it filed the objection. Instead, Agency strategically chose to ignore the second affidavit and object only to the filing of the first affidavit. Agency's failure to address the second affidavit in its brief is its own fault. Employee additionally states that there is no reason to doubt the statements made by Dr. Moghal in the first affidavit. She maintains that the statements in the first affidavit are corroborated and supported by the second affidavit filed and the verification of treatment forms in the record. Employee asserts that the slight delay in the filing of the second affidavit was not caused by Employee and did not cause any detriment to Agency.[28]

On March 15, 2019, Employee filed a Reply to Agency's Response to Employee's Brief in Response to January 2, 2019 Order. Employee reiterated that the SAJ's decision to reopen the administrative record in accordance with the Order from the Board was proper and consistent with applicable statutes and rules. She argues that this Office was completely within its discretion to reopen the record and was also required to do so pursuant to the instructions outlined in the Board's Opinion and Order. Employee explained that the Opinion and Order required the SAJ to supplement the administrative record and to make findings based on the additional information.[29]

Furthermore, Employee contends that nothing in D.C. Code 2-501-562 (2001 ed.) or the DCAPA prohibits the court from reopening the records or from ordering the parties to provide additional evidence in reconsidering its previous decision. Citing to D.C. Code section 2-509(b), Employee asserts that the DCAPA has an explicit provision affirmatively allowing the Court to reopen the "exclusive record" and allowing the parties an opportunity to introduce evidence to support a fact where such material fact does not appear in the record. Also, Employee argues that

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[26] *Id.*
[27] Employee's February 22, 2019 submission.
[28] Employee's Reply to Agency's Response to Employee's request for Leave to submit Affidavit (March 11, 2019).
[29] Employee's Reply to Agency's Response to Employee's Brief in Response to January 2, 2019 Order (March 15, 2019).

D.C. Code section 2-503 gives individual administrative offices the discretion and power to establish their rules, if they are not inconsistent with the procedures established in DCAPA. Consequently, OEA has created its own rules of procedure which allows the administrative judge to reopen the record on remand.[30]

Employee reiterates that Agency utterly failed to meet its burden and continues to wrongfully attempt to shift its burden onto her. Employee reiterates that the burden of proof in this matter lies with Agency, and she also reiterated the arguments found in her February and March 2019, submissions.[31]

Agency's Objection to and Motion for Reconsideration of January 2, 2019 Order

On January 11, 2019, Agency filed its Objection to and Motion for Reconsideration of January 2, 2019 Order. In its Motion, Agency states that the AJ's January 2, 2019 Order "is beyond the remand of the Board, which required the SAJ to make findings based upon the existing record." This assertion is incorrect. The OEA Board stated in the O&O as follows: "Based on *the record in its current state, the Board cannot satisfactorily conclude that the Initial Decision was based on substantial evidence* (emphasis added)." Citing to *Murchison v. District of Columbia Department of Public Works*,[32] and other cases, the Board explained that "… we believe the administrative record in the case at bar is *not complete… there is no decisive evidence in the record* ... this Board cannot simply surmise that Employee established a legitimate excuse for being AWOL in the absence of *clear and complete supporting medical evidence*. Whether Employee was medically incapacitated during the relevant period in question is a matter germane to this appeal. In light of the foregoing, this Board is compelled to grant Agency's Petition for Review, and remand this matter to the Administrative Judge to make the *appropriate factual findings* (emphasis added)."[33]

The OEA Board found that the record in its current state was defective – in the Board's own word, "based on *the record in its current state*, … we believe the administrative record in the case at bar is *not complete*… there is *no decisive evidence in the record* ... this Board is compelled to grant Agency's Petition for Review, and remand this matter to the Administrative Judge to make the *appropriate factual findings* (emphasis added)." Accordingly, to conduct any additional/appropriate fact findings, the Administrative Judge must reopen the record.

Moreover, I find that, if the OEA Board did not want the record reopened, it would have relied on the record in its current state and simply reversed or affirmed the Initial Decision, instead, of remanding the matter to the undersigned to make appropriate factual findings. By reopening the record, the undersigned is adhering to the OEA Board's directive to make appropriate factual findings to establish a complete record, with clear and concise medical evidence establishing whether Employee was medically incapacitated during the relevant AWOL period. Consequently, I find that all of Agency's arguments relating to this motion are

[30] *Id.*
[31] *Id.*
[32] 813 A.2d 203, 206 (D.C. 2002).
[33] *See Frances Wade v. Department of Behavioral Health*; OEA Matter No. 1602-0067-15, Opinion and Order on Petition for Review (December 18, 2018).

inconsequential. Therefore, I further find that Agency's Objection to and Motion for Reconsideration of January 2, 2019 Order is hereby **DENIED**.

Employee's Sworn and Unsworn Statements

Following the issuance of the O&O, I issued an Order requiring Employee to submit a sworn statement addressing whether Employee was medically incapacitated during the relevant period. Employee submitted two statements – one sworn and one unsworn.[34] Agency objected to the submission of the unsworn, stating that it was inadmissible hearsay. However, although Agency was in possession of the sworn statement, it did not make any objection to the content therein.[35] In response, Employee noted that the content of both letters were substantively similar, and the sworn statement was submitted prior to the due date of Agency's response Brief.

Although this Office is guided by the Federal Rules of Evidence, it is not bound by them. Therefore, it has been a practice of this Office to admit evidence that maybe considered hearsay and would clearly be inadmissible in a Court of Law. Consequently, Agency's objection to the admissibility of the unsworn doctor's note based on inadmissible hearsay is hereby overruled. Pursuant to OEA Rule 626.1, all material and relevant evidence or testimony *shall be admissible*, but may be excluded if it is unduly repetitive (emphasis added). Both the sworn and unsworn statements provided by Employee's doctor are relevant to the outcome of this matter and they are not unduly repetitive. Moreover, OEA Rule 619.2(h) further highlights that the Administrative Judge may take other appropriate actions authorized by the Board. Here, the Board specifically noted that the current record was incomplete and directed the undersigned to "make the appropriate factual findings" to include clear and complete medical evidence establishing that Employee was medically incapacitated during the AWOL period. The two statements (sworn and unsworn) from Employee's doctor are in compliance with this directive from the OEA Board. As such, I conclude that both statements by Dr. Moghal will be considered in deciding this matter.

Analysis

On December 18, 2018, the OEA Board issued an O&O granting Agency's Petition for Review. Consequently, the undersigned must reexamine the current record to determine if Employee was medically incapacitated during the AWOL period, and whether Employee's affirmative defense of PTSD is supported by a preponderance of the evidence.

Unauthorized Absence and Absent Without Authorized Leave (AWOL)

In the instant case, the undersigned must determine if the evidence that Employee was absent from work for ten (10) or more consecutive day is adequate to support Agency's decision to terminate Employee. In such cases, "[t]his Office has consistently held that when an employee offers a legitimate excuse, such as illness, for being absent without leave, the absence is justified

[34] Both statements were signed by Dr. Moghal.
[35] Agency argues that the request for leave to submit the sworn statement is misleading because the initial statement was unsworn. Agency also argues that Employee did not provide an explanation in support of its request, nor did Employee mention that the sworn statement would be forthcoming.

and therefore excusable."[36] Additionally, if the employee's absence is excusable, it "cannot serve as a basis for adverse action."[37] The relevant time period in this matter is February 9, 2015, through February 27, 2015. Employee does not dispute that she was absent from work during this period. She has however provided several doctors' notes in justification of her illness. Employee further notes that Agency was aware of her condition as she provided Agency with several Verification of Treatment forms, stating that she was suffering from PTSD because of the May 2013 incident that occurred on the job.

In the December 18, 2018, O&O, the OEA Board specifically noted that "…This Board cannot simply surmise that Employee established a legitimate excuse for being AWOL in the absence of clear and complete supporting medical evidence. Whether Employee was medically incapacitated during the relevant period in question is a matter germane to this appeal. In light of the foregoing, this Board is compelled to grant Agency's Petition for Review, and remand this matter to the Administrative Judge to make the appropriate factual findings."

The crux of the matter is whether Employee was medically incapacitated from February 9, 2015 to February 27, 2015, as she alleged. In compliance with the Board's directive to "make the appropriate factual findings" to include clear and complete medical evidence establishing that Employee was medically incapacitated during the AWOL period, the undersigned requested that Employee's doctor submit a sworn statement addressing the severity of her condition to cover the relevant period. Employee filed two separate documents, one sworn and one unsworn, from her doctor – Dr. Moghal. Both statements were substantively similar.

Employee provided an unsworn statement from Dr. Moghal dated January 30, 2019. This statement in pertinent parts highlighted that "… Ms. Wade is diagnosed with Posttraumatic Stress Disorder (PTSD), caused by workplace assault on May 24, 2013. I have since treated her symptoms (flashbacks, nightmares, anxiety, and insomnia) with various medications… Ms. Wade attended a routine follow-up appointment with me on February 27, 2015. During this appointment, she reported persisting PTSD symptoms for several weeks: anxiety, crying spells, and insomnia. These symptoms were triggered and exacerbated by the prospect of Ms. Wade returning to the previous work environment where she was assaulted… it is my conclusion that Ms. Wade's condition for the period of February 9, 2015 to February 27, 2015 was severe. Ms. Wade's condition rendered her incapacitated during the above mentioned period, such that she was unable to perform her work."[38]

Thereafter, on February 22, 2019, Employee submitted a sworn statement from the same doctor – Dr. Moghal. This document provided in pertinent parts that "… Ms. Wade has been under my psychiatric care since July 1, 2013. [She] sought treatment for anxiety due to being assaulted at work on May 24, 2013. [She] continues to have nightmares, flashbacks, hypervigilance, and insomnia related to being assaulted at work on May 24, 2013. [*She] had*

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[36]*Murchinson v. Department of Public Works*, OEA Matter No. 1601-0257-95R03 (October 4, 2005); *citing Employee v. Agency*, OEA Matter No. 1601-0137-82, 32 D.C. Reg. 240 (1985); *Tolbert v. Department of Public Works*, OEA Matter No. 1601-0317-94 (July 13, 1995).

[37] Murchison,*supra, citing Richard v. Department of Corrections*, OEA Matter No. 1601-0249-95 (April 14, 1997); *Spruiel v. Department of Human Services*, OEA Matter No. 1601-0196-97 (February 1, 2001).

[38] Employee's Brief in Response to January 2, 2019 Order, *supra*, at Exhibit J.

been diagnosed with … ("PTSD") at the time she was allegedly … ("AWOL") from work, February 9, 2015 to February 27, 2015. [She] was *not able to return to work from February 9, 2015 to February 25, 2015 due to the severity of her PTSD* (emphasis added). I documented my medical opinion regarding this fact on September 5, 2014, May 5, 2015, and November 12, 2015. Records of this opinion are included as attachments."[39]

Throughout the course of this appeal, Employee has provided several doctors' notes and/or Verification of Treatment forms filled by her treating physician, Doctor Faheem Moghal and those documents were corroborated by Dr. Moghal's sworn statement. Although these documents were helpful in determining if Employee had a legitimate reason for being absent from work between February 9, and February 27, 2015, the OEA Board noted that it needed more concise and clear evidence with regards to Employee's medical condition during the relevant period. Such clarity is found in Dr. Moghal's 2019 statements, along with the accompanying attachments.

I find that there is sufficient evidence in the record to establish that Employee's mental condition was so debilitating that it prevented her from performing her duties during the relevant time frame. I also find that, unlike in *Murchison*, here, the record shows that Employee and her psychiatrist, Dr. Moghal, submitted sufficient documentation to address the severity of her mental condition and the extent to which it was exacerbated by her work condition. The record shows that: (1) Employee was hurt on the job on May 24, 2013; (2) she first visited Dr. Moghal on July 1, 2013; (3) she had been diagnosed with PTSD during the AWOL period; (4) her condition was a result of the on-duty assault of May 24, 2013; (5) Employee continues to have nightmares, flashbacks, hypervigilance and insomnia related to the May 24, 2013 assault at work; (6) she was not able to return to work from February 9, 2015 to February 27, 2015 due to the severity of her PTSD; (7) Dr. Moghal advised that she should not return to work; (8) Dr. Moghal never released Employee to return to work from the time he started treating Employee in 2013, up until 2015; (9) Employee notified Agency of her diagnosis in September of 2014;[40] and (10) there is no evidence in the record to show that Agency made any changes to accommodate Employee following her diagnosis.

Based on the record, I find that Employee's absences from February 9, 2015, through February 27, 2015, was excusable because of her illness. Her PTSD diagnoses is supported by a preponderance of evidence. Employee has also provided sufficient documentation to establish a continued impairment that prevented her from carrying out her essential job functions.

Because Employee's absence is excusable, it cannot serve as a basis for adverse action such. However, DPM § 1268.4 highlights that, "[i]f it is later determined that the absence was excusable, or that the employee was ill, the charge to AWOL may be changed to a charge against annual leave, compensatory time, sick leave, or leave without pay, as appropriate."[41] Here,

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[39] Affidavit of Dr. Faheem Moghal (February 22, 2019).

[40] There are multiple email exchanges between Employee's previous attorney Andrew Hass, and Mar Campbell-Harris, Agency's Risk Manager and American with Disabilities (ADA) Coordinator regarding Employee's health and her return to work status dating back to August 2014.

[41] DPM § 1268.2 provides that "[a]n agency head is authorized to determine whether an employee should be carried as AWOL."

Employee was charged with AWOL for the period of February 9, 2015 through February 27, 2015. Nevertheless, given the record, I find that Employee's absence was justified by her mental illness; and therefore excusable. In accordance with DPM § 1268.4, Agency had the discretion to change the AWOL charge to Employee's sick leave, annual leave, compensatory leave or leave without pay, once it was informed of Employee's illness, yet, it chose to terminate, which is in violation of District of Columbia laws, rules and regulation.

Affirmative Defense of PTSD (Burden of Proof)

The OEA Board also directed the undersigned to address the issue of whether Employee admitted that she was AWOL during the relevant period. It noted that this issue "must be resolved for the purpose of determining whether Agency met its burden of proof, or whether Employee's affirmative defense of PTSD is supported by a preponderance of evidence." Pursuant to OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean 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 628.2 *id.* states: the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

Agency argues that this burden shifted to Employee once she admitted that she was AWOL during the relevant AWOL period. However, Employee maintains that she did not admit to being AWOL. She also argues that based on OEA rules, Agency had the burden of proof in this matter. Employee explained that she only stated that she did not work between February 9, 2015 and February 27, 2015. Because this appeal is not dealing with a jurisdiction issue, I conclude that Agency has the burden of proof in this matter. However, this burden of proof shifted to Employee when she stated that she was not at work during the AWOL period because of her medical condition. To prove her claim, Employee provided medical documentation in support of her assertion that she was suffering from PTSD from 2013 to 2015. Based on the evidence presented, I conclude that Employee's medical condition is supported by a preponderance of evidence.

Agency further argues that Dr. Moghal's VOT forms lacked clarity and were inconclusive with regards to the relevant period. Additionally, Agency asserts that accepting an affidavit from Dr. Moghal will be unfair to Agency as it would not be able to cross-examine Dr. Moghal. Agency had these reservations prior to the scheduled Evidentiary Hearing, yet Agency decided against doing so. Agency failed to provide this Office with any evidence to contradict Dr. Moghal's assessment, diagnosis and treatment plan of Employee. Agency did not produce any witness to support its point of view or refute Employee's rendition of events.

Upon presentation of the medical documents from Employee's doctor, it became Agency's burden to challenge the evidence provided by Employee. Agency was aware of the importance of Dr. Moghal's testimony/documentary evidence in deciding the outcome of this matter. Agency was also aware that the decision of whether Employee was truly incapacitated during the relevant period is determinative in this matter. If Agency wanted the opportunity to

depose Dr. Moghal prior to the Evidentiary Hearing or to cross-examine him during the Evidentiary Hearing, it could have requested a subpoena to do or called a rebuttal witness during the Evidentiary Hearing.[42]

The primary purpose of an Evidentiary Hearing is to assess witness credibility with respect to the actors that either viewed and/or in some fashion participated in the events that lead to an employee's removal. Agency had the opportunity to call Doctor Moghal to the stand to testify during the Evidentiary Hearing and clarify the record, but it chose not to do so. Agency has the burden of proof in this matter, and I find that it has not met that burden by a preponderance of the evidence.

Whether the penalty of removal is within the range allowed by law, rules, or regulations.

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).[43] According to the Court in *Stokes,* OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties ("TAP"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency. In the instant case, I find that Agency has not met its burden of proof for the above-referenced charges, and as such, Agency cannot rely on these charges in disciplining Employee.

[42] *Butler v. District of Columbia Office of Aging*, OEA Matter No. 1601-0132-14R17 (July 3, 2018). In should be noted that the Agency's attorney in *Butler* requested and was granted a subpoena to depose Butler's doctor prior to the scheduled Evidentiary Hearing, to clarify inconsistencies in the record.

[43] *See also Anthony Payne v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections,* OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections,* OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools,* OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration,* OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of separating Employee from service is **REVERSED**; and
2. Agency shall reinstate Employee to her last position of record; or a comparable position; and
3. Agency shall reimburse Employee all back-pay and benefits lost as a result of the separation; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.
Senior Administrative Judge