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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
KHADIJAH MUHAMMAD,	)	
Employee	)	
	)	OEA Matter No.: 1601-0033-07
v.	)	
	)	Date of Issuance: March 1, 2010
DISTRICT OF COLUMBIA	)	
NATIONAL GUARD	)	
Agency	)	
_____	)	

**OPINION AND ORDER**  
**ON**  
**PETITION FOR REVIEW**

Khadijah Muhammad (“Employee”) worked as an Office Automation Assistant with the District of Columbia National Guard (“Agency”). On October 24, 2006, Employee received a final notice of removal from Agency. The notice stated that Employee was removed based on a charge of Unauthorized Absence (“AWOL”) totaling 1,032 hours between March 20, 2006 and September 14, 2006. Agency alleged that Employee failed to notify a manager of her intended absences and also failed to submit acceptable documentation to justify the absences.

On December 2, 2006, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”). Employee stated that she was ordered to bed rest by her doctor because of

pregnancy complications. She also argued that she provided Agency with the proper medical documentation regarding her leave of absence and immediately contacted her supervisor to return to work after she received medical clearance. Employee contended that Agency was fully aware of her illness, doctor's orders and the duration of her leave of absence through written correspondence and direct contact.

On May 19, 2008, the Administrative Judge issued her Initial Decision. The first issue she addressed was whether Employee was medically incapacitated during the time period in which she was charged with AWOL.<sup>1</sup> The AJ held that the testimonial and documentary evidence supported the conclusion that Employee submitted sufficient medical documents to give Agency notice of her illness. The AJ noted that when an employee offers a legitimate excuse for being absent without leave, the absence is justified and therefore excused. Although Employee often failed to notify the correct person of her absence, the AJ found that her extensive medical and personal problems made it hard for her to reach her supervisor via telephone, computer or letter. The AJ determined that Employee had a legitimate medical excuse to explain her absence from work from March 20, 2006 through June 30, 2006. This period of absence was supported by a letter from Employee's doctor's office that ordered her to bed rest until approximately June 30, 2006.

The second issue the AJ addressed concerned Employee's absence from work from July 1, 2006 through September 14, 2006. Agency did not dispute that Employee had contacted them and communicated that she was ready and willing to report to work after July 1, 2006. The primary issue was Agency's response to Employee's request.<sup>2</sup> The AJ relied heavily on the testimony of each witness and found all of them to be credible and forthright. However, the AJ

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<sup>1</sup> *Initial Decision* p. 6 (May 19, 2008).

determined that Employee reasonably interpreted Agency's communications after July 1<sup>st</sup> as directives not to return to work until a resolution was reached. Therefore, the AJ ruled that Agency did not meet its burden of proof by a preponderance of the evidence and reversed the decision to remove Employee from her position.

On June 23, 2008, Agency filed a Petition for Review with OEA. Agency asks us to reverse the Initial Decision because the AJ's finding that Employee was medically incapacitated from March 20, 2006 until June 30, 2006 was not supported by substantial evidence.<sup>3</sup> Agency also states that Employee gave several inconsistent statements during the hearing, which undermined her credibility. Agency relied on *Hillen v. Department of the Army*<sup>4</sup> to support its arguments. In *Hillen*, the court enumerated several factors to be used in resolving witness credibility issues, including: 1) the witness' opportunity and capacity to observe the event in question; 2) the witness' character; 3) any prior inconsistent statement by the witness; 4) bias; 5) the contradiction of the witness' version of events by other evidence; 6) the inherent improbability of the witness' version of events; and 7) the witness' demeanor.<sup>5</sup>

On July 31, 2008, Employee filed her response to Agency's Petition for Review. Employee argues that the AJ properly ruled that the decision to terminate her should be reversed. Employee believes that she provided Agency with the appropriate documentation to support her medical incapacity until the end of June 2006. Employee states that she contacted Agency on or around July 1, 2006 and inquired about what she needed to do in order to return to work. Employee offers that she did not return to work after July 1<sup>st</sup> because she was told to remain at home until Agency resolved the matter.

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<sup>3</sup> *Petition for Review* at p. 5 (June 23, 2008).

<sup>4</sup> 35 M.S.R.P. 453 (1987).

<sup>5</sup> *Id.*

Under District Personnel Manual, Chapter 16, Part I, Section 1603, the definition of cause includes, among the actionable behavior, “unauthorized absence.” An employee who has not been granted leave for his or her absence from duty is deemed absent without authorization.<sup>6</sup> 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.”<sup>7</sup> The cases further hold that if an employee’s absence is excusable, the absences cannot “serve as a basis for an adverse action.”<sup>8</sup> In this case, the Board must first make a determination of whether there was substantial evidence to support a finding that Employee was medically incapacitated during the period she was charged with AWOL.<sup>9</sup> Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>10</sup> This Board will uphold an Administrative Judge’s decision so long as it is supported by substantial evidence notwithstanding that there may be contrary evidence in the record.<sup>11</sup>

This Board believes that the AJ’s decision that Employee had a legitimate medical excuse during the time in which she was charged with AWOL was based on substantial evidence. Employee testified that she notified Agency that she was ill and was unable to return to work. Moreover, Employee corroborated her testimony with medical reports submitted on her behalf.<sup>12</sup> Each doctor’s note was submitted on letterhead from Lauren Rodgers, M.D. from Oxon Hill, MD. There is no evidence to indicate that the excuse slips were fabricated. Employee’s doctor submitted a letter of medical clearance dated July 31, 2006, and verified that Employee had been under her care since March 6, 2006. Although Agency received the doctor’s clearance note a day

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<sup>6</sup> *Bundy v. Department of Public Works*, OEA Matter No. 1601-0053-07 (August 20, 2008).

<sup>7</sup> *Employee v. Agency*, OEA Matter No. 1601-0137-82, 32 D.C. Reg. 240 (1985).

<sup>8</sup> *Richardson v. Dep’t of Corrections*, OEA Matter No. 1601-0196-97 (February 1, 2002), \_\_\_ D.C. Reg. \_\_\_ ( ).

<sup>9</sup> *Murchinson v. District of Columbia Dep’t of Public Works*, 813 A.2d 203 (D.C. 2002).

<sup>10</sup> *Davis-Dodson v. D.C. Dep’t of Employment Services*, 667 A.2d 310, 312 (D.C. 1995).

<sup>11</sup> *Ferreira v. District of Columbia Dep’t of Empl. Servs.*, 667 A.2d 310, 312 (D.C. 1995).

<sup>12</sup> Agency’s Answer to Petition for Appeal, Exhibit 10 (February 2, 2007).

late and it was not signed by the appropriate person, we consider these errors to be *de minimus* and insufficient to negate a finding that Employee was medically incapacitated during this time period. Employee was therefore unable to return to work until approximately July 1, 2006 due to medical incapacity. Pursuant to *Employee v. Agency* and *Murchison*, the absences are justified and therefore excusable. Since the absences are excusable, they cannot form the basis for an adverse action.

It is within the province of the Administrative Judge to assess the credibility of witnesses.<sup>13</sup> Witness credibility was at issue with respect to this case because there was a conflict of testimony between the witnesses for Agency and the Employee. This Board agrees with Agency's argument that the factors enumerated in *Hillen* offer a framework to assist a judge in resolving issues of credibility. However, these factors do not require strict adherence to every factor and each case must be evaluated on its own merits. The District of Columbia Court of Appeals has emphasized the importance of credibility evaluations by the individual who observes the witness "first hand."<sup>14</sup> Even if some parts of a witness' testimony are discredited, other parts may be accepted as true.<sup>15</sup>

With respect to Employee's absences between July 1, 2006 and September 14, 2006, this Board finds no reason to disturb the AJ's finding that Employee reasonably interpreted the communications from Agency after July 1<sup>st</sup> to be directives not to return to work until the status of her employment was resolved. In this case, the AJ found Employee's testimony to be credible. The AJ has many years of experience observing and assessing witness testimony and there was no indication that her expertise was not utilized in this instance. As noted in the Initial Decision, this does not mean that Agency's witnesses did not testify credibly; however, the AJ

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<sup>13</sup> *Dell v. Dep't of Employment Services*, 499 A2d. 102 (D.C. 1985).

<sup>14</sup> *Stevens Chevrolet Inc. v. Commission on Human Rights*, 498 A.2d 440 (D.C. 1985).

<sup>15</sup> *DeSarno, et. al. v. Dep't of Commerce*, 761 F.2d 657, 661 (Fed. Cir. 1985)

found that Agency did not meet its burden of proof by a preponderance of the evidence. This Board finds that the Initial Decision was supported by substantial evidence and the AJ's findings were not arbitrary, capricious or otherwise an abuse of discretion.<sup>16</sup> Since Employee adequately proved that her absence from work was a result of a legitimate medical excuse, Agency did not have cause to remove her from her position based on an AWOL charge. Agency's Petition for Review is therefore **DENIED**.

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<sup>16</sup> See *McCamey v. D.C. Dep't of Empl. Servs.*, 947 A.2d 1191, 1196 (D.C. 2008) (citing *Landesberg v. D.C. Dep't of Empl. Servs.*, 794 A. 2d 607, 614-15 (D.C. 2002) (overruling unrelated issues)).

**ORDER**

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

FOR THE BOARD:

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Sherri Beatty-Arthur, Chair

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Barbara D. Morgan

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Richard F. Johns

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Hilary Cairns

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Clarence Labor, Jr.

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 the formal notice of the decision or order sought to be reviewed.