



Upon consideration of the brief filed by Agency, and the documents filed by Employee, the undersigned referred this matter back to mediation. After an unsuccessful mediation attempt, this matter was returned for adjudication on the merits. The record is now closed.

### JURISDICTION

Jurisdiction of this Office is established in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

### ISSUE

1. Whether Agency had cause to remove Employee for “[a]ny on-duty employment-related act or omission that interferes with the efficiency and integrity of government operations, specifically; unauthorized absence, absence without official leave, and neglect of duty<sup>1</sup>; and
2. If so, whether removal was appropriate under the circumstances.

### BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.<sup>2</sup> “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.

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.<sup>3</sup>

### **FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW**

#### *Agency’s position*

Employee requested and was approved for a leave of absence from May 22, 2017, through July 18, 2017, due to the death of a family member. While out on leave of absence Employee informed Agency that she sustained an injury which prevented her from returning to work on July 19, 2017.<sup>4</sup> Employee did not return to work on July 19, 2017, the end date of her original leave request. Employee called out fourteen (14) times after she was scheduled to return to work on July 19, 2017.<sup>5</sup> When Employee had not returned to work as of September 25, 2017, an advance written notice of proposed removal was issued. The proposed removal notice cited

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<sup>1</sup> Pursuant to Section 1603.3(f)(1)(2)(3) of Chapter 16 of the District Personnel Manual, effective August 27, 2012.

<sup>2</sup> 59 DCR 2129 (March 16, 2012).

<sup>3</sup> OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

<sup>4</sup> See Agency’s Brief in Support of Termination, Attachment C (August 9, 2018).

<sup>5</sup> Employee called out every work day from July 31, 2017, through August 11, 2017, and August 15, 2017, through August 21, 2017 (See Agency’s Brief in Support of Termination, Attachment E (August 8, 2018)).

Employee's unauthorized absence, absence without official leave ("AWOL"), and neglect of duty.<sup>6</sup> Agency issued its Final Notice of Proposed Removal on December 12, 2017, terminating Employee from her position, effective on the same day.

Agency acknowledges that while out on approved leave from May 22, 2017, through July 18, 2017, Employee sent an email requesting to extend her leave since she suffered a broken leg while out. Employee's email suggests using all annual and sick leave to her credit until she can apply for Family and Medical Leave (commonly referred to as "FMLA"). A Management Liaison Specialist with Agency acquiesced and responded to Employee's email stating, "I am in receipt of your email and put in 22 hours of Annual leave and 6.5 hours of sick leave per your request."<sup>7</sup>

### *Employee's position*

While on leave of absence from May 22, 2017, through July 18, 2017, Employee sustained an injury.<sup>8</sup> Employee informed Agency of her injury via email on June 20, 2017, and requested to use all of her annual and sick leave hours until she could be placed on FMLA status.<sup>9</sup>

On September 13, 2018, in response to the Post Prehearing Conference Order which set forth a briefing schedule for the parties to address the legal issues, Employee submitted medical documentation regarding her injury while already out on approved leave. The documentation provides that Employee suffered a right ankle bimalleolar and T11 vertebral body fracture.<sup>10</sup> Essentially, Employee's argument is that she was unable to return back to work at the end of her approved leave of absence from May 22, 2017, through July 18, 2017, because of an intervening injury.

### Whether Agency had cause to take adverse action

#### *Unauthorized Absence and Absence without Official Leave (AWOL)*

Employee was terminated for "[a]ny on-duty employment-related act or omission that interferes with the efficiency and integrity of government operations, specifically; unauthorized absence, absence without official leave, and neglect of duty, pursuant to DPM §§ 1603.3(f)(1), (2), and (3). Employee's termination was effective December 12, 2017. District Personnel Manual ("DPM") § 1268.4 provides 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. This Office has consistently held "that when an employee offers a legitimate excuse, such as illness, for

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<sup>6</sup> See District Personnel Manual §§ 1603.3 (f)(1)(2)(3) (August 27, 2012).

<sup>7</sup> See Agency's Brief in Support of Termination, Attachment C (August 9, 2018).

<sup>8</sup> Employee's submission of medical documents (September 13, 2018).

<sup>9</sup> See Agency's Brief in Support of Termination, Attachment C (August 8, 2018).

<sup>10</sup> Employee's submission (September 13, 2018).

being absent without leave, the absence is justified and therefore excusable.”<sup>11</sup> Additionally, if an employee’s absence is excusable, it “cannot serve as a basis for adverse action.”<sup>12</sup>

The basis for Agency’s charges against Employee stem from her absence from July 31, 2017, through August 21, 2017. In support of her position, Employee submitted medical documentation from her physician indicating that she suffered an ankle injury. Employee’s medical documentation included Disability Certificates stating that she was “totally incapacitated” during the relevant time frame.<sup>13</sup> In a June 20, 2017 email, Employee informs Agency of her intervening ankle injury. In a June 26, 2017 email, a Management Liaison Specialist with Agency acknowledged receipt of Employee’s email.<sup>14</sup> Based on this email, it appears that Agency approved 22 hours of annual leave and 6.5 hours of sick leave after Employee was scheduled to return to work on July 19, 2017. After these leave hours were exhausted, Agency began its tally of Employee’s unauthorized absence.

The relevant time period in this matter is July 31, 2017, through August 21, 2017—the dates cited by Agency for Employee’s unauthorized absence, absence without approved leave, and neglect of duty.<sup>15</sup> Employee does not dispute being absent during this time period. However, in medical documentation provided by Employee, specifically the Disability Certificates, her physician writes on July 28, 2017, and September 22, 2017, that Employee was under his care and unable to return to work. A November 8, 2017 Disability Certificate, states that Employee was “totally incapacitated” and would be able to return to light work duties on December 4, 2017. Prior to being approved by her physician to return to work, Agency initiated the instant termination action. Based on the medical documents provided by Employee, I find that Employee has offered a legitimate excuse for being absent without leave. Furthermore, I find that Employee’s absence from July 31, 2017, through August 21, 2017, is justified and therefore excusable. The evidence of record establishes that Employee’s ankle fracture prevented her from carrying out her duties as a Bus Attendant.

A charge of AWOL can be defeated by the submission of medical evidence of incapacitation, even if that evidence is submitted for the first time [during the adjudication process before the AJ].<sup>16</sup> Here, the medical evidence clearly demonstrates that Employee was incapacitated during the time period for which she was charged with AWOL, unauthorized absence, and neglect of duty. The record further supports that Agency was at least aware of Employee’s intervening injury while she was out on leave. Nonetheless, Agency elected to take adverse action against Employee for her absence. As explained above, I have determined that Employee’s absence was excusable.

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<sup>11</sup> *Murchinson v. D.C. Department of Public Works*, OEA Matter No. 1601-0257-95R03 (October 4, 2005; citing *Tolbert v. Department of Public Works*, OEA Matter No. 1601-0317-94 (July 13, 1995)); *Hines v. Department of Transportation*, OEA No. 1601-0116-05, Opinion and Order on Petition for Review (February 25, 2009).

<sup>12</sup> *Murchinson*, *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).

<sup>13</sup> See Employee’s submission, Disability Certificate issued November 8, 2017 (September 13, 2018).

<sup>14</sup> See Agency’s Brief, Exhibit C (August 9, 2018).

<sup>15</sup> *Id.*, Exhibit E.

<sup>16</sup> See *Grubb v. Department of Interior*, 96 M.S.P.R. 377 (2004).

*Neglect of Duty*

Because I find that Employee's absence was justified and therefore excusable, Agency did not have cause to take adverse action against Employee for Unauthorized Absence and AWOL. As such, Agency also cannot charge Employee for neglect of duty for the same time period.

Appropriateness of penalty

As explained above, I find that Agency did not have cause to take adverse action against Employee for unauthorized absence, absence without official leave, or neglect of duty. Therefore, a discussion on the appropriateness of the penalty is moot.

**ORDER**

Accordingly, based on the aforementioned, it is hereby ORDERED that:

1. Agency's action of separation Employee from service is **REVERSED**;
2. Agency shall reinstate Employee to her last position of record, or a comparable position;
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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Arien P. Cannon, Esq.  
Administrative Judge