THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DARLENE REDDING,	)	
Employee	)	OEA Matter No. 1601-0112-08R11
	)	
v.	)	Date of Issuance: December 12, 2011
	)	
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF PUBLIC WORKS,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

Clifford Lowery, Employee Representative
Pamela Smith, Esq., Agency Representative

ADDENDUM DECISION ON REMAND

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 10, 2008, Darlene Redding ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") challenging the District of Columbia Department of Public Works' ("Agency") decision to terminate her from her position as Parking Enforcement Officer, effective July 7, 2008. Employee was terminated for Inexcusable Absence Without Official Leave ("AWOL") from February 14, 2008, through April 14, 2008, for a total of 400 duty hours.

This matter was initially assigned to Senior Administrative Judge ("AJ") Rohulamin Quander. AJ Quander presided over an evidentiary hearing in this matter on December 10, 2008. Employee was present at the hearing and was represented by Clifford Lowery, President of AFGE Local 1975. Agency was represented by attorney Pamela Smith. During the evidentiary hearing, both parties presented written and oral testimonies in support of their position. Specifically, Employee submitted letters from her doctors explaining her medical condition from 2007, through the end of 2008. AJ Quander subsequently issued an Initial Decision on August 6, 2009, wherein, he determined, *inter alia,* that Employee's AWOL was excused by her illness and as such, reversed Agency's action of removing Employee from service.

Thereafter, Agency filed a Petition for Review with the OEA Board ("the Board") arguing, *inter alia,* that, the Initial Decision lacked substantial evidence and that the AJ relied upon an incorrect legal standard. And that therefore, the Board should reverse the Initial

Decision. On March 15, 2011, the Board issued an Opinion and Order on the Petition for Review ("O&O"), remanding this matter. In effectuating the remand, the Board stated as follows:

> As the court in *Murchison*, we too conclude that more evidence is needed to determine whether and to what extent Employee's mental condition was so severe that from February 14, 2008, through April 18, 2008, she was actually disabled and unable to perform her duties as a Parking Enforcement Officer. Therefore, we are compelled to grant Agency's Petition for Review, vacate the Initial Decision, and remand this appeal to the Administrative Judge to make the appropriate factual findings.[1]

This matter was reassigned to the undersigned around September, 2011, pursuant to AJ Quander's retirement from service. I then issued an Order on September 14, 2011, scheduling a Status Conference for October 12, 2011. Both parties were in attendance.[2] During the Status Conference, Employee noted that she did not have any witnesses to testify *specifically as to the severity of her condition during the above-mentioned timeframe* (emphasis added). Therefore, an evidentiary hearing was unwarranted. Moreover, Agency objected to having an evidentiary hearing. In the course of the Status Conference, I verbally Ordered Employee to submit two (2) sworn statements, one from her primary care physician and one from her psychiatrist addressing the severity of her condition for the period of February 14, 2008, through April 18, 2008. This Order was later codified in an Order dated October 14, 2011. Employee had until November 3, 2011, to submit the requested documents. Subsequently, Employee via a telephone call requested an enlargement of time in order to provide the required documents. I advised Employee to submit her request to this Office in writing before the November 3, 2011, deadline. Employee did not comply. On November 9, 2011, I issued an Order for Statement of Good Cause to Employee. Employee complied, and Agency has submitted its reply to Employee's submission. The record is now closed.

JURISDICTION

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

ISSUES

Whether Employee's AWOL from February 14, 2008, through April 18, 2008, was excusable due to her mental illness.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

Undisputed Facts:

1. Employee worked for Agency as a Parking Enforcement Officer.

[1] *Darlene Redding v. Department of Public Works*, Opinion and Order on Petition for Review, March 15, 2011.
[2] Employee's Representative on record was absent. After several attempts to reach Employee's representative via telephone, Employee consented to continue the Status Conference without her representative present.

2. Employee was absent from work for a total of 400 duty hours from February 14, 2008 through April 18, 2008.
3. On April 21, 2008, Agency issued an Advanced Written Notice of Proposed Removal based upon a charge of Inexcusable AWOL for the above-referenced period. In addition, Employee was charged with job abandonment for being AWOL for 10 consecutive work days or more.
4. Within days of receiving Agency's proposed notice of removal, Employee returned to work ready to resume her duties.
5. Employee was afforded an administrative review and a report dated June 24, 2008, was issued by the Hearing Officer. In her report, the Hearing Officer recommended that Agency's proposed penalty of removal be sustained.
6. On June 26, 2008, Agency issued a notice of Final Decision for Removal, terminating Employee's employment effective July 7, 2008.
7. Employee filed a Petition for Appeal with this Office on July 10, 2008.
8. AJ Quander held a hearing on December 10, 2008, and issued an Initial Decision on August 6, 2009. In his Initial Decision, AJ Quander reversed Agency's removal action, agreeing with Employee that her absences were excusable because of her mental illness.
9. Subsequently, Agency filed a Petition for Review appealing AJ Quander's Initial Decision. In an O&O issued March 15, 2011, the Board vacated AJ Quander's Initial Decision, and remanded the appeal to the AJ to make appropriate factual findings.

Evidence on Disputed Facts:

During the Status Conference held on October 12, 2011, and in her written submissions to this Office throughout the course of this appeal, Employee conceded that she was indeed absent from February 14, 2008, through April 18, 2008. However, Employee noted that her absences were due to medical reasons. When asked by the undersigned if she was able to produce witnesses to testify as to the severity of her condition during the relevant time period, Employee noted that some of her treating physicians at that time no longer work for the District Government and she did not have their contact information. Employee later submitted that her new psychiatrist cannot testify to her prior medical condition and that Medical Records could not find any records from two other physicians Employee had spoken with during the relevant time period. In her November 15, 2011, submission to this Office, Employee referenced a May 12, 2008, letter by her Psychiatrist, Dr. Maw, stating that Employee was "seen in the clinic with worsening symptoms beginning approximately March 15, 2008, through April 2008." The letter went on to note that Employee's symptoms were currently being managed with medication and monthly intramuscular injections, and she was "encouraged to attend therapy on a weekly basis, as a part of her treatment plan and to maintain her medical health." However, this letter does not indicate whether or not this affected Employee's ability to work. Instead, Dr. Maw noted that, Employee mentioned that she was ready to return to work, and he opined that, "if she maintains her treatment at her program, Ms. Redding will be successful at her work."

To further support her claim of medical incapacity during the relevant time period, Employee submitted the following documents[3] to this Office:

1. A letter dated October 29, 2008, from a Clinical Care Manager at the D.C. Department of Mental Health.
    a. The letter highlights the fact that Employee has been a patient with the department since 2003, and has received medication for her condition. According to this letter, Employee mentioned during her visit on April 3, 2008, that she had "an exacerbation of her chronic mental illness beginning in February 2008, which prevented her from performing her duties as a Vehicle Registration Compliance Officer. She stated that she spoke to her case manager at this clinic by telephone, but was unable to get an appointment immediately to see the doctor…"[4]
2. Two Medical reports for the time periods of November 17, 2008; and October 14, 2008 through January 12, 2009.[5]
    a. These reports provide a summary of Employee's medical history and diagnosis for the above listed time frames. According to the reports, the patient is mildly depressed; has appropriate thought content and process; and Psychiatric condition unchanged. The report lists hallucinations, depression and paranoid ideations as the specific precipitating events leading to the current request. The author of the report went on to note that the patient has "depression with psychotic disorder, Pt has not been compliant, last saw over one yr. ago. Pt convinced me that she will take her meds and follow rec. Labs ordered not done yet,…Pt is depressed not psychotic/manic/S/H."[6]
3. A Letter from a Dr. Raj P. Mathur, MD., dated November 1, 2011.
    a. This is a one paragraph letter basically stating that Employee has been under the care of Dr. Mathur since August 2003. It also states that Employee visited Dr. Mathur's office on February 28, 2008, stating "she had been sick with shortness of breath for some time earlier and has been staying home." Dr. Mathur did not explain the severity of Employee's condition or provide a diagnosis or course of treatment in his letter to this Office. He only noted that he scheduled Employee's next visit for July 2008.[7]

Analysis and Conclusion

Section 1603.2 of the District Personnel Manual ("DPM") provides that, an employee may be removed for cause. Pursuant to § 1603.3, the definition of cause includes AWOL and job abandonment. In such matters, Agency has the burden of proving by a preponderance of the

[3] None of the documents submitted by Employee were sworn statements, thereby, not in compliance with the October 14, 2011, Order.
[4] *See* October 29, 2008, Letter from the Clinical Care Manager at D.C. Department of Mental Health.
[5] The name on the reports was "Darlene Bond". This is the same name used in the May12, 2008, statement from Dr. Maw.
[6] *See* Medical report dated November 17, 2008, for patient Darlene Bond. The authors of these reports are unknown.
[7] *See* Letter from Raj P. Mathur, dated November 1, 2011.

evidence that the proposed disciplinary action was for cause.[8] "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.[9]

In AWOL case such as this one, "[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 and therefore excusable."[10] Additionally, if the employee's absence is excusable, it "cannot serve as a basis for adverse action."[11]

As per the instruction of the Board, the only factual issue to be determined is whether Employee was medically incapacitated from working during the period of February 14, 2008, through April 18, 2008, when she was charged for being AWOL. Employee conceded that she was absent without leave during the relevant period. The question is whether the absence was excusable due to a medical condition that warranted Employee's absence from work.

Based on the documents on record, there is no evidence that Employee's mental condition was so debilitating that it prevented her from performing her duties during the relevant time frame. Like in *Murchison*, the medical reports and physician's notes submitted by Employee did not address the severity of her mental condition or the extent to which it was exacerbated by her working condition. Employee's physicians (including her psychiatrists) only noted how long she has been a patient with them, and the fact that she had been diagnosed with a mental condition, but never made mention of the severity of her condition during the relevant time period.

Moreover, the reports dated November 17, 2008, indicate that Employee was mildly depressed and not psychotic. This is further corroborated by Employee in her November 15, 2011, submission to this office when she notes that her doctor "submitted a signed statement about my mental condition. That I was suffering from depression. That working would do me good." While it is undisputed that Employee did in fact suffer from a depression and ultimately visited her treating physicians[12] within the relevant time frame, there is no evidence in the record to support Employee's assertion that her mental condition was so serious that it prevented her from going to work from February 14, 2008, through April 18, 2008. Instead, based on her statement, her physicians recommended going to work, not staying away from work. In light of all the evidence presented, I find that Employee was not medically incapacitated from working during the period of her AWOL that served as the basis for her removal. Thus, I conclude that Employee's absence was inexcusable and therefore, this can serve as a basis for adverse action.

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[8] OEA Rule 629.3.
[9] OEA Rule 629.1, 46 D.C. Reg. 9317 (1999).
[10] *Murchinson v. Department of Public Works*, OEA Matter No. 1601-0257-95R03 (October 4, 2005), __D.C. Reg. __( ); *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), __ D.C. Reg. __( ).
[11] Murchison, *Supra*, *citing Richard v. Department of Corrections*, OEA Matter No. 1601-0249-95 (April 14, 1997), __ D.C. Reg. __( ); *Spruiel v. Department of Human Services*, OEA Matter No. 1601-0196-97 (February 1, 2001), __ D.C. Reg. __ ( ).
[12] Dr. Maw noted that Employee had been in his care from March 15, 2008, through April. However, his signed letter to this Office does not address the issue of whether Employee was unable to work as a result of her condition. Additionally, the letter from the Clinical Care Manager at D.C. Department of Mental Health dated October 29, 2008, noted that Employee was seen on April 3, 2008, but again, is silent as to the severity of Employee's condition.

In assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."[13] And when a charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is not clearly an error of judgment."[14] The sole recommended penalty for an offense of inexcusable absence without leave for ten (10) consecutive workdays or more, is removal.[15] Considering that Employee was inexcusably AWOL for 400 duty hours from the period of February 14, 2008 through April 18, 2008, longer than the 10 consecutive workdays required by the guidelines, I find no error in Agency's decision to remove her as penalty for her inexcusable absence. Accordingly, I conclude that Agency's action of terminating Employee should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of terminating Employee from her position of Parking Enforcement Officer is UPHELD.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

[13] *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).
[14] *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Red. 2915, 2916 (1985).
[15] DPM, Chapter 16, Part I, Rule 1619.1 (Table of Penalties, (6)(a)).