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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0068-17
JANEKA REED,)	
Employee)	
)	Date of Issuance: August 1, 2018
v.)	
)	Arien P. Cannon, Esq.
OFFICE OF THE STATE SUPERINTENDENT)	Administrative Judge
OF EDUCATIONS,)	
Agency)	
_____)	
Janeka Reed, Employee, <i>Pro se</i>)	
Hilary Hoffman-Peak, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 12, 2017, Janeka Reed (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) challenging the Office of the State Superintendent of Education’s (“Agency” or “OSSE”) decision to remove her from her position as a Bus Attendant. Employee’s removal was based on the charge of “[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.¹ Employee’s removal was effective June 23, 2017. I was assigned this matter on November 3, 2017.

A Prehearing Conference was convened on January 26, 2018, where both parties were present. Subsequently, a Post Prehearing Conference Order was issued which set forth a briefing scheduling to allow the parties to further address their arguments. Both parties submitted their briefs accordingly. The record is now closed.

¹ Section 1603.3(f)(1), f(2), and f(3) of Chapter 16 of the District Personnel Regulations (August 27, 2012).

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against 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”²; 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.³ “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.⁴

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Agency’s Position

On September 27, 2016, Employee requested a leave of absence from August 23, 2016, to November 17, 2016. Agency asserts that in September of 2016, it notified Employee that her request for a leave of absence had been granted, in part, from August 23, 2016, to October 19, 2016.⁵ Employee was expected to return to work without restrictions on October 20, 2016.⁶ Employee did not return to work on October 20, 2016. From October 20, 2016, through November 21, 2016, Employee did not report to work nor did she have any contact with Agency. Based on her absence during this time period, Employee was charged with absent without official leave for ten (10) or more consecutive days and unauthorized absence.

Additionally, due to Employee’s failure to come to work, she was charged with neglect of duty as a bus attendant. Agency asserts that this abandonment of duties substantiates the neglect of duty charge.

² Section 1603.3(f)(1), f(2), and f(3) of Chapter 16 of the District Personnel Regulations (August 27, 2012).

³ 59 DCR 2129 (March 16, 2012).

⁴ OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

⁵ See Agency Answer, Exhibit C (August 16, 2017).

⁶ *Id.*, Exhibit A.

Also, the following is Employee's approved medical leave over the two years immediately preceding her removal:

August 31, 2015 to October 20, 2015

March 1, 2016 to June 1, 2016⁷

June 2, 2016 to August 9, 2016

August 23, 2016 to October 19, 2016⁸

Employee was not eligible for DC Family Medical Leave Act ("DC FMLA") during her requested leave period of August 23, 2016, through November 17, 2016, because she did not meet the 1,000 hours worked in the previous year requirement. Thus, Employee's Leave of Absence during the approved time period was not under DC FMLA.

Employee's Position

Employee's main contention is that her rights were violated under the American with Disabilities Act ("ADA").⁹ Employee mainly focuses her arguments on the reasonableness of an ADA accommodation request that she made with Agency prior to her termination and the interactive process under the ADA. Employee does not directly address her absences from the time periods relevant to the instant matter: October 20, 2016, through November 21, 2016.¹⁰

Discussion

Employee was terminated for any 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.¹¹ Pursuant to DPM § 1603, *et. seq.* (August 27, 2012), an employee may not be reprimanded, suspended, demoted, placed on enforced leave or removed without cause, as defined in Chapter 16 of the District Personnel Manual. Under DPM § 1603.3(f)¹², unauthorized absence, Absence without Official Leave, and Neglect of Duty constitutes cause and warrants corrective or adverse action. Here, Employee was subjected to an adverse action when she was terminated from her position.

Throughout Employee's brief, she focuses her arguments on how Agency handled her ADA accommodation request and the interactive process, or lack thereof, under the ADA, rather than directly addressing her absence from work during the time period of October 20, 2016,

⁷ The Advance Written Notice of Proposed Removal states that Employee was out on approved leave from March 1, 2015 (emphasis added) to June 1, 2016. However, it is apparent from the record that the March 1, 2015 date should actually be March 1, 2016 (emphasis added).

⁸ See Agency Answer, Exhibit A (August 16, 2017).

⁹ See Employee's Brief (March 26, 2018).

¹⁰ Agency does not provide the November 21, 2016, date as the last date of Employee's Unauthorized Absence and Absence without Official Leave in the Advance Written Notice of Proposed Removal or in the Final Notice of Proposed Removal. Agency does list November 21, 2016, in its brief (February 22, 2018) as the end date of Employee's unauthorized absence. The Advance Written Notice was issued on November 29, 2016.

¹¹ Section 1603.3(f)(1), f(2), and f(3) of Chapter 16 of the District Personnel Regulations (August 27, 2012).

¹² Effective August 27, 2012.

through November 21, 2016. Generally, issues relating to ADA disputes are outside the purview of this office. Additionally, Employee did not provide any medical documentation to this Office excusing her absence during the relevant time period.

Agency sets forth its argument in its Brief in support of its decision to remove Employee from her position as a Bus Attendant. In its brief, Agency provides background information relating to Employee's history of absence to illustrate the context of the instant matter. The dates relevant here are Employee's absence from October 20, 2016, through November 21, 2016.¹³ Based on Employee's absence on these dates, it issued an Advance Written Notice of Proposed Removal on November 29, 2016.¹⁴

On September 27, 2016, Employee requested a leave of absence from August 23, 2016 to November 17, 2016. Agency granted part of Employee's request—granting her a Leave of Absence from August 23, 2016, to October 19, 2016. Employee does not dispute that she was absent from work October 20, 2016 to November 21, 2016. Other than raising the ADA complaints, Employee does not offer any other arguments to support her position. As previously stated, ADA issues are generally outside the scope of this Office's jurisdiction. Based on both parties' written submissions to this Office, I find that Agency had cause to take adverse action against Employee for Unauthorized Absence, Absence without Official Leave, and Neglect of Duty.

Appropriateness of the penalty

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). 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 Appropriate Penalties; whether the penalty is based on a consideration of the relevant factors, and whether there is a clear error of judgment by agency. Here, as discussed above, I find that Agency satisfied its burden of proof that it had cause to charge Employee for Unauthorized Absence, Absence without Official Leave, and Neglect of Duty.

Unfortunately, this is not Employee's first occasion having issues with her attendance. On May 29, 2014, she was issued an admonition and placed on leave restriction.¹⁵ Additionally, Employee was given a ten (10) day suspension, issued on August 5, 2014, for Absence Without official Leave and Neglect of Duty—two of the same charges levied against Employee in the instant matter.¹⁶

Under 6-B DCMR § 1619.6 (Table of Appropriate Penalties)¹⁷ an appropriate penalty for a first time offense for an Unauthorized Absence is removal; an appropriate penalty for Absence Without Official Leave ranges from a reprimand to removal; and a first time offense for Neglect

¹³ See Agency's Brief (February 22, 2018).

¹⁴ Agency Answer, Exhibit A (August 16, 2017).

¹⁵ See Agency's Brief, Attachment F (February 22, 2018).

¹⁶ *Id.*, Attachment G.

¹⁷ (August 27, 2012).

of Duty also ranges from a reprimand to removal. An appropriate penalty for a first time offense for either one of the three charges in the instant case permits the maximum penalty of removal.

Given Employee's prior disciplinary history regarding her attendance issues, I find that Agency was within the range of appropriate penalty for subsequent offenses of Absence Without Official Leave and Neglect of Duty. Agency's decision to remove Employee from her position was within the acceptable range of discipline under the Table of Appropriate Penalties. Accordingly, I find that the penalty imposed against Employee was appropriate and that Agency did not exceed the limits of reasonableness when invoking its managerial discretion.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's removal of Employee from her position as a Bus Attendant is **UPHELD**.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge