THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
LINDA RASH,	)	
Employee	)	OEA Matter No. 1601-0014-12
	)	
v.	)	Date of Issuance: February 24, 2015
	)	
D.C. DEPARTMENT OF CORRECTIONS,	)	
Agency	)	Eric T. Robinson, Esq.
	)	Senior Administrative Judge

Linda Rash, Employee *Pro-Se*
Frank McDougald, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 15, 2010, Linda Rash ("Employee") sustained a work-related injury to her back. At the time of her injury, Employee was working for the District of Columbia Department of Corrections ("DOC" or "the Agency) as a Legal Instruments Examiner. Employee then filed a claim for Public Sector Workers' Compensation benefits ("Benefits") and the claim was accepted on October 15, 2010. At this point, it was initially determined that Employee was temporarily totally disabled. However, in a notice dated April 27, 2011, Employee was advised by the District of Columbia Office of Risk Management that her benefits would be terminated based upon a medical determination that she had recovered from her work-related injury and was able to return to work. Employee benefits ceased and she challenged this decision before multiple quasi-judicial agencies in an attempt to get her benefits restored. [1] Soon after Employee received the aforementioned notice, she was directed by the Agency to return to work. Employee did not return to work asserting that she had not recovered from injuries. By notice dated October 5, 2011, DOC informed Employee that she was being removed from service based

[1] Employee's appeal of the cessation of her benefits was eventually heard by the District of Columbia Court of Appeals. On December 9, 2014, The Court of Appeals affirmed the prior decision that determined that Employee had recovered from her work related injury.

on a charge of unauthorized absence for ten consecutive days or more.[2] The effective date of her removal was October 7, 2011.

On October 31, 2011, Employee timely filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the Agency's action of removing her from service. This matter was assigned to the undersigned on or about July 25, 2013. At the time this matter was assigned, the parties had been engaged in prolonged settlement talks. Ultimately, the parties were unable to settle their differences. After reviewing the record, I decided that an evidentiary hearing was necessary for a proper disposition of this matter. Accordingly, an evidentiary hearing was held on December 2, 2014. Pursuant to my Order dated January 8, 2015, the parties were directed to submit written closing arguments. Both parties have complied. The record is now closed.

JURISDICTION

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

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:
>
> > 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.

ISSUE

Whether Agency's action of removing the Employee from service was done in accordance with applicable law, rule, or regulation.

[2] It was alleged that Employee was not present at work from July 4 through July 15, 2011. *See* Agency's Exhibit C.

SUMMARY OF RELEVANT TESTIMONY

Andrew Whiteford ("Whiteford") Tr. 7 to 53.

During May, June and July of 2011, Whiteford worked as a Security Chief with the Department of Corrections ("Agency"). He was also the Head of Compensation with the Department of Risk Management. This department dealt with worker's compensation benefits. Whiteford recalled that during this time, Linda Rash ("Employee") was on worker's compensation. He explained that Employee was on a list that was provided to him by risk management.

Whiteford's duty was to follow Agency employees who were receiving worker's compensation, make contact with them, and bring them back to work. The employees' names were provided to him from the records office. He stated that according to a source at risk management, Employee was released, in 2011, from worker's compensation by her doctor in order for her to return to work. Whiteford's duty was to find a modified position for Employee.

In June of 2011, Whiteford had conversations with Employee regarding her return to work. He informed her that there was an assignment in the records office where she would be answering phones. Whiteford explained to Employee that the records office was short-staffed and needed someone to answer incoming calls. He explained to her that she could work a modified schedule; she could work two, three or four hours and modify her duties based on what her doctor would allow her to do. Whiteford testified that Employee provided that she could not work and gave excuses. She stated to him that she could not sit for long periods. Although Employee was released by a doctor to return to work, she did not return to work. Whiteford explained that he did not personally see a release but rather Ms. Malone (from the records office) had indicated to him that they had received medical clearance to return Employee back to work on modified duty.

Whiteford retired on December 3, 2011. By this time, Employee had not returned to Agency. On several occasions, Whiteford offered her a position in the records office. However, he provided that Employee circumvented him by going to the Board and stating that he yelled at her on the phone and was being disrespectful. Whiteford stated that because of this conflict, their conversations ended.

Whiteford had a conversation with Ms. Bennett, the deputy in charge of the records office. He told Ms. Bennett to proceed with the paperwork on Employee's return to work. Most of Whiteford's information went through risk management because they were in direct contact between Employee and her doctors. Whiteford provided that Employee refused to come back to work and that she refused assignments offered to her.

During the time that Whiteford communicated with Employee, his place of employment was the D.C. Jail. His office was on the first floor, the administrative side. It was two doors from Ms. Bennett's office. He explained that if Employee would have returned, he would have written up an agreement for her modified duties. He stated that the position offered to her was a modified duty and she would not have gotten into her basic work as a Lead Examiner in the

records office. He explained that they needed someone to answer the phones in order to keep the examiners doing their jobs. He explained that the position offered to Employee was sedentary and was at the front door. Because Employee refused to come to work, Whiteford recommended to Ms. Bennett and Ms. Silverman, Employee's immediate supervisor, that she be placed in an Absent Without Leave ("AWOL") status.

Leona Bennett ("Bennett") Tr. 53 – 73.

Bennett retired from the DOC on December 2, 2013. During June of 2011, Bennett was serving as the Acting Deputy Warden. As part of her duties at that time, she supervised Employee's direct supervisor Catherine Silveran. During this period of time she was informed by Whiteford and Ms. Silveran that Employee refused to come back to work on modified duty. Consequently, during this period of time Employee was placed in AWOL status. Agency's Exhibit No. 1 was admitted into evidence through Bennett. It is a letter of intent to remove Employee from service due to her unauthorized absences.

During cross examination, Bennett recalled a four way teleconference involving herself, Employee, Whiteford and Ms. Malone. According to Bennett, the purpose of this telephone call was to encourage Employee to return to work. As part of this teleconference, when asked whether she received medical documentation excusing Employee from working, Bennett did not recall. Bennett also did not recall Employee informing her that she had been requesting leave through Ms. Myrick. Bennett asserted that she did not recall the exact date of the teleconference but that the DOC waited at least 10 days before instituting the removal action against Employee.

Valerie Emerson ("Emerson") Tr. 73 – 87.

Emerson testified that she has known Employee for approximately 22 years. They worked together at the DOC and at one point Emerson was Employee's direct supervisor. Emerson asserted that in her capacity as Employee's one time supervisor, she has never known Employee to not follow policies and procedures. However, it was noted that Emerson was not Employee's supervisor during the time period surrounding her alleged AWOL and subsequent removal from service. Emerson recalled a conversation that she had with Ms. Myrick noting that here was an opportunity for Employee to return to work in modified duty and that Ms. Myrick felt that Employee was a diligent worker and would have had no problems with Employee returning to work. During cross examination, Emerson stated that she was not aware of the efforts that were made to bring Employee back to work.

Jeanette Myrick ("Myrick") Tr. 87 – 127.

Myrick testified that she did not request that Employee be removed. Myrick was in continual telephonic contact with Employee while she was out on disability. Employee notified Myrick when her disability compensation ceased and told her that she going to appeal that decision. Myrick recalled that Ms. Silveran showed her an expert medical opinion done for Employee. During cross examination, it was revealed that Myrick did not supervise Employee when the period of AWOL in question occurred.

Linda A. Rash ("Employee") Tr. 127 – 145.

Employee testified that she was in compliance with the DOC's affirmative attendance program and she contends that Myrick's testimony corroborates this point. Employee indicated that Whiteford had instructed her to either report for duty or provide medical documentation excusing her from work. Employee asserted that she complied with this directive by submitting medical documentation. Employee testified that she was in contact with her supervisor Myrick who allegedly approved her leave. Employee also noted that she had worked for the Agency for 22 years.

During cross examination, Employee stated that she saw Dr. Delosorte for the first time on July 12, 2011. Employee admitted that at the time of her appointment that Dr. Delosorte did not have access to or knowledge of her medical records. Employee explained that Dr. Delosorte was an internal medicine doctor whereas in contrast the expert medical opinion that had been provided to the Agency was done by orthopedic doctors. At the date of this hearing, Employee had an appeal pending before the District of Columbia Court of Appeals regarding the cessation of her disability compensation.[3] The following excerpt from Employee's testimony is relevant to this matter:

> Q: … [Y]ou're awaiting on a decision for the Court of Appeals on your disability comp case (*sic*)?
>
> A: That's correct. And they said it can take about a year to get that.
> …
>
> Q: What is your position before the Court of Appeals?
>
> A: My position before the Court of Appeals is I was denied medical treatment and I want my benefits reinstated.
>
> Q: Because you can't go back to work?
>
> A: They didn't ask me that… It's been four doggone years. I have no clue. I feel like I can. I don't know. But that was not a question posed to me, to my recollection before the DC Court of Appeals.
>
> Q: So there's no dispute, you didn't go back to work in 2011?
>
> A: No, there's no dispute.
>
> Tr. 136 – 139.

[3] As was mentioned *supra* in footnote 1, Employee's appeal with the Court of Appeals was denied.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Agency contends that Employee never reported for duty after she was required to do so when her benefits ceased and her initial round of appealing the expiration of her benefits ended on or about June 24, 2011. Employee explains that she was medically excused from reporting to duty. Agency notes that Employee had been medically cleared to return to duty and that her failure to do so resulted in her removal. Prior to the evidentiary hearing at the OEA, the issue of whether Employee was medically cleared to return to duty was litigated before the Department of Employment Service - Office of Hearings and Adjudication on more than one occasion as that case was reviewed and remanded on at least one occasion. As was mentioned *supra*, it was determined that Employee was physically able to work. I find that the legal doctrine of issue preclusion prevents the undersigned from making a determination on whether Employee was physically able to return to work. [4] Employee had sought review of her claim that she was physically unable to work and at the time of the OEA evidentiary hearing, she had received multiple decisions noting that she was cleared to return to work. That issue was ultimately decided by the District of Columbia Court of Appeals when it affirmed the determination that Employee was physically able to return to work. What is left for the undersigned is to determine whether Employee was absent from work without official leave for ten days or more.

During the Evidentiary hearing Employee admitted that she did not report for duty during calendar year 2011. Tr. at 139. The Board of the OEA has previously held that an employee's admission is sufficient to meet Agency's burden of proof. *See Employee v. Agency*, OEA Matter No 1601-0047-84, 34 D.C. Reg. 804, 806 (1987). I find that the Agency's adverse action was taken for cause. Considering as much, I find that the Agency has met its burden of proof in this matter. The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office.[5] Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." [6] When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment.[7] I find that based on the preceding findings of facts and resulting conclusion thereof that the penalty of removal was within managerial discretion and otherwise within the range allowed by law.

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[4] Issue preclusion has the effect of foreclosing successive litigation of an issue or fact or law actually litigated and resolved in a valid court determination essential to a prior judgment, whether or not the issue arises in the same or different claim. *New Hampshire v. Maine*, 532 U.S. 742, 748-749 (2001).

[5] *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), __ D.C. Reg. __ ( ); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994), __ D.C. Reg. __ ( ).

[6] *See Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

[7] *Id.*

ORDER

Based on the foregoing, it is ORDERED that Agency's action of removing Employee from service is hereby UPHELD.

FOR THE OFFICE:

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ERIC T. ROBINSON, Esq.
Senior Administrative Judge