THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1],	)	OEA Matter No. 1601-0089-24
	)	
v.	)	Date of Issuance: August 6, 2025
	)	
DISTRICT OF COLUMBIA	)	MONICA DOHNJI, ESQ.
DEPARTMENT OF CORRECTIONS,	)	Senior Administrative Judge
Agency	)	
	)	

Andra Parker, Employee Representative
Stephen Milak, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On September 9, 2024, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Corrections' ("DOC" or "Agency") decision to terminate him from his position as a Correctional Officer, effective September 6, 2024. Employee was charged with Attendance Related Offenses: Unauthorized absence of five (5) workdays or more,[2] and DOC's Standard Operating Procedure ("SOP") 3490.7B-16. OEA issued a Request for Agency Answer to Petition for Appeal on September 9, 2024. Agency submitted its Answer to Employee's Petition for Appeal on October 1, 2024. This matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on October 2, 2024.

The undersigned SAJ issued an Order on October 8, 2024, scheduling a Status/Prehearing Conference for November 14, 2024. Both parties were present for the scheduled Conference. Subsequently, on November 25, 2024, the undersigned issued a Post Status/Prehearing Conference requiring the parties to submit written briefs.[3] On December 13, 2024, Agency filed

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] District of Columbia Personnel Manual ("DCMR") Section 1607.2(f)(4).
[3] Due to personal extenuating circumstances requiring the undersigned's absence, on December 11, 2024, AJ Harris issued a Notice Regarding Temporary Abeyance of Proceedings advising the parties that the briefing schedule in the November 25, 2025, Order should be adhered to.

a Motion to Extend Filing Deadlines. SAJ Harris issued an Order on December 18, 2024, granting Agency's Motion and extended the briefing deadlines. On February 18, 2025, Agency filed a Motion to Stay Filing Deadlines. On February 20, 2025, the undersigned issued an Order convening a Status Conference for March 20, 2025. Employee filed a document titled 'Order Employee Reply' on March 6, 2025, stating he had not received Agency's brief. Both parties attended the March 20, 2025, Status Conference. On March 24, 2025, Agency filed its Motion for Subpoena for Employee's Medical Record.[4] The undersigned issued a Second Post/Status Conference Order on April 4, 2025, setting briefing schedules. Agency's brief was due by May 23, 2025; Employee's brief was due by June 13, 2025, and Agency's sur-reply brief was due by June 27, 2025. Agency filed its brief on May 22, 2025, and Employee filed his brief on June 13, 2025. Thereafter, on June 27, 2025, Agency filed a Motion for Extension requesting additional time to file its sur-reply brief. This Motion was granted in an Order dated July 1, 2025, wherein, Agency was required to submit its sur-reply brief by July 11, 2025. Agency filed its sur-reply brief as required. Upon review of the record and considering the parties' arguments as presented in their submissions, I have determined that there are no material facts in dispute, and as such, an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

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

ISSUES

(1) Whether Agency had cause to charge Employee with Unauthorized absence of five (5) workdays or more.[5] And

(2) Whether Employee's affirmative defense is supported by a preponderance of the evidence. And

(3) Whether the penalty of removal was appropriate under the circumstance.

BURDEN OF PROOF

OEA Rule § 631.1, 6-B District of Columbia Municipal Regulations ("DCMR") Ch. 600, et seq (December 27, 2021) states:

> The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

[4] The undersigned issued a Subpoena for Employee's Medical record on March 31, 2025.
[5] Employee was charged with unauthorized absence without leave ("AWOL") on the following dates: (1) March 2- March 5, 2024; (2) March 8-March 9, 2024; (3) March 13-March 14, 2024; (4) March 15-March 17, 2024; (5) March 31- April 1, 2024; (6) April 5- April 8, 2024; (7) April 12 – April 14, 2024; (8) April 16, 2024; (9) April 20- April 23, 2024; (10) April 27- April 30, 2024; (11) May 3- May 5, 2024; (12) May 13- May 14, 2024; (13) May 17 – May 21, 2024; (14) May 21, 2024; (15) May 24, 2024; (16) May 31, 2024; (17) June 2- June 3, 2024; (18) June 17, 2024; (19) June 23-25, 2024; (20) June 30, 2024; (21) July 7- July 9, 2024.

> the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.[6]

OEA Rule § 631.2 *id.* states:

> For appeals filed under § 604.1, 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.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW[7]

According to the record, Employee was hired as a Correctional Officer with Agency on October 18, 2018.[8] In a letter dated May 3, 2024, Employee was notified that he had accrued more than five (5) days of unauthorized absence for the period of March 1, 2024, to May 3, 2024.[9] This letter listed the dates and total consecutive days for which Employee was charged with AWOL. The letter also advised Employee that unless he provided "an explanation and appropriate documentation and justification for your absence (e.g. date and nature of incapacity for duty, nature of your illness, or injury) adverse action will be initiated to remove you from your position with the Department of Corrections …. You are directed to notify this office of your intentions and conditions in writing or email within five (5) days of receipt of this correspondence."[10] This letter also included several 'Notification of Charge to Absence Without Leave (AWOL)' forms to Employee dated May 2, 2024, and outlined the dates Employee was placed on AWOL.[11]

On July 19, 2024, Agency issued an Advance Notice of Proposed Removal ("NOP") to Employee, charging Employee with unauthorized absence of five (5) workdays or more, and violation of Agency's SOP 3490.7B-16, Section 14.[12] On July 26, 2026, Employee filed a response to the Advance Notice of Proposed Removal.[13] This response included several medical notes from different doctors, spanning from 2021 to 2024. Employee's response also included an email from Employee to Deputy Warden Williams dated on May 8, 2024, wherein, Employee cited that he had been in contact with Agency's management team and he was under the impression that "as long as I called out I was covered and would not be considered as an

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[6] OEA Rule § 699.1.
[7] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").
[8] Agency's Answer (October 1, 2024).
[9] *Id*. at Tab 7.
[10] *Id*.
[11] *Id*. at Tab 6, at Attachment 3.
[12] *Id*. at Tab 6.
[13] *Id*. at Tab 5.

AWOL." Employee also asserted in his May 8, 2024, email that he was not aware that he could request leave without pay ("LWOP").[14]

This matter was assigned to a Hearing Officer and she issued her recommendation on August 2, 2024, upholding Agency's decision to terminate Employee.[15] Agency issued its Final Decision on August 27, 2024, terminating Employee from his position with DOC effective September 6, 2024, and placing Employee on Administrative Leave effective August 27, 2024.[16] Employee filed the instant Petition for Appeal on September 9, 2024.

Agency's Position

Agency argues in its Answer that there was just cause for the adverse action levied against Employee. It notes that Employee violated DCMR § 1607.2(f)(4) and Agency's SOP 3490.7B-16, Section 14. Agency asserts that Employee accumulated unauthorized absences in excess of five (5) workdays and he was reported as AWOL on (1) March 2- March 5, 2024; (2) March 8-March 9, 2024; (3) March 13-March 14, 2024; (4) March 15-March 17, 2024; (5) March 31- April 1, 2024; (6) April 5- April 8, 2024; (7) April 12 – April 14, 2024; (8) April 16, 2024; (9) April 20- April 23, 2024; (10) April 27- April 30, 2024; (11) May 3- May 5, 2024; (12) May 13- May 14, 2024; (13) May 17 – May 21, 2024; (14) May 21, 2024; (15) May 24, 2024; (16) May 31, 2024; (17) June 2- June 3, 2024; (18) June 17, 2024; (19) June 23-25, 2024; (20) June 30, 2024; (21) July 7- July 9, 2024.[17]

Additionally, Agency asserts that in a letter dated May 3, 2024, Employee was directed to provide Agency with explanation, appropriate documentation to justify his absences, and his return date to avoid adverse action.[18] Yet, Employee failed to respond, while he continued to incur unauthorized absences. Agency cites that as a result, it issued an Advance Notice of Proposed Removal to Employee on July 19, 2024. Agency explains that Employee provided medical documents for 2021 to 2024, however, these documents did not cover the AWOL period listed in the July 19, 2024, NOP, and therefore, not relevant to the current adverse action.[19]

Agency highlights that, OEA is not to substitute its judgement for that of Agency but ensure that "managerial discretion has been legitimately invoked and properly exercised." Agency contends that the Table of Illustrative Actions ("TIA") provides that removal is within the range of penalties for a violation of DCMR § 1607.2(f)(4). Agency also notes that after a full consideration of the *Douglas* factors[20], it believes that its decision to terminate Employee is

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[14] *Id*.
[15] *Id*. at Tab 4.
[16] *Id*. at Tab 3.
[17] Agency Answer, *supra*.
[18] Agency avers that the May 3, 2024, letter also advised Employee to apply and/or inquire about leave under the Family Medical Leave Act ("FMLA"), leave without pay, disability retirement or any other option available to accommodate his disability. Agency maintains that it provided Employee with "information, benefits, and services that the Employee could have chosen to access." Agency notes that Employee by his own negligence waived his right to access these potential benefits, when he failed to respond to the May 3, 2024, letter that was mailed to his address on record.
[19] Agency Answer, *supra*.
[20] *Citing Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981).

"supported by the facts and has been established by a preponderance of evidence. Therefore, the Agency's decision to remove Employee should be upheld."[21]

Agency reiterates in its May 22, 2025, Brief that it had cause to terminate Employee for violating DCMR § 1607.2(f)(4) and Agency's Attendance SOP. Agency argues that Employee was AWOL for 51 days – which is 46 days in excess of the required amount to support a cause of action for DCMR § 1607.2(f)(4). Agency explains that Employee failed to provide DOC with any reason to excuse his AWOL as requested in the May 3, 2024, letter from Agency to Employee. Agency cites that the July 19, 2024, NOP listed the exact dates for which Employee was charged with AWOL. However, Employee noted in his response that he should be "medically excused from the charged AWOL days/periods due to "serious chronic medical condition" and that, through his Response, would be submitting medical documentation from his physician which are in concert with his absences from duty beginning February 2021 until the present." Agency explains that only two (2) of Employee's submissions covered dates within the relevant AWOL period – (1) the May 9, 2024, note from Moon[22] excusing Employee from work from May 14, 2024 to May 25, 2024; and (2) the March 15, 2024, "Verification of Treatment" ("VOT") from Dr. Garcia[23], excusing Employee from work on May 15, 2024. Agency states that it excused Employee for May 15, 2024, but did not excuse Employee for the other dates listed in the May 9, 2024, note because this note from Dona Lee Moon ("Moon") did not contain "letterhead of a verifiable medical provider." Agency contends that even if it excused these dates, Employee would still have more than five (5) days of unexplained/undocumented and unexcused absences.[24]

Agency further argues that Employee's note from Dr. Garcia dated November 25, 2024, "is insufficient for purposes of excusing Employee's charged AWOL days/periods." Agency avers that this note stated that "Employee has been under my care since February, 2021 – this includes the period of March 2024, to July 2024." Agency maintains that the November 25, 2024, note does not provide any medical excuse for the charge of AWOL. Agency explains that "it is not atypical for a person to be under the care of multiple physicians for routine medical care that does not ordinarily require them to take leave from work." Agency also states that while Dr. Garcia's note states that Employee has been under Dr. Garcia's care since February 2021, "Employee has certainly reported to duty at DOC since February, 2021." Citing to case law, Agency argues that if an employee raises a medical defense, the employee must provide "clear and complete medical evidence" establishing that they were medically incapacitated during the period they were charged with AWOL.[25] Therefore, Agency contends that while the November 25, 2024, note from Dr. Garcia provides that Employee has been under Dr. Garcia's care, it does not specify for what condition, whether Employee was medically incapacitated, and for what period Employee was medically incapacitated.[26]

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[21] Agency Answer, *supra*.
[22] Agency noted that Moon is a licensed Social Worker.
[23] Agency noted that Dr. Garcia is an Infectious Disease Specialist.
[24] Agency's Brief (May 22, 2025).
[25] Agency cited to *Frances Wade v. Department of Behavioral Health*; OEA Matter No. 1602-0067-15, Opinion and Order on Petition for Review, at pg. 7 (December 18, 2018).
[26] Agency's Brief, *supra*.

Agency further asserts that Employee's medical record highlights that Dr. Garcia treated Employee on March 15, 2024, a date for which Agency had already excused Employee for the charge of AWOL. Agency also asserts that based on Employee's medical record, "Dr. Garcia had *no additional* treatment records for Employee that covered the charged AWOL period/days." Agency further highlights that based on Employee's medical record, on July 25, 2024, "Employee asked Dr. Garcia to provide him with a doctor's note "stating that [he] has a chronic disease … or they are going to terminate [him] from his position." … In response, Dr. Garcia in a July 25, 2024, "Verification of Treatment," stated: "[Employee] has been under my care since February 2021 to present. [Employee] is undergoing treatment for a chronic condition that requires frequent follow up visits. This letter was written per [Employee's] request." … Significantly, besides the March 15, 2024, in office visit … Employee had no other "follow up visits" for any "chronic disease" or "chronic condition" that coincided with the charge AWOL periods/days."[27]

Agency argues that Employee had multiple opportunities to submit relevant medical documentation to DOC and this Office, but he failed to submit sufficient medical documentation excusing his 51 workdays of AWOL charge. Therefore, this Office should find that DOC had cause to discipline Employee for AWOL and violating Agency's Attendance SOP. Agency reiterates that the penalty of termination was appropriate in this matter pursuant to the TIA and *Douglas* factors. Agency cites that removal is the only appropriate penalty under DCMR § 1607.2(f)(4) for both a 'first occurrence' and 'subsequent occurrences.' Agency maintains that it thoroughly considered each of the *Douglas* factors in both the NOP and the Final Decision to terminate Employee. Thus, this Office should uphold its decision to terminate Employee.[28]

Agency also asserts in its July 11, 2025, Reply Brief that in AWOL cases, OEA has consistently held that when an employee provides a legitimate reason, such as illness for their absence without leave, the absence is justified and therefore excusable. Agency restates that Employee has failed to establish that he was medically incapacitated during the relevant charged AWOL periods/days. Agency explains that Dr. Garcia also submitted a note stating that "[Employee] has been under my care since February, 2021 for [****][29] care until the present day – this includes the period between March, 2024 and July, 2024." Agency argues that this doctor's note is equally insufficient for purposes of excusing Employee's charged AWOL period/days. Agency contends that this note does not specify whether Employee's medical condition rendered him "medically incapacitated" and if so, which days was Employee "medically incapacitated." Agency reiterates that Employee has reported to duty at DOC since February 2021, despite his medical condition diagnosis. Agency states that the doctor's note does not provide any medical reason excusing Employee from work during the relevant AWOL period due to his medical condition. Additionally, Agency cites that Dr. Garcia's treatment record of Employee reveals that besides his medical treatment on March 15, 2024, "Employee did not seek any other medical treatment for any other medical condition … over the charged AWOL days/period." Citing to

[27] *Id*.
[28] *Id*.
[29] Employee's medical condition has been masked/omitted for privacy reasons.

case law[30], Agency avers that Dr. Garcia's treatment record of Employee does not support any conclusion that Employee was medically incapacitated during the charged AWOL days/period.[31]

In addition, Agency asserts that Employee was approved for 'Intermittent' FMLA between October 30, 2022, and July 26, 2023. Agency notes that this FMLA expired long before Employee's current AWOL charged. Therefore, Employee's prior FMLA is irrelevant to the current matter. Agency further cites that it has no record of any other FMLA application from Employee and Employee had not provided any evidence to OEA of any other FMLA application. Agency expresses that even if Employee filed an FMLA application with Agency, it is uncertain that the application would have been retroactively approved to cover the current AWOL charge days/period considering the absence of any medical treatment for Employee's medical condition during the relevant period.[32]

Agency contends that Employee's claim that he was never directly notified of his placement on AWOL is factually inaccurate. Agency explains that U.S. Postal Service ("USPS") tracking confirms that Agency's May 3, 2024, AWOL letter addressed to Employee was delivered to Employee's last known address on May 6, 2024. Agency also avers that the July 19, 2024, NOP was delivered to Employee's last known address on July 20, 2024, and Employee meaningfully participated in Agency's disciplinary proceedings by submitting a response, with documentation, to the NOP. Agency cites that Employee's response and documentation were considered by the Hearing Officer, and Agency before issuing a Final Decision.[33]

Employee's Position

Employee states in his Petition for Appeal that he is appealing Agency's decision to terminate him "due to misleading, false and misrepresentation of the facts." He asserts that his placement on AWOL was "due to disabity (sic) medical reasons known to the agency prior to the termination."[34]

Employee asserts that "there was no cause and supportive evidence to substantiate the employee termination of employment." Employee states that the medical documentation he provided was sufficient and covered the period of the AWOL charge that led to his termination. Employee requested that his termination be reversed, Agency reinstate him to "his official position of record "Senior Correctional Officer" with loss backpay and benefit."[35]

Additionally, Employee denied that he abandoned his job with Agency. He cites that Agency was aware of his absence via Employee's communication with his supervisor and

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[30] *Murchinson v. Department of Public Works*, OEA Matter No. 1601-0257-95R03 (October 4, 2005); *Mims v. Department of Transportation*, OEA Matter No. 1601-0003-18 (2019); *Dasilva v. Department of Motor Vehicle*, OEA Matter No. 1601-0035-17 (2018); *Holcomb v. D.C. Office of the State Superintendent of Education*, OEA Matter No. 1601-0068-14 (2016); and *Redding v. D.C. Department of Public Works*, OEA Matter No. 1601-0123-08R11 (2013).
[31] Agency's Reply Brief (July 11, 2025).
[32] *Id*.
[33] *Id*.
[34] Employee's Petition for Appeal (September 9, 2024).
[35] Order Employee Reply (March 6, 2025).

Agency management, prior to the current adverse action. Employee asserts that Agency's management did not provide him with any direction on this matter, except for instructing him "to take his time in regard to returning to duty." Employee avers that his absence from work was medically related, which he disclosed to Agency prior to the current adverse action. Employee cites that Agency approved his FMLA and he had a pending FMLA application, but he was terminated while the FMLA application was pending. Employee also asserts that he "was never notified directly of his placement on AWOL in concert with Agency Policies and Procedures the issuance of an AWOL Form issued by the supervisor and presented to the Employee for signature." Employee maintains that he "received notification long after the alleged violation through the issuance of the Proposed Adverse action "Termination."" Employee asserts that he had available annual and sick leave during the AWOL period which Agency was using in lieu of AWOL. Employee highlights that he voluntarily submitted medical documentation for the period he was absent from duty, therefore, Agency does not have cause to terminate him for AWOL.[36]

Employee included two (2) doctor's notes with his June 13, 2025, submission – the first doctor's note signed by Dr. Garcia on November 25, 2024, provides that "[Employee] has been under my care since February, 2021– this includes the period of time between March, 2024 and July, 2024." The second doctor's note signed by Dr. Garcia on March 26, 2025, provides that "[Employee] has been under my care since February, 2021 for [****] care until the present day – this includes the period between March, 2024 and July, 2024." Employee concluded that the penalty of termination is inappropriate under District law, regulations and the TIA.[37]

Analysis

Pursuant to OEA Rule § 631.2, Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. The District Personnel Manual ("DPM") regulates the manner in which agencies in the District of Columbia administer adverse and corrective actions. DPM § 1602.1 provides that disciplinary action against an employee may only be taken for cause. Employee was terminated for an Attendance-related offense: Unauthorized absence of five (5) workdays or more and for violating Agency's SOP 3490.7B-16, Section 14(d): Consecutive Unauthorized Absence With No Call.[38]

In the instant case, the undersigned must determine if the evidence that Employee was absent from work for five or more workdays is adequate to support Agency's decision to terminate Employee. Employee does not dispute Agency's assertion that he was absent from work for the following listed dates: (1) March 2- March 5, 2024; (2) March 8-March 9, 2024; (3) March 13-March 14, 2024; (4) March 15-March 17, 2024; (5) March 31- April 1, 2024; (6) April 5- April 8, 2024; (7) April 12 – April 14, 2024; (8) April 16, 2024; (9) April 20- April 23, 2024; (10) April 27- April 30, 2024; (11) May 3- May 5, 2024; (12) May 13- May 14, 2024; (13) May 17 – May 21, 2024; (14) May 21, 2024; (15) May 24, 2024; (16) May 31, 2024; (17) June 2- June 3, 2024; (18) June 17, 2024; (19) June 23-25, 2024; (20) June 30, 2024; (21) July 7- July 9,

[36] Second Post Status/Prehearing Conference Order (June 13, 2025).
[37] *Id*.
[38] This SOP provision further notes that "Employees who do not report to work and do not call-in to request emergency or unplanned leave for two or more consecutive days shall be cited under Section 14 of this directive."

2024. Therefore, based on Employee's own admission and the record, I find that Employee was absent from work for five or more workdays during the relevant period.

However, Employee asserts that his absence from work was medically related, which he disclosed to Agency prior to the current adverse action. In *Murchinson v. D.C. Department of Public Works*[39], the D.C. Court of Appeals held that an employee must be incapacitated by their illness and unable to work during the AWOL period for it to be deemed a legitimate excuse to overcome a charge of AWOL. In such cases, "[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."[40] A charge of AWOL can be defeated by the submission of medical evidence for that cause of action. Moreover, if the employee's absence is excusable, it "cannot serve as a basis for adverse action."[41] Therefore, the undersigned must determine if Employee was incapacitated by his illness and unable to work during the AWOL dates of: (1) March 2- March 5, 2024; (2) March 8-March 9, 2024; (3) March 13-March 14, 2024; (4) March 15-March 17, 2024; (5) March 31- April 1, 2024; (6) April 5- April 8, 2024; (7) April 12 – April 14, 2024; (8) April 16, 2024; (9) April 20- April 23, 2024; (10) April 27- April 30, 2024; (11) May 3- May 5, 2024; (12) May 13- May 14, 2024; (13) May 17 – May 21, 2024; (14) May 21, 2024; (15) May 24, 2024; (16) May 31, 2024; (17) June 2- June 3, 2024; (18) June 17, 2024; (19) June 23-25, 2024; (20) June 30, 2024; (21) July 7- July 9, 2024. Employee avers that he contacted his supervisor and Agency management for the dates that he was marked as AWOL. However, Employee has not provided this Office with any evidence in support of this assertion.

Employee has provided several doctors' notes from 2021 to 2024, to justify his illness. However, the only notes that cover the relevant AWOL period were the notes from Moon dated May 9, 2024, and that covered the period of May 14, 2024 to May 25, 2024[42], and the doctor's notes from Dr. Garcia highlighting that Employee has been under her care from February 2021, to July 2024. However, none of the doctor's notes from Moon and Dr. Garcia provide any medical evidence that Employee was medically incapacitated during the relevant period in the current matter. Furthermore, none of the doctor's notes provided by Dr. Garcia or Moon addressed the severity of Employee's condition and the extent to which it was exacerbated by his work condition during the relevant period, such that he was unable to perform his work. Additionally, Dr. Garcia did not cite in any of her two (2) notes that Employee should be excused from work during the charged AWOL period. Furthermore, none of the notes submitted in support of Employee's position provide a medical explanation of his condition, and any symptoms Employee was experiencing as a result of his condition during the relevant timeframe.

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[39] *Murchinson v. D.C. Department of Public Works*, 813 A.2d 203 (D.C. 2002).

[40] *Murchinson v. Department of Public Works*, OEA Matter No. 1601-0257-95R03 (October 4, 2005); *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).

[41] *Murchison, 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).

[42] Agency argues that because this note was not on a letterhead, it did not consider the note. Agency further argues that even if it considered this medical note as valid, Employee would still be AWOL for at least 46 days, and it would still have cause to charge Employee under this cause of action. I agree with Agency's assertion. Even *assuming* that Agency did not charge Employee from May 13- May 25, 2024, as stated in Moon's note, I find that Employee was still absent from work for more than five (5) workdays.

Consequently, I find that the record is void of any evidence to support a conclusion that Employee was incapacitated during the relevant time frame which led to his AWOL charge.

Employee further asserts that he "was never notified directly of his placement on AWOL…" He explains that his supervisor had to present him with the AWOL form and request his signature. Employee maintains that he "received [the AWOL] notification long after the alleged violation through the issuance of the Proposed Adverse action "Termination." The record contradicts this assertion. Prior to issuing the NOP, Agency issued several 'Notification of Charge to Absent Without Leave (AWOL)' forms to Employee on May 2, 2024, notifying him of the dates he had been placed on AWOL.[43] Agency has provided this Office with the USPS tracking information for this letter, which was mailed to Employee's address of record. Per the USPS tracking history, this letter was delivered to Employee's address on file on May 6, 2024. Additionally, the included May 3, 2024, Notice advised Employee to submit "an explanation and appropriate documentation and justification for your absence …" to avoid adverse action. Therefore, I conclude that Employee had direct notice of the AWOL charge prior to the issuance of the July 19, 2024, NOP.

Additionally, Employee cites that Agency approved his FMLA and he had a pending FMLA application, but he was terminated while the FMLA application was pending. Upon review of the record, the undersigned finds that Employee had no approved FMLA or pending FMLA during the relevant AWOL period. Moreover, Employee has not provided this Office with any evidence to support this assertion.

As Agency correctly stated, while Employee has been under Dr. Garcia's care from February 2021, Employee has reported to work at DOC since February 2021. Therefore, absent any information on the severity of Employee's condition during the relevant period that prevented him from reporting to work during the relevant period, the undersigned finds that Employee was not incapacitated and as such, his absences were not excused. Moreover, except for Employee's visit with Dr. Garcia, on March 15, 2024, there is no record of Employee seeking any medical treatment from any medical provider after March 15, 2024. Accordingly, I further find that the record is void of sufficient evidence to establish that Employee's condition was so debilitating that it prevented him from performing his duties during the relevant time frame. Consequently, I conclude that Agency had cause to discipline Employee for violating DCMR § 1607.2(f)(4) and SOP 3490.7B-16, Section 14(d).

Whether the penalty of removal is within the range allowed by law, rules, or regulations.

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).[44] According to the Court in

[43] See Agency's Answer, *supra*, at Tab 7.

[44] *See also Anthony Payne v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections,* OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections,* OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools,* OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department,* OEA

Stokes, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Illustrative Actions ("TIA"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency. In the instant matter, Employee avers that his absence from work was medically related, which he disclosed to Agency prior to the current adverse action, as such, the penalty of termination is inappropriate under District law, regulations and the TIA.

Agency on the other hand argues that the penalty of termination was appropriate in this matter pursuant to the TIA and *Douglas* factors. Agency cites that removal is the only appropriate penalty under DCMR § 1607.2(f)(4) for both a 'first occurrence' and 'subsequent occurrences.' Agency maintains that it thoroughly considered each of the *Douglas* factors in both the NOP and the Final Decision to terminate Employee.[45] Thus, this Office should uphold its decision to terminate Employee. Agency cites under its *Douglas* factor 3 analysis, that "Your disciplinary record for attendance related issues does not bode well for you. The Agency has progressively disciplined you to address your attendance and tardiness issues. You have been counseled on several occasions, receiving a written reprimand on October 13, 2022 and a one (1) day suspension on August 3, 2022."

I find that Agency has met its burden of proof for the charge of: Attendance-related offense: Unauthorized absence of five (5) workdays or more. Consequently, I conclude that Agency can rely on this charge to discipline Employee. While Employee has been disciplined in the past for attendance related offenses, the record shows that this was the first time Employee

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Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[45] The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3) the employee's past disciplinary record;
4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7) consistency of the penalty with any applicable agency table of penalties;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10) potential for the employee's rehabilitation;
11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

violated DCMR § 1607.2(f)(4). Pursuant to the TIA, the penalty for a first offense under DCMR § 1607.2(f)(4) - Unauthorized absence of five (5) workdays or more is removal.

As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[46] 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.

Penalty Based on Consideration of Relevant Factors

An Agency's decision will not be reversed unless it fails to consider relevant factors, or the imposed penalty constitutes an abuse of discretion.[47] Pursuant to the TIA, the only penalty available to Agency for the first offense of unauthorized absence of five (5) or more workdays is removal, which is what Agency levied against Employee. The cause of action does not provide for a lesser penalty such as counseling or suspension. Consequently, I conclude that Agency's decision to remove Employee from his position did not exceed the scope of reasonableness. I also conclude that Agency has properly exercised its managerial discretion, and its chosen penalty of removal is reasonable. Therefore, I find that Agency's action should be upheld.

ORDER

It is hereby **ORDERED** that Agency's action of removing Employee from service is **UPHELD**.

FOR THE OFFICE:

/s/ *Monica N. Dohnji*
MONICA DOHNJI, Esq.
Senior Administrative Judge

[46] *Love* also provided that "[OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." Citing *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981).

[47] *Butler v. Department of Motor Vehicles,* OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C. Reg. 352 (1985).