THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 1601-0292-10
JAMES WASHINGTON,	)	
Employee	)	
	)	Date of Issuance: July 31, 2013
v.	)	
	)	
D.C. PUBLIC SCHOOLS	)	
DIVISION OF TRANSPORTATION,	)	
Agency	)	Sommer J. Murphy, Esq.
	)	Administrative Judge

James Washington, Employee, *Pro Se*
Hillary Hoffman-Peak, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On April 5, 2010, James Washington ("Employee"), filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the D.C. Public Schools Division of Transportation's[1] ("Agency") action of terminating his employment. Employee was charged with Job Abandonment—Unauthorized Absence. Specifically, Employee was charged with being Absent Without Leave ("AWOL") beginning on September 8, 2009, and ending in April of 2010. Employee was working as a Bus Attendant at the time he was terminated. The effective date of Employee's termination was April 12, 2010.

I was assigned this matter in July of 2012. On December 13, 2012, a Prehearing Conference ("PHC") was held for the purpose of assessing the parties' arguments. During the PHC, it was determined that there were material facts in dispute, therefore an Evidentiary Hearing ("EH") was held on April 25, 2013. The parties were subsequently ordered to submit written closing arguments. Both parties submitted timely responses to the order. The record is now closed.

[1] Agency is now the Office of State Superintendent of Education ("OSSE").

JURISDICTION

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

ISSUES

1. Whether Agency's action was taken for cause.

2. If so, whether the penalty imposed was appropriate under the circumstances.

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.

Employee's Position

Employee contends that he did not abandon his job and was ready to return to work in September of 2009. According to Employee, Agency refused to allow him to return to work after being on leave for the treatment of mental illness. Employee believes that Agency failed to act in accordance with fair labor practices as enumerated in the American Federation of State County and Municipal Employees bargaining agreement, and that its refusal to return him to work was discriminatory. Moreover, Employee argues that the amended medical slip he received from his doctor should have been sufficient documentation to allow him to return to work. Employee submits that Agency made unreasonable and illicit demands upon him when he attempted to return from medical leave.

Agency's Position

Agency submits that Employee was authorized to take leave from his position as a Bus Attendant from June 4, 2009 until August 18, 2009 due to a health condition. According to Agency, Employee worked on September 2, 2009 through September 4, 2009, but stopped coming to work on September 8, 2009. Although Employee was still working, Agency contends that Employee did not return for work, and was terminated effective April 10, 2010. Agency

argues that its policy allows for an employee to return to duty when they are determined to be fit for duty. It is Agency's position that Employee failed to provide sufficient proof that he was cleared to return to his job as a Bus Attendant without restrictions. Agency further submits that there was no medical testimony about Employee's health condition, and no evidence was given to support his assertion that he actually attempted to return to work.

SUMMARY OF RELEVANT TESTIMONY

Sergio Martinez (Transcript pages 8-30)

Sergio Martinez ("Martinez") works as a Terminal Manager for Agency. Martinez supervised Employee during his tenure with Agency. (Tr. pg. 9). When asked about Employee's request to take time off in 2009, Martinez testified that Employee requested leave for the period of June 4, 2009 through August 18, 2009. Martinez approved Employee's leave request in writing and subsequently sent the documentation to human resources. (Tr. pg. 10). Martinez identified Agency's Exhibit 2 as a doctor's note, which stated that Employee was authorized to return to work on August 18, 2009. (Tr. pg. 12). After reviewing Employee's time sheets, Martinez testified that Employee likely arrived to work on September 16, 2009, but left prior to the end of his tour of duty. According to Martinez, an employee is supposed to "swipe in" and "swipe out" in both the a.m. and p.m. (Tr. pg. 14). Martinez further stated that Agency's Exhibit 4 reflected Employee's time sheet dated August 31, 2009 through September 4, 2009. According to Exhibit 4, Employee received regular pay Wednesday, Thursday, and Friday of that time period, but received leave without pay the following Monday and Tuesday. (Tr. pgs. 15-16). According to Martinez, Employee was still officially employed by Agency until April 10, 2010, but did not physically show up for work after September 7, 2009. (Tr. pgs. 16-19). Martinez testified that job abandonment occurs when an employee is absent from work for several days and does not inform management or human resources about his or her situation. (Tr. pg. 20).

During cross examination, Martinez stated that employees who have been out of a work for some time are directed to the Penn Center to seek reinstatement because reinstatements are required to be effectuated by management, and not at the terminal level. (Tr. pgs. 29-30).

Tracey Langley (Transcript pages 34-38)

Tracey Langley ("Langley") works as Agency's Employee Relations Manager. Her primary responsibilities include oversight of disciplinary actions, employee appreciation, and wellness programs. (Tr. pg. 34). Langley testified that, in order to take a leave of absence, an employee must go to Human Resources and fill out a request for leave without pay. A Human Resource Specialist will submit the request to the immediate supervisor, and if the request is for less than thirty (30) days, it will generally be approved automatically. (Tr. pgs. 34-35). The longest period a leave request can be granted is fifty two (52) weeks. Langley further testified that the District Personnel Manual defines job abandonment as an employee who is absent from work for ten (10) consecutive days or more. (Tr. pg. 35).

On cross examination, Langley testified that Agency never tells employees that they "can't return you to duty." If an employee returns to work, but his or her medical documentation does not state that they are clear to return to duty without restrictions, then Agency will inform the employee to go back to their medical provider for the purpose of getting clear written instructions. (Tr. pg. 36). Langley stated that Agency's positions at the terminal are safety-sensitive positions; therefore, employees are required to be completely cleared by their doctors before returning to duty. According to Langley, if an employee remits acceptable medical documentation that clears them with no restrictions, they would be allowed to return to work. (Tr. pgs. 37-38).

James Washington (Transcript pages 38-53)

James Washington ("Employee") elected to provide sworn testimony to the record. Employee testified that he attempted to return to work by providing two or three doctor's certificates, but was told he could not return by David Gilmore. Employee stated that he made a good-faith effort to return to work, but Mr. Gilmore refused to accept his documentation. (Tr. pgs. 46-47). According to Employee, he was able to return to work in October of 2009.

During cross examination, Employee admitted that he was angry when he received the proposed notice of termination. He stated that he was scared to return to work because of the hostile work environment. According to Employee, the only attempt he made to return to work was in October of 2009, when he met with Mr. Gilmore. (Tr. pg. 48-49).

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

1. Employee's position of record at the time he was terminated was Bus Attendant, Grade 3, Step 3.

2. Employee requested, and was granted, a medical leave of absence beginning on June 4, 2009, and ending on August 18, 2009.[2]

3. Employee visited the Veteran's Hospital on June 25, 2009. His treating physician stated in a note that Employee had a "serious urinary tract infection and is unable to lift at work. Kindly excuse him from work for one month."[3]

4. Employee subsequently wrote a letter to his terminal manager, Sergio Martinez, stating that he was unable to work due to a serious illness. Employee further stated that he did not know when he would be able to return to work.

5. On August 18, 2009, Employee received a hand-written note from the Veteran's Hospital stating that he could return to work "full duty, no restrictions." The note was signed by a hospital doctor.

[2] Transcript, Agency Exhibit 1.
[3] *Id*., Agency Exhibit 2.

6. On September 15, 2009, Vanessa More, Ph.D., from the Veteran's hospital wrote a letter stating the following:

> "Mr. Washington was seen by me for an unscheduled appointment today. He reports he was out from September 8th until today. He reports he is ready to return to work after having been off for the past week. He does not feel like doing harm to anyone. He understands he also has to pursue reinstatement through his agency. I cannot identify any restrictions to his return. He has a follow-up appointment in this clinic with me and another doctor on September 30th and he knows he can call in the interim if necessary."[4]

7. Employee's timesheets, as reflected in PeopleSoft[5], show that he took seven (7) hours of Leave Without Pay on August 31, 2009, and September 1, 2009, respectively. Employee received Regular Pay from September 2, 2009 until September 4, 2009. On September 7, 2009, Employee received Holiday Pay. The PeopleSoft records do not reflect that Employee worked at any time from September 8, 2009 through April 12, 2010, the effective date of his termination.[6]

8. On March 25, 2010, Agency issued a Proposed Notice of Termination to Employee. The notice stated that Employee was being charged with Job Abandonment. The notice further advised Employee that he had the right to an administrative review of the charges, or he could chose to grieve the proposed adverse action under the provisions of the Collective Bargaining Agreement between Employee's union and the Division to Transportation.

9. Agency subsequently issued its Final Notice of Termination to Employee. The effective date of his termination was April 12, 2010.

Whether Agency's adverse action was taken for cause.

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

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[4] *Id*., Agency Exhibit 3. It should be noted that Employee's Exhibit 5 reflects a similar letter from the Veteran's Hospital, but the document does not state that Employee could return to work without restriction. Employee also offered an Amended letter from the VA, dated October 2, 2009, stating that he could return to work without restriction. *See* Transcript, Employee Exhibit 6.

[5] PeopleSoft is the Human Resource Management System utilized to the District of Columbia Government. Employees commonly submit their timesheets through this program for processing by the D.C. Department of Human Resources.

[6] Transcript, Agency Exhibit 4.

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

In accordance with Section 1651 (1) of the CMPA (D.C. Official Code §1-616.51 (2001)), disciplinary actions may only be taken for cause. Section 1603.3 of the District Personnel Manual ("DPM") defines cause to include s "[a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: unauthorized absence of ten (10) consecutive days or more constitutes abandonment." Chapter 16 DPM § 1603.3(f).

I find that Employee's absences are well documented and fall squarely within the DPM's definition of cause for termination. The record reflects that Employee was approved for a medical leave of absence from June 4, 2009 through August 18, 2009. Employee's timesheets confirm that he took seven (7) hours of Leave Without Pay on August 31, 2009, and September 1, 2009, respectively. Employee received Regular Pay from September 2, 2009 until September 4, 2009. On September 7, 2009, Employee received Holiday Pay for Memorial Day. The PeopleSoft records do not reflect that Employee worked at any time from September 8, 2009 through April 12, 2010, the effective date of his termination.[7] In support of the charges that gave rise to the Agency's action, Agency witnesses provided credible testimony to corroborate the allegations. Martinez, Employee's Terminal Manager, testified that Employee did not show up for his tour of duty after September 8, 2009. Moreover, Martinez believes that Employee's absences from work for more than ten (10) days constituted job abandonment.

Although it was unclear from the testimony adduced during the Evidentiary Hearing, Employee states that he was ready to return to work on October 15, 2009, but was denied by David Gilmore.[8] However, Employee fails to provide any evidence to support this assertion. Employee's conflicting testimony and lack of consistent supporting documentation undermines his position that he was cleared to work without restriction, and attempted to return to duty on October 15, 2009. The handwriting on the letters from the Veteran's Hospital have not been authenticated by any witnesses, and I find their probative value to be diminutive in comparison to Agency's documentary evidence and witness testimony.

Employee was asked several times about the date on which he was prepared to return to work during the Evidentiary Hearing, yet he did not provide a definite date until his closing statement. There is also no credible evidence in the record to prove that the October 2, 2009 amended letter Employee received from the Veteran's Hospital was in fact provided to Agency.

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[7] Transcript, Agency Exhibit 4.
[8] Employee Closing Argument (July 19, 2013).

I find that Employee was only authorized to be absent until August 18, 2009. I further find that Employee abandoned his job by failing to appear for duty for more than ten (10) days after September 8, 2009. Employee had not received notice of termination, and was still employed by Agency during this time. Employee's failure to return to work constitutes job abandonment and interferes with the efficiency and integrity of government operations. Accordingly, Agency has met their burden of proof that Employee's termination was supported by cause as required by Section 1603.3 of the DPM.

Whether the penalty was appropriate under the circumstances.

With respect to Agency's decision to terminate Employee, any review by this Office of the agency decision selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[9] Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised.[10] When the 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 clearly not an error of judgment."[11]

Agency has the discretion to impose a penalty, which cannot be reversed unless "OEA finds that the agency failed to weigh relevant factors or that the agency's judgment clearly exceed the limits of reasonableness."[12] The Table of Appropriate Penalties, found in Section 1619 of the DPM, provides general guidelines for imposing disciplinary sanctions when there is a finding of cause. The penalty for a first offense for Unauthorized Absence for ten (10) or more consecutive days is removal.

I find that Agency acted reasonably and well within the parameters established in the Table of Penalties. Based on the foregoing, I conclude that Agency's decision to terminate Employee as the appropriate penalty for his actions was not an abuse of discretion and should be upheld.

Discrimination

With respect to Employee's claims of discrimination, D.C. Code § 2-1411.02 specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR"). Complaints classified as unlawful discrimination are described in the District of Columbia

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[9] *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, Opinion and Order on Petition for Review (March18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, Opinion and Order on Petition for Review (July 2, 1994).
[10] *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).1601-0417-10
[11] *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915, 2916 (1985).
[12] *See Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985).

Human Right Act.[13] Additionally, District Personnel Manual ("DPM") § 1631.1(q) reserves allegations of unlawful discrimination to Office of Human Rights. However, it should be noted that the Court in *El-Amin v. District of Columbia Dept. of Public Works* held that OEA may have jurisdiction over an unlawful discrimination complaint if the employee is "contending that he was targeted for whistle blowing activities outside the scope of the equal opportunity laws, or that his complaint of a retaliatory RIF is different for jurisdictional purposes from an independent complaint of unlawful discrimination or retaliation.…"[14]

Here, Employee's claims as described in his submissions to this Office do not allege any whistle-blowing activities as defined under the Whistleblower Protection Act. There is also no evidence in the record to support a finding that Employee's termination was retaliatory in nature. Accordingly, I find that Employee's claims of discrimination based on an alleged breach of his Collective Bargaining Agreement fall outside the scope of OEA's jurisdiction. This is not to say that Employee may not aggrieve any allegations of discrimination or a hostile work environment in another venue; however, I am unable to address the merits, if any, of such allegations.

Based on the foregoing, I find that Agency has met its burden of proof by establishing that Employee's conduct constituted job abandonment. Accordingly, removal was reasonable in light of the seriousness of the offense, and its relation to Employee's duties, position and responsibilities as a Bus Attendant.

ORDER

It is hereby **ORDERED** that Agency's action is upheld.

FOR THE OFFICE:

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SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE

[13] D.C. Code §§ 1-2501 *et seq.*
[14] 730 A.2d 164 (May 27, 1999). *See also El-Amin*; *citing Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994).