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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	OEA Matter No.: 1601-0043-17
KEVIN REED,	)	
Employee	)	
	)	Date of Issuance: May 9, 2018
v.	)	
	)	Arien P. Cannon, Esq.
D.C. DEPARTMENT OF DISABILITY	)	Administrative Judge
SERVICES,	)	
Agency	)	
	)	
	)	
Erik Williams, Esq., Employee Representative	)	
Janea Hawkins, Esq., Agency Representative	)	

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

On March 10, 2017, Kevin Reed (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of Disability Services’ (“Agency” or “DDS”) decision to separate him from his position as a Management Analyst, effective at the close of business on February 10, 2017. Agency filed its Answer on June 8, 2017. I was assigned this matter on August 23, 2017.

A Prehearing Conference was convened on October 4, 2017. Subsequently, a Post Prehearing Conference Order was issued which required the parties to submit legal briefs addressing the issues in this matter. Agency submitted its brief in support of Employee’s removal on November 7, 2017. Employee submitted his brief in opposition to his removal on January 19, 2018. Agency submitted a sur-reply brief on February 2, 2018. On April 10, 2018, Agency filed an Amended Brief in Support of Employee’s Removal.<sup>1</sup> Based on the submission

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<sup>1</sup> On April 3, 2018, the undersigned informed the parties, via email, that the Agency’s original brief, filed on November 7, 2017, referenced Employee’s Prehearing Statement numerous times and cites to documents and/or exhibits attached to Employee’s Prehearing Statement. However, Employee’s Prehearing Statement does not contain any attachments. Thus, Agency was prompted to submit an amended brief and provide the actual documents they were referencing in their original brief.

of the written briefs, I have determined that an evidentiary hearing is not warranted. The record is now closed.

### 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 terminate Employee for Unauthorized absence of one (1) workday or more, but less than five (5) workdays, pursuant to District Personnel Manual (“DPM”) § 1605.4(f)(2);
2. If so, whether Agency’s penalty of terminating Employee 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.<sup>2</sup> “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.<sup>3</sup>

### FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Employee was removed from his position with Agency as a Management Analyst, effective at the close of business on February 10, 2017. The cause for Employee’s removal is based on Chapter 16 of the District Personnel Manual (“DPM”), Section 1605.4(f)(2) Unauthorized absence of one (1) workday or more, but less than five (5) workdays.<sup>4</sup>

#### Agency’s position

On or about July 22, 2016, Employee submitted a District of Columbia Family and Medical Leave Application (“DC FMLA”) Form requesting seventy-one (71) hours of leave to cover a period of leave prescribed by his physician for July 5, 2016, through July 15, 2016.<sup>5</sup>

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<sup>2</sup> 59 DCR 2129 (March 16, 2012).

<sup>3</sup> OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

<sup>4</sup> DPM version effective February 5, 2016.

<sup>5</sup> Agency’s Amended Brief in Support of Employee’s Removal, Supplemental Exhibit A. (April 10, 2018).

Employee elected to use annual and sick paid leave to cover his absence. At the time of Employee's request, his pay records indicated that he had an insufficient amount of leave hours to his credit to cover paid FMLA leave of seventy-one (71) hours.<sup>6</sup>

Employee's DC FMLA request was approved by Agency's Human Capital Administrator, Gria Hernandez, in a letter dated July 26, 2016.<sup>7</sup> In the same letter, Employee was advised that under DC FMLA he had the right to take sixteen (16) weeks of *unpaid* leave within a 24-month period. Based on the medical documentation that Employee submitted, Agency anticipated that Employee's DC FMLA leave would be for a continuous period starting on July 5, 2016, running through July 15, 2016. Employee was informed that this approved DC FMLA would be combined with all other available leave balances, including both sick and annual leave. If all leave balances were exhausted, Employee would then be placed on leave without pay until the approved DC FMLA leave period ended. Employee returned to work from his DC FMLA on July 18, 2016.

On or about November 3, 2016, Employee submitted a second DCFMLA request with supporting medical documentation regarding a personal health condition.<sup>8</sup> The DC FMLA request was to cover the period of November 3, 2016, through November 14, 2016. In this request, Employee also indicates that he would be using paid annual and sick leave to cover this absence. However, Employee had zero hours of annual and sick leave to his credit during the time period in which he submitted this request.<sup>9</sup> On or about November 9, 2016, Agency issued Employee a letter informing Employee that "due to [his] previous use of FMLA in July 2016, the number of hours has been deducted from [his] current request for FMLA."

On or about November 10, 2016, Employee's medical provider recommended that Employee be off work due to his medical condition until November 30, 2016. On November 21, 2016, Ms. Hernandez informed Employee that the extension of his DC FMLA until November 30, 2016 was approved. Employee was cleared to return to work on December 2, 2016, without limitations by his medical provider. Employee returned to work that day and sought no additional DC FMLA leave prior to his removal.

Agency further contends that Employee's work performance began to wane shortly after he was notified, by letter dated July 27, 2016, that effective August 1, 2016, his immediate

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<sup>6</sup> Agency incorrectly asserts that Employee's pay records indicate that he had twenty-two (22) hours of annual leave and (18) hours of sick leave to his credit at the time Employee filed his FMLA applications on or around July 22, 2016. Employee actually *used* twenty-two (22) hours of sick leave and eighteen (18) hours of annual leave for the pay period beginning on June 26, 2016, and ending on July 9, 2016. The check for this pay period was issued on July 22, 2016. Employee's leave balance for this same pay period reflects that Employee actually only had four (4) hours of both annual and sick leave, each. *See* Attachment A to Agency's Amended Brief in Support of Employee's Removal (April 10, 2018).

<sup>7</sup> Agency's Amended Brief in Support of Employee's Removal, Supplemental Exhibit B. (April 10, 2018).

<sup>8</sup> *Id.*, Supplemental Exhibit C.

<sup>9</sup> *See* Agency's Brief in Support of Employee's Removal, Attachment B (November 7, 2017). Again, Agency incorrectly asserts in its brief that Employee had 4 hours of sick leave and 10 hours of annual leave to his credit during this time period. In actuality, Employee has zero hours of annual and sick leave to his credit during this pay period. It is assumed that Agency misread Employee's pay stubs for the pay period beginning on October 30, 2016, through November 12, 2016. This check was issued on November 25, 2016. Employee actually used four (4) hours of scheduled sick leave and ten (10) hours of annual leave during this same pay period.

supervisor would be Jaime Coronado, Agency's Operation Program Manager.<sup>10</sup> This same letter informed Employee that effective August 8, 2016, his Compressed Work Schedule would be rescinded due to the workload demands within Agency and in accordance with Agency's Alternative Work Schedules Policy.<sup>11</sup> Additionally, Employee was informed that his new tour of duty would be from 8:30 a.m. to 5:00 p.m., Monday through Friday. In response to this memorandum, Employee emailed Mr. Coronado on August 2, 2016, and requested that his schedule be modified to 7:30 a.m. to 4:00 p.m., Monday through Friday.<sup>12</sup> Mr. Coronado approved this modification.

Agency contends that despite this schedule modification, Employee failed to maintain regular attendance and report to work on time. On August 11, 2016, Employee emailed Mr. Coronado at 7:38 a.m. to inform him that he was sick and would be absent.<sup>13</sup> Mr. Coronado was also informed via email on August 23, 2016, at 10:29 a.m., that Employee would be absent due to an illness. Employee also did not report to work on September 13, 2016, and notified Mr. Coronado via email that he was sick and not coming into work.<sup>14</sup> Again, on September 15, 2016, Employee emailed Mr. Coronado at 7:27 a.m. stating that he was sick and staying home. Agency maintains that Employee had exhausted all of his annual and sick leave at this time. Employee also did not report to work on September 19, 2016, and sent an email at 8:53 a.m. informing Agency that he would be absent. Accordingly, Employee's leave was coded as Absent Without Official Leave ("AWOL") for September 15 and 19, 2016.<sup>15</sup>

On October 14, 2016, Employee emailed Mr. Coronado at 7:36 a.m. stating that he was sick and would be absent. Agency avers that Employee called out of work at least once every pay period from the commencement of his supervision by Mr. Coronado, until October 19, 2016, when Employee was placed on leave restriction.<sup>16</sup> The October 19, 2016 leave restriction detailed Employee's repeated failure to report to work or report to work on time.<sup>17</sup> The leave restriction required that: (1) Employee report to work each day at his scheduled start time; (2) all annual leave requests be requested and approved in advance of the leave; and (3) a medical certificate from Employee's doctor be submitted for any absence due to illness, regardless of the duration of absence. Employee's leave restriction was effective for 90 days from the date of issuance. The leave restriction further instructed Employee to call Mr. Coronado at the beginning of Employee's scheduled tour of duty if he anticipated that he would be late. Employee was advised that leaving a voicemail message or sending an email did not constitute notice and it would not be accepted as official notification.

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<sup>10</sup> Agency's Answer, Exhibit 4 at Attachment 9.

<sup>11</sup> Agency's Alternative Work Schedules Policy, Section 8, Procedures, E.2, states in relevant part:

An employee's participation in an AWS may be rescinded by the Agency Director whenever it is determined that the needs of the agency require it, or for any other work-related reasons. The employee may be given up to two (2) weeks' notice of the rescission of the AWS.

<sup>12</sup> Agency Answer, Exhibit 3 (June 8, 2017).

<sup>13</sup> *Id.*, Exhibit 4 at Attachment 5.

<sup>14</sup> *Id.*, Exhibit 4 at Attachment 6.

<sup>15</sup> *Id.*, Exhibit 4 at Attachment 1.

<sup>16</sup> *Id.*, Exhibit 4 at Attachment 2.

<sup>17</sup> From August 1, 2016, through October 17, 2016, Employee failed to report to work/report to work on time on the following dates: August 11, 2016, August 23, 2016, September 13, 2016, September 15, 2016, September 19, 2016, and October 14, 2016.

Agency contends that Employee failed to abide by the leave restrictions when he emailed Mr. Coronado on December 12, 2016, at 10:52 p.m. informing him that he would be late the following day due to an impending move. On December 14, 2016, Employee emailed Mr. Coronado again informing him that he “was still moving and would be late.”<sup>18</sup> Employee reported to work around 12:30 p.m. with a doctor’s note; however, this medical documentation conflicted with Employee’s email that he would be moving as the reason for his tardiness. Employee was charged with AWOL as a result of his unapproved absences on December 13, 2016, and December 14, 2016.

On December 16, 2016, Agency issued an Advance Written Notice of Proposed Removal to Employee for: “Unauthorized absence of one (1) workday or more, but less than five (5) workdays,” pursuant to District Personnel Regulations (“DPR”) § 1605.4(f)(2).

#### Employee’s position

Employee was hired by Agency in October 2013 as a Management Analyst and worked under the supervision of Mr. Thomas Jared Morris. In September 2015, Employee was promoted and assigned to Agency’s Rehabilitation Services Administration (“RSA”) under the supervision of Marline Jones-Kinney. Employee asserts that soon after this promotion he was subjected to a hostile workplace environment by Mrs. Jones-Kinney, his new supervisor. This alleged hostile work environment resulted in Employee seeking EEO counseling on or about June 21, 2016, alleging race discrimination. Employee’s EEO complaint was later amended on or about July 22, 2016, to include sexual harassment allegations against Mrs. Jones-Kinney.<sup>19</sup> Following this internal complaint, Employee was transferred to the supervision of Jaime Coronado, effective August 1, 2016.

In December of 2016, following Employee’s initial EEO complaint, he asserts that Agency manufactured charges of AWOL against him. As a result, Agency issued an Advance Written Notice of Proposed Removal on December 16, 2016. On January 12, 2017, Adrienne Day, the Hearing Officer assigned to conduct the administrative review of the proposed removal action, submitted her *Written Report and Recommendations to Deciding Official*.<sup>20</sup> Ms. Day recommended that “the Deciding Official remand this matter to the Proposing Official for consideration of the required [Douglas Factors] and resubmission with the Proposing Official’s Rationale Worksheet.”<sup>21</sup> Employee asserts that Agency never resubmitted the matter to the Hearing Officer.

On February 8, 2017, Agency issued its Notice of Final Decision on Proposed Removal, terminating Employee, effective February 10, 2017. Employee contends that his termination was in retaliation for engaging in protected EEO activity.

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<sup>18</sup> *Id.*, Exhibit 4 at Attachment 7.

<sup>19</sup> See Employee’s Brief in Opposition to Agency’s Removal, Exhibit 1 (January 19, 2018).

<sup>20</sup> *Id.*, Exhibit 2.

<sup>21</sup> *Id.*, Exhibit 2 at p. 6.

## Discussion

As previously stated, OEA Rule 628.1 provides that Agency has the burden of proof with regard to material issues of fact. The burden of proof shall be by a preponderance of the evidence.<sup>22</sup> “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.

Employee was terminated for Unauthorized absence of one (1) workday or more, but less than five (5) workdays, pursuant to District Personnel Manual (“DPM”) § 1605.4(f)(2).<sup>23</sup> Pursuant to DPM § 1602.1, 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 § 1605.4(f), unauthorized absence constitutes cause and warrants corrective or adverse action. Here, Employee was subjected to an adverse action when he was terminated from his position.

Employee raises several arguments in his brief, some of which are outside the purview of this Office; specifically, Employee’s race discrimination and sexual harassment complaints.<sup>24</sup> These matters are generally adjudicated by the District of Columbia Office of Human Rights. Thus, these issues will not be addressed in this decision. Employee does assert a procedural error argument committed by Agency. This argument stems from the fact that the Hearing Officer, Adrienne Day, submitted her *Written Report and Recommendations* to Agency and recommended that the Deciding Official remand this matter to the Proposing Official to consider the *Douglas* Factors, and resubmit with the Proposing Official’s Rationale Worksheet.<sup>25</sup> Employee asserts that Agency never resubmitted the matter to the Hearing Officer.

It is true that Agency’s initial Advance Written Notice of Proposed Removal did not include a Rationale Worksheet evidencing appropriate consideration of the required factors. However, it is apparent that the Deciding Official remanded this issue back to the proposing official to appropriately consider the *Douglas* Factors, as evidenced by the “Consideration of factors” in the Amended Advance Written Notice.<sup>26</sup> These factors are included as the last two pages of the Advance Written Notice. I do not find that the Proposing Official was required to resubmit the matter back to the Hearing Officer for consideration. The Hearing Officer in this matter set forth a very detailed and thorough analysis in her Report and Recommendation and brought forth the issue of consideration of the *Douglas* factors. The Proposing Official (P.O.) then considered the factors and submitted the matter to the Deciding Official. I do not find that

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<sup>22</sup> 59 DCR 2129 (March 16, 2012).

<sup>23</sup> Transmittal No. 227, February 25, 2016. The District Personnel Manual has been amended numerous times over the past several years. Thus, the applicable version of the DPM applicable in the instant matter is the version effective in February of 2016.

<sup>24</sup> See *Edith Eastman-Ajaero v. D.C. Public Schools*, OEA Matter No. 2401-0221-10, Opinion and Order on Petition for Review (September 18, 2013) and *Mallie Wiggins v. Department of Corrections*, OEA Matter No. 2401-0010-00, Opinion and Order on Petition for Review (June 20, 2007).

<sup>25</sup> See Employee’s Brief in Opposition to Agency’s Removal, Exhibit 2 at p. 6 (January 19, 2018).

<sup>26</sup> See Agency’s Answer, Tab 5, Attachment “Consideration of Factors” (June 8, 2017).

the P.O.'s failure to resubmit the matter to the Hearing Official was a procedural error. Even if it were determined that it was a procedural error, I find such an error to be harmless.<sup>27</sup>

Employee further asserts that because his anxiety-related illness was caused by a hostile workplace environment and sexual harassment by Mrs. Jones Kinney, he was entitled to Administrative Leave with Pay ("ALWP") for the two weeks in July of 2016 when he was out on DC FMLA. Employee maintains that he should have been granted ALWP and not required to use his annual and sick leave while out on DC FMLA. Employee's argument that he was *entitled* to Administrative Leave with Pay under DC FMLA is misplaced. In October 2016, Employee sent an email to Mr. Reese setting forth his arguments as to why his leave in July 2016 should have been classified as Administrative Leave with Pay.<sup>28</sup> The D.C. Family and Medical Leave Act, D.C. Code § 32-501, *et seq.*, does not provide a guarantee that leave granted under this statute will be paid leave. Rather, DC FMLA, under certain circumstances, grants an employee the right to take unpaid, temporary medical leave from employment, with protection from the threat of, or actual, termination from his job.<sup>29</sup> In an email sent by Employee on October 12, 2016, he acknowledges that paid leave under DC FMLA is in the "discretion" of Agency's management.<sup>30</sup> Employee contends that the denials of his requests to be placed on Administrative Leave with Pay were in retaliation for him engaging in protected EEO activity. As stated above, this issue falls outside the purview of OEA and no opinion is given to this argument.

On October 19, 2016, Employee was placed on Leave Restriction, which detailed Employee's repeated failure to report to work or report to work on time.<sup>31</sup> The leave restriction required that: (1) Employee report to work each day at his scheduled start time; (2) all annual leave requests be requested and approved in advance of the leave; and (3) a medical certificate from Employee's doctor be submitted for any absence due to illness, regardless of the duration of absence. Employee's leave restriction was effective for 90 days from the date of issuance. The leave restriction further instructed Employee to call his supervisor, Mr. Coronado, at the beginning of Employee's scheduled tour of duty if he anticipated that he would be late. Employee was advised that leaving a voicemail message or sending an email did not constitute notice and it would not be accepted as official notification.

It is uncontroverted that Employee did not report to work on September 15, 2016, December 13, 2016, and December 14, 2016. Agency argues that the September 15, 2016, AWOL charge was "directly attributable to Employee's lack of available leave" after returning from DC FMLA on July 18, 2016. Agency provides several of Employee's pay stubs which include the number of leave hours credited to Employee. However, the pay stub for the pay period covering September 15, 2016, is not included in any of Agency's briefs or other documentation throughout the record. As such, Agency's argument that Employee's "lack of

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<sup>27</sup> DCMR § 631.3 provides that "[h]armless error shall mean an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action."

<sup>28</sup> *Id.*, Exhibit 5.

<sup>29</sup> *Alford v. Providence Hospital*, 945 F.Supp2d 98 (D.D.C. 2013).

<sup>30</sup> See Employee's Brief in Opposition to Agency's Removal, Exhibit 5 (January 19, 2018).

<sup>31</sup> See Agency's Answer, Exhibit 4 at Attachment 2. (June 8, 2017).

available leave” on September 15, 2016, as the basis for his AWOL charge is not supported by the record. Thus, I find that Agency lacked cause to charge Employee with AWOL on September 15, 2016.<sup>32</sup>

Employee’s AWOL charges for December 13, 2016, and December 14, 2016, came after he was placed on a 90-day Leave Restriction in October of 2016. The DPM provides that a supervisor may place an employee on leave restriction whenever it is established that an employee is engaging in a pattern or practice of abuse of sick leave, such as: (1) request emergency sick leave with such frequency that it results in the employee being unavailable immediately preceding or following the employee’s consecutive two days outside the basic work week; or (2) requesting emergency sick leave with such frequency that it results in the employee being absent part of the workday or an entire workday on a consistent and regular basis.<sup>33</sup> As provided above, the leave restriction required that: (1) Employee report to work each day at his scheduled start time; (2) all annual leave requests be requested and approved in advance of the leave; and (3) a medical certificate from Employee’s doctor be submitted for any absence due to illness, regardless of the duration of absence. Here, the record supports that Employee used emergency leave at least once a pay period for five consecutive pay periods.<sup>34</sup> This frequency established a pattern of Employee “being absent part of the workday or an entire workday on a consistent and regular basis.”<sup>35</sup> As such, I find that Agency was within its discretion to place employee on Leave Restriction in October 2016.

Despite being place on leave restrictions, Employee continued to have issues with leave. On December 12, 2016, Employee emailed his supervisor, Mr. Coronado, at 10:52 p.m. informing him that he would be late the following day because he was in the process of moving and would need to meet with the movers.<sup>36</sup> Employee did not seek this leave in advance of the request. Although Employee indicated that he may be late on December 13, 2016, Employee was in fact absent for the entire work day.<sup>37</sup> The next day, on December 14, 2016, Employee again sent Mr. Coronado an email indicating that he and his partner were still in the process of

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<sup>32</sup> Employee also asserts and relies on the Hearing Officer’s Report and Recommendation to support his argument that the adverse action for AWOL on September 15, 2016, was not initiated within ninety (90) days of occurrence and Agency improperly relied upon an AWOL charge on September 15, 2016 in taking adverse action. Here, Agency initiated adverse action on December 16, 2016, relating to three separate instances of AWOL, when it issued the Advance Written Notice of Proposed Removal to Employee. Although it is not cited in the Hearing Officer’s Written Report and Recommendation or in Employee’s brief, the alleged ninety (90) day violation appears to be based on the language in DPM § 1602.3 (February 2016), which provides that “[a] corrective or adverse action shall be commenced no more than ninety (90) *business* days after the agency or personnel authority knew or should have known of the performance or conduct supporting the action.”<sup>32</sup> One instance of the conduct giving rise to the AWOL charges occurred on September 15, 2016. The adverse action was initiated on December 16, 2016, well within ninety (90) *business* days as prescribed in DPM § 1602.3, thus Employee’s argument that the September 15, 2016, AWOL charge was not timely is incorrect. However, based on the above discussion, I find that Agency lacked cause to take adverse action against Employee for AWOL on September 15, 2016, directly attributing this charge to Employee’s lack of available leave. Agency does not provide any documentation demonstrating that Employee lacked leave to his credit during the September 15, 2016, pay period.

<sup>33</sup> 12 DPM § 1243.2 (Amended April 6, 2012).

<sup>34</sup> See Agency’s Answer, Tab 4, Exhibit 8 (June 8, 2017).

<sup>35</sup> 12 DPM §§ 1236.3(c), 1243.4 (c) (Amended April 6, 2012).

<sup>36</sup> Agency’s Answer, Tab 4, Exhibit 7 (June 8, 2017).

<sup>37</sup> *Id.*



moving and that he would be arriving late to work. Mr. Coronado responded and reminded Employee that he was still on leave restriction and that his emails and voicemails were not proper notification for unplanned and unexcused absences.<sup>38</sup> Mr. Coronado also let Employee know that his absence and delayed arrivals would be coded as AWOL for December 13, 2016, and December 14, 2016.

Employee argues that his requirement to contact Mr. Coronado, or Ms. Nicole Boykin in Mr. Coronado's absence, was unreasonable. Employee specifically takes issue with the language in his leave restriction which provides that "leaving a voicemail message or sending an electronic mail (email) does not constitute notice, and will not be accepted as official notification." Employee maintains that this requirement is unreasonable because Mr. Coronado or Ms. Boykins could deliberately choose not to answer the phone, thereby rendering Employee unable to give notice described in the 90-Day Leave Restriction. I agree with Employee's assertion that this is an unreasonable requirement regarding notice. There are a number of scenarios that would put Employee in a position where he would be unable to actually speak directly with Mr. Coronado or Ms. Boykins even with his most diligent efforts. Despite finding that the notice requirements that Employee actually speak with Mr. Coronado or Ms. Boykins is unreasonable, I find Employee's emails sent on December 12, 13, and 14, 2016, were sufficient notice of his absence/tardiness. However, the issue here is the reason Employee provides for his absence and tardiness on December 13 and 14, 2016. All of the emails sent between December 12-14, 2016, by Employee and/or his partner, address the need for Employee to miss work because of their impending move. Employee's move was a foreseeable event that allowed Employee plenty of advance time to put in a leave request to the appropriate persons. The Leave Restriction provides that an AWOL charge will be imposed if the reason given for being tardy is inadequate or if Employee's emergency annual leave request is unacceptable.<sup>39</sup> Here, although I find Employee's email was sufficient notice, I do not find the reason provided (moving) for the tardiness and absence was adequate or acceptable to overcome a charge of AWOL given the circumstances.

On December 14, 2016, Employee was tardy for work. Agency asserts in its brief that Employee reported to work on December 14, 2016, at 12:30 p.m. with a doctor's note; however the medical documentation conflicted with Employee's email, which stated that he would be tardy because he was in the process of moving. A copy of the doctor's note is not a part of the record submitted before OEA, nor is any documentation reflecting the time Employee actually arrived to work on December 14, 2016. However, Employee acknowledges that he was tardy on December 14, 2016, and emails are provided in the record evincing that Employee was tardy on this date as a result of moving.<sup>40</sup> As noted the Hearing Officer's Report and Recommendation, as well as in Agency's brief, Employee's move was not an unforeseen event. Employee was well aware of his scheduled move, but failed to properly plan and request leave in advance as required by his leave restrictions. Thus, I find that Agency had cause to take adverse action against Employee for being AWOL on December 13, 2016, for the entire workday and on December 14, 2016, for part of the workday.

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<sup>38</sup> *Id.*

<sup>39</sup> See Agency's Answer, Tab 4, Exhibit 2 (June 8, 2017).

<sup>40</sup> *Id.*

### **Appropriateness of 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 Illustrative Actions]; 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 of one (1) workday or more, but less than five (5) workdays." The applicable version of Chapter 16 of the DPM in the instant matter went into effect on February 5, 2016. The Table of Illustrative Actions of 6-B DCMR 1607.2, the applicable section in the instant matter provides, in pertinent part:

NATURE OF CIRCUMSTANCES	FIRST OCCURENCE	SUBSEQUENT OCCURENCES	
<b>f. Unauthorized absence of one (1) workday or more, but less than five (5) work days:</b>	Suspension to Removal	14-Day Suspension to Removal	

Here, the penalty for any subsequent occurrence of an unauthorized absence of one workday or more ranges from a 14-day suspension to removal. Given Employee's prior disciplinary history, which contains a previous AWOL charge which resulted in a nine (9) day suspension, I find that Agency was within the range of penalty for a subsequent occurrence of AWOL in the instant matter. The Agency's decision to terminate Employee from his position was within the acceptable range of discipline under the Table of Illustrative Actions. Additionally, I find that Agency considered the relevant *Douglas* factors in its decision to remove Employee.<sup>41</sup> Accordingly, I find that the penalty imposed against Employee was

<sup>41</sup> See Agency Answer, Tabs 5 and 8 (June 8, 2017). See also *Douglas v. Veteran Administration*, 5 M.S.P.B. 313 (1981); The *Douglas* factors are:

- (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 the 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

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 his position as a Management Analyst is **UPHELD**.

FOR THE OFFICE:

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Arien P. Cannon, Esq.  
Administrative Judge

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