THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0003-18
MICHAEL MIMS,	
Employee	
	Date of Issuance: March 11, 2019
v.	
DISTRICT OF COLUMBIA DEPARTMENT OF TRANSPORTATION,	Arien P. Cannon, Esq.
Agency	Administrative Judge

Gina Walton, Employee Representative
Michael F. O'Connell, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Michael Mims ("Employee") filed a Petition for Appeal on October 5, 2017, challenging the District of Columbia Department of Transportation's ("Agency" or "DDOT") decision to remove him from his position as an Asphalt Worker, effective September 5, 2017. I was assigned this matter on December 11, 2017.

A Prehearing Conference Order was convened in this matter on March 13, 2018. A Post Prehearing Conference Order was subsequently issued which required the parties to submit written briefs addressing their legal arguments. Agency submitted its brief on April 13, 2018, followed by Employee's submission on May 14, 2018. Agency submitted a sur-reply brief on May 29, 2018. Based on the submissions by the parties, the undersigned scheduled this matter for an evidentiary hearing. However, because Employee's representative informed the undersigned that Employee's physician would not be testifying, I found that the hearing would not be fruitful. As such, an order was issued on January 9, 2019, which ordered Employee to further address his incapacitation argument during the relevant time frame in this matter.

Employee submitted his brief on January 25, 2019. Agency submitted its reply brief to Employee's submission on February 1, 2019. The record is now closed.

JURISDICTION

Jurisdiction of this Office is established in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

1. Whether Agency had cause to take adverse action against Employee "for any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations; specifically, absence without official leave, unauthorized absence, and neglect of duty[1];" and

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

BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.[2] "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.[3]

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Agency's Position

Agency asserts that Employee failed to report to work without notifying his supervisor on the following workdays in 2017: February 24, 2017, and February 28, through March 14, 2017 for a total of eleven (11) consecutive business days. On Friday, February 24, 2017, Employee failed to report to work and did not notify his supervisor. On February 27, 2017, Employee sent a text message to his supervisor stating, "This Mims—Not going to be in today." Employee was granted unscheduled leave for February 27, 2017. The next eleven (11) workdays, from February 28, 2017, through March 14, 2017, Employee was Absent Without Leave (AWOL) and did not request or notify his supervisor, or any other supervisor in his supervisory chain of command. During this time frame, Employee did not contact or request any time of unscheduled leave or inform management of the expected duration of his continued absence.

Employee returned to work on March 15, 2017, with a "Verification of Treatment" (VOT) medical certificate from Kaiser Medical Center, indicating that Employee had been

[1] *See* DPM §§§ 1603.3(f)(2), 1603.3(f)(1), and 1603.3(f)(3) (August 27, 2012).
[2] 59 DCR 2129 (March 16, 2012).
[3] OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

evaluated on March 14, 2017, and could return to work on March 15, 2017.[4] Agency determined that the VOT form from Kaiser only covered one (1) of the eleven (11) workdays (March 24, 2017) that Employee was AWOL.

Agency also notes that it had previously disciplined Employee for being absent without leave for twelve (12) days, by suspending him for ten (10) days. When Agency issued this previous disciplinary action, it provided Employee information regarding the Employee Assistance Program (EAP) as well as documentation pertaining to Family and Medical Leave.

Agency contends that it lawfully removed Employee due to his protracted and continuous absence, and that Employee offered no evidence that he was unable to contact Agency during this period of absence in the instant matter.

Employee's Position

Employee maintains that his absence was a result of being diagnosed with Gastro-Esophageal Reflux Disease (GERD) and taking prescribed medication when experiencing a flare up. Employee contends that his supervisors were aware of his condition and that he was never counseled regarding his leave in accordance with the collective bargaining agreement.

Additionally, Employee asserts that medical documentation was provided to demonstrate that he was incapacitated and could not come to work on the days he was cited for AWOL, unauthorized absence, and neglect of duty. Employee maintains that because Agency failed to notify Employee's union of his leave issues, and failed to provide FMLA/DCFMLA counseling and proper notification after he provided evidence of a legitimate illness, that his termination was improper.

Adverse Action for Cause

DPM § 1268.1 provides in part that "[a]n absence from duty that was not authorized or approved, or for which a leave request had been denied, shall be charged on the leave record as absence without leave '(AWOL).'" Section 1268.4 further provides that "[i]f it is later determined that the absence was excusable, or that the employee was ill, the charge to AWOL may be changed to a charge against annual leave, compensatory time, sick leave, or leave without pay, as appropriate."

Employee seemingly relies upon a completed D.C. FMLA application signed and dated for September 2016 to show that he was unable to perform his duties for the relevant time frame in the instant case.[5] The D.C. FMLA form provides that Employee should be placed on light duty from June 3, 2016, through June 13, 2016, and return to regular duty without restrictions on June 14, 2016.[6]

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[4] *See* Agency's Brief in Response to Order Dated March 14, 2018, Exhibit 7 (April 13, 2018).
[5] Employee's Response to Agency's Brief, Exhibit 4 (May 14, 2018).
[6] *Id*.

In *Murchinson v. D.C. Department of Public Works*[7], 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. Furthermore, this 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."[8] A charge of AWOL can be defeated by the submission of medical evidence for that cause of action.

In addressing the AWOL charge, I must determine (1) if Employee was incapacitated and unable to work from February 28, 2017, through March 14, 2017, due to his illness; and (2) If Employee properly informed Agency of such incapacity during the period in question.[9] Here, Employee relies on a D.C. FMLA form, signed and dated September 26, 2016, to illustrate that Employee's doctor certified that he was unable to perform any work of any kind if medical leave is required for the employee's absence from work.[10] This form also indicates that Employee is unable to perform any of his job functions while incapacitated.

The issue with Employee's argument is that there is no medical evidence that he was *incapacitated* during the relevant time period here—February 28, 2017, through March 14, 2017. The only medical evidence submitted by Employee are two VOT forms which provide that Employee received a medical evaluation on March 14, 2017, and was cleared to return to work on March 15, 2017.[11] This form does not address Employee's absence from February 28, 2017, through March 13, 2017. However, the second VOT form does provide that Employee received medical treatment again on May 3, 2017, and that he should also be excused from work retroactively between February 28, 2017, through March 14, 2017.[12] Although the second VOT form states that Employee should be retroactively excused from work between February 28, 2017, through March 14, 2017, it does not address the severity of the illness that Employee purportedly experienced, nor does it provide a medical explanation of GERD and the symptoms associated with Employee's illness during the relevant time frame. Thus, it cannot be determined whether Employee was truly incapacitated during the relevant time frame which led to his AWOL charge.

It is noted that the first VOT form issued by Employee's physician on March 14, 2017, does not suggest that Employee should be excused from work between February 28, 2017, through March 14, 2017. It was not until after the adverse action was initiated on May 1, 2017, that Employee then sought medical treatment on May 3, 2017, seeking a doctor's note excusing him from work between February 28, 2017, through March 14, 2017.[13]

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[7] *See, Murchinson v. D.C. Department of Public Works*, 813 A.2d 203 (D.C. 2002).
[8] *Murchinson v. D.C. Department of Public Works*, OEA Matter No. 1601-0257-95R03 (October 4, 2005; citing *Tolbert v. Department of Public Works*, OEA Matter No. 1601-0317-94 (July 13, 1995)); *Hines v. Department of Transportation*, OEA No. 1601-0116-05, Opinion and Order on Petition for Review (February 25, 2009).
[9] *See, Victor Hines v. Department of Transportation*, OEA Matter No. 1601-0116-05, Opinion and Order on Petition for Review, (February 25, 2009).
[10] Employee's Response to Agency's Brief, Exhibit 4 (May 14, 2018).
[11] Employee's Response to Agency's Brief, Exhibit 5 (May 14, 2018).
[12] *Id.*, Exhibit 6.
[13] *See,* Agency's Brief in Response to Order Dated March 14, 2018, Exhibit 2 (April 13, 2018); Employee's Response to Agency's Brief, Exhibit 6 (May 14, 2018).

To further ascertain whether Employee was truly incapacitated, this matter was scheduled for an evidentiary hearing in an effort to elicit medical testimony regarding Employee's condition. The parties were informed that Employee's physician was a necessary witness to address his claim of incapacitation. In an email dated January 2, 2019, Employee's representative stated that Employee's physician would not be testifying. Based on this representation, the undersigned determined that it would not be fruitful to proceed with an evidentiary hearing considering that a necessary and crucial witness would not be testifying. An Order was issued on January 9, 2019, which provided Employee an opportunity to provide an affidavit from his physician in lieu of live testimony, addressing Employee's incapacitation claim. On January 25, 2019, Employee submitted a Brief in response to the January 9, 2019 Order. Employee's response restates his previous arguments; however, it did not contain an affidavit from his treating physician addressing his incapacitation claim from February 28, 2017, through March 14, 2017.

As such, I cannot find that Employee was incapacitated between February 28, 2017, through March 14, 2017. Additionally, other than a text message sent by Employee on February 27, 2017, informing his supervisor that he was not coming to work that day, Employee failed to request leave or otherwise contact Agency during the time in which he did not report for duty. Thus, I find that Agency had cause to take adverse action against Employee for AWOL, unauthorized absence, and neglect of duty for failure to contact and inform management regarding his absence.

Violation of Collective Bargaining Agreement ("CBA")

Employee asserts that Agency violated the CBA when it failed to inform Employee's union of his excessive unscheduled leave and deprived the union of an opportunity to counsel Employee. In *Brown v. Watts*[14], the D.C. Court of Appeals held that OEA is not jurisdictionally barred from considering that an adverse action violated express terms of an applicable CBA.

I find Employee's claim that Agency violated the CBA by not informing his union of his excessive unscheduled leave disingenuous. As stated by Agency, and acknowledged by Employee, this is not Employee's first disciplinary action related to absenteeism. On September 15, 2014, Employee was issued a ten (10) day suspension for AWOL.[15] This previous suspension makes clear that the union aware of Employee's attendance issues since it responded on his behalf and that Employee was aware of the possibility of FMLA leave and the Employee Assistance Program ("EAP"). The instant AWOL charge against Employee illustrates a pattern of absence without leave. Accordingly, I find that Agency did not violate the CBA with Employee's union.

Appropriateness of the penalty

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). According to the Court in *Stokes*,

[14] 993 A.2d 529 (D.C. 2010).
[15] *See*, Agency's Brief in Response to Order Dated March 14, 2018, Exhibit 1 (April 13, 2018).

OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Appropriate Penalties; whether the penalty is based on a consideration of the relevant factors, and whether there is a clear error of judgment by agency. Here, as discussed above, I find that Agency satisfied its burden of proof that it had cause to charge Employee for Unauthorized Absence, Absence without Official Leave, and Neglect of Duty.

Unfortunately, this is not Employee's first occasion having issues with his attendance. On September 15, 2014, Employee was issued a ten (10) day suspension for AWOL. Under 6-B DCMR § 1619.6 (Table of Appropriate Penalties)[16] an appropriate penalty for a first-time offense for an Unauthorized Absence is removal; an appropriate penalty for Absence Without Official Leave ranges from a reprimand to removal; and a first-time offense for Neglect of Duty also ranges from a reprimand to removal. As set forth in the Table of Penalties, a first-time offense for either one of the three charges levied in the instant case permits the maximum penalty of removal.

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

ORDER

Accordingly, it is hereby **ORDERED** that Employee's removal from his position as an Asphalt Worker is **UPHELD**.

FOR THE OFFICE:

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Arien P. Cannon, Esq.
Administrative Judge

[16] (August 27, 2012).