THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
VERONICA BUTLER,	)	
Employee	)	OEA Matter No. 1601-0132-14R17
	)	
v.	)	Date of Issuance: July 3, 2018
	)	
DISTRICT OF COLUMBIA	)	
OFFICE OF AGING,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

Joseph Mallon, Esq., Employee Representative
Janea Hawkins, Esq., Agency Representative

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 25, 2014, Veronica Butler ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Office of Aging's ("DCOA" or "Agency") decision to terminate her from her position as a Special Assistant to the Executive Director, effective September 3, 2014. Employee was charged with violating the following: (1) any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operation, specifically: Absent without official leave;[1] and (2) any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operation, specifically: Unauthorized absence.[2] On November 13, 2014, Agency submitted its Answer to Employee's Petition for Appeal.

A Status Conference was held in this matter on July 15, 2015, wherein, both parties were present. Thereafter, the parties submitted their respective briefs as requested. On October 27, 2015, I issued an Initial Decision ("ID") reversing Agency's decision to terminate Employee. Agency appealed the ID to the OEA Board. On April 17, 2017, the OEA Board remanded this matter to the undersigned. The Board explained that:

[1] District Personnel Manual ("DPM") §§ 1603.3(f)(2), 1619.6(b).
[2] DPM §§ 1603.3(f)(2),1619.6 (a). It should be noted that this cause of action – Unauthorized Absence is listed under DPM 1603.3(f)(1) and not DPM 1603.3(f)(2) as stated in the Notice of Final Decision on Proposed Removal. The cause of action is correctly found under DPM § 1619(6)(a) of the Table of Appropriate Penalties.

> "This Board does not believe that the AJ was able to sufficiently and reliably determine that Employee was medically incapacitated based on the record alone. Similar to the holding in *Dupree*, the documents of record in this case seem to obfuscate, rather than clarify, the material issues of fact. There are inconsistencies in the documents submitted by Employee which the AJ relied on in her decision. For example, the AJ unilaterally concluded that one of the dates referenced in Dr. Prayaga's July 23, 2014 note constituted a typographical error. Yet, the parties were not given an opportunity to resolve this inconsistency by way of testimonial evidence. In addition, as Agency noted in its pleadings, Employee's doctor released her to resume working on July 21, 2014. However, approximately nine days later, Dr. Prayaga rescinded Employee's release note without explanation, stating that she could not resume her duties. Whether Employee was truly incapacitated during the time period in question is relevant to the disposition of this case. The documents of record in this case contain inconsistencies which raise disputed issues of material fact. Thus, the parties should be afforded an opportunity to contest and/or clarify the medical documentation submitted by Employee and her doctor. Accordingly, this Board must remand the matter to the AJ for the aforementioned purpose."[3]

The Board also explained in a footnote that:

> "Agency argues that the AJ's finding that it did not properly serve Employee with the Advance Written Notice of Proposed Removal is erroneous and not in accordance with the applicable law. Since this matter is being remanded for the purpose of conducting an evidentiary hearing, the parties will also be given an opportunity to address their arguments pertinent to the notice requirement at that time."[4]

Subsequently, several conferences were held in this matter. Additionally, Agency requested to depose Employee's doctor and this request was granted. Employee's doctor was deposed by Agency on September 18, 2017. Thereafter, an Evidentiary Hearing was held on March 1, 2018. Both parties were present for the Evidentiary Hearing. The record is now closed.

JURISDICTION

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

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[3] *Veronica Butler v. D.C. Office on Aging*, OEA Matter No. 1601-0132-14, Opinion and Order on Petition for Review (April 17, 2017).
[4] *Id.*

ISSUES

1) Whether Employee was medically incapacitated from July 28, 2014 through August 8, 2014; and
2) Whether Agency properly served Employee with the Advance Written Notice of Proposed Removal; and
3) Whether the penalty of removal was appropriate under the circumstance.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

As part of the appeal process within this Office, I held an Evidentiary Hearing on the issue of whether Agency's action of terminating Employee was in accordance with applicable law, rules, or regulations. During the Evidentiary Hearing, I had the opportunity to observe the poise, demeanor and credibility of the witnesses, as well as Employee. The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of Employee's appeal process with this Office.

SUMMARY OF RELEVANT TESTIMONY

Agency's Case in Chief

1. **Camile Williams (Transcript pages 29-98)**

Camile Williams ("Williams") was employed with the D.C. Office on Aging ("Agency") from 2008-2015. She served as John Thompson's ("Thompson") chief of staff/deputy director for Agency. Williams testified that she worked directly and indirectly with Employee. Williams explained that Employee was the MFP Coordinator, and she was promoted to Thompson's special assistant. Williams stated that because she was the chief of staff, she collaborated and coordinated certain activities with Employee. (Tr. pgs. 29-33).

Williams recalled a period in the summer of 2014 when Employee did not work because she was out on sick leave. She explained that typically an employee is allowed two to three days of consecutive leave before the employee had to provide medical documentation to excuse their absence. Williams stated that Employee was out longer than the grace period and Agency requested that Employee provide documentation to support her absence. Williams suggested that Employee apply for Family Medical Leave Act ("FMLA") so that her position would be protected. Williams stated that Employee did not want her assistance. She explained that Employee told her that she was not the appropriate Human Resources ("HR") advisor to handle her FMLA and that she only wanted to deal directly with HR. Williams informed Employee that Glendora Myers ("Myers") was out on emergency leave, so in her absence Williams was next in line to handle the FMLA. Williams sensed that Employee was uncomfortable providing her with her information, so she offered Troy Higginbotham ("Higginbotham"), who was the point of contact at D.C. Human Resources ("DCHR") to communicate directly with Employee. (Tr. pgs. 35-41).

Williams stated that Agency did not have a reason to believe that Employee intended to return to work because all of the documentation that was provided stated that Employee was in the care of her physician and that she would be out indefinitely. Agency did not receive any documentation stating when Employee was going to return to work, thus Agency offered her FMLA. Williams further stated that FMLA would have given Employee eight to sixteen weeks of additional time off of work and ensure her job was protected. (Tr. pgs. 42-43).

Williams stated that after several requests, certified mailers, and emails, Employee failed to provide the requested information regarding her medical condition. In one of William's emails, she informed Employee that Agency considered her Absent Without Official Leave ("AWOL") because of the lack of medical documentation and informed Employee that further disciplinary action would be taken. Williams testified that Employee was also told that because she refused to sign or follow-up with FMLA, Agency could not offer it to her. Since Employee did not provide the necessary documentation, Agency terminated her for AWOL. (Tr. pgs. 48-58).

Williams testified that she received an email that stated Employee was not returning to work Monday, July 28, 2014, per her doctor's verification of treatment. (Tr. pg. 64).

Williams stated that she received HR training when she assumed Myer's role as a HR specialist. Her duties entailed following-up on payroll, time and attendance, entering information into PeopleSoft, ensuring that performance evaluations were timely completed, and grievances. She further explained that as an HR specialist, she was not required to contact a physician unless an employee provided the information. Additionally, it was unnecessary to reach out to a physician unless additional information was required. (Tr. pgs. 72-76).

Williams attested that the original medical documentation that she received from Employee did not indicate the physician's contact information. Williams was not aware of when Agency received the other documentation that provided Employee's physician's address. (Tr. pgs. 80-87). Williams reiterated that the original medical documentation that she received did not have the physician's information, thus she concluded that two medical documents were circulating since the subsequent documents had the doctor's contact information. Williams stated that the last notice Agency received from Employee's doctor stated that she would remain in his care until further notice and Employee was not to return to work on July 28, 2014. (Tr. pgs. 90-93).

Williams testified that she did not review any of the medical documentation. She was aware of Employee's absence and provided in a letter that Employee was AWOL from July 28, 2014 to August 8, 2014. (Tr. pg. 93).

2. **Glendora Myers (Transcript pages 99-134)**

Glendora Myers ("Myers") worked as an Administrative Officer with Agency. Her role as an HR transactional processor was to process people that were hired within Agency, assist employees with internal issues, and advise on whom to contact on employee relations issues at the Office of Human Rights. (Tr. pg. 102).

Myers stated that per the District Personnel Manual ("DPM"), if an employee was out on sick leave for longer than three days, Agency issued a verification of treatment. The verification of treatment identified the time that the person was out and made sure that the person knew how to access the PeopleSoft system from their home, so that they could enter their time for work. (Tr. pgs. 102-103).

Myers explained that she worked with Employee at Agency and they interacted with each other at the staff meetings. She did not recall the exact date that Employee was ill, but remembered that Employee came into her office looking sick. Employee told Myers that she had to go home because she did not feel well. Myers was concerned about Employee's health and wanted to make sure that she did not need assistance going home. The next day, Employee called Myers and told her that she was not coming into work. Myers sent an email to the executive director and chief of staff notifying them that she would be out. Myers received the verification of treatment from Employee's doctor which stated that she was under her physician's care until further notice. (Tr. pgs. 104-115). Based on the verification of treatment, Myers acknowledged that Employee was properly out on leave. Myers sent a follow-up email that stated that Agency would wait a week to send out a letter regarding when Employee anticipated on returning to work. (Tr. pg. 120).

Myers stated that she contacted personnel within Agency and stated that Employee would not return to work on July 28, 2014. She explained that if a date was not indicated when an employee would return, she granted them a grace period to confer with their doctor and determine when the employee would be able to return to work. She stated that if Agency did not have medical documentation and verification of treatment for a period, they could charge an employee with AWOL for that time period. (Tr. pgs. 124-131).

Myers stated that when an AWOL notification was sent to an employee, they were allotted a certain time frame to have the verification of treatment submitted to Agency. She reiterated that based on the July 23, 2014 medical verification form, Employee was on proper leave from July 28, 2014 until August 8, 2014.

Myers stated that it was not her role to determine if Employee's absence was an excused absence. She attested that she would never take any steps without seeking approval from General Counsel in Employee Relations to do so. Myers stated that she did not make the determination to place Employee on AWOL during the period in question. (Tr. pg. 133).

3. **Antonette Dozier (Transcript pages 136-155)**

Antonette Dozier ("Dozier") worked as a Clerical Assistant with Agency. One of her responsibilities was to handle mailings. If a staff member brought mail that needed to be certified, she would write up the certification and have it mailed out. Although she sent or received packages, she did not know their contents. Dozier stated that she followed instructions for receiving and sending the packages and explained that the packages dropped off to her were already addressed. (Tr. pgs. 137-140).

Dozier explained that it was typical for her to receive confirmations after she sent a document out on behalf of Agency. For FedEx SameDay deliveries, Agency wanted the package delivered with a signature of receipt. She stated that the email she received from FedEx on August 19, 2014, stated that the subject indicated "Driver at Delivery". Dozier explained that if the recipient was not at the location to sign for the package, FedEx was required to contact Agency and inform Agency that no one was there to sign for the package. Based on the documentation that was provided from FedEx, the last status notified Agency that the package was delivered. (Tr. pgs. 140-145).

Dozier did not recall receiving any documentation indicating that Employee signed for the package. Additionally, she did not recall whether Agency obtained a signed, or written statement from FedEx or any other courier indicating that Employee refused acknowledge of receipt. Dozier provided that FedEx would call and inform Agency that there was no response and Agency would either tell them to leave the package or have FedEx return the package to Agency. She stated that when FedEx contacted her about Employee's package they never indicated that Employee refused to sign for the package. (Tr. pgs. 146-148).

Dozier explained that certified mail went out with the regular mail. A green card was attached with the mailing and the mailman would have the intended recipient sign for the package. (Tr. pg. 149).

Dozier stated that the green card was never signed or returned to Agency for Employee's package. Dozier stated that if the package was returned, she sent the packages back to the executive staff and if they wanted to resend the package they would bring it back to her. She acknowledged that if the package was returned to Agency that meant that the intended recipient never received it. (Tr. pgs. 150-151).

On redirect examination, Dozier stated that if FedEx delivered the package to her and she received it, FedEx would have notified her. If the recipient did not sign for it, FedEx would state that there was no one there to sign for it. (Tr. pgs. 151-153). Dozier testified that she never received any signature from Employee indicating that she received any FedEx package. (Tr. pg. 153). Dozier stated that she never received a signature because FedEx informed Agency that the package was undeliverable because Employee did not sign for them. (Tr. pg. 154).

Employee's Case in Chief

1. **Veronica Butler ("Employee") (Transcript pages 155-233)**

Employee worked as a Case Manager with Agency since January 31, 2012. Subsequently, she was promoted to special assistant and remained in that role until her termination. Employee testified that the period of June 23, 2014, was a dark and difficult period for her. She explained that she was under a lot of stress from Thompson, Williams, and the General Counsel. Employee stated that she requested to meet with an Equal Employment Opportunity Commission ("EEOC") advisor. She was informed by Myers that she would have to speak with someone in HR. Employee attested that she worked in a hostile environment and

stated that her office was moved to the basement. She asserted that employees knew that if one was removed from their regular work space, they were in trouble. (Tr. pgs. 157-165).

Later that day, Employee felt ill and told Myers that she was leaving early. Myers asked Employee if she wanted her to call an ambulance. Myers' facial expression scared Employee because it was apparent to Employee that Myers was concerned about Employee's physical condition. Employee told Myers that she lived three minutes from work and she already contacted her family to meet her at home. Employee made it home and made an appointment to see her physician. Her doctor told her that she probably suffered from a panic attack and recommended that she see a psychiatrist. (Tr. pgs. 165-167).

Employee testified that Myers received medical documentation from her physician. In the progress note, the doctor commented that Employee experienced nervousness, racing thoughts, mood swings, impulsive behavior, and restlessness. Additionally, Employee told her doctor that she was being harassed at Agency. Ultimately, Employee's doctor diagnosed her with depression and stated that she suffered from syncope.[5] Employee stated that the doctor's office stated that they would submit the documents to Agency. Based on Employee's communication with Myers, Agency did receive the July 1, 2014, medical note. In the note, the doctor told Employee not to return to work because he felt the toxic environment would exacerbate her problems. (Tr. pgs. 169-174).

Employee stated that after treatment with her doctor she felt better. However, she was still depressed and was harassed by employees at Agency. As a result, she continued to suffer from panic attacks. Employee took prescription medication and believed that the medication allowed her to confront her colleagues. (Tr. pg. 178).

The doctor stated in a medical note dated July 14, 2014, that Employee could return to work because her time away from Agency reduced her job-related stress. By July 21, 2014, Employee considered returning to work, but did not. She explained that she requested verification on what she would be required to do upon her return to work. Employee further explained that part of the stress she endured was related to the fact that it was not clear what her new work project would be. Employee stated that she received responses from the employees at Agency that nothing had changed and that the hostility was still there. Thus, Employee showed the written responses to her doctor and in turn her doctor told her that he would not clear her to return to work. (Tr. pg. 179).

Employee testified that she notified Agency via email that she was not going to return to work on July 21, 2014. She also provided in the email that she would have her doctor submit an updated progress note after she received treatment from him on that day. In the doctor's note, he indicated that a non-hostile work environment and the absence of unhealthy stress was imperative upon Employee's return to work. (Tr. pgs. 183-188).

On July 29, 2014, Employee met with Ms. Wright at Agency and discussed with her that she was on medical leave. She believed that Ms. Wright heard her concerns based on a notice

[5] Temporary loss of consciousness caused by a fall in blood pressure.

sent to her regarding the need for reasonable accommodation to Employee during her time of temporary disability. (Tr. pgs. 190-191).

Employee stated that Williams emailed her and demanded that she provide documentation within twenty-four (24) hours, of her absence from July 28, 2014 until August 8, 2014. Employee explained that her appointment with the doctor was at 5:00 p.m. and the doctor's staff already left for the day, so there was no one to send an excused absence notice until the following business day. (Tr. pgs. 194-196).

Employee testified that the email sent by Agency irritated her because she felt that she was intentionally harassed. Further, she was informed that some employees at Agency laughed at her disorder and wanted her to be terminated. (Tr. pg. 198). Employee stated that she sent an email to Myers on August 20, 2014, to make sure that her paychecks would continue because Williams intervened and had the checks stopped. Employee wanted to know what needed to be done to continue receiving her checks. (Tr. pgs. 202-204).

Employee testified that she did not receive the Advanced Written Notice of Proposed Removal before she was terminated. She also stated that she did not sign any acknowledgment of receipt from a package that was either mailed or delivered on or about August 18, 2014, from Agency; nor did she refuse to accept a letter from Agency by any courier, or certified mail. (Tr. pgs. 206-207).

During the period of mid to late August of 2014, Employee did not stay at her primary residence because it was old and did not have air conditioning, so she stayed with relatives. (Tr. pg. 207).

Employee stated that she lived at her primary residence since 1997 and she never indicated a change of address in PeopleSoft. Employee testified that she was unemployed and only did unpaid volunteer work. After her employment with Agency ended, she made attempts to find other work. Employee stated that she had no other income other than social security. Employee explained that she received unemployment benefits and was required to apply for, and prove that she applied for positions in order to qualify. Employee believed that she was contacted for interviews because she graduated from graduate school in 2000, but stated that she was discriminated against because of her age. Employee felt that companies sought younger people to hire. (Tr. pgs. 208-215).

Employee stated that she showed her doctor the email exchanges between her and Agency because she felt that the harassment and hostile work environment would not stop. She explained that she felt depressed and was concerned about not having a job. Employee attested that she did want to return to work, but the work she was expected to complete was unreasonable. (Tr. pgs. 215-219).

Employee contacted Brittney Wright ("Wright") at DCHR to report harassment, discrimination, and a toxic work environment. Wright suggested that Employee apply for leave bank in which she already donated leave to. Employee stated that she wanted to avoid delay of

her paychecks and ensure that she would be able to get into her work computer from home. (Tr. pgs. 221-223).

Employee testified that her doctor forwarded medical documentation on August 7, 2014, to Agency, but she did not personally forward any information to HR. On August 8, 2014, Williams contacted Employee and stated that Agency had not received documentation from her doctor. In turn, Employee stated that she would have her doctor forward the documents. (Tr. pgs. 226-228).

Analysis

1) ***Whether Employee was medically incapacitated from July 28, 2014 through August 8, 2014***

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, DPM § 1603.2 provides that disciplinary action against an employee may only be taken for cause. Under DPM §§1603.3(f)(1),(2), the definition of "cause" includes [a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include, unauthorized absences and absent without official leave. Here, Employee's removal from her position at Agency was based upon a determination by Agency that Employee was not fit to serve in her current position because she was absent from work for ten (10) or more consecutive days without official leave.

Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: Unauthorized Absences and Absent without official leave (AWOL)

The OEA Board stated in its O&O that it "does not believe that the AJ was able to sufficiently and reliably determine that Employee was medically incapacitated based on the record alone." It explained that the documents of record in this case seem to obfuscate, rather than clarify, the material issues of fact. The Board also noted that "there are inconsistencies in the documents submitted by Employee which the AJ relied on in her decision. For example, the AJ unilaterally concluded that one of the dates referenced in Dr. Prayaga's July 23, 2014, note constituted a typographical error. Yet, the parties were not given an opportunity to resolve this inconsistency by way of testimonial evidence." As a result, the undersigned convened an Evidentiary Hearing to address the issues highlighted by the OEA Board. Agency was also provided with the opportunity to depose Dr. Prayaga in an attempt to clarify the inconsistencies. During the Evidentiary Hearing, I had the opportunity to observe the witnesses' demeanor while testifying. I found Myers, Dozier and Employee's testimonies to be more credible and persuasive that Williams' testimony.

Based on the testimonies and documentary evidence, I conclude that Employee was medically incapacitated from July 28, 2014 to August 8, 2014. "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."[6] Additionally, if the employee's absence is excusable, it "cannot serve as a basis for adverse action."[7] The relevant time period in this matter is July 28, 2014 to August 8, 2014. Employee was absent from work during this period. Employee provided several doctor's notes in justification for her illness. These notes stated that Employee was suffering from work related stress and undergoing treatment.

The July 23, 2014, note from Dr. Prayaga, stated that Employee "was advised *not to return to work on Monday, July 28, 2014, as had been stated*. Please note that a non-hostile working environment and the absence of unhealthy stress is imperative upon her return. She remains in my care until further notice (*emphasis added*)."[8] Doctor Prayaga stated during his deposition that the mention of July 28, 2014, in this note was a typographic error. Specifically, during the September 18, 2017, deposition of Dr. Prayaga, Agency's attorney asked:[9]

> Agency: Is this your letter?
>
> Dr. Prayaga: Yes
>
> Agency: And this is dated July 23, 2014?
>
> Dr. Prayaga: Yes. Yes, that is what the date shows on it, yes.
>
> Agency: Okay, and just for clarity of the record and this was something that came forth in a supplemental affidavit[,] is Monday, July 28, 2014 the accurate date intended for this document?
>
> Mr. Mallon (Employee's attorney): Here's the supplemental affidavit that I have a copy of.
>
> Mr. Howell (Dr. Prayaga's attorney): Yes, it's just referring back to the previous one which says 21. This one says 28.
>
> Mr. Mallon (Employee's attorney): Was that a mistake?
>
> Dr. Prayaga: It was a mistake, yes.
>
> Agency: So the date that it should read for the record is July 21, 2014?

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[6] *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).
[7] 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).
[8] Agency's Answer, *supra*, at Exhibit 9.
[9] Employee's Exhibit No. 30 at pgs. 54 - 55.

Dr. Prayaga: That's right.

The July 23, 2014, note was a follow-up to the July 14, 2014, note releasing Employee to return to work on July 21, 2014. Based on Dr. Prayaga's testimony during the deposition, and given the totality of the circumstance, I find that the mention of July 28, 2014, was indeed a typological error.

Employee testified that she was in a "dark place." All four (4) notes from Dr. Prayaga established a legitimate excuse for Employee to be absent from work. Dr. Prayaga diagnosed Employee with depression caused by her work environment. He informed Agency that "…prescription medication *and the time spent away from the office has reduced the job related stress. I remain guarded …* (*emphasis added*)." Moreover, Dr. Prayaga also stated in his July 23, 2014, note that Employee "was advised not to return to work on Monday, July 28, 2014, as had been stated. *Please note that a non-hostile working environment and the absence of unhealthy stress is imperative upon her return. She remains in my care until further notice* (*emphasis added*)."[10] Dr. Prayaga stated in his affidavit to this Office that he was treating Employee for anxiety and panic attacks which she suffered as a result of job-related stress and a hostile work environment during the relevant time period.

Based on the documents on record, and witness testimonies, there is sufficient evidence that Employee's mental condition was so debilitating that it prevented her from performing her duties during the relevant time frame. I find that, unlike in *Murchison*, here, the record shows that Employee and her psychiatrist, Dr. Prayage, submitted sufficient documentations to address the severity of her mental condition and the extent to which it was exacerbated by her work condition. The record shows that: (1) Employee left work sick on June 23, 2014 and thereafter, was treated for anxiety and panic attacks; (2) her mental illness was a result of job-related stress and a hostile work environment; (3) she was prescribed medication for her condition; (4) her psychiatrist noted that time spent away from the office reduced the job related stress; (5) Employee's July 17, 2014, email to Dr. Thompson informed him of the issues leading to Employee's job related stress; (6) Employee's July 29, 2014, letter to Ms. Wright, Management Analyst, DCHR, stated that her physician is concerned about her return to work unless the issues regarding the hostile workplace environment are resolved; (7) Dr. Prayaga advised Employee not to return to work and informed Agency that Employee would remain in his care until further notice; (8) Dr. Prayaga also advised Agency that Employee needed a non-hostile working environment and the absence of unhealthy stress is imperative upon her return; and (9) there is no evidence in the record to show that Agency made any changes to accommodate Employee's need for a non-hostile working environment. Therefore, I conclude that Employee was medically incapacitated during the relevant period and her condition was exacerbated by the work environment.

Agency argues that Employee did not submit sufficient documentation to establish a continued impairment from the period of July 28, 2014, through August 8, 2014. I disagree with this assertion. Agency was made aware of Employee's continued impairment that prevented her from carrying out the essential job functions via the multiple Verification of Treatment forms submitted by Dr. Prayaga. Employee's physician referred her to a psychiatrist, Dr. Prayaga, who

[10] Agency's Answer at Exhibit 9.

provided Agency with multiple documentations highlighting Employee's illness and the cause of the illness.

Agency, as well as its witness, Williams, asserted that despite numerous requests from Agency to Employee, she has not provided any evidence whatsoever that her purported illness rendered her incapacitated during the period at issue, such that she was unable to perform her work or report for duty. On cross-examination, Myers stated that informed Agency personnel that Employee would not return to work on July 28, 2014. She explained that if a date was not indicated when an employee would return to work, she granted them a grace period to confer with their doctor to determine the return to work date. Myers also testified that based on the July 23, 2014, verification of treatment, Employee was properly out on leave on July 28, 2014 and the foreseeable future. Myers also explained that upon receipt of the July 23, 2014, verification of treatment, on July 25, 2018, she emailed Dr. Thompson, Ms. Williams and other Agency employees informing them that she would wait a week or so to send out a letter regarding Employee's anticipated return to work date. (Tr. pg. 120).[11] Additionally, Williams testified that she received an email that stated that Employee was not returning to work on Monday, July 28, 2014, per her doctor's verification of treatment. (Tr. pg. 64). Also, Dr. Prayaga noted in his note signed August 11, 2014, in response to Agency's request for documentation that Employee "was still under my care from July 28, 2014 through August 8, 2014."[12] Agency received the August 8, 2014, Verification of Treatment more than a week before issuing the August 18, 2014, advanced notice of proposed removal. Consequently, I conclude that Agency was aware of Employee's medical condition during the relevant time period. Agency was also aware when it issued the advanced written notice of proposed termination on August 18, 2014, that Employee had not been released to return to work and she remained under her doctor's care during the relevant time frame and beyond.

Accordingly, I find that Employee's absences from July 28, 2014, through August 8, 2014, is excusable because of her mental illness, and she has provided sufficient documentation to establish a continued impairment that prevented her from carrying out her essential job functions. Despite Agency's assertion that the record is not clear even after the Evidentiary Hearing and the deposition of Dr. Prayaga, I conclude that Agency was provided with every opportunity to make its case, yet it failed to do so. Agency requested to depose Dr. Prayaga and the undersigned granted that request. Thereafter, an Evidentiary Hearing was convened to further clarify the record; yet, Agency failed to call or subpoena Dr. Prayaga to testify at the Evidentiary Hearing in support of its case or to refute Employee's rendition of events. Agency has the burden of proof in this matter, and I find that it has not met that burden by a preponderance of the evidence. Consequently, I further conclude that this cause of action should be overturned.

Furthermore, DPM § 1268.2 provides that "[a]n agency head is authorized to determine whether an employee should be carried as AWOL." Additionally, DPM § 1268.4 highlights 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." Here, Agency determined that Employee was AWOL for the period of July 28, 2014 through August 8, 2014. However, given the record, I

[11] Employee's Exhibit 8.
[12] Employee's Reply Brief at Exhibit 15 and 16.

find that Employee's absence was justified by her mental illness; the doctor's notes from Dr. Prayaga cover the relevant timeframe in this matter; Employee's absence is excusable and as such, the charge for AWOL during that timeframe can be charged against Employee's sick, annual leave, compensatory leave or as leave without pay as provided in DPM § 1268.4.

2) Advance Written Notice

Employee asserts that Agency violated her due process rights. She maintains that Agency failed to comply with the strict notice requirements of DPM §§ 1608.1(a) and 1608.7. Employee contends that Agency has not, and cannot provide evidence that Employee received the notices.

DPM § 1608.1 (a) provides as follows:

> Except in the case of a summary suspension action pursuant to § 1615 or a summary removal action pursuant to § 1616, an employee against whom corrective or adverse action is proposed shall have the right to an advance written notice, as follows:
>
> (a) In the case of a proposed adverse action, an advance written notice of fifteen (15) days.

In the current matter, Agency's decision to terminate Employee is considered an adverse action; therefore, Employee is entitled to at least fifteen (15) days advanced written notice. Agency issued the advanced written notice on August 18, 2014, and the termination was effective September 3, 2014. DPM § 1608.7 highlights that:

> If the employee is not in a duty status, i.e., at work, the notice of proposed action *shall* be sent to the employee's last known address by *courier*, or by c*ertified* or *registered mail, return receipt requested* (emphasis added).

Furthermore, in *Aygen v. District of Columbia Office of Employee Appeals*,[13] the D.C. Superior Court found that where an employee is in duty status, "the notice of final decision must [be] delivered to the employee on or before the time the action is effective, *with a request for employee to acknowledge it*" (emphasis added). The Court noted that if the employee refused to acknowledge receipt, a signed written statement by a witness may be used as evidence of service.[14] Additionally, the Court found that where an employee is not in duty status, the notice "must be sent to employee's last known address by courier, or by certified or registered mail, *return receipt requested*, before the time of the action becomes effective" (emphasis added).[15] The court further explained that "a dated cover letter, by itself, was insufficient evidence" of a mailing date or proof of receipt by an employee.[16]

[13] No. 2009 CA 006528; No. 2009 CA 008063 at p. 9 (D.C. Superior Ct. April 5, 2012).
[14] *Id.*
[15] *Id.*
[16] *Id.* at pp. 10-11.

Here, Employee was not at work on August 18, 2014, when the advanced written notice of proposed removal was issued. Agency asserts that it mailed the notice to Employee's address on file via FedEx same day delivery service with order confirmation on August 19, 2014. Agency further asserts that the mail was delivered to Employee on the same day. Employee argues that she did not receive the advanced written notice. Agency's witness, Dozier, explained the mailing process. She explained that she typically received confirmations after she sent out mail on behalf of Agency. Agency requested a signature of receipt for FedEx SameDay deliveries. Dozier explained that if the recipient was not at the location to sign for the package, FedEx was required to contact Agency and inform Agency that no one was available to sign for the package. Based on the documentation that was provided from FedEx, the last status notified Agency that the package was delivered. (Tr. pgs. 140-145). However, Dozier did not recall receiving any documentation indicating that Employee signed for the package. Additionally, she did not recall whether Agency obtained a signed, or written statement from FedEx or any other courier indicating that Employee refused acknowledge of receipt. Dozier stated that when FedEx contacted her about Employee's package they never indicated that Employee refused to sign for the package. (Tr. pgs. 146-148). However, she later testified that she never received any signature from Employee indicating that she received any FedEx package. (Tr. pg. 153). She explained that she never received a signature because FedEx informed Agency that the package was undeliverable because Employee did not sign for it.

Agency also noted that it mailed the notice using USPS certified mail service, which meets the requirements of DPM § 1608.7 and the ruling in *Aygen*. Agency provided the undersigned with a USPS certified mail receipt, along with the tracking information. During the Evidentiary Hearing, Dozier explained that certified mail went out with the regular mail. A green card was attached with the mailing and the mailman would have the intended recipient sign for the package. (Tr. pg. 149).

Dozier asserted that the green card was never signed or returned to Agency for Employee's package. Dozier noted that if Employee's package was returned, she sent the packages back to the executive staff. She also acknowledged that if a package was returned to Agency, then the intended recipient never received it. (Tr. pgs. 150-151).

According to the tracking information provided by Agency, the August 18, 2014, Advance Written Notice arrived at the USPS facility on August 20, 2014. USPS attempted to deliver the Notice on August 21, 2014, but no authorized recipient was available. A notice was left at the address, and because the mail was never picked up from USPS, it was returned to the sender in September 2014. According to DPM § 1608.5;

> The first day of the notice period *shall* be the day following the date on which service is made to the employee, either in person, by courier, or by certified or registered mail, *or the date on which service was attempted and refused* (emphasis added).

Based on the record, USPS attempted to serve Employee on August 21, 2045. There is no evidence in the record to show that Employee refused service. Dozier testified that the green card that came with the certified mail was not signed by Employee. Assuming *arguendo*, that

Employee denied the package on August 21, 2014 when the USPS attempted service, pursuant to DPM § 1608.5, the notice period for the instant matter began on August 21, 2014. The timeframe between August 21, 2014, through September 3, 2014, is less than fifteen (15) days. Because this period is less than the required fifteen (15) day notice, I find that Agency did not comply with the provision of DPM § 1608.1.

3) 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).[17] 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 Penalties ("TAP"); 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 case, I find that Agency has not met its burden of proof for the above-referenced charges, and as such, Agency cannot rely on these charges in disciplining Employee.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of separating Employee from service is **REVERSED**; and
2. Agency shall reinstate Employee to her last position of record; or a comparable position; and
3. Agency shall reimburse Employee all back-pay and benefits lost as a result of the separation; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

_____
MONICA DOHNJI, Esq.
Senior Administrative Judge

[17] *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 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).