THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
KHADIJAH MUHAMMAD	OEA Matter No. 1601-0033-07
Employee	
	Date of Issuance: March 19, 2008
v.	
	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA NATIONAL GUARD	Administrative Judge
Agency	

Ronald Colbert, Esq., Employee Representative
Andrea Comentale, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Employee filed a petition with the Office of Employee Appeals (OEA) on December 1, 2006, appealing Agency's final decision to remove her from his position as an Office Automation Assistant. The effective date of the removal was October 31, 2006.[1] At the time of the removal, Employee was in permanent career status and had been employed at Agency for approximately two years.

The matter was assigned to me on February 9, 2007. On February 15, 2007, I issued an Order scheduling the prehearing conference for March 12, 2007. On February 9, 2007, Employee's representative contacted me and advised me the parties were amenable to mediation. I issued an Order on March 12, 2007, postponing the prehearing conference and directing the parties to advise me of the status of the matter by April 12, 2007. The parties did not comply, but I was subsequently advised by Mediator Wanda Jackson that the parties had entered into mediation. Those efforts did not prove successful. On June 15, 2007, I issued an Order scheduling the prehearing conference for July 17, 2007. Several continuances were requested and granted, and the prehearing conference took place on August 23, 2007. The hearing was scheduled for October 22, 2007.

[1] The petition was filed one day beyond the time permitted by OEA Rule 604.2, 46 D.C. Reg . at 9299 and Agency moved to dismiss the matter based on lack of timeliness. I found that the Agency decision failed to provide the requisite appeal rights. However, I gave Agency the opportunity to present an affidavit from the deciding official or any other person with personal knowledge of any notice provided to Employee regarding her appeal rights to OEA. Agency did not submit such documentation On September 27, 2007, I issued an Order concluding that Agency had failed to provide Employee with her appeal rights as required by Section 1614.1(d) of the District Personnel Manual. I permitted the delay of one day in filing this appeal.

After several postponements, the hearing took place on January 28, 2008.[2] At the proceeding, the parties were given full opportunity, and did in fact, present testimonial and documentary evidence and arguments in support of their positions.[3] The parties agreed to submit closing arguments thirty days from the date of notification of the availability of the transcript. I issued an Order on February 22, 2008 notifying the parties of the availability of the transcript. The parties jointly requested an extension, which was granted by Order dated March 26, 2008. The record closed on April 20, 2008

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Code Ann. §1-606.3 (1999 repl.).

ISSUE

Did Agency meet its burden of proof regarding its decision to remove Employee?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Agency issued its Advanced Written Notice of Proposed Removal on September 14, 2006, charging Employee with Unauthorized Absence between March 20, 2006 and September 14, 2006. Agency charged that Employee was absent without authorization a total of 1,032 hours and that she had "failed to notify a managerial official of [her] intended absence, and failed to submit acceptable justification to cover [her] period of absence." The Notice of Final Decision was issued on October 24, 2006.

Agency's position is that although Employee had attendance problems prior to March 20, 2006, she did report to work periodically. However, in March, Employee's attendance problems worsened, she failed to use the appropriate procedures to notify her supervisor of absences, and that she failed to submit required documentation. Agency contends it was aware that Employee was experiencing personal problems, and tried to assist her.

Tammy Wright, Information Support Services Branch Chief, was Employee's direct supervisor between December 2005 and January 2006. Thereafter, she stated, Patricia Marshall became Employee's direct supervisor because Employee was a District employee. (Tr, 20). Ms.

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[2] Despite multiple opportunities to submit witness and document lists, Employee failed to do so, and did not present good cause for this failure. Agency filed a motion to dismiss on December 20, 2007 based on Employee's failure to prosecute her appeal. By Order dated January 9, 2008, I denied Agency's motion but did sanction Employee by prohibiting her from presenting any witnesses other than herself and prohibiting her from introducing any documentary evidence other than what was already in the official file.

[3] Witnesses provided sworn testimony. The transcript is cited at "Tr" followed by the page number. Exhibits are identified as "Ex" followed by "A" (Agency), or "E" (Employee), followed by the exhibit number.

Wright remained in Employee's chain-of-command. She stated that she provided Employee with the Agency's leave policy. (Ex A-1). Ms. Wright stated that Employee would text-message her that she was not able to come to work in violation of the leave policy, which required the employee to telephone. (Tr, 19). The witness testified that she was always available by telephone.

Patricia Marshall, Information Services Branch Chief, stated that she became Employee's timekeeper beginning on January 9, 2006, but was never her supervisor (Tr, 25-26). She stated that she issued a leave policy on January 18, 2006, which was similar to the one issued to Employee by Ms. Wright. Ms. Marshall testified that she reviewed each item with Employee and provided her with a copy which she signed for on January 12, 2006. (Ex A-2). Ms. Marshall testified that Employee did not comply with the leave policy in that she did not call in to request leave, called in after her tour-of-duty began to advise her of problems, reported to work late, did not turn in leave slips, and at times, did not report at all. She described the problem as "consistent". She said she counseled Employee in person and suggested she contact the Employee Assistance Program (EAP) because of her erratic attendance. On April 6, 2008, she placed Employee on leave restriction for 30 days. She reviewed the document with Employee, who acknowledged its receipt in writing. . (Ex E-3) Ms. Marshall stated that between February 3 and March 21, Employee did not report to work and either "called to leave reasons why she couldn't come or she didn't call at all or [the witness] called her to find out where she was and to let her know a pay period was coming up and that [she] needed a leave slip". (Tr. 31). She said she provided Employee with transportation and gave her a Metro pass. (Tr, 30). On March 22, Employee telephoned and requested the telephone number for EAP. She said Employee came in on March 23 or 24, and they met to complete the paperwork necessary for referral to EAP.

Ms. Marshall stated that in late March, Employee telephoned her and said she wanted to make a "clean start" and was scheduled to return on March 28 or 29, but that she did not report until April 2, and then she reported late. Employee did not report the following days, and on April 6 telephoned to say she had an ear ache. (Tr, 36). Ms. Marshall said Employee called again to say that the antibiotics she was taking had made her ill. She recalled that Employee contacted her again on April 18 to ask if she had received her doctor's certificate. Ms. Marshall told her she had received the leave slip earlier that day. The leave slip stated that Employee should remain on bed rest "until further notice". (Ex A-5). Ms. Marshall telephoned the doctor's office and spoke with Lisa Whitaker, Office Manager, who informed her that Employee was scheduled for a follow-up visit in one or two weeks. Since Employee had submitted a medical excuse, Ms. Marshall did not place her on AWOL status.[4] When Employee did not return after two weeks, Ms. Marshall telephoned her on May 10, but her telephone had been disconnected. She then contacted the doctor's office to ascertain if Employee could return to work. Ms. Whitaker informed her that Employee had not kept the follow-up appointment. She asked Ms. Whitaker to request that Employee contact her if Ms. Whitaker heard from her. She returned Employee to AWOL status. Other than the April 18 doctor's note, Ms. Marshall said the only other document she received was a wrist band which Employee submitted to confirm that her child had been in the hospital. She said she told Employee the wrist band was not sufficient. Ms. Marshall stated she did not attempt to contact Employee's mother, although she was listed as her emergency contact.

Michael Jackson, Agency Director of Information Management, was not in Employee's chain-of-command, was familiar with her work. He said Employee initially performed well, but then started to missing work. He said at one point during her absence, she telephoned him and was crying that she could not come to work because there were people outside her apartment

[4] Absence Without Official Leave

who wanted to repossess her things so she was afraid to leave her bathroom. (Tr, 60). He asked if there was anything he could do, and Employee said no. Mr. Jackson stated he was aware Employee was having personal problems, and directed staff to assist her. He said she did not telephone him again.

Charlotte Clipper, Agency Human Resource Supervisor, testified Employee contacted her on March 20 and advised her that "she was very stressed due to a family crisis" and that she was going to Court that afternoon to obtain a restraining order". (Tr, 90). She told Employee to contact her supervisor and to report to work to complete a leave slip since she did not have to appear in court until the afternoon. Employee contacted her supervisor, but did not provide any documentation. Ms. Clipper's next contact with Employee came after she mailed Employee a letter dated June 27, asking Employee to contact Agency and advise it of her intentions regarding her employment. (Ex A-8). Employee contacted her and told her that Ms. Marshall had advised her that a letter had been sent to her, but she had not received it. She asked that it be sent to her mother's address. The two discussed the contents of the letter. (Tr, 69). Employee responded, referring to her termination. Ms. Clipper testified that she contacted Employee by e-mail and advised her that Agency's letter did not reference termination. On July 12, Employee submitted her amended response, explaining why she had been absent, and deleting reference to a termination. The letter stated in pertinent part:

> In late March, I was advised by my Doctor that I needed to be confined to complete bed rest due to a problematic pregnancy which was causing me [undue] stress and medical complications. (Ex A-9).

Ms. Clipper testified she notified Employee on July 21, that Employee needed to submit documentation from her doctor by no later than August 1, regarding her condition "in terms of returning to duty." (Tr, 76, Ex A-11). In response, she received a fax signed by the doctor's office manager dated July 31, 2006 but received on August 2. The letter stated:

> Khadijah Muhammad has been under our care for home IV therapy from March'06 to June '06. PT is medically clear to return back to work except for light walking, if possible. Please feel free to call me with any concerns. (Ex A-12).

The witness stated that the document was insufficient, was not signed by the doctor and was received after the deadline. She stated that if Employee was cleared to return to work, she should have returned to work. She noted that Agency had not taken her office keys or building identification. Employee was then sent a letter notifying her that the documentation had not been accepted and was then issued the 15 day advance notice of Agency's intent to remove her..

David Wherley, Agency Director, testified he knew Employee, and interacted with her daily because they worked in proximity. He stated that while "her performance was fine, her attendance was not". (Tr, 107). He noted that she was reassigned several times because of attendance problems. The witness stated that based on his review and the review of his legal staff, he determined that there was sufficient bases for removing Employee. He noted that Agency had tried to accommodate her problems by offering assistance and transferring her several times. Despite these efforts, her attendance had not improved and she failed to comply with proper notification procedures.

Employee's position is that she submitted the required documentation and complied with all of Agency's requests. She maintains that she was ill during the period from March through June and that when she contacted Agency in June and stated that she was ready to return to work, she was told that Agency was in the process of removing her from her position and that is why she did not return to work.

Employee testified that prior to March 2006, she was "ill on many occasions, dehydrated, no energy, couldn't get out of the bed, didn't know what was, you know, what was wrong". In March she learned that she was pregnant and was required to remain on bed rest with an IV in her leg. (Tr, 117). She said the office manager of her doctor's office faxed a note to Agency, because she was too ill to bring it there. Employee remained on the IV from March until the end of June. In the beginning of July, she said she contacted Ms. Marshall to say she could return to work. She was told to call Ms. Clipper who, she said, told her that she had sent Employee a letter. She explained to Ms. Clipper that she had not abandoned her position, but had been too ill to report to work. Employee said Ms. Clipper told her that she needed a doctor's note. She said she repeatedly called the doctor's office to obtain the letter, and finally on the day before the due date, she was told it would be faxed over on that day. (Tr, 122). She said Ms. Clipper also told her that "the paperwork had [gone] up to the general's office [to have her] released from [her] position" and that she was not to report to work until a decision was made. (Tr, 123). She said she then received the letter asking her for documentation, which she provided.

Employee said she was told to contact Ms. Marshall about her absences, because Ms. Wright, her supervisor, was often not there when she called. Employee stated that she went to her first EAP appointment but was late to her second one because she had been at the hospital. She said the EAP counselor closed her file after she told her that she was on bed rest. Employee stated she missed her follow-up doctor's appointment because she was in the hospital on that date. She stated she did not receive mail because after she was evicted from her apartment in April, she stayed with a friend part of the time and at a homeless shelter the rest of the time. Employee testified that when she contacted Ms. Marshall on the 1st or 2nd of July and told her she was ready to return to work, she was told to contact Ms. Clipper, and that Ms. Clipper told her not to report to work since "paperwork had been sent upstairs and that [she] needed to just wait for the decision as to what it is that [she needed] to do" before she returned to work. (Tr, 135).

The first issue to be decided is whether Employee was medically incapacitated during the period she was charged with AWOL. *Murchsion v. District of Columbia Department of Public Works*, OEA Matter No. 1601-0257-95-R03 (October 4, 2005), ____ D.C. Reg. ____ ( ). Agency does not dispute that Employee was ill, was on bed rest, and had an IV tube in her leg and medical conditions for which she received treatment. Employee's reasons for not returning to her doctor's appointment or the EAP session were credible. The testimonial and documentary evidence support the conclusion that Employee submitted medical documents that placed Agency on notice that Employee had medical conditions that impacted on her ability to return to work. The report from the doctor's office dated July 31, 2006 but received by fax on August 2 provided the requested information. It was received on August 2 rather than August 1, but it was dated July 31. Agency could have pursued why the sending date differed from the faxed date if it considered the problem significant. There may have been a problem with the fax machine, but the delay, if there was a delay, was excusable. With regard to the content and the signature, Agency could have contacted the doctor and/or Employee to explain that the letter had to be signed by the doctor and not the office manager and needed additional language. Employee had relied on the information provided to her by the doctor's staff that the required letter had been sent. However, the evidence established that between March and June 2006, Employee was medically unable to report to work. In reviewing the testimonial and documentary evidence, the Administrative Judge finds that Employee was unable to report to work because of medical problems from March 20, 2006 until June 30, 2006

Agency established that Employee did not always notify the right person, did not always notify individuals in time, and did not always report to work. However, Employee's myriad of serious medical and personal problems made it difficult for her to communicate by telephone, computer or letter. She was evicted from her home, and part of the time she was living in a homeless shelter. She was restricted to bed rest with an IV in her leg. The Administrative Judge was impressed with the genuine concern expressed by Agency witnesses about Employee's situation and their offers to reach out to her. Agency did not and was not required to contact her mother, listed as Employee's "emergency contact", who may have been able to communicate more easily with Employee. Employee may not have contacted the right person, but she did continue to contact Agency regarding her absences. The medical reports provided on her behalf were insufficient, but Employee continued to use her best efforts to obtain reports. She did not refuse to comply, although she may have fallen short of meeting the procedural requirements. She did not abandon her position.

In cases when employees are removed on AWOL charges, 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". *Employee v. Agency*, OEA Matter No. 1601-0137-82, 32 D.C. Reg. 240 (1985). The cases further hold that if an employee's absence is excusable, the absences "cannot serve as a basis for adverse action". *Richardson v. Department of Corrections*, OEA Matter No. 1601-0196-97 (February 1, 2002), ____ D.C. Reg. ( ). Pursuant to OEA Rule 629.3, 46 D.C. Reg. 9317 (1999), Agency has the burden of proof in adverse action appeals. OEA Rule 629.1 requires that the burden be met by "a preponderance of the evidence". Based on the evidence presented in this matter, I conclude that Agency did not meet its burden of proof on the AWOL charge for the period between March 20, 2006 and June 30, 2006.

The more difficult issue is Employee's failure to report after July 1, 2006. It is undisputed that she contacted Agency and stated she was ready to report back to work. The response she received is disputed. She stated that she was told a letter had already been sent and her right to return to work depended on her response to the letter. As noted above, she had not received the letter because she no longer lived at the address to which it was mailed. Agency's position is that Employee was never told not to return to work.

It is within the province of the Administrative Judge to assess the credibility of witnesses. *Dell v. Department of Employment Services*, 499 A.2d 102 (D.C. 1985). Credibility was at issue in this case. In trying to resolve issues of credibility, the Administrative Judge considered the demeanor of the witness, the character of the witness, the inherent improbability of the witness's version, inconsistent statements of the witness and the witness's opportunity and capacity to observe the event or act at issue. *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987). The District of Columbia Court of Appeals emphasized the importance of credibility evaluations by the individual who sees the witness "first hand". *Stevens Chevrolet Inc. v. Commission on Human Rights*, 498 A.2d at 440-450 (D.C. 1985). These "first-hand" observations are critical in cases, such as this, where removal is at issue. This Administrative Judge has many years of experience observing and assessing witnesses, and that experience and expertise was called upon and utilized in this case. The Administrative Judge found all of the witnesses to be credible and forthright. The conflict in the testimony, particularly regarding the conversation that took place on or about July 1, appears to be the result of miscommunication and language getting "lost in translation". Ms. Clipper e-mailed Employee that she had not mentioned "a letter of intent to terminate", but rather had "stated that a letter was sent requesting an explanation as to why you had abandon[ed] your position". Employee's

interpretation that she was not to return to work until she provided the letter was not unreasonable, particularly under the circumstances. In addition, Ms. Clipper's response of July 21, 2006, to Employee's letter explaining her absences notified Employee that her explanation to Agency's request…for an explanation to the reason you apparently have abandoned your position…was not sufficient". She was then instructed to have her doctor submit "a full report identifying the medical time off", although she was told this was "not a request for any medical diagnosis or patient/doctor confidential information". She was told she would be terminated if the letter was not accepted. None of Agency's communications informed Employee that she could return to work until a decision was made on the validity or sufficiency of her medical documentation. I find that Employee testified credibly that she interpreted the communications from Agency, written and oral, as directives not to return to work until the matter was resolved. This does not mean that Agency's rendition was untrue or that Employee could have pursued the question more aggressively. It does mean that the confusion was understandable. Each case is unique and must be reviewed on its own merits. In this case, there were many factors that required consideration.

As noted above, in adverse actions, agencies have the burden of proof and must meet its burden by a preponderance of evidence. "Preponderance" is defined as "that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue". OEA Rule 629.1, 46 D.C. Reg. 9317 (1999). On this issue, the evidence is in equipoise. Since Agency carries the burden of proof, it cannot prevail.

For the reasons discussed herein, and based on a thorough review of the evidence presented in this matter, I conclude that Agency has not met its burden of proof by a preponderance of evidence and that its decision to remove Employee must be reversed.

ORDER

It is hereby ORDERED :

1. Agency's decision is to remove Employee is reversed.

2. Agency is directed to reinstate Employee to her position of record on the date of her removal, to restore any benefits lost as a result of her removal from the date of her removal and to pay her all back pay to which she is entitled. Agency is directed to comply with these directives by no later than 30 calendar days from the date of issuance of this decision.

3. Agency is directed to document its compliance with this Order no later than 45 calendar days from the date of issuance of this decision.

FOR THE OFFICE: LOIS HOCHHAUSER, Esq.
Administrative Judge