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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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In the Matter of:	)	
	)	OEA Matter No.: 1601-0067-15
FRANCES WADE,	)	
Employee	)	
	)	Date of Issuance: December 18, 2018
v.	)	
	)	
DEPARTMENT OF	)	
BEHAVIORAL HEALTH,	)	
Agency	)	
_____	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Frances Wade (“Employee”) worked as a Consumer Affairs Liaison with the Department of Behavioral Health (“Agency”). On March 4, 2015, Employee was served with a fifteen-day Advance Notice of Proposed Removal based on charges of neglect of duty; unauthorized absence; failure to follow procedures for leave request and approval; and absence without official leave (“AWOL”). The charges stemmed from Employee’s failure to report for full duty after being medically cleared from an on-the-job injury that she sustained on May 24, 2013. On March 4, 2015, an Agency Hearing Officer issued a Report and Recommendation, finding that Employee failed to follow the policy regarding leave requests. The Hearing Officer further determined that Employee failed to provide sufficient documentation or justification for her

absences. On March 31, 2015, Agency issued its Notice of Final Decision, sustaining the charges against Employee. The effective date of her termination was April 7, 2015.

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on April 29, 2015. In her appeal, Employee stated that she should not have been ordered to return to her position because of her physical injuries and supporting medical reports.<sup>1</sup> In its Answer to Employee’s Petition for Appeal, Agency argued that its termination action was supported by a preponderance of the evidence and that Employee’s termination was an appropriate exercise of managerial discretion. As a result, it requested that OEA uphold Employee’s termination.<sup>2</sup>

An OEA Administrative Judge (“AJ”) was assigned to this matter in September of 2015. On November 16, 2016, the AJ held a status conference to assess the parties’ arguments. The AJ subsequently ordered Employee and Agency to submit briefs addressing whether the instant adverse action was taken for cause; whether Employee followed the proper procedure for submitting a leave request; whether Employee neglected her duties; and whether removal was the appropriate penalty under the circumstances.<sup>3</sup> After reviewing the parties’ submissions, the AJ determined that an evidentiary hearing was warranted because there were genuine issues of material fact that could not be decided on the record alone.<sup>4</sup> Therefore, a hearing was scheduled for October 30, 2017. On the day of the hearing, the parties informed the AJ that no witnesses were present to provide testimony. As a result, Employee and Agency entered exhibits and oral stipulations into the record, followed by written closing statements.

An Initial Decision was issued on February 27, 2018. With respect to the AWOL charge, the AJ highlighted three of Employee’s Verification of Treatment (“VOT”) forms from her

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<sup>1</sup> *Petition for Appeal* (April 29, 2015).

<sup>2</sup> *Agency’s Response to Petition for Appeal* (June 1, 2015).

<sup>3</sup> *Post-Status Conference Order* (November 30, 2016).

<sup>4</sup> *Order Convening Hearing* (August 21, 2017).

treating physician, Dr. Faheem Moghal (“Moghal”), which advised that she could not return to work as a result of her Post Traumatic Stress Disorder (“PTSD”) diagnosis. The AJ noted that while the forms were completed outside of the relevant timeframe of February 9, 2015 through February 27, 2015, the documents nonetheless provided insight into Employee’s ongoing illness.

Moreover, the AJ found that Agency “utterly” failed to meet its burden to produce any witnesses at the evidentiary hearing in support of its position that Employee was AWOL. Additionally, she opined that Agency failed to adequately refute Dr. Moghal’s assessment of Employee’s medical diagnosis and treatment plan. As a result, the AJ concluded that Employee’s medical condition was sufficiently debilitating and continuous as to provide her with a legitimate excuse for being absent from work without leave during the relevant time period.<sup>5</sup>

Additionally, the AJ noted that District Personnel Manual (“DPM”) § 1268.2 and § 1268.4 collectively provide that an AWOL charge may be changed to a charge against annual leave, compensatory time, sick leave, or leave without pay if it is later determined that an employee was ill or that the absence was excusable. However, she provided that Agency erroneously failed to amend the AWOL charge after it was informed of Employee’s excusable illness. Therefore, she held that the AWOL charge was not supported by the evidence.<sup>6</sup>

With respect to the neglect of duty charge, the AJ held that because Employee’s absence from February 9, 2015 until February 27, 2015 was excusable, Agency was prevented from charging her with neglect of duty. Consequently, she concluded that Agency did not have cause to impose a neglect of duty charge. Based on the record, the AJ determined that Agency failed to meet its burden of proof for each charge levied against Employee. Therefore, she reversed the

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<sup>5</sup> *Initial Decision* (February 27, 2018).

<sup>6</sup> *Id.*

termination action and ordered Agency to reinstate Employee to her previous position of record with back pay and benefits.<sup>7</sup>

Agency disagreed with the Initial Decision and filed a Petition for Review on April 3, 2018. It argues that OEA's Board has previously held that an employee's admission is sufficient to meet an agency's burden of proof with respect to a charge of AWOL. According to Agency, the AJ should have ascertained whether Employee's affirmative defense of PTSD was supported by a preponderance of the evidence. It further asserts that Dr. Moghal's VOT forms lacked clarity and were inconclusive regarding the relevant AWOL period. Regarding Employee's medical condition, Agency asserts that Dr. Moghal's diagnosis of PTSD is not supported by any documentation that explains why Employee could not perform the functions of her position. As a result, it opines that the Initial Decision is not supported by substantial evidence. Therefore, Agency requests that the Board grant its Petition for Review.<sup>8</sup>

In response, Employee contends that the AJ correctly concluded that Agency carried the burden of proof in this case. Employee states that she never admitted to being AWOL from February 9, 2015 to February 27, 2015; thus, the burden of proof remained with Agency to prove each charge by a preponderance of the evidence. Additionally, Employee maintains that Agency's termination action was unlawful because she provided a legitimate medical excuse for being absent from work. Employee further states that Agency was aware of her ongoing medical care prior to her absence, and that Agency was provided with sufficient documentation of her PTSD diagnosis. With respect to the failure to follow procedures for leave request charge, Employee asserts that Agency was provided with notice on several occasions that she was unable to return to work on February 9, 2015. Lastly, Employee provides that she did not neglect her

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<sup>7</sup> *Id.*

<sup>8</sup> *Petition for Review* (April 3, 2018).

duties because her absences were excused under District law. Consequently, she believes that termination was an improper and asks that the Initial Decision be upheld.<sup>9</sup>

### Substantial Evidence

Employee argues that Agency failed to proffer substantial evidence to support its assertion that Employee neglected her duties as a Program Monitor. This Board disagrees. On Petition for Review, this Board must determine whether the AJ's findings were based on substantial evidence in the record. The Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.<sup>10</sup> Under OEA Rule 628.1, the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. Preponderance of the evidence shall mean "that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

Based on the record in its current state, the Board cannot satisfactorily conclude that the Initial Decision was based on substantial evidence. The decisive case on the issue of when an illness can excuse a prolonged absence from work culminated with the District of Columbia Court of Appeals' holding in *Murchison v. D.C. Dep't of Public Works*, 813 A.2d 203 (D.C. 2002). In *Murchison*, the D.C. Court of Appeals remanded the case to OEA for further consideration, providing that the administrative record was incomplete and lacked substantial evidence on the issue of whether the employee's medical condition was so debilitating as to

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<sup>9</sup> *Answer to Petition for Review* (May 8, 2018).

<sup>10</sup> *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

prevent her from performing her duties as a Clerical Assistant. In *Redding v. Department of Public Works*, OEA Matter No. 1601-0112-08, *Opinion and Order on Petition for Review* (March 15, 2011), this Board remanded the matter to the AJ for further consideration, reiterating that based on the holding in *Murchison*, in order to excuse an extended period of absence, an employee must prove that they had a legitimate medical illness that rendered him or her incapacitated and unable to perform his or her work duties. Further, in *Butler v. D.C. Office of Aging*, OEA Matter No. 1601-0132-14, *Opinion and Order on Petition for Review* (April 18, 2017), OEA's Board remanded the matter to the AJ for further determination after concluding that the record was insufficient to support a finding that the employee was incapacitated during the time period in she was charged with AWOL. The Board in *Butler* also noted that an evidentiary hearing was warranted where genuine issues of material fact existed that could not be decided on the record alone.<sup>11</sup> Based on the preceding case law, we believe the administrative record in the case at bar is not complete.<sup>12</sup>

It is uncontested that the relevant period at issue in this case is February 9, 2015 through February 27, 2015; the dates during which Employee was charged with being AWOL. Employee offers three notes from her physician, Dr. Moghal, to support her position that she had a legitimate medical excuse for being absent from work. The first VOT was dated September 5, 2014, approximately four months prior to Employee's AWOL charge. On the form, Dr. Moghal states that Employee has been diagnosed with PTSD as a result of an on-duty assault on May 5, 2013, and that "at this time, I have advised Ms. Wade not to return to work."<sup>13</sup> The subsequent

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<sup>11</sup> *Id.*

<sup>12</sup> See also *Jimenez v. District of Columbia Dep't of Employment Services*, 701 A.2d 837, 838–39 (D.C.1997) (holding that when an administrative body fails to make findings on material, contested issues of fact, a reviewing court cannot fill in the gap and make its own findings. Rather, the court must remand the case to the agency for it to make the necessary factual determinations).

<sup>13</sup> *Initial Decision* at 6.

VOTs, dated May 5, 2015, and November 12, 2015, respectively, were not submitted to Agency until after the effective date of Employee's termination. The forms address Employee's diagnosis, but do not specifically reference the status of her medical condition from February 9, 2015 through February 27, 2015. While the AJ concluded that the three VOTs collectively provided "an insight into Employee's illness,"<sup>14</sup> there is no decisive evidence in the record to support the finding that Employee was medically incapacitated during the period in which she was charged as AWOL, or that she was unable to perform the duties of her position at that time. This Board cannot simply surmise that Employee established a legitimate excuse for being AWOL in the absence of clear and complete supporting medical evidence.<sup>15</sup> Whether Employee was medically incapacitated during the relevant period in question is a matter germane to this appeal. In light of foregoing, this Board is compelled to grant Agency's Petition for Review, and remand this appeal to the Administrative Judge to make the appropriate factual findings.<sup>16</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> See *Wilkey-Marzin v. Office of Personnel Management*, 82 M.S.P.R. 200 (1999) (holding that the mere existence of diagnosed Major Depressive Disorder and PTSD is not dispositive of an appellant's inability to perform the duties of her position.)

<sup>16</sup> It should also be noted that the parties disagree as to whether Employee admitted to being AWOL from February 9, 2015 through February 27, 2015. Agency, citing the holding in *Westley v. United States Postal Service*, 94 M.S.P.R. 277, 283 (2003), contends that in order to satisfy its burden of proof, it was only required to show that Employee was absent and that the absence was not authorized. It further cites to and *Employee v. Agency*, OEA Matter No. 1601-0047-84 (1987), wherein OEA's Board held that an employee's admission is sufficient to meet an agency's burden of proof. According to Agency, it is undisputed that Employee was AWOL during the relevant condition. However, Employee offers a different position, and claims that Agency's assertions on this issue are misleading and mischaracterize her statements. Employee further provides that she never admitted to being AWOL for the period charged by Agency; only stating that "she did not work between February 9, 2015 and February 27, 2015." This issue must be resolved for the purpose of determining whether Agency met its burden of proof, or whether Employee's affirmative defense of PTSD is supported by a preponderance of the evidence.

**ORDER**

Accordingly, it is hereby ordered that Agency's Petition for Review is **GRANTED**, and the Initial Decision is **REMANDED** to the Administrative Judge for further consideration.

**FOR THE BOARD:**

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Clarence Labor, Chair

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Vera M. Abbott

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Patricia Hobson Wilson

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Jelani Freeman

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Peter Rosenstein

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.