

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	
EMPLOYEE <sup>1</sup>	)	
	)	
v.	)	OEA Matter No.: 1601-0017-21
	)	
	)	Date of Issuance: November 16, 2023
DEPARTMENT OF COMMERCE	)	
AND REGULATORY AFFAIRS,	)	
Agency	)	
	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Employee worked as an Elevator Inspector<sup>2</sup> with the Department of Consumer and Regulatory Affairs (“Agency”). On October 30, 2020, Agency issued a Notice of Proposed Removal charging Employee with unauthorized absence for five workdays or more, in violation of Chapter 6-B, Sections 1607.2(f)(2) and 1607.2(f)(4) of the D.C. Municipal Regulations (“DCMR”). The charge stemmed from Employee’s failure to apprise Agency of the status of his disability and inability to return to work because of a medical condition dating back to 2019. On

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<sup>1</sup> Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

<sup>2</sup> In its proposed notice of removal, Agency classified Employee’s position as a Housing Code Inspector; however, it later conceded that his position at the time of removal was an Elevator Inspector.

February 10, 2021, Agency issued a Final Notice of Removal, sustaining the charge against Employee. The effective date of his termination was February 13, 2021.<sup>3</sup>

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on March 11, 2021. He argued that Agency’s termination action was improper because he was not able to perform the functions of his position because of his disability. Employee contended that Agency failed to properly address his disability and did not provide a reasonable accommodation for him. Additionally, he asserted that Agency misclassified his position of record that was used as a basis for the removal action. As a result, Employee asked that the termination action be reversed.<sup>4</sup>

Agency filed its answer on June 14, 2021. It contended that OEA lacked jurisdiction to determine whether Employee’s disability was the basis for the termination action because the D.C. Office of Human Rights was the proper venue to adjudicate those claims. Agency also posited that while Employee correctly identified his position as an Elevator Inspector and not a Housing Inspector, the error was not utilized as a basis for his removal. Therefore, it requested that Employee’s appeal be dismissed.<sup>5</sup>

After holding an evidentiary hearing, the AJ issued an Initial Decision on April 18, 2023. In determining whether Employee was disciplined for cause for unauthorized absences, the AJ first provided that 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. She confirmed that it was undisputed that Employee was absent from work during the relevant time period, of September 14, 2020, to October 30, 2020, while under the medical care of Dr.

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<sup>3</sup> Agency Answer, Tab 10.

<sup>4</sup> *Petition for Appeal* (March 11, 2021).

<sup>5</sup> *Answer to Petition for Appeal* (June 14, 2021).

Kevin Griffiths (“Dr. Griffiths”). The AJ concluded that Employee was medically incapacitated during this period. She considered the testimony of Dr. Griffiths, who attested that Employee was under his care for end-stage renal disease while undergoing dialysis treatment during the AWOL period. According to the AJ, Dr. Griffiths credibly testified that Employee’s position as an Elevator Inspector required him to stand on his feet for long periods of time, which is something most dialysis patients could not do. Moreover, according to Dr. Griffiths, Employee continued his dialysis regimen for four days a week during the period in which he was charged with being AWOL; Employee experienced weakness and fatigue from the medical treatments; and Employee’s condition was so debilitating that it prevented him from performing his assigned duties during the relevant time period.<sup>6</sup>

The AJ went on to explain that Agency was apprised on multiple occasions about Employee’s medical condition, dating back to January of 2017, when he first applied for leave under the Family Medical Leave Act (“FMLA”). She opined that Agency could have contacted Dr. Griffiths to clarify his July 2020 doctors’ note regarding Employee’s ongoing medical care if it had additional questions pertaining to Employee’s return-to-work date. Based on a review of the record, the AJ reasoned that Agency did not meet its burden of proof in establishing a charge of AWOL since Employee offered a legitimate medical excuse during that time period. Because Employee’s absences were deemed excusable, the AJ concluded that Employee’s removal was improper. Consequently, the termination action was reversed, and Agency was ordered to reinstate Employee with back pay and benefits.<sup>7</sup>

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<sup>6</sup> *Initial Decision* (April 18, 2023). The AJ subsequently issued an *Errata and Addendum to the Initial Decision* on May 9, 2023. The addendum noted the following: “Strike the following name from page 1 of the April 18, 2023, Initial Decision in the above-captioned matter: Samuel Bailey, Jr., Esq., and replace it with Samuel Bailey, Jr.” It further clarified that “Director Chavez” should be replaced with “Director Chrappah” on page 8 of the decision.

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

Agency disagreed with the Initial Decision and filed Petition for Review with the OEA Board on May 23, 2023.<sup>8</sup> Agency also filed a Motion for Extension of Time requesting additional time to file a Memorandum in Support of the Petition for Review.<sup>9</sup> On June 22, 2023, the parties filed a Joint Motion to Stay OEA Proceedings, indicating that they began settlement negotiations.<sup>10</sup> However, on August 9, 2023, Employee filed a praecipe withdrawing the motion, stating that the negotiations had failed between the parties.<sup>11</sup> Thereafter, on September 8, 2023, Agency filed a Praecipe Withdrawing Petition for Review. Agency's filing requests to withdraw its petition before the Board and provides that Employee will be reinstated with back pay and benefits in accordance with the AJ's April 18, 2023, Initial Decision.<sup>12</sup> In light of Agency's request to voluntarily withdraw its petition, the Petition for Review is dismissed.

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<sup>8</sup> *Agency's Petition for Review* (May 23, 2023).

<sup>9</sup> *Agency's Motion for Extension of Time to File Memorandum in Support of Petition for Review* (May 23, 2023).

<sup>10</sup> *Joint Motion to Stay Proceedings* (June 22, 2023).

<sup>11</sup> *Praecipe* (August 9, 2023).

<sup>12</sup> *Praecipe Withdrawing Agency's Petition for Review* (September 8, 2023).

**ORDER**

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **DISMISSED**. Agency is ordered to reimburse Employee all back pay and benefits lost as a result of his termination, consistent with the April 18, 2023, Initial Decision.

**FOR THE BOARD:**

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Clarence Labor, Jr., Chair

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Peter Rosenstein

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Dionna Maria Lewis

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Arrington L. Dixon

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.