**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | |
| | OEA Matter No.: 1601-0037-14 |
| AMOS LEWIS, | |
| Employee | |
| | Date of Issuance: July 14, 2015 |
| v. | |
| DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS, | |
| Agency | |
| | Arien P. Cannon, Esq. |
| | Administrative Judge |

Donnell L. Pringle, Employee Representative
Frank McDougald, Esq., Agency Representative

## INITIAL DECISION

### INTRODUCTION AND PROCEDURAL BACKGROUND

Amos Lewis ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on December 19, 2013, challenging the Department of Public Works' ("Agency") decision to remove him from his position as a Sanitation Worker. Employee was cited for "any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, specifically: unauthorized absence: ten days or more constitute abandonment."[1] Agency filed its Answer on January 22, 2014. I was assigned this matter on June 16, 2014.

After initially being rescheduled, a Prehearing Conference was convened on January 9, 2015. Neither party disputed the facts of this case; rather, Employee raised a disparate treatment argument as an affirmative defense and submitted his brief at the Prehearing Conference to support his assertion. A Post Prehearing Conference Order was subsequently issued which required Agency to file a response to Employee's submission. Agency submitted its brief accordingly. The record is now closed.

[1] Agency Answer, Tab 10 (January 22, 2014).

## JURISDICTION

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

## ISSUES

1. Whether Employee was subjected to disparate treatment by Agency for Unauthorized Absence: Ten (10) consecutive days or more constitutes abandonment.

Employee's position

Employee does not dispute that he was absence without leave ("AWOL") for more than ten (10) consecutive days due to his incarceration. Rather, Employee raises a disparate treatment defense. Employee provides names of two other Agency employees whom he asserts were allowed to use leave while incarcerated and not subject to termination for being AWOL.

Agency's position

Agency maintains that it rightfully removed Employee from his position as a Sanitation Worker for unauthorized absence of ten days or more, constituting abandonment. The time periods in which Employee was charged with AWOL were on September 3-6, September 9-13, and September 16-20, 2013, for a total of fourteen (14) days. Agency further maintains that it consistently applied its policy that prohibits employees from using leave, of any form, who are AWOL due to incarceration.

## FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

In *Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-94, Opinion and Order on Petition for Review (September 29, 1995), this Office's Board set forth the law regarding a claim of disparate treatment:

> [An Agency must] apply practical realism to each [disciplinary] situation to ensure that employees receive fair and equitable treatment where genuinely similar cases are presented. It is not sufficient for an employee to simply show that other employees engaged in misconduct and that the agency was aware of it, the employee must also show that the circumstances surrounding the misconduct are substantially similar to his own. Normally, in order to show disparate treatment, the employee must demonstrate that he or she worked in the same organizational unit as the comparison employees and that they were subject to [disparate] discipline by the same supervisor [for the same offense] within the same general time period.

An employee who raises an issue of disparate treatment bears the burden of making a *prima facie* showing that he or she was treated differently from other similarly-situated employees.[2] If such a showing is made, then the burden shifts to the agency to produce evidence that establishes a legitimate reason for imposing a different penalty on the employee raising the issue.[3] "In order to prove a disparate treatment, [Employee] must show that a similarly situated employee received a different penalty."[4] In determining whether a penalty is reasonable it is appropriate to consider whether the agency has meted out similar penalties for similar offenses. *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

Here, in Employee's brief, he addresses two other Agency employees, Jerome Wilson ("Wilson") and Kevin Garces ("Garces"), whom he asserts were similarly situated as him and were not removed from their position. Employee avers that Wilson was arrested and charged with Simple Assault on May 13, 2011.[5] Attached with Employee's brief, he provides an Employee Time/Attendance Detail Report ("Attendance Report") with the relevant dates of Wilson and Garces bouts with the criminal justice system. The Attendance Report indicates that Wilson used four (4) hours of Annual Leave and was given four (4) hours of Administrative Leave for May 13, 2011, the date of his alleged arrest.[6] Employee further asserts that Wilson attended a court hearing on August 19, 2011, and was "carried on annual leave for 4 hours."[7] However, in Agency's brief, it highlights that the Attendance Report for Wilson indicates that he was in Leave Without Pay (LWOP) status for eight (8) hours on August 19, 2011.[8]

Additionally, Employee maintains that Wilson was taken into custody on September 12, 2011, and released on September 13, 2011. The Attendance Report with Employee's brief shows that Wilson was on annual leave on September 12 and on sick leave on September 13, 2011. Furthermore, according to Employee, Wilson attended a scheduled court hearing on September 30, 2011, where he entered a guilty plea, and the Attendance Report indicates that Wilson worked eight (8) hours on this date. Employee argues that Agency "has been aware of certain employees' periods of incarceration and no discipline was imposed and some were even allowed to utilize their leave" while incarcerated.[9]

Employee has failed to demonstrate that he was similarly-situated to Wilson in regards to discipline. Employee appears to argue that Wilson's use of leave to appear at a number of court hearings was in violation of Agency's policy that "an employee cannot be carried on leave while incarcerated."[10] Simply because Wilson may have used leave to appear in court does not violate Agency's policy that an employee may not use leave while incarcerated. Furthermore, Employee's argument that because Wilson was allowed to use leave for his May 13, 2011, and

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[2] *See Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-01190-90, Opinion and Order on Petition for Review (July 22, 1994).
[3] *Id*.
[4] *Social Sec. Admin. v. Mills*, 73 M.S.P.B. 463 (1991).
[5] *See* Employee's Brief, Summary of Supporting Documentation (January 9, 2015).
[6] *See* Agency's Brief, Exhibit 2 (February 20, 2015).
[7] Employee's Brief, Summary of Supporting Documents (January 9, 2015).
[8] See Employee's Brief, Employee Time/Attendance Detail Report for Jerome Wilson (attachment) (January 9, 2015); See also Agency's Brief, Exhibit 3 (February 20, 2015).
[9] Employee's Brief (January 9, 2015).
[10] Employee's Brief, p.1 (January 9, 2015); *See also* Agency's Answer, p. 4 (January 22, 2014).

September 12, 2011, arrests illustrates disparate treatment falls short. Here, Employee was incarcerated for a total of fourteen (14) consecutive work days. The leave taken by Wilson on May 13, 2011, and September 12-13, 2011, a total of three (3) days, while purportedly being incarcerated, does not place him in a similar situation with Employee.

Additionally, Employee fails to demonstrate that he and Wilson occupied the same position or organizational unit, or that they were subject to discipline by the same supervisor.

Garces is the second employee identified for Employee's disparate treatment argument. Employee asserts that Garces was arrested and charged with Simple Assault on June 7, 2010, and was carried in AWOL status for eight (8) hours.[11] Employee maintains that on June 15, 2010, and July 1, 2010, Garces attended a hearing and on both occasions used annual leave. However, the Attendance Report for Garces provides that he used eight (8) hours of annual leave for June 15, 2010, but worked eight (8) hours on July 1, 2010. Furthermore, Employee avers that on July 28, 2010, Garces was carried on annual leave to appear at a hearing where the Simple Assault charge was dismissed.

Employee points to another matter involving Garces, wherein, on March 7, 2012, Garces was arrested and charged with Criminal Contempt and subsequently released. Employee contends that Garces used eight (8) hours of annual leave on this date. Moreover, Employee asserts that Garces used annual leave to attend court hearings on April 9, April 23, and May 9, 2012.

Employee also alleges the following regarding Garces: on August 6, 2012, Garces entered a guilty plea and was sentenced to 180 days in jail, with 160 days being suspended. Garces served a twenty (20) day sentence and from August 6, 2012, through August 10, 2012, Garces was carried on Annual Leave; from August 13, 2012 through August 17, 2012, Garces was carried in an AWOL status, and from August 20, 2012, through August 31, 2012, Garces was carried in an Annual Leave status.[12]

With respect to Garces, Employee again fails to demonstrate that the two were similarly situated. A large part of Employee's argument asserts that Garces used leave to attend a number of court hearings. Again, as is the case with Wilson, Employee's argument that Garces used leave to attend court hearings is in violation of Agency's policy is misplaced. The policy that Employee relies upon states, "an employee cannot be carried on leave while incarcerated."[13] Employee also asserts that during Garces' 20 day incarceration, Garces was carried as AWOL for five (5) workdays, and permitted to use annual leave for ten (10) workdays. While Agency does not offer any explanation as to why Garces was permitted to use ten (10) days' worth of annual leave while purportedly incarcerated, it is noted that Garces incarceration occurred more than a year before Employee was incarcerated. In order to show disparate treatment, Employee must demonstrate that he worked in the same organizational unit as the comparison employees (Wilson and Garces) and they were subjected to disparate discipline by the same supervisor,

[11] Employee's Brief, Summary of Supporting Documents (January 9, 2015).
[12] *Id.*
[13] *See* Employee's Brief, p. 1. (January 9, 2015).

within the same general time period.[14] Here, Employee does not provide the position occupied by Garces in order to make the appropriate comparison for a disparate treatment defense. Furthermore, the time periods in which both Employee and Garces were incarcerated are more than a year a part, further diminishing Employee's disparate treatment argument. Accordingly, Employee has failed to satisfy his burden that he was subjected to disparate treatment.

ORDER

It is hereby **ORDERED** that Agency's decision to remove Employee be **UPHELD**.

FOR THE OFFICE:

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Arien P. Cannon, Esq.
Administrative Judge

[14] See *Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-94, Opinion and Order on Petition for Review (September 29, 1995).