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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0134-14
OLANA WAKO,)	
Employee)	
)	Date of Issuance: August 28, 2015
v.)	
)	
OFFICE OF THE STATE SUPERINTENDENT)	
OF EDUCATION,)	
Agency)	
_____)	
Olana Wako, Employee, <i>Pro se</i>)	Arien P. Cannon, Esq.
Hillary Hoffman-Peak, Esq., Agency Representative)	Administrative Judge

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Olana Wako (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) on September 30, 2014, challenging the Office of the State Superintendent of Education’s (“Agency” or “OSSE”) decision to suspend him for ten (10) days. Agency filed its Answer on October 30, 2014. I was assigned this matter on December 12, 2014.

A Status Conference was convened on February 24, 2015. Subsequently, a Post Status Conference Order was issued which required the parties to submit briefs addressing the issues. Both parties have submitted their briefs accordingly. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee for any on-duty employment related act or omission that interferes with the efficiency and integrity of government operations, specifically: Absence without Official Leave (AWOL); and
2. If so, whether the penalty of a ten (10) day suspension was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.¹ “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.

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.²

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Whether Agency’s adverse action was taken for cause

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

- (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or *suspension for 10 days or more* (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

Chapter 16, Section 1603.3 of the District Personnel Manual (“DPM”) sets forth the definitions of cause for which disciplinary actions may be taken against Career Service employees of the District of Columbia government. Here, Employee was a Career Service employee and his ten (10) day suspension was based on “any on-duty employment related act or

¹ 59 DCR 2129 (March 16, 2012).

² OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

omission that interferes with the efficiency and integrity of government operations, specifically: Absence without Official Leave (“AWOL”).”

The undisputed facts here establish that Employee submitted annual leave forms on August 29, 2013, for December 23, 2013, through February 18, 2014 in order to travel to his home country of Ethiopia.³ All of these forms were denied by Employee’s immediate supervisor, Kisha Roberts (“Roberts”), the Assistant Manager for Employee’s assigned terminal, citing staff shortage. Employee further maintained that Roberts also told him that he was submitting his leave forms too far in advance of the time he was requesting time off.⁴ On September 6, 2013, Employee again submitted leave forms requesting annual leave from December 23, 2013, through February 19, 2014. These leave request forms were also denied by Roberts, again citing staff shortage. On October 10, 2013, Employee submitted leave forms to Kenneth Faunteroy, the Terminal Manager where Employee was assigned. Faunteroy approved Employee’s annual leave request on October 16, 2013, for December 23, 2013 to January 10, 2014—ten work days. After Employee was initially approved by Faunteroy for December 23, 2013, through January 10, 2014, he again submitted leave forms for additional time off from January 13, 2014, through March 21, 2014. These requests were denied by Faunteroy, citing that school was in session.⁵

Employee was out on approved annual leave from December 23, 2013 to January 10, 2014. From January 13, 2014 to mid-March 2014, Employee did not report to work. Employee eventually returned to work on March 11, 2014, where he was returned to duty by Agency’s Human Resource Department. Upon further investigation, Agency determined that Employee was AWOL for approximately two months.

Absence without Official Leave (“AWOL”)

6-B DCMR § 1268.1⁶, provides that an absence from duty that was not authorized or approved, or for which leave request has been denied, shall be charged on the leave record as “absence without leave (AWOL).” The AWOL action may be taken whether or not the employee has leave to his or her credit. If 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.⁷ Here, despite Employee’s efforts to secure extended time off to travel to his home country of Ethiopia, Employee was only granted leave from December 23, 2013, through January 10, 2014—approximately ten (10) workdays, considering time off for the holidays and school not being in session.

³ Employee submitted four separate leave forms, each one for a different pay period. *See* Petition for Appeal, Attachments (September 30, 2014); *See also* Employee’s Brief, Attachments (April 23, 2015).

⁴ Roberts denied that she told Employee he submitted his leave form too far in advance.

⁵ *See* Petition for Appeal, Attachments (September 30, 2014); *See also* Employee’s Brief, Attachments (April 23, 2015).

⁶ 6-B DCMR § 1268.1.

⁷ 6-B DCMR § 1268.4.

Employee's main argument is that he was wrongfully denied his request for two months' of annual leave to travel to Ethiopia, despite him submitting this request four months in advance.⁸ Employee also advances the argument that although he was eventually granted ten (10) days of annual leave, once he got to Ethiopia, he faced the unexpected and unforeseen circumstances of the sickness of his mother. Employee cites to the District of Columbia's Family and Medical Leave Act ("FMLA") and asserts that Agency was supposed to convert the time he was charged with AWOL to FMLA leave since he was assisting his ill mother.

A hearing was held by a Hearing Officer pursuant to 6-B DCMR § 1612 to supplement the record at the administrative review level.⁹ At the hearing, testimony was adduced from Agency witnesses regarding Employee's efforts to secure annual leave to plan his trip to Ethiopia and the basis for denial of Employee's initial leave requests.¹⁰ The Hearing Officer's *Written Report and Recommendation to Deciding Official* provides a thorough analysis of Employee's efforts to secure leave for his trip to Ethiopia and the basis for Agency's management's denial of Employee's extended leave requests.¹¹ The written report by the Hearing Officer addresses Agency's arbitrary limitations on the amount of annual leave an employee may take at a time and the unwritten and informal policies Agency utilized to deny Employee his earned annual leave for his trip to Ethiopia.

While I agree with the Hearing Officer's report regarding the policies on the amount of annual leave an employee may use at one given time, and the fact that the amount of time in advance an employee should request such leave has not been formally established by Agency, I find the Employee's actions fall within the definition of AWOL. 6-B DCMR § 1268.4 provides that if it is later determined that an employee's absence was excusable the AWOL charge *may* be changed to a charge against annual leave, compensatory time, sick leave, or leave without pay. 6-B DCMR § 1268 makes it clear that an employee may be charged with AWOL despite there being annual leave hours in an employee's leave bank. Here, Employee was granted leave from December 23, 2013, through January 10, 2014--ten work days. He was denied on several occasions for leave beyond that time period. Thus, Employee's absence from January 11, 2014, through March 2014, was unauthorized, thereby making his absence without official leave. Although Employee states that Agency should convert his AWOL time to FMLA leave because he was taking care of his sick mother, it was not required to do so.

Pursuant to D.C. Official Code §§ 32-502 and 32-503 ("D.C. Family and Medical Leave Act"), if the necessity for leave under these sections are foreseeable, an employee shall provide his or her employer with reasonable prior notice. Here, Employee asserts in his brief that the illness of his mother was unexpected and unforeseen once he arrived in Ethiopia. While this may be true, Employee arrived in Ethiopia sometime in later December 2013. At no time between late December 2013 and the time Employee returned to work in March 2014, did he notify Agency of his intention to take leave under D.C. FMLA. Only after Agency imposed its

⁸ See Employee's Brief at 1-2 (April 23, 2015); In Employee's brief, he asserts that this request was submitted six months in advance. In actuality, he submitted his first leave request in August 2013, for leave to occur in December 2013—which is approximately four months apart.

⁹ See Agency's Brief, Attachment (March 24, 2015).

¹⁰ See Agency's Brief in Support of the Suspension of Olana Wako, Attachment B (March 24, 2015).

¹¹ Agency's Answer to Petition for Appeal, Attachment (October 30, 2014).

penalty did Employee assert that his AWOL should be converted to leave under the District's FMLA. Accordingly, I find that Agency had cause to take adverse action against Employee for absence without leave.

Appropriateness of penalty

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). 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; whether the penalty is based on a consideration of the relevant factors, and whether there is a clear error of judgment by agency. Here, I have found that Agency had cause to take adverse action against Employee for AWOL. The Table of Appropriate Penalties, as set forth in Chapter 16 § 1619.1(6), of the District Personnel Manual, provides that the appropriate penalty for a first time offense of AWOL ranges from a reprimand to removal. Here, the ten (10) day suspension imposed by Agency falls within this range.

Agency has the primary discretion in selecting an appropriate penalty for Employee's conduct, not the Administrative Judge.¹² The undersigned may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.¹³ When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.¹⁴ Here, Agency initially proposed removing Employee from his position. After the written report by the Hearing Officer, which addressed Agency's arbitrary limitations on the amount of annual leave an employee may take at any given time and the unwritten and informal policies Agency utilized to deny Employee his earned annual leave, it reduced Employee's penalty to a ten day suspension. The reduction in the proposed penalty demonstrates that Agency thoroughly considered the mitigating factors regarding its policies on annual leave and exercised its managerial discretion by imposing a lesser penalty than originally proposed. Still, the lesser penalty does not negate the fact that Employee was absent from work from January 13, 2014 through mid-March 2014, without authorized leave. Based on the foregoing, I find that Agency's ten (10) day suspension was appropriate under the circumstances.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's decision to suspend Employee for ten (10) work days is **UPHELD**.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge

¹² See *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

¹³ See *Id.*

¹⁴ *Id.*