Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. 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:	
LYNETTE HOLCOMB, Employee	OEA Matter No. 1601-0068-14
v.	Date of Issuance: September 13, 2016
OFFICE OF STATE SUPERINTENDENT OF EDUCATION, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Lynette Holcomb ("Employee") worked as a Bus Attendant with the Office of State Superintendent of Education ("Agency"). On March 6, 2014, Agency terminated Employee for "any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: Specifically−unauthorized absence of ten (10) consecutive days or more constitutes abandonment."[1] The effective date of Employee's removal was March 6, 2014.[2]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on April 4, 2014. She argued that she was absent from work because she had to care for her mother

[1] Agency claimed that Employee was absent without leave ("AWOL") for ten consecutive days or more starting in January of 2014. *The Office of State Superintendent of Education's Answer to Lynette Holcomb's Petition for Appeal*, Exhibit B (May 1, 2014).
[2] *Petition for Appeal,* p. 8 (April 4, 2014).

who subsequently passed away. Moreover, Employee provided that she became sick and provided medical documentation as an attachment to her petition. Employee stated that she is in a much better place and requested that she be reinstated to her position.[3]

On May 1, 2014, Agency filed its Answer to Employee's Petition for Appeal. It contended that Employee never requested Family Medical Leave during her absence. However, it claimed that even if she submitted a request, she would not have been eligible for Family Medical Leave because she exhausted her five hundred and sixty (560) hours of leave by January 31, 2013. Agency explained that it was unable to fulfill its mission because it could not depend on Employee's presence at work when scheduled. Additionally, it highlighted Employee's deliberate disregard for the time and attendance rules which affected the integrity of its operations. Further, Agency argued that Employee's removal for AWOL was within the range set forth in the Table of Penalties. Therefore, it requested that her petition be denied.[4]

On December 29, 2014, the OEA Administrative Judge ("AJ") issued an order requesting that the parties submit briefs addressing whether the AWOL charge was taken for cause and whether removal was the appropriate penalty. Employee failed to file her brief. In its brief, Agency explained that AWOL is defined as absence regardless of notice, where leave is ultimately not approved and/or failure to report to work without notification. It provided that Employee was AWOL consecutively from January 23, 2014 through February 6, 2014. Agency further provided that if Employee was absent as a result of her mother's passing, she should have notified her supervisor. Therefore, it, again, requested that Employee's petition be denied.[5]

The AJ issued her Initial Decision on February 27, 2015. She found that in matters

[3] *Id.*, 2-7.
[4] *The Office of State Superintendent of Education's Answer to Lynette Holcomb's Petition for Appeal,* p. 2 (May 1, 2014).
[5] *The Office of State Superintendent of Education's Brief in Support of the Termination of Lynette Holcomb,* p. 1-4 (February 9, 2015).

involving AWOL, the D.C. Court of Appeals ruled in *Murchison v. D.C. Department of Public Works*, 813 A.2d 203 (D.C. 2002) that an employee must be incapacitated and unable to work for it to be a legitimate excuse for AWOL. She found that the medical documentation provided by Employee did not corroborate that she was incapacitated due to illness during the absence period. Moreover, the AJ held that Employee did not request leave for the period that she was AWOL. Accordingly, she ruled that Employee's absence was not excusable. Additionally, the AJ found that removal was within the range of penalty for the first offense of AWOL. Therefore, she upheld Agency's removal action.[6]

Employee filed a Petition for Review with the OEA Board on April 2, 2015. She asserts that she was absent once a week due to relocating after her mother's passing. Employee concedes that she was informed of the penalty she would face if she continued to be absent from work. However, she contends that things got out of hand as a result of her mother's death. Employee provides that she was a good employee who did not deserve the harsh penalty of removal as a result of her absence.[7]

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

> The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:
>
> (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
>
> (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
>
> (c) The findings of the Administrative Judge are not based on substantial evidence; or

[6] *Initial Decision*, p. 3-6 (February 27, 2015).
[7] *Petition for Review*, p. 2-3 (April 2, 2015).

(d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

Employee's petition raises the same arguments that were presented to the AJ on Petition for Appeal. There is no new evidence presented that was not available or previously considered by the AJ. The arguments made by Employee on Petition for Review seem to merely be disagreements with the AJ's ruling in this matter. That is not a valid basis for appeal.

This Board believes that the AJ's decision was based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found 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.[8] Therefore, if there is substantial evidence to support the AJ's decision, then this Board must accept it.

Cause

The AJ found that Agency had cause to remove Employee based on the charge of AWOL. The record established that Employee took leave that was not approved and failed to report to work without notification on January 23, 2014; January 24, 2014; January 27, 2014; January 28, 2014; January 29, 2014; January 30, 2014; January 31, 2014; February 3, 2014; February 4, 2014; February 5, 2014; and February 6, 2014.[9] Thus, she was absent for ten consecutive days. As the AJ properly held, Employee did not prove that she was incapacitated on any of these days. Therefore, the AJ's holding that Agency had cause to remove Employee is

[8] *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).
[9] *The Office of State Superintendent of Education's Brief in Support of the Termination of Lynette Holcomb,* p. 3 and Exhibits #1, # 5, and #6 (February 9, 2015).

based on substantial evidence.

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 *Stokes*, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties. The Court in *Stokes* reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised."[10] As a result, OEA has consistently held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[11]

Penalty within the Range Allowed by Law, Regulation, or Applicable Table of Penalties

When discussing the imposition of penalties, *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981) provides that "any disciplinary action demands the exercise of responsible judgment so that an employee will not be penalized out of proportion to the character of the

---

[10] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). Additionally, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that although selection of a penalty is a management prerogative, the penalty cannot exceed the parameters of reasonableness. Moreover, the Merit Systems Protection Board ("MSPB") in *Douglas v. Veterans Administration,* 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981), provided the following:

> [OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness.

[11] *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, Opinion and Order on Petition for Review (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections,* OEA Matter No. 1601-0062-08 (April 25, 2011).

offense . . . ."[12] The D.C. Court of Appeals has consistently relied on the Table of Penalties when determining the appropriateness of an agency's penalty.[13] In the current case, the Table of Penalties for the charge of AWOL is outlined in District Personnel Manual § 1619(6)(b). In accordance with that section, the range of penalties for the first offense of AWOL is reprimand to removal. Because removal was within the range of penalties, the AJ's ruling was appropriate. Accordingly, the Initial Decision is upheld, and Employee's Petition for Review is denied.

[12] *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 330 (1981). Furthermore, *Power v. United States*, 531 F.2d 505, 507-508, 209 Ct.Cl. 126 (1976) (citing *Daub v. United States*, 292 F.2d 895, 154 Ct.Cl. 434 (1961) and *Cuiffo v. United States*, 137 F.Supp. 944, 950, 131 Ct.Cl. 60, 68 (1955)), held that there are two scenarios in which courts will not uphold the punishment imposed by the agency because of an invalid penalty. The first is where the sanction exceeds the range of permissible punishment specified by statute or regulation. The second scenario is where a court has determined that the discipline is so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion by the agency. Although the decisions issued from these courts are not binding on the OEA Board, we believe that they offer sound guidance regarding Table of Penalties.

[13] *Department of Public Works v. Colbert*, 874 A.2d 353 (D.C. 2005); *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985); *Brown v. Watts*, 993 A.2d 529 (D.C. 2010); *Hutchinson v. D.C. Office of Employee Appeals*, 710 A.2d 227 (D.C. 1998); and *District of Columbia v. Davis*, 685 A.2d 389 (D.C. 1996).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

_____
Sheree L. Price, Interim Chair

_____
Vera M. Abbott

_____
A. Gilbert Douglass

_____
Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. 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.