

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
EMPLOYEE ¹ ,)	OEA Matter No. 1601-0017-21
)	
v.)	Date of Issuance: May 9, 2023
)	
D.C. DEPARTMENT OF CONSUMER)	
AND REGULATORY AFFAIRS ² ,)	MONICA DOHNJI, Esq.
Agency)	Senior Administrative Judge
_____)	
Samuel Bailey, Jr., Employee’s Representative	
Karl Carter, Employee’s Representative	
Shanice Adams McWhirter, Esq., Agency’s Representative	
Chanel Hall, Esq, Agency’s Representative	

ERRATA AND ADDENDUM TO “INITIAL DECISION”

Please 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.”

Additionally, please strike the following name from page 8 of the April 18, 2023, Initial Decision in the above-captioned matter: “Director Chavez” and replace it with “Director Chrappah”.

/s/ Monica N. Dohnji

MONICA DOHNJI, Esq.
Senior Administrative Judge

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

² This Agency no longer exists as it was split into two (2) separate agencies in 2022 - Department of Licensing and Consumer Protection and the Department of Buildings.

Notice: This decision is subject to formal revision before publication in the District of Columbia Register. Parties are requested to notify the Office Manager of any formal errors in order that corrections be made prior to publication. This is not intended to provide an opportunity of a substantive challenge to the decision.

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Chanel Hall, Esq, Agency’s Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On March 11, 2021, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of Consumer and Regulatory Affairs’ (“DCRA” or “Agency”) decision to terminate him from his position as an Elevator Inspector³, effective February 13, 2021. Employee was charged with: “Unavailability for work due to medical reasons. Unauthorized absence of five (5) workdays or more.”⁴ OEA issued a Request for Agency Answer to Petition for Appeal on April 22, 2021. On June 14, 2021, Agency submitted its Answer to Employee’s Petition for Appeal and Motion to Dismiss. On July 28, 2021, Employee filed his Opposition to Agency’s Response and Motion to Dismiss. Following a failed attempt at mediation, this matter was assigned to the undersigned Senior Administrative Judge (“SAJ”) on September 3, 2021.

Following a request for extension, a Status/Prehearing Conference was held in this matter on November 9, 2021. Both parties were present for the scheduled Status/Prehearing Conference. Thereafter, on November 16, 2021, I issued a Post-Status Conference Order requiring the parties to submit written briefs addressing the issues raised at the Status Conference. Following several requests for extensions which were

¹ Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.
² This Agency no longer exists as it was split into two (2) separate agencies in 2022 - Department of Licensing and Consumer Protection and the Department of Buildings.
³ The Notice of Proposed Removal and the Final Agency Decision listed Employee’s position as a Housing Code Inspector. However, Agency conceded during this proceeding that Employee was an Elevator Inspector and not a Housing Code Inspector.
⁴ 6B District of Columbia Municipal Regulation (“DCMR”) §§ 1605.4(f)(2) and 1607.2(f)(4).

granted by the undersigned, both parties submitted their respective briefs. Upon further review of the record, the undersigned determined that there were factual issues in dispute, as such, a virtual (via WebEx) Evidentiary Hearing was held on November 14 and November 15, 2022. Both parties were present for the Evidentiary Hearing.⁵ Subsequently, the undersigned issued an Order requiring the parties to submit written closing arguments. Following several requests for extension of time to file written closing arguments, both parties filed their respective closing arguments. The record is now closed.

JURISDICTION

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

ISSUES

- 1) Whether Employee's actions constituted cause for adverse action; and
- 2) If so, whether the penalty of removal is within the range allowed by law, rules, or regulations.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW⁶

As part of the appeal process within this Office, I held an Evidentiary Hearing on the issue of whether Agency's action of terminating Employee was in accordance with applicable law, rules, or regulations. During the Evidentiary Hearing, I had the opportunity to observe the poise, demeanor and credibility of the witnesses, as well as Employee. The following findings of fact, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of Employee's appeal process with this Office.

SUMMARY OF RELEVANT TESTIMONY

Employee's Case in Chief

Vol I. – November 14, 2022

Kevin Griffiths Vol. I. Tr. pgs. – 18 -93

Kevin Griffiths (“Dr. Griffiths”) is a Nephrologist in the D.C. metro area. As a Nephrologist, he treats people with renal disease - patients with kidney problems; those on dialysis for kidney failure as well as kidney transplant patients. Tr. Vol. I. pgs. 18-20.

Dr. Griffiths stated that Employee has been his patient since late 2015, early 2016 when he was referred to Dr. Griffiths for chronic kidney disease. He explained that chronic kidney disease occurs when a person's kidney function is decreased but they are not yet at the level of needing dialysis. He asserted that

⁵ Agency submitted several Motions via email on the morning of the Evidentiary Hearing. I hereby find that all the motions emailed to the undersigned on the morning of the Evidentiary Hearing are not accepted as part of the record because they were not properly filed with OEA. Even if these motions were properly filed, I further find that they are moot and hereby **DENIED**.

⁶ Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. See *Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) (“The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence”).

around 2017 or 2018, Employee's kidneys continued to deteriorate, and Employee was placed on hemodialysis. Tr. Vol. I. pg. 22. Dr. Griffiths explained that hemodialysis is when two needles are inserted into the arm of a patient - one needle is used to take the blood away from the body and it goes to a machine. Once in the machine, the blood is purified of toxins and the body is given back nutrients that is not being naturally produced because of the kidney failure. He also noted that the machine can withdraw fluid from the patient's body to help lower their blood pressure and decrease the swelling in the body. The other needle is used to return the good blood back to the body. He asserted that some patients had to go to the center three (3) times a week for their treatment – Monday, Wednesday, and Friday, and their treatment was done by a technician or nurse. However, in Employee's case, he was placed on a home hemodialysis treatment plan because of his support system, his acuity, his understanding of the process and his desire to keep working. Tr. Vol. I. pgs. 23 -24, 66-67.

Dr. Griffiths testified that Employee was diagnosed with end stage renal disease requiring dialysis, and he has treated Employee for approximately six (6) to seven (7) years. He stated that Employee is still under his care but is no longer on dialysis since he received a transplant in 2021 and is doing well with the transplant. Tr. Vol. I. pgs. 24-25, 30.

Dr. Griffiths explained that the side effects of the dialysis treatment include most people feeling weak and wiped out. Some people experience drops in blood pressure on dialysis and pass out at dialysis or have extreme cramping. He also asserted that generally, after treatment, most patients are not well enough to go on and do other things during the day and so they go home and sleep the remainder of the day. Further, with most patients, even when they go home, they lack the desire to eat or do not feel like themselves. This feeling subsides and generally the next day they feel more appropriate, but that during treatment and the time immediately after dialysis, a patient feels "wiped out". Dr. Griffiths affirmed that Employee experienced these side effects. He explained that at the beginning of his dialysis treatment, Employee was able to work, but he started experiencing some of the effects of dialysis such as feeling weak and fatigue a couple years into his treatment. Thus, Employee expressed that it became more difficult to work and do his dialysis. Dr. Griffiths averred that based on statistics, only 20-26% of dialysis patients can work full time or part-time. He further noted that based on his sixteen (16) years of experience, only a handful patients can work full time while on dialysis. Tr. Vol. I. pgs. 25-27.

Dr. Griffiths asserted that Employee's position of Elevator Inspector required him to stand on his feet for long periods of time and that's not generally something most dialysis patients could do. Dr. Griffiths cited that he had expressed to Employee that his job duties could be problematic in relation with him being on dialysis. He also noted that Employee's blood pressure became problematic, and he was place on a lot of blood pressure medicines and which in itself could decrease his blood pressure and affect his energy level. Dr. Griffiths stated that Employee had a lot of complications associated with dialysis that made his type of occupation difficult. He testified that for dialysis patients who work, light duty such as working behind a desk is the best option for most of them. Tr. Vol. I. pgs. 27-29.

Dr. Griffiths testified that once a patient starts dialysis, they remain on dialysis until they die, or they get a transplant. Tr. Vol. I. pg. 40. He stated that at the start of his treatment, Employee had dialysis four (4) times a week – Monday, Tuesday, Thursday, and Friday for four and a half (4.5) hours per day. He also noted that on average, Employee had dialysis about 16 times a month. He cited that he cautioned Employee that there would be side effects associated with the dialysis treatment such as weakness, fatigue, unsteady gait, and potential shortness of breath. Tr. Vol. I. pgs. 42, 58, 64.

Dr. Griffiths identified Exhibit 6 as a document from his office date July 22, 2020, stating that due to complications from dialysis, Employee should not return to work at that time. Tr. Vol. I. pg. 49. Dr. Griffiths stated that upon his review of Employee's record at that time, Employee had been on home hemodialysis for three (3) years, and he had been doing relatively well. But over the last months prior to the July 22, 2020, letter, Employee had started complaining of fatigue, difficulties in doing his job because of the number of hours allocated to dialysis per day, the fact that he had to drive to work and stand, and he was experiencing swelling. Therefore, they had to start taking more fluids off Employee's body and this dehydrated and weakened his body causing a lot of fatigue. Employee did not feel like he could continue his job. Employee's blood pressure also became problematic, and it was difficult to control his hypertension despite him being on dialysis. Employee was placed on four (4) or five (5) medication which added to the side effects of the dialysis he already suffered. He cited that Employee was at risk for decompensating and developing a worsening of his heart disease. And the decision was made that he stop working and hopefully he would improve the next couple of months, but that did not happen. He explained that he requested in his letter to Agency that they contact him if they needed additional information about Employee's condition. Tr. Vol. I. pgs. 53 - 54.

Dr. Griffiths affirmed that Employee was undergoing dialysis treatment from September 14, 2020, to October 31, 2020. He also admitted that Employee was experiencing the side effects of dialysis during the period of September 14, 2020, to October 30, 2020. Dr. Griffiths acknowledged that Employee continued his four (4) days a week dialysis regiment from September 2020, to March of 2021. Tr. Vol. I. pg. 62, 64, 80-81.

Dr. Griffiths stated that he saw Employee in both July and September of 2020, but he did not see him in October of 2020. He explained that home dialysis patients send in their blood work, and he sees them once a month, and they are also seen once a month by a nurse. Tr. Vol. I. pgs. 65-66. He affirmed that home dialysis patients such as Employee have the flexibility to schedule their dialysis treatment and they can set their treatment for Friday, Saturday, Sunday, and Monday at whatever time of the day they choose to do the treatment. Tr. Vol. I. pgs. 67-69.

Referencing Employee's Exhibit 4, at page 7, number 5, Dr. Griffiths testified that although it was in his office manager's handwriting, he told her what to write. He stated that he reviewed Employee's medical record prior to coming to court to testify. Dr. Griffiths stated that he noted in Employee's Exhibit 4, that Employee would be incapacitated for seven (7) days because Employee was just starting dialysis and he did not know how Employee was going to respond to the dialysis treatment. Tr. Vol. I. pgs. 70-74.

Dr. Griffiths testified that he did not disclose Employee's specific medical conditions in the July 22, 2020, letter to Agency for privacy reasons. Instead, he issued a generic letter and requested that Agency contact him if they needed specific information, but nobody from Agency contacted him about Employee's condition. He averred that Employee never approached him again regarding additional clarifying information. Tr. Vol. I. pgs. 74-76, 78.

Dr. Griffiths explained that 'incapacitation' was a medical term with broad meaning, and as an example, he noted that "incapacity might be, oh, I'm feeling not well today, but I feel better tomorrow, or incapacity means, I'm going to be like this -- like a demented patient, where they are just in a nursing home and never responding to anything. So I don't -- I think that's an overly broad term. If we want to clarify, like, hey, this is what I think incapacity -- I mean, I can give you further details and how I feel that fits with [Employee] and your Agency." (Emphasis added). Tr. Vol. I. pgs. 80-81.

Dr, Griffiths testified that in general, a patient does not need another individual in the house for home dialysis as some patients do it by themselves. Predominantly, the spouse or the caring partner does the dialysis with them. He affirmed that Employee's spouse assisted him with the dialysis treatment. Tr. Vol. I. pgs. 83-84.

Agency's Case in Chief

Jeffrey Reiss Vol. I. Tr. pgs. 95 – 167

Jeffrey Reiss ("Reiss") is currently employed with the Department of Housing and Community Development as a program manager. He was employed by Agency from February 2015 to August 2022, as Construction Inspector, Technical Advisor, Third Party Program Manager, and Program Manager Chief of Inspections. He stated that he was familiar with the current matter involving Employee. Tr. Vol. I. pgs. 95-96. Reiss explained that he had a tiered supervisory role - he supervised Employee's supervisor, Mr. Foss. Reiss asserted that he signed Agency's Notice to Propose removal. Tr. Vol. I. pgs. 98-99, 113.

Reiss testified that Employee was an Elevator Inspector at the old DCRA, where he had attendance issues. Mr. Foss communicated with Employee and wrote him up in April 2020 for failure to report to work. Mr. Foss left Agency sometime in August or September of 2020, and Employee became his direct report. Reiss noted that he was acting as Employee's supervisor for the period between September 3, 2020, and October 30, 2020. He stated that Employee did not report to work during that time frame, and he had not received any notification from Employee as to his status. Thus, the *Douglas* Factors⁷ were reviewed to determine if there were any mitigating factors and a notice to propose separation was initiated. Tr. Vol. I. pgs. 100-101, 120, 137, 155.

Reiss stated as an Elevator Inspector, Employee's duties included accident investigation, physical inspections of conveyance devices, compliance with the codes, and review of third-party documents for verification of their field work prior to issuance of elevator certificates. Reiss identified Agency's Exhibit 1

⁷ *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

- 1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- 3) the employee's past disciplinary record;
- 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
- 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- 7) consistency of the penalty with any applicable agency table of penalties;
- 8) the notoriety of the offense or its impact upon the reputation of the agency;
- 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- 10) potential for the employee's rehabilitation;
- 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

as the position description for the Code Compliance Specialist Elevator Inspector grade CS-12. Tr. Vol. I. pgs. 101-103, 105-106, 112-113.

Reiss identified Agency's Exhibit 3 as the Notice of Proposed Removal. Tr. Vol. I. pgs. 113-114. He asserted that Employee was charged with: (1) unavailability for work due to medical reasons. Tr. Vol. I. pgs. 115. Reiss highlighted that he was aware that Employee left work for medical reasons from secondary sources. However, as of his issuance of the October 30, 2020, Notice of Proposed Removal he had not received any information or notification from Employee about his medical status. Tr. Vol. I. pgs. 125-126.

Reiss testified that Agency remained in full operation during the pandemic, with all the inspectors coming to the office. He averred that Inspectors were working in the field, performing inspections. He stated that all the inspectors worked their normal tours of duty as construction was deemed an essential activity by the mayor. Reiss asserted that Agency had four (4) elevator inspectors in 2016 and 2017. However, during part of his tenure, the number went down to three (3), then two (2) elevator inspectors. The number went back up to three (3) within the last 60 days from when he testified. Tr. Vol. I. pgs. 126-129, 164.

While referencing Agency's Exhibit 8, when asked if Employee was a Housing Code Inspector, Reiss said 'no'. He explained that it was an error. He stated that the *Douglas* factors were based on the elevator inspector job description. Reiss asserted that he did not draft/prepare the Notice of Proposed Removal/*Douglas* factors, he just signed them in his capacity as the proposing official/program manager of the department. He averred that the document was prepared for Agency by the Office of the General Counsel. When asked why all the neutral factors were not added up and scored, he stated that he did not recall. He further explained that the *Douglas* factors did not have a scoring system. Tr. Vol. I. pgs. 133 – 134, 136-137, 154-155, 160-161.

Eric Ampedu - Vol. I. Tr. pgs. 170 - 227

Eric Ampedu ("Ampedu") is currently employed with the Department of Licensing and Consumer Protection, one of two (2) agencies born out of DCRA. He joined Agency on March 3, 2020, as a Deputy Chief Administrative Officer. In this role, he was responsible for the human capital, human resources training and organizational development, labor and employee relations, risk management and support services and records. Tr. Vol. I. pgs. 170 – 172.

Ampedu noted that he was familiar with Employee's matter. He testified that this matter existed prior to his tenure with Agency. It was brought to his attention in May or June of 2020, that Employee had been out of the office for a while and had not reported back to duty or informed the Agency of his situation or circumstances. So they reached out to Employee to obtain some information regarding his situation. Tr. Vol. I. pg. 172.

Ampedu identified Agency's Exhibit 6 as the June 30, 2020, Letter he sent to Employee to ascertain his circumstances and find out why he was not reporting to work and if he had any intentions to report to work at all. He acknowledged signing the letter. He noted that the June 30, 2020, Letter was not a Notice of Proposed Removal. He testified that after sending the June 30, 2020, Letter to Employee, he received a response from Employee which vaguely indicated that Employee was on dialysis and could not return to work. Ampedu explained that the letter only stated that Employee was on dialysis and did not provide any additional information regarding his return-to-work date, and his health details. He stated that he knew what dialysis meant, but he did not know if that meant Employee would never return to work in some capacity since the doctor did not indicate when Employee would return to work. Ampedu identified Agency's Exhibit

7 as the doctor's note dated July 22, 2020, that he received from Employee's doctor, Dr. Griffiths, of the Metro Renal Associates, PLSC, regarding Employee's situation. He explained that despite the note stating that Agency could reach out to Dr. Griffiths if it had additional questions about Employee's condition, he did not call Dr. Griffiths about the note because he had no business with him. Ampedu averred that the September 3, 2020, letter was Agency's follow-up to the July 22, 2020, doctor's note. Ampedu highlighted that he did not receive any other documentation regarding Employee's status after he received the July 22, 2020, doctor's note. Tr. Vol. I. pgs. 174-177, 180, 193-195, 220.

Ampedu testified that for HIPAA reasons, agencies nor the government require that detailed employee medical information be included in doctor's note such as the one Dr. Griffiths sent to the Agency. But he asserted that the July 22, 2020, note could have provided some information that would impact Agency's decision or let Agency know when Employee could possibly return to work. Tr. Vol. I. pg. 181.

Ampedu affirmed that after receiving the doctor's note in July of 2020, he sent another correspondence to Employee on September 3, 2020. Tr. Vol. I. pg. 183. He identified Agency's Exhibit 5 as the letter he sent to Employee following up on the previous doctor's note, which Agency found to be insufficient. He cited that the September 3, 2020, Letter offered Employee with another opportunity to let Agency know of his return-to-work date. He asserted that he did not receive any information from Employee's doctor regarding his status. Ampedu affirmed that he would have accepted any additional helpful information from the doctor. He stated that pursuant to the September 3, 2020, Letter, Employee was to return to work on September 14, 2020. Ampedu testified that the letter instructed Employee to let Agency know if he decided to resign or Agency would start termination proceedings if Employee did not return to work. He noted that the September 3, 2020, Letter was not a Notice of Proposed Removal, rather, an additional request and a follow-up to his previous letter to Employee. Tr. Vol. I. pgs. 184 -186, 190-191, 204-205.

Ampedu identified Agency's Exhibit 15 as the mail delivery receipt from the United States Postal Services. He noted that the mail in question was addressed to Employee and the receipt is dated August 30, 2021, with a mail delivery event date of September 20, 2020, or 21, 2020. Ampedu explained that although Employee received the September 3, 2020, letter after the response was due on September 14, 2020, Employee could have still responded to the September 3, 2020, Letter since Agency did not commence adverse action until October 2020. He explained that the pandemic might have had an impact in the discrepancies in the dates. Ampedu averred that he was unsure as to why the August date was '2021' and the September date was '2020'. Tr. Vol. I. pgs. 187-190, 205, 207.

Monique Bocock Vol. I. Tr. pgs. 227 - 240

Monique Bocock ("Bocock") is employed with the Department of Buildings, which is formerly DCRA, as Senior Policy Advisor. In this role, she oversees a couple business units like the Freedom of Information Act ("FOIA") in the legislative affairs team. She also serves as a Deciding Official. She is familiar with the current matter as she was the Deciding Official. Tr. Vol. I. pgs. 228-229.

Bocock identified Agency's Exhibit 9 as the Hearing Officer's Report in the current matter, dated January 15, 2021. She admitted reviewing the report. Tr. Vol. I. pgs. 230 - 231. Bocock identified Agency's Exhibit 10 as the Final Agency Decision in this matter. She also identified her signature on the document. Tr. Vol. I. pgs. 232-233. She testified that in making her decision in this matter, she reviewed the Notice of Proposed Removal and the accompanying documents; the hearing officer's report and the information that was provided on Employee's behalf - his response. Bocock noted that she was familiar with the *Douglas*

Factors and it was one of the documents she reviewed that accompanied the Notice of Proposed Removal. Tr. Vol. I. pg. 234 -235.

Bocock testified that the Final Agency Decision lists both the 1605.4(f)(2) and 1607.2(f)(4) under disciplinary cause and those are basically the same, not separate charge. 1605.4(f)(2) - unauthorized absence of five workdays and more is the actual charge levied against Employee and 1607.2(f)(4) is referring to the table of penalties for the charge. Tr. Vol. I. pgs. 237-238.

Employee's Case in Chief

Vol. II. November 15, 2022

Employee – Vol. II. Tr. 4 – 91

Employee has been an Elevator Inspector with Agency since 2001. Tr. Vol. II. pgs. 4 -5. Employee identified Employee's Exhibit 4 as the application for Family Medical Leave ("FMLA") he submitted to Agency when he was diagnosed with end-stage renal failure. He noted that Dr. Griffiths suggested that he did home hemodialysis. Agency granted his request for intermittent use of his FMLA. Employee stated that he was on FMLA for a period of two (2) years. He however noted that he did not use up his FMLA approved 16 weeks. He averred that he had about 46-64 hours of leave left under FMLA. Tr. Vol. II. pgs. 6 -13, 31-32.

Employee testified that he did dialysis at home with the help of his wife because he was afraid of needles, and it was hard for him to learn how to stick himself. He stated that his wife had to stick him and monitor his vitals on an iPad that Dr. Griffith's office provided. The vital information was sent to the server at Dr. Griffith's clinic in Southeast. Employee noted that he had to report to that clinic once a month. He also had to supply blood work and dropped it off at the clinic. The blood work was sent to John Hopkins in Baltimore for analysis. Thereafter, it was distributed throughout the network of hospitals in the DC area, Maryland, and Virginia, to see if there was a match. Employee stated that he did this for four and a half (4.5) years. Employee asserted that he worked for three and a half (3.5) years while on dialysis. And then it became problematic due to swelling in his fingers and feet which affected his ability to walk and caused fatigue. Tr. Vol. II pgs. 13-14.

Employee testified that because of the nature of his job, when he started having health issues due to the dialysis, he contacted Dr. Griffiths, and told him the side effects of the dialysis made it difficult for him to effectively perform his job. He noted that he had difficulties walking across gravel or asphalt rooftops to get to elevator machine rooms and that sometimes he would lose his balance, and he did not want to fall off a building. He also stated that he had problems climbing on top of the elevator, climbing in the elevator pits, as well as problems stooping and bending. Employee requested to go out on medical disability leave. Tr. Vol. II. pg. 16.

Employee averred that his last day of work was July 10, 2019. He stated that he had a conversation with Agency Director - Director Chavez to tell him about his condition and inform him it was his last day at work as he was going out on disability. Employee asserted that he applied for disability on July 11, 2019, and his short-term disability claim was approved for six (6) months. He transitioned from short term disability to long term disability in January of 2020, after his short-term disability expired. According to Employee, he hand-delivered his long-term disability approval paperwork and other documents to a Lorraine Green at District Department of Human Resources ("DCHR"). He did not hear back from Agency until he received the June 30, 2020, letter. Employee testified that he took the letter to Dr. Griffiths during his monthly visit.

Dr. Griffiths responded to Agency in the July 22, 2020, doctor's note and Dr. Griffiths' note was a sufficient response to the June 30, 2020, Letter from Agency. He stated that apart from the letter dated September 3, 2020, which he received on September 21, 2020, he did not have any contact with Ampedu after he submitted the July 2020 doctor's note. He explained that he did not contact anyone at Agency after he received the September 3, 2020, Letter because they had already started the proceedings to remove him. Tr. Vol. II. pgs. 18, 20-21, 24-26, 56-57, 60.

Employee asserted that the September 3, 2020, Letter noted that he had to report to work on September 14, 2020, or resign his position or steps would be taken to remove him. Employee stated that he did not contact Agency after he received the September 3, 2020, Letter because he was already seven (7) days past the prescribed deadline of September 14, 2020. Thereafter, he received a letter of proposed removal on October 30, 2020. Tr. Vol. II. pgs. 27.

Employee testified that he was still under the care of Dr. Griffiths from September 14, 2020, to October 30, 2020, and continuing with his dialysis four (4) days a week, four and a half (4.5) hours each time, with his wife's assistance. Employee affirmed that he was unable to work from September 14, 2020, to October 30, 2020. He also affirmed that he was unable to work when he received the June 30, 2020, and September 3, 2020, Letters from Agency. He stated that he was weak, fatigued and had some swelling in my legs, and arms after the dialysis. When asked If he was able to perform his duties as an elevator inspector during the two (2) months period of September 2020 to October 2020, Employee said 'no'. Employee expressed that he is no longer on dialysis since he got a kidney transplant, and he is ready to return to work. Tr. Vol. II. pgs. 28-30, 44, 52-53, 81, 84-85, 90.

1) Whether Employee's actions constituted cause for discipline

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Furthermore, the District Personnel Manual ("DPM") regulates the manner in which agencies in the District of Columbia administer adverse and corrective actions. DPM § 1602.1 provides that disciplinary action against an employee may only be taken for cause. Agency terminated Employee pursuant to 6-B DCMR §§ 1605.4(f)(2) and 1607.2(f)(4) - Attendance-related offenses, including Unauthorized absence; and Attendance Related Offenses: Unauthorized absence of five (5) workdays or more, respectively.

Attendance-related offenses, including Unauthorized absence; and Attendance Related Offenses: Unauthorized absence of five (5) workdays or more.

In the instant case, the undersigned must determine if the evidence that Employee was absent from work for five (5) or more workdays is adequate to support Agency's decision to terminate Employee. In such cases, "[t]his 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."⁸ Additionally, if the employee's absence is excusable, it "cannot serve as a basis for adverse action."⁹ The relevant time period in this matter is September 14, 2020, to October 30, 2020.

⁸*Murchinson v. Department of Public Works*, OEA Matter No. 1601-0257-95R03 (October 4, 2005); citing *Employee v. Agency*, OEA Matter No. 1601-0137-82, 32 D.C. Reg. 240 (1985); *Tolbert v. Department of Public Works*, OEA Matter No. 1601-0317-94 (July 13, 1995).

⁹ *Murchison, supra*, citing *Richard v. Department of Corrections*, OEA Matter No. 1601-0249-95 (April 14, 1997); *Spruiel v. Department of Human Services*, OEA Matter No. 1601-0196-97 (February 1, 2001).

Employee does not dispute that he was absent from work from September 14, 2020, to October 30, 2020. However, he testified that he was under the care of Dr. Griffiths, his nephrologist, from September 14, 2020, to October 30, 2020, and continuing with his dialysis four (4) days a week, four and a half (4.5) hours each time, with his wife's assistance. Employee affirmed that he was unable to work from September 14, 2020, to October 30, 2020.

Dr. Griffiths, Employee's treating physician testified that Employee was diagnosed with end-stage renal disease requiring dialysis, and Employee was undergoing dialysis treatment from September 14, 2020, to October 31, 2020.¹⁰ Dr. Griffiths stated that he saw Employee in July and September of 2020, but he did not see him in October of 2020. He acknowledged that Employee continued his four (4) days a week dialysis regiment from September 2020, to March of 2021 and he was experiencing side effects of the dialysis treatment during the period of September 14, 2020 to October 30, 2020.¹¹ Dr. Griffiths explained that at the beginning of Employee's dialysis treatment, Employee was able to work, but a couple of years into his treatment, he started experiencing some of the side effects of the dialysis treatment – he became weak and fatigued and Employee informed him that it had become more difficult for him to work while on dialysis.

When asked if Employee was incapacitated during the period of September 14, 2020, to October 30, 2020, Dr. Griffiths explained that 'incapacitation' was a medical term with broad meaning, and as an example, he noted that "incapacity might be, oh, I'm feeling not well today, but I feel better tomorrow, or incapacity means, I'm going to be like this -- like a demented patient, where they are just in a nursing home and never responding to anything. So I don't -- I think that's an overly broad term. If we want to clarify, like, hey, this is what I think incapacity -- I mean, I can give you further details and how I feel that fits with [Employee] and your Agency." (Emphasis added). Tr. Vol I. pgs. 80-81.

Although Dr. Griffiths did not specifically state that Employee was incapacitated, he provided that Employee's position of Elevator Inspector required him to stand on his feet for long periods of time and that was not something most dialysis patients could do. Dr. Griffiths further testified that Employee's job duties could be problematic in relation with him being on dialysis. He also noted that Employee's blood pressure became problematic, and he was placed on a lot of blood pressure medicines which could decrease his blood pressure and affect his energy level. Dr. Griffiths stated that Employee had a lot of complications associated with dialysis that made his type of occupations difficult. Dr. Griffiths also provided this court with examples of conditions that can be considered incapacitating. Applying these examples and rationale to Employee's medical condition/symptoms as described by Dr. Griffiths and Employee, it can reasonably be concluded that Employee was incapacitated during the relevant timeframe.

According to Dr. Griffiths, over the last months prior to completing the July 22, 2020, Letter, Employee started complaining of fatigue, difficulties in doing his job because of the number of hours allocated to dialysis per day, the fact that he had to drive to work and stand, and he was experiencing swellings. They started taking more fluids off Employee's body and this dehydrated and weakened Employee's body causing a lot of fatigue. Employee did not feel like he could continue his job. Employee's blood pressure also became problematic, and it was difficult to control his hypertension despite him being on

¹⁰ Agency conceded throughout the appeal process before this Office that it was aware that Employee had a medical condition that necessitate him to undergo dialysis treatment.

¹¹ Dr. Griffiths explained that the side effects of the dialysis treatment included (1) feeling weak; (2) wiped out; (3) a drop in blood pressure while on dialysis; and (4) extreme cramping. Dr. Griffiths further explained that after treatment, most dialysis patients are not well enough to go on and do other things during the day, while some lack the desire to eat, do not feel like themselves, and so they go home and sleep the remainder of the day. Dr. Griffiths provided that based on statistics and his 16 years of experience in the field, only 20-26% of dialysis patients can work full time or part-time while on dialysis.

dialysis. Employee was placed on four (4) or five (5) medication which added to the side effects of the dialysis he suffered. Dr. Griffiths testified that Employee was at risk for decompensating and develop worsening of his heart disease. A decision was made that Employee stop working with hopes that his condition would improve the next couple of months, but that did not happen.

Of note, in Employee's Exhibit 4 – Employee's FMLA application form which was filed with Agency when Employee began dialysis treatment in 2019, Dr. Griffiths stated that the side effects of dialysis treatment were incapacitating, and that Employee could suffer from weakness and unsteady gait that could necessitate that Employee be absent from work. The application states:¹²

1. Approximate date condition commenced: **1-9-17**

Probable duration of condition: *lifetime*

4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regiment of continuing treatment such as the use of specialized equipment):

[Employee] will be seen 4x a week for dialysis. The days are Mon, Tues, Thur, and Fri for approximately 4 1/2 hrs each day. The patient will experience weakness, fatigue, unsteady gait, and shortness of breath which improves with dialysis.

5. Will the employee be incapacitated for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery? ___ No Yes

...

7. Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions? ___ No Yes

Is it medically necessary for the employee to be absent from work during the flare-ups? ___ No Yes. If so, explain:

During flare-ups pt will have generalized weaknesses and unsteady gait.

(Emphasis added).

While the date of Employee's Exhibit 4 is outside of the relevant timeframe, it sheds light into Employee's medical condition and the important question of whether Employee's medical condition was so debilitating during the relevant period that it prevented him from performing his duties. Based on Dr. Griffiths' acknowledgement that Employee continued his four (4) days a week dialysis regiment from September 2020, to March of 2021, which encompasses the relevant time frame, and that Employee was experiencing similar side effects (weakness and fatigue) from the dialysis treatment as those listed in Employee's Exhibit 4 Question 7, I find that Employee's condition was so disabling that it prevented him from performing his duties during the relevant timeframe.

In a letter dated June 30, 2020, Agency requested that Employee provide information from his physician/medical provider on the status of his disability and if any, an expected date of his return to work. Employee was required to provide the requested information no later than July 31, 2020.¹³ Dr. Griffiths submitted a note to Agency dated June 22, 2020, highlighting that Employee was not to return to work due to

¹² See Employee's Exhibit 4.

¹³ Agency Exhibit 6.

dialysis.¹⁴ Dr. Griffiths also provided that if Agency needed further information, they should contact him at the telephone number included in the letter.¹⁵ In a letter dated September 3, 2020, Agency informed Employee that it had no additional information about Employee's return to work date. Agency stated that Employee was no longer covered under an approved absence. The letter also informed Employee that if Agency did not receive Employee's resignation or he did not return to work by September 14, 2020, Agency might initiate procedures to terminate his employment.¹⁶

Ampedu testified that after sending the June 30, 2020, Letter to Employee, he received a response from Employee which vaguely indicated that Employee was on dialysis and could not return to work. Ampedu explained that the July 22, 2020, Letter from Employee's doctor only stated that Employee was on dialysis and did not provide any additional information regarding his return-to-work date, and his health details. He averred that the September 3, 2020, Letter was Agency's attempt to follow-up on the doctor's note dated July 20, 2020. Ampedu explained that the July 20, 2020, note could have provided information that would impact Agency's decision or let Agency know when Employee could return to work. Dr. Griffiths testified that he did not disclose Employee's specific medical conditions in the July 22, 2020, Letter to Agency for privacy reasons. Instead, he issued a generic letter and requested that Agency contact him if they needed specific information, but nobody from Agency contacted him about Employee's condition. Ampedu conceded that for HIPAA reasons, agencies do not necessarily require that detailed employee medical information be included in doctor's note such as the one Dr. Griffiths sent to the Agency.

Employee also explained that he did not contact Agency after he received the September 3, 2020, letter because he received the letter seven (7) days past the prescribed deadline of September 14, 2020. There is evidence in the record to support Employee's assertion that he received the September 3, 2020, Letter from Agency seven (7) days from the response deadline. Ampedu explained that although Employee received the September 3, 2020, letter after the response was due on September 14, 2020, Employee could have still responded to the September 3, 2020, letter since Agency did not commence adverse action until sometime in October. I find this argument to be disingenuous, especially since Agency had already threatened termination in the September 3, 2020, Letter. Further, Employee had no way of knowing that Agency had not already commenced adverse action against him because the September letter specifically provided that Agency might commence adverse action against Employee if he did not return to work by September 14, 2020. Moreover, a reasonable person would assume that since it was already a week past the specified deadline, Agency had already commenced adverse action against them. Besides, after receiving the letter, Employee still needed additional time (especially during the COVID-19 State of Emergency/Pandemic) to contact his doctor to get the requested information. This could have further delayed his submission. Referencing the delay in the mail delivery of the September 3, 2020, Letter to Employee, Ampedu acknowledged that the pandemic caused operational delays. Thus, I conclude that because Employee received the September 3, 2020, Letter after the prescribed response deadline, it was impossible for him to comply with the September 3, 2020, Letter.

Furthermore, the record shows that Agency was sufficiently apprised on multiple occasions by Employee's medical provider and Employee himself of Employee's medical condition from January 2017 when Employee filed for FMLA to October 2020, when Agency proposed removal. Employee and his medical provider, Dr. Griffiths, submitted documentation to Agency from when he was placed on dialysis addressing the severity of his condition and the extent to which it was exacerbated by his work condition. The record shows that: (1) Employee was placed on dialysis in 2017; (2) Dr. Griffiths informed Agency in the FMLA forms that he submitted to Agency in 2017 of the side effects of dialysis; (3) he informed Agency

¹⁴ This note was faxed to Agency on June 22, 2020.

¹⁵ Agency Exhibit 7.

¹⁶ Agency Exhibit 5.

that Employee's condition would last for a lifetime; (4) Dr. Griffiths advised in the July 2020 doctor's note that Employee was on dialysis and was not to return to work; and (5) Dr. Griffiths provided his contact information in the July 2020, doctor's note for Agency to contact him in case Agency needed additional information on Employee's medical condition and return to work status. Furthermore, Employee testified that he provided DCHR employee, Lorraine Green, with his long-term disability approval notice, along with addition medical documentation in January of 2020. While some of these notices were provided to Agency outside of the relevant timeframe, given the totality of the circumstances, I conclude that Agency had adequate notice of Employee's medical condition prior to initiating the current adverse action.

Based on the record and the foregoing, I find that Employee's absences from September 14, 2020, through October 30, 2020, is excusable because of the side effects he suffered from his dialysis treatment. Accordingly, I further find that Agency does not have sufficient evidence to support this cause of action; therefore, I conclude that, this charge cannot be sustained.

Furthermore, DPM § 1268.2 provides that "[a]n agency head is authorized to determine whether an employee should be carried as AWOL." Additionally, DPM § 1268.4 highlights that, "[i]f 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." (Emphasis added). Here, Agency determined that Employee was AWOL for the period of September 14, 2020, through October 30, 2020. However, given the record, I find that Employee's absence was justified by his medical condition. Dr. Griffiths testified that Employee was under his care and experiencing disabling symptoms during the relevant timeframe because of the dialysis treatment. Since I find that Employee's absence is excusable, I further find that the charge for AWOL during that timeframe can be charged against Employee's sick, annual leave, compensatory leave or as leave without pay as provided in DPM § 1268.4.

2) *Whether the penalty of removal is within the range allowed by law, rules, or regulations.*

In the instant case, I find that Agency has not met its burden of proof for the above-referenced charges, and as such, Agency cannot rely on these charges in disciplining Employee.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of separating Employee from service is **REVERSED**; and
2. Agency shall reinstate Employee to his last position of record; or a comparable position; and
3. Agency shall reimburse Employee all back-pay and benefits lost as a result of the separation; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

/s/ Monica N. Dohnji
MONICA DOHNJI, Esq.
Senior Administrative Judge