THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0067-15R19
FRANCES WADE, Employee	
	Date of Issuance: October 23, 2019
v.	
DEPARTMENT OF BEHAVIORAL HEALTH, Agency	

OPINION AND ORDER
ON REMAND

This matter was previously before the Board. Frances Wade ("Employee") worked as a Consumer Affairs Liaison with the Department of Behavioral Health ("Agency"). On March 4, 2015, Employee was served with a fifteen-day Advance Notice of Proposed Removal based on charges of neglect of duty; unauthorized absence; failure to follow procedures for leave request and approval; and absence without official leave ("AWOL"). On March 31, 2015, Agency issued its Notice of Final Decision, sustaining the charges against Employee. The effective date of her termination was April 7, 2015.

An Initial Decision was issued on February 27, 2018. With respect to the AWOL charge, the AJ highlighted three of Employee's Verification of Treatment ("VOT") forms from her treating physician, Dr. Faheem Moghal ("Moghal"), which stated that she could not return to

work as a result of Post Traumatic Stress Disorder ("PTSD"). The AJ noted that while the forms were completed outside of the AWOL timeframe—February 9, 2015 through February 27, 2015—the documents nonetheless provided insight into Employee's ongoing illness. Additionally, the AJ held that Agency failed to produce any witnesses during the evidentiary hearing in support of its position that Employee was AWOL. As a result, the AJ concluded that Employee's medical condition was sufficiently debilitating and continuous as to provide her with a legitimate excuse for being AWOL. Consequently, she concluded that Agency did not have cause to terminate Employee. Therefore, she ordered Agency to reinstate Employee to her previous position with back pay and benefits. [1]

Agency filed a Petition for Review on April 3, 2018. It argued that OEA's Board has previously held that an employee's admission of being AWOL is sufficient to meet an agency's burden of proof with respect to the charge. It further asserted that Dr. Moghal's VOT forms lacked clarity and were inconclusive regarding the relevant AWOL period. Moreover, Agency posited that Dr. Moghal's diagnosis of PTSD was not supported by any documentation that explained why Employee could not perform the functions of her position. Therefore, Agency requested that the Board grant its Petition for Review.[2]

In response, Employee contended that she never admitted to being AWOL from February 9, 2015 to February 27, 2015. Additionally, Employee maintained that Agency's termination action was unlawful because she provided a legitimate medical excuse for being absent from work. She asserted that Agency was provided with notice on several occasions that she was

[1] *Initial Decision* (February 27, 2018).
[2] *Petition for Review* (April 3, 2018).

unable to return to work on February 9, 2015. Consequently, Employee believed that termination was improper and asked the Board to uphold the Initial Decision.[3]

The Board issued an Opinion and Order on Petition for Review on December 18, 2018. Based on the state of the record at that time, the Board could not satisfactorily conclude that the Initial Decision was based on substantial evidence. The Board noted that Employee's VOTs did not specifically address the status of her medical condition during the time period in which she was charged with being AWOL or that she was unable to perform the duties of her position during that time. Because Employee's medical status was germane to the disposition of this appeal, the Board granted Agency's Petition for Review and remanded the matter to the Administrative Judge to make the appropriate factual findings.[4]

On January 2, 2019, the AJ issued an order which required Employee to submit a sworn statement or affidavit from her treating physician which specifically addressed the status of her incapacitation during from February 9, 2015 through February 27, 2015. The parties were also ordered to address whether Employee was deemed to be AWOL during the relevant time period.[5]

In her brief, Employee reiterated that numerous VOT forms verified that she was diagnosed with PTSD caused by a workplace assault and that she was advised not to return to work during the period at issue. Thus, she opined that her absences were excusable and could not serve as a basis for termination under District Personnel Manual ("DPM") § 1268.4.[6] In addition, Employee submitted that she never admitted to being AWOL. Therefore, she opined that Agency

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[3] *Answer to Petition for Review* (May 8, 2018).
[4] *Opinion and Order on Petition for Review* (December 18, 2018). In its order, the Board also noted that the parties disagree as to whether Employee admitted to being AWOL from February 9, 2015 through February 27, 2015. Agency argued that it was only required to show that Employee was absent and that the absence was not authorized. However, Employee claimed that she never admitted to being AWOL for the period charged by Agency; only stating that she did not work between February 9, 2015 and February 27, 2015.
[5] *Order Requesting Briefs* (January 3, 2019).
[6] This regulation provides 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."

retained the burden of proof in proving this charge. On January 30, 2019, Employee filed an unsworn statement from Dr. Moghal regarding the status of her medical diagnosis during the AWOL period. On February 22, 2019, Employee filed with OEA a supplement to her brief which contained a notarized affidavit from Dr. Moghal which addressed Employee's medical status during the relevant time period.[7] As a result, Employee believed that Agency's termination action was improper.[8]

In response, Agency argued that the Board's December 18, 2018 remand order did not permit the AJ to re-open the record that was closed by way of the February 27, 2018 Initial Decision. It reasoned that the AJ's January 2, 2019 order requiring a written statement from Dr. Moghal violated the D.C. Administrative Procedures Act ("DCAPA") because the AJ went beyond the scope of the remand order by allowing additional evidence to be submitted. Agency provided that Dr. Moghal's unsworn affidavit, which was submitted after the issuance of the Initial Decision, could not be considered by the AJ on remand. It further stated that Dr. Moghal's unsworn statement was considered new evidence that was available before the record was closed.[9] Alternatively, Agency explained that it should have been allowed to depose Dr. Moghal for the purpose of challenging his statements regarding Employee's medical status. Lastly, Agency submitted that it proved, by a preponderance of the record, that Employee was AWOL during the relevant time period because her absences were not authorized. Consequently, it asked that Employee's termination be upheld.[10]

The AJ issued an Initial Decision on Remand on April 5, 2019. With respect to Agency's argument that the January 2, 2019 order requesting briefs went beyond the Board's remand

[7] Discussed *infra*.
[8] *Employee's Brief in Response to January 2, 2019 Order* (February 4, 2019).
[9] *Agency's Response to Employee's Brief in Response to January 2, 2019 Order* (February 25, 2019).
[10] *Id*.

instructions, the AJ held that re-opening the record for additional, supporting evidence was proper and did not violate the DCAPA.[11] As it related to the submission of Employee's sworn and unsworn affidavits from Dr. Moghal, the AJ noted that this Office is guided by the Federal Rules of Evidence but is not bound by them. As a result, she held that Dr. Moghal's unsworn and sworn statements constituted admissible hearsay, as both documents were relevant to the disposition of this matter.[12]

Regarding the AWOL charge, the AJ provided that the Board's instructions on remand required her to make a specific determination regarding Employee's medical status from February 9, 2015 to February 27, 2015. In making her determination, the AJ examined Dr. Moghal's January 30, 2019 unsworn statement and his February 22, 2019 sworn statement which booth addressed the status of Employee's PTSD diagnosis.[13] The AJ concluded that both notes supported a finding that Employee's medical condition was so severe that she was not able to perform the functions of her job during the relevant time period. She further held that Dr. Moghal's affidavits corroborated the information contained in the VOT forms which were submitted on September 5, 2014, May 5, 2015, and November 12, 2015, respectively.

Based on the above, the AJ found that Employee and her treating physician submitted sufficient documentation to address the severity of her mental condition and the extent to which it was exacerbated by her work conditions. She explained that Agency was advised of Employee's diagnosis in September of 2014, and that there was no evidence in the record to

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[11] *See also Agency's Objection to and Motion for Reconsideration of January 2, 2019 Order* (January 11, 2019). The AJ noted that D.C. Official Code § 2-503 gives individual administrative offices the discretion and power to establish their own internal rules so long as they are not inconsistent with the procedures established in the Administrative Procedures Act. Consequently, she concluded that OEA's rules of procedure permits an Administrative Judge to re-open the record on remand. The AJ also held that both the unsworn and sworn statements provided by Dr. Mohghal on remand constituted admissible hearsay evidence.

[12] *Initial Decision on Remand* (April 5, 2019).

[13] The AJ clarified that both Employee's sworn, and unsworn statements were admissible and relevant evidence notwithstanding Agency's protestations to the contrary because the statements in Dr. Moghal's first statement were corroborated and supported by the second, sworn statement regarding the VOTs.

show that Agency made any changes to accommodate Employee following her diagnosis. As a result, the AJ held that Employee's absence was excusable during the relevant time period and could not; therefore, serve as a basis for Agency's adverse action.

Lastly, regarding the directive from the Board to address the burden of proof issue, the AJ explained that Agency retained the initial burden of proof to show, by a preponderance of the evidence, that Employee was AWOL. However, she clarified that the burden shifted to Employee after she stated that she was not at work during the AWOL period because of her medical condition. Accordingly, the AJ found that Agency failed to meet its burden of proof in this matter and that Employee provided a satisfactory affirmative defense in support of her PTSD diagnosis during the relevant time period.[14] Consequently, she held that Agency's termination action was improper. Agency was ordered, again, to reinstate Employee with backpay and benefits.[15]

Agency subsequently filed a second Petition for Review with OEA's Board on May 10, 2019. It argues that the AJ violated the DCAPA and erred by exceeding the scope of the remand order because there is no language in the Board's December 18, 2018 decision which required the record to be re-opened to receive new evidence. Agency asserts that under the DCAPA, the AJ should have only been permitted to make findings based on the exclusive record when it was closed on February 27, 2018. Agency also contends that the AJ erred by considering Dr.

[14] The AJ also dismissed Agency's argument that Dr. Moghal's VOT forms lacked clarity and were inconclusive with regard to Employee's medical condition. She also disagreed with Agency's claim that accepting an affidavit from Dr. Moghal would be unfair because it would not have an opportunity to cross-examine him during an evidentiary hearing. The AJ stated that Agency failed to produce any evidence to contradict Dr. Moghal's medical assessment at any time during this course of this appeal to refute Employee's documentation and did not subpoena him for the same purpose.
[15] *Second Initial Decision on Remand*.

Moghal's statements without a showing by Employee that the statements were unavailable before the record closed.[16]

Additionally, it reasons that the AJ erred by giving weight to Dr. Moghal's newly-submitted affidavits because the documents were created approximately four years after the date on which Dr. Moghal states that he treated Employee and did not reflect an actual treatment date of February 27, 2015. Agency opines that the proceedings on remand were unfair because instead of making findings based on the record that closed February 27, 2018, the AJ issued a January 2, 2019 order that gave Employee a second opportunity to present a defense to the AWOL charge. Agency believes this is inherently unfair because its right to challenge Dr. Moghal's newly-submitted statements was circumvented. Therefore, Agency requests that the Board grant its Petition for Review.[17]

Employee filed a response to Agency's petition on June 7, 2019, arguing that the AJ's decision to re-open the administrative record was within the scope of the Board's remand order and was consistent with all applicable case law, statutes, and rules. She also reasons that the AJ did not err in giving weight to Dr. Moghal's statements, as the medical documentation submitted on remand was consistent with the numerous VOT forms which were submitted throughout the course of this appeal. Employee believes that the remand proceeding conducted by the AJ was fair; nothing in the AJ's January 2, 2019 order prohibited Agency from asking for leave to submit its own rebuttable evidence; and Agency has had many opportunities to depose or examine Dr. Moghal but failed to do so.[18]

Further, Employee states that Agency has failed to submit any evidence to show that a treating physician cleared her to return to work during the relevant time period and that Agency

[16] *Agency's Petition for Review* (May 10, 2019).
[17] *Agency's Petition for Review* (May 10, 2019).
[18] *Employee's Response to Petition for Review* (June 7, 2019).

has not provided any contradictory evidence to rebut Employee's medical diagnosis. According to Employee, Agency has simply relied on its position that she failed to voluntarily produce Dr. Moghal as a witness during the evidentiary hearing. Lastly, Employee contends that the burden was on Agency to rebut her claim that she could not return to work due to the severity of her PTSD. As such, Employee submits that Agency's termination action was unlawful and requests that the Board affirm the AJ's Initial Decision on Remand.[19]

OEA Board's Instructions on Remand

After reviewing Agency's initial Petition for Review, this Board concluded that the documentary evidence was insufficient to support a finding that Employee was medically incapacitated during the period in which she was charged with being AWOL in the absence of clear and complete supporting medical evidence. Therefore, the matter was remanded to the AJ with the following instructions:

> In light of [the] foregoing, this Board is compelled to grant Agency's Petition for Review and remand this appeal to the Administrative Judge to make the appropriate factual findings.[20]

Agency first argues that the AJ went beyond the scope of the Board's instructions on remand because she was only permitted to make findings based upon the existing record when it closed on February 27, 2018. It further suggests that the AJ's January 2, 2019 order on remand violated the DCAPA, as codified in D.C. Official Code § 2-509.[21] Section 2-509(c) provides the following in pertinent part:

> "…[t]he testimony and exhibits, together with all papers and requests filed in the proceeding, and all material facts not appearing in the evidence but with respect to which official notice is taken, shall constitute the exclusive record for order or decision. No sanction shall be imposed or rule or order or decision be issued

[19] *Agency's Response to Petition for Review* (June 7, 2019).
[20] *Opinion and Order on Petition for Review* (December 18, 2109).
[21] *See Agency's Objection to and Motion for Reconsideration of January 2, 2019 Order*.

> except upon consideration of such exclusive record, or such lesser portions thereof as may be agreed upon by all the parties to such case…."

Thus, pursuant to the foregoing subsection, it is Agency's position that the exclusive record was established on February 27, 2018, when the AJ issued her first Initial Decision. However, as Employee correctly points out, nothing within the language of D.C. Official Code § 2-509(c) explicitly excludes an agency's ability to re-open the record on remand for the submission of additional evidence. In fact, D.C. Official Code § 2-509(b) provides that "…where any decision of the Mayor or any agency in a contested case rests on official notice of a material fact not appearing in the evidence in the record, any party to such case shall on timely request be afforded an opportunity to show the contrary…." Additionally, D.C. Official Code § 2-503 directs agencies, including this Office, to establish internal administrative procedures in accordance with the DCAPA. In accordance with District law, OEA has established its own procedures, as provided in Chapter 6, Title 6, of the D.C. Municipal Regulations.[22] OEA Rule 630.1 states that "[t]he Administrative Judge may reopen the record to receive further evidence or argument at any time prior to the issuance of the initial decision."

As such, we find that the AJ's January 2, 2019 order was consistent with the DCAPA and the Board's instructions on remand. In reviewing Agency's first Petition for Review, this Board could not determine whether the AJ's findings were based on substantial evidence because the administrative record did not contain supporting medical documentation to show that Employee was medically incapacitated from February 9, 2015 through February 27, 2015. Thus, it logically follows that the AJ would be required to permit the parties to introduce additional, supporting documentation and/or testimonial evidence. Remanding the matter to the AJ to receive additional evidence, in this case, was necessary to complete the administrative record. This is not

[22] *See* 59 DCR 2129 (March 16, 2012).

incongruent with the Board's previous rulings wherein the record was deficient on Petition for Review.[23] Moreover, both parties were afforded an opportunity to respond to the AJ's January 2, 2019 order. Thus, this Board finds Agency's argument to be unpersuasive.

Admissibility of Dr. Moghal's Statements on Remand

Next, Agency contends that the AJ erred by considering Dr. Moghal's newly-submitted affidavits on remand without a showing that the statements were unavailable before the record closed. It is Agency's position that before Employee's new evidence could be considered, there must have been a showing that despite due diligence, the new evidence was not available before the record closed. In support thereof, it cites to OEA Rule 633.3, which provides that a Petition for Review may be granted when the petition establishes that "new and material evidence is available that, despite due diligence, was not available when the record closed."

It appears that Agency has muddled the standard for granting a Petition for Review with the standard of admissibility of new evidence after a remand order has been issued, as Agency was the party to file a Petition for Review of both the February 27, 2018 Initial Decision and the April 5, 2019 Initial Decision on Remand. It has not cited OEA Rule 633.3 as a basis for granting either petition. As previously stated, the AJ did not err in permitting the introduction of additional evidence in response to the Board's December 18, 2018 Opinion and Order on Petition for Review.

Under OEA Rule 626.1, all material and relevant evidence or testimony shall be admissible but may be excluded if it is unduly repetitious. In this case, both of Dr. Mohghal's affidavits constitute relevant evidence because they address Employee's medical condition from February 9,

[23] *See Gina Vaughn v. Metropolitan Police Department*, OEA Matter No. 2401-0020-12, *Opinion and Order on Petition for Review* (May 10, 2016) (ordering the matter to be remanded for further proceedings to properly determine whether Employee was placed in the correct competitive level and whether the inconsistencies in the RIF documents constitute a reversible error) and *Veronica Butler v. D.C. Office on Aging*, OEA Matter No. 1601-0132-14, *Opinion and Order on Petition for Review* (April 18, 2017) (remanding the matter to the AJ for the purpose of conducting an evidentiary hearing because of the existence of material issues of fact).

2015 through February 27, 2015. Nothing in OEA's rules requires a showing that, for a record to be re-opened, the moving party must show that said evidence was not available despite due diligence before the record was closed. Accordingly, the AJ correctly concluded that the admissibility of Employee's new evidence was consistent with the Board's remand order. Likewise, the AJ was permitted to rely upon Dr. Moghal's statements and accord them the appropriate weight in rendering her decision on remand.

Unauthorized Absence and Absence Without Official Leave ("AWOL")

In cases where an employee has been charged with being AWOL, this Office has previously held that "…when an employee offers a legitimate excuse, such as illness, for being absent without leave, the absence is justified and therefore excusable."[24] Additionally, if the employee's absence is excusable, it cannot serve as a basis for adverse action.[25] The issue germane to this appeal is whether Employee was absent from work for ten (10) or more consecutive days to support Agency's charges of AWOL and Unauthorized Absence. On remand, this Board instructed the AJ to make a specific determination regarding the status of Employee's medical condition from February 9, 2015 through February 27, 2015. Specifically, the AJ was tasked with determining if Employee's medical condition—PTSD—rendered her incapacitated and unable to work during the period in which she was charged with being AWOL.

In support of her position, Employee submitted both a sworn and unsworn affidavit from Dr. Moghal which addressed her medical status during the relevant time period. The first statement, dated January 30, 2019, was signed by Dr. Moghal, but was not notarized. It stated

[24] *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); and *Muhammad v. D.C. National Guard*, OEA Matter No. 1601-0033-07, *Opinion and Order on Petition for Review* (March 1, 2010).
[25] *Murchison, supra*, citing *Richard v. Department of Corrections*, OEA Matter No. 1601-0249-95 (April 14, 1997) and *Spruiel v. Department of Human Services*, OEA Matter No. 1601-0196-97 (February 1, 2001).

that Employee was diagnosed with PTSD caused by a workplace assault on May 24, 2013; Dr. Moghal treated Employee's symptoms (flashbacks, nightmares, anxiety, and insomnia) with various medications; Employee attended a routine follow-up appointment with Dr. Moghal on February 27, 2015, during which she reported persisting PTSD symptoms for several weeks; and the symptoms were triggered and exacerbated by the prospect of Employee returning to the previous work environment where she was assaulted. In the document, Dr. Moghal concluded that Employee's condition from February 9, 2015 to February 27, 2015 was "severe" and that Employee's diagnosis rendered her incapacitated such that she was unable to perform the functions of her job.[26]

Dr. Moghal subsequently submitted a notarized affidavit on January 4, 2019. The document provided that Employee "had been diagnosed with [PTSD] at the time she was allegedly Absent Without Leave…from work" and that Employee "was not able to return to work from February 9, 2015 to February 27, 2015 due to the severity of her PTSD." Attached to the affidavit were copies of Employee's VOT forms from various treatment dates. Each document addressed the status of Employee's medical status as a result of her PTSD diagnosis after being assaulted at work.[27]

In her Initial Decision on Remand, the AJ thoroughly analyzed Employee's VOT forms as well as Dr. Moghal's affidavits regarding the status of Employee's PTSD diagnosis, ultimately finding that there was sufficient evidence in the record to establish that Employee's medical condition was so debilitating that it prevented her from performing the functions of her job. This Board agrees with the AJ's assessment regarding such and finds that Dr. Moghal's newly-submitted affidavits constitutes specific medical evidence which addresses the relevant

[26] *Employee Brief in Response to January 2, 2019 Order*, Exhibit J.
[27] *Letter Regarding Affidavit of Dr. Faheem Moghal, Exhibit K* (February 22, 2019).

time period. The evidence supports a finding that Employee was medically incapacitated from February 9, 2015 through February 27, 2015. Pursuant to *Murchison*, Employee's absences are justified and; therefore, excusable. Accordingly, because the absences are excusable, they cannot form the basis for an adverse action.

On remand, the AJ was permitted to rely upon the newly-submitted affidavits from Dr. Moghal and accord them the appropriate weight in rendering her decision. While Agency argues that the instructions on remand were unfair, it has not proffered any compelling or conflicting evidence to refute Employee's affirmative defense of medical incapacitation. Accordingly, this Board finds that Employee has met her burden of proof in establishing a legitimate excuse for being AWOL. As a result, we find no reason to disturb the AJ's rulings on remand.[28]

Conclusion

In light of the foregoing, this Board concludes that the AJ's findings on remand are supported by substantial evidence in the record.[29] Employee's absences from February 9, 2015 to February 27, 2015 were justified as a result of her medical incapacitation. The AJ's January 2, 2019 order was consistent with this Board's directives, and the AJ was permitted to rely on the newly-submitted medical documentation in rendering her decision. Because Employee's absences were excusable, they cannot serve as a basis for adverse action. Accordingly, Agency's

[28] On August 9, 2019, Agency filed a *Notice of Additional Authority* with the OEA Board. It cites to *Brendan Cassidy v. D.C. Public Schools*, OEA Matter No. 2401-0253-10R16, *Opinion and Order on Petition for Review* (September 13, 2016) in support of its position that the AJ should have been precluded from allowing the parties to introduce new evidence on remand. However, in *Cassidy*, this Board remanded the matter because the AJ failed to provide a satisfactory analysis of the appropriate Reduction-in-Force regulations. Unlike in *Cassidy*, the record in this case required additional documentation and evidence to be introduced to develop the administrative record. Therefore, we do not find Cassidy to be on point with the facts in this matter. Accordingly, we are unpersuaded by Agency's argument.

[29] Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.13 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.

Petition for Review is denied Employee is ordered to reinstate Employee to her previous position with back-pay and benefits.

ORDER

Accordingly, it is hereby ordered that Agency's Petition for Review is **DENIED**.

FOR THE BOARD:

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Clarence Labor, Chair

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Patricia Hobson Wilson

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Jelani Freeman

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Peter Rosenstein

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Dionna Maria Lewis

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.