THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
AMELIA LOFTON,	)	
Employee	)	OEA Matter No. 1601-0095-17
	)	
v.	)	Date of Issuance: May 19, 2020
	)	
OFFICE OF THE DEPUTY MAYOR FOR PLANNING AND ECONOMIC DEVELOPMENT,	)	
Agency	)	ERIC T. ROBINSON, ESQ.
	)	Senior Administrative Judge

Keith Grimes, Employee Representative
Milena Mikailova, Esq., Agency Representative[1]

INITIAL DECISION[2]

Introduction and Procedural History

On September 22, 2017, Amelia Lofton ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting the Office of the Deputy Mayor for Planning and Economic Development's ("DMPED" or the "Agency") adverse action of removing her from service. Employee's last position of record with DMPED was Staff Assistant. Employee was charged with being Absent Without Official Leave ("AWOL") from June 26, 2017 through July 5, 2017. On October 24, 2017, DMPED filed its Answer defending its removal action. This matter was then assigned to the OEA's Mediation department so that the parties could explore possibly settling this matter. Mediation talks ensued in and around December 2017. Ultimately, those talks were unsuccessful, and this matter was assigned to the Undersigned on February 5, 2018. Thereafter, the parties participated in multiple Prehearing and Status Conferences as both parties had sought delays for various reasons including varying medical continuances as well as onboarding new Agency counsel who needed time to acclimate to the newly assigned matter.

[1] Initially, Tamika Springs, Esq., entered her appearance on behalf of DMPED. However, Mrs. Springs, was replaced by Ms. Mikailova due to Mrs. Springs leaving District government employ during the pendency of this matter.
[2] This decision was issued during the District of Columbia's COVID-19 State of Emergency.

Eventually, the Undersigned determined that an Evidentiary Hearing was required. The parties each requested at least one of their witnesses appear through telephone or video. Both requests were contested and ultimately denied.[3] Ultimately, an Evidentiary Hearing was held on October 24, 2019. Pursuant to an Order dated January 7, 2020, the parties were required to submit their written Closing Arguments on or before February 24, 2020. Pursuant to a Consent Motion, this deadline was extended to February 28, 2020. On March 2, 2020, Employee's representative sent an email requesting an extension, noting that he had second degree burns that needed treatment. This request was granted, and the deadline was extended to March 4, 2020. To date, the OEA has not received Employee's closing argument, in spite of multiple email requests to Employee's representative seeking its submission. DMPED timely submitted its closing argument. After reviewing the record as a whole, the Undersigned has determined that no further proceedings are required. The record is now closed.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
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> > 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.

OEA Rule 628.2 *id.* states:

> 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.

ISSUES

Whether the Agency's adverse action was taken for cause. If so, whether the penalty was appropriate given the circumstances.

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[3] Agency first sought to call Andrew Trueblood through telephone/video conference. It was denied since Mr. Trueblood was slated to provide first-hand testimony regarding Employee's dismissal. Employee sought to call Dr. Lewis A. Winkler through telephone/video conference. That request was denied because he was slated to provide first-hand testimony of medical documentation that he allegedly filled out or created. The veracity of these documents is under heightened scrutiny given a number of factors that are discussed more fully below.

Summary of Relevant Testimony

Sheila Cuthrell ("Cuthrell") Transcript[4] pp 21 – 81

Cuthrell testified in relevant part that she works for the Office of the Deputy Mayor for Planning and Economic Development as its Administrative Officer and Director of Operations. Her job-related duties include overseeing Human Resource ("HR") practices, management of office staff, and she was DMPED's FMLA[5] Coordinator. Cuthrell was involved with Employee's termination. Agency's Exhibit No. 4 contained an email from Employee to DMPED management staff that informed the staff that she was not coming to work on June 16, 2016. On June 17, 2016, Cuthrell sent a letter informing Employee that she was being placed on AWOL[6] status and that she could apply for FMLA (federal and/or D.C. FMLA). This same letter provided Employee with the appropriate FMLA forms. Furthermore, due to her AWOL status, the letter also informed Employee that she was required to return to work no later than June 20, 2016.[7] The due date for Employee's FMLA application was July 1, 2016. Cuthrell noted that Employee filed her FMLA and D.C. FMLA forms on July 29, 2016.[8] Notwithstanding Employee's late filing of her FMLA applications, Employee was retroactively given FMLA leave starting from June 16, 2016.[9] According to Cuthrell, Employee submitted additional documentation on November 22, 2016, in an attempt to extend her FMLA leave. This submission required further review because DMPED was unable to ascertain how much additional time was being called for according to the submission. Employee was given 15 days in order to submit updated documentation. On December 20, 2016, Employee was informed that her FMLA requests had been approved.

At this point, Employee's FMLA leave was then set to expire on January 26, 2017.[10] On January 19, 2017, Cuthrell sent a letter to Employee notifying her that her FMLA leave allotment was set to expire in a few days. This letter also provided Employee with information on how to request a reasonable accommodation for her return to work. The reasonable accommodation form required input from Employee and her medical provider. The deadline for submitting the reasonable accommodation form was February 6, 2017. However, Cuthrell noted that Employee late filed this form in or around May 2017. DMPED noted that Employee was on continuous Leave Without Pay ("LWOP") starting from the end of her approved FMLA leave in January 2017 through May 2017. According to Cuthrell, three reasonable accommodation requests made by Employee were denied because to accommodate her would have presented an undue burden on the Agency. Another request for additional training was granted and scheduled. Employee was provided with an opportunity to make a secondary request to include additional information. According to Cuthrell, Employee informed her that she would not be able to adhere to the initial deadline due to prearranged travel plans. In response, Cuthrell extended the deadline to June 23, 2017. Employee did not file a response by the extended deadline.

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[4] Hereinafter denoted as Tr.
[5] Family Medical Leave Act.
[6] Absence Without Official Leave.
[7] Tr. pp 23 – 26.
[8] Tr. pp 28 – 30.
[9] *Id.*
[10] Tr. pp 31 – 34.

On June 26, 2017, Cuthrell sent Employee a letter informing her that her time and attendance were being noted as AWOL. This letter also informed Employee, *inter alia*, that she had accumulated approximately 70 hours of Annual Leave. Cuthrell noted that at no time did Employee ask to use any of her accumulated leave.[11] Cuthrell noted that Employee reached out to her, via email, to inform her that she would return to work on July 17, 2017, as opposed to the July 5, 2017, deadline that was presented to Employee. Cuthrell was personally involved with proposing discipline in this matter. She reasoned that since Employee had been rightfully carried in AWOL status for more than five consecutive days, that the adverse action terminating Employee was appropriate given the circumstances.[12]

During cross examination, Cuthrell testified in relevant part that she was not in Employee's chain of command. Cuthrell recounted the incident that led to Employee's extended leave began in June 2016 where Employee was in a heated argument with her direct supervisor ("Ms. Hampton"). Cuthrell was questioned about Employee's leave status prior to the AWOL dates that led to her removal from service.[13] Cuthrell explained that initially on June 16, 2016, Employee was carried in an AWOL status. However, that was retroactively rescinded when Employee submitted her FMLA leave application as noted during her direct testimony.[14]

Cuthrell testified that Agency management considered Employee's reasonable accommodation request when Employee was directed to report for duty after her FMLA leave had run out. Cuthrell conferred with DMPED Chief of Staff Andrew Trueblood and others about Employee's accommodation requests. After deliberation, DMPED could not accommodate Employee's requests to be transferred to a different department[15] and to have only written communication with her direct supervisor or third-party communication because it would create an unworkable burden on Agency resources given the nature of their responsibilities.[16] On redirect examination, Cuthrell, noted that DMPED had not received any medical documentation requiring her to stay out of work.

Andrew Trueblood ("Trueblood") Tr. pp 81 – 139

Trueblood testified that from November 6, 2018, up to the present he has been the Director of the District of Columbia Office of Planning. Prior to that, he was the Chief of Staff of DMPED.[17] Trueblood's primary responsibilities as Chief of Staff of DMPED included supporting the Deputy Mayor in planning as well as managing the DMPED's staff.[18] Trueblood recognized Agency Exhibit 1, p 1 as the July 6, 2017, letter he signed proposing Employee's removal from service. Trueblood testified that Agency did a thoughtful analysis of the aggravating and mitigating factors

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[11] Tr. pp 42 – 46.
[12] *Id.*
[13] Tr. pp. 57 – 73.
[14] Tr. pp 72 – 73.
[15] Management determined that Employee was not qualified for any of the open positions.
[16] Tr. pp 73 – 75.
[17] Tr. p 82.
[18] *Id.*

and determined that removal was the proper recourse.[19] Trueblood noted that Employee's unexcused absences made her unable to perform her on-the-job duties and created an increased workload for Employee's coworkers.[20] Trueblood noted that DMPED had accommodated Employee through Employee's failure to timely file required medical documentation or to timely request leave in an appropriate manner.[21]

On cross examination, Trueblood testified that he was familiar with Employee's removal. He also recalled a June 15, 2016 conversation with Employee where she complained about workplace issues that she was having with her direct supervisor (Ms. Hampton). Trueblood told Employee he would have to follow up with Cuthrell about her concerns. However, before he could begin that process, Employee left DMPED without (at that moment) official leave.[22] Trueblood noted that he was unaware that Employee was sick when she initially left DMPED in June 2016.[23]

On redirect and recross examination, Trueblood explained that Employee's removal was due to her unauthorized absence in June and July 2017 as noted in her proposed and final notice of removal from service.[24]

Amelia Lofton ("Employee") Tr. pp 139 – 232

Employee confirmed that she worked for DMPED on June 15, 2016. She recalled a conversation she had with Trueblood on that date regarding workplace issues she was having with her supervisor Ms. Hampton. During this conversation, Employee recounted the lengthy troubled history that she had with Ms. Hampton along with the heated argument that had just occurred. Employee noted that her discord with Ms. Hampton had been simmering for years.[25] Employee noted that Employee Exhibit No. 4 is a June 16, 2016, note from her primary care physician with a referral to a cardiologist. This notice did not reference Employee's June and July 2017 AWOL time frame. Employee asserted that she was unable to return to work in June 2017 as Agency had asked because she did not have a medical release from her treating medical provider. She explained that her treating provider, Dr. Winkler, was in a very small practice and it was very difficult to reach him.[26] Employee asserted that her former attorney, Douglas Hartnett was in communication with Agency General Counsel, Susan Longstreet, regarding Employee's return to work. Employee alleged that she (and Mr. Hartnett) had been in contact with Ms. Longstreet regarding her return to work on July 5, 2017. She further alleged that emails were exchanged that corroborated that assertion.[27] Employee then relied on Employee's Exhibit No. 8, as the note that allegedly provided an extended excuse from returning to work.[28] During cross examination,

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[19] Tr. pp 85 – 91. Trueblood utilized a *Douglas Factors* analysis when assessing the appropriate punishment given the aggravating and mitigating factors involved in determining the appropriate sanction in this matter.
[20] Tr. pp 86 – 91.
[21] *Id.*
[22] Tr. pp 95 – 97.
[23] Tr. pp 99 – 101.
[24] Tr. pp 114 – 121.
[25] Tr. pp 142 – 161.
[26] Tr. pp 180 – 183.
[27] Tr. pp 184 – 201.
[28] *Id.*

Employee was questioned as to why a document that was seemingly dated in July 2017 was only first presented to the Agency in December 2017, well after her removal had been effectuated. She reluctantly admitted that she had not presented it to DMPED until her matter was under active consideration at the OEA.[29]

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

The following findings of facts, analysis and conclusions of law are based on the documentary evidence as presented by the parties during the course of Employee's appeal process with this Office. The Undersigned notes that the time period between June 26, 2017 through July 5, 2017, is the only relevant time period under review in this matter. A significant portion of the submissions in this matter refer to periods of time approximately one year prior to the dates in question. To the extent required, DMPED summarily had to defend its action during this discrete time period. Conversely, Employee had to prosecute this time frame in order to prevail. While the acts that occurred prior to June and July 2017 provided some needed perspective for the events in question, the instant Initial Decision will not decide those acts but rather how those acts colored the parties' actions during and right after the alleged AWOL.

District Personnel Manual ("DPM") § 1268.1 provides in part that "[a]n absence from duty that was not authorized or approved, or for which a leave request had been denied, shall be charged on the leave record as absence without leave '(AWOL).'" Section 1268.4 further 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." According to the DPM Table of Illustrative Actions § 1607.2 (f) (4), the only allowable penalty for a sustained five workday (or more) unauthorized absence is removal from service. In *Murchinson v. D.C. Department of Public Works*,[30] the D.C. Court of Appeals held that an employee must be incapacitated by their illness and unable to work during the AWOL period for it to be deemed a legitimate excuse to overcome a charge of AWOL. Furthermore, this 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." A charge of AWOL can be defeated by the submission of medical evidence for that cause of action.

In addressing the AWOL charge, the Undersigned must determine (1) if Employee herein was incapacitated and unable to work from June 26, 2017 through July 5, 2017 due to her ongoing medical treatment; and (2) if Employee properly informed Agency of her illness during the period in question.[31] The record is clear in noting that on June 26, 2017, DMPED sent a letter to Employee regarding "Summary of Agency Communication and Notification of AWOL Status." In this letter, DMPED first noted that Employee had not submitted medical documentation substantiating her reasonable accommodation requests. Employee was further informed of the following:

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[29] Tr. pp 206 – 210, 217 – 223.

[30] *See, Murchinson v. D.C. Department of Public Works,* 813 A.2d 203 (D.C. 2002).

[31] *Murchinson v. D.C. Department of Public Works*, OEA Matter No. 1601-0257-95R03 (October 4, 2005; citing *Tolbert v. Department of Public Works*, OEA Matter No. 1601-0317-94 (July 13, 1995)); *Hines v. Department of Transportation*, OEA No. 1601-0116-05, Opinion and Order on Petition for Review (February 25, 2009).

AWOL Status

> To date, the Agency has not received a response from you to the Response to Reasonable Accommodation Form and Associated Submittals. Therefore, you are being carried in an Absent Without Official Leave (AWOL) status effective, Monday, June 26, 2017. You currently have an annual leave balance of 70 hours and a sick leave balance of 32 hours, but have not requested or been approved to use such leave.
>
> If you intend to work, please notify us in writing by or (*sic*) Friday, June 30, 2017, and report to work on Wednesday, July 5, 2017.

Employee did not report for duty on July 5, 2017. In response to the June 26, 2017, letter, Employee informed Cuthrell, via email, that she did not intend to report to DMPED until July 17, 2017. Moreover, Employee did not provide a cognizable medical reason for her delayed report for duty request. However, at this point, DMPED interpreted the June 26, 2017, as a direct order to report for duty. When Employee failed to report, or to otherwise diligently comply with the directive to provide additional documentation substantiating her reasonable accommodation request, it decided to institute the instant removal action. DMPED asserted that Employee had been AWOL for more than five workdays. On July 6, 2017, DMPED sent written notice to Employee that it was proposing her separation due to her AWOL status starting June 26, 2017.

In response, Employee relies on Exhibit No. 8, a self-described Doctor's note from Dr. Lewis Winkler that has multiple dates hand scratched out and allegedly replaced with other handwritten dates. She proffered this Doctor's note in an effort to justify her continued absence and to overturn DMPED's AWOL assertion. Employee was questioned regarding this document and she admitted that this Doctor's note was created after her removal from service and that she only presented a copy of it to DMPED in December 2017 when this matter was pending before the OEA for mediation. Considering Employee's testimony as a whole, and more particularly with regard to Employee's Exhibit No. 8, the self-serving explanation regarding this Doctor's note leads me to question the veracity of the document as a whole. Moreover, Employee was given ample opportunity to present Dr. Winkler's testimony in this matter and a number of continuances were granted in order to secure his live in-person testimony. Notably, he did not testify on Employee's behalf. Notwithstanding Employee's flimsy explanation, I find that Employee's Exhibit No. 8 shall be given no weight due to it lacking any credibility.[32] I further find that Employee has not provided any credible evidence that she was incapacitated as is mandated by *Murchinson* for a successful prosecution of an AWOL charge.

The record is replete with multiple instances where DMPED provided leniency regarding taking adverse action against Employee's unexcused, extended absences. DMPED, had it so chosen, could have instituted action during an earlier time frame when Employee failed to timely submit documentation to substantiate her continued use of FMLA leave. As part of its Proposed Notice of Separation, DMPED provided Employee with the information necessary to request sick

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[32] *See* footnotes 28 and 29.

and/or annual leave when it proposed the instant removal action. Employee failed to request leave (sick or annual). Moreover, they provided a credible explanation as to why DMPED required an updated reasonable accommodation submission from Employee and her medical providers. This was due to the ongoing needs of DMPED and the inability to accommodate her request and faithfully fulfill DMPED's mission. I find Cuthrell and Trueblood's collective testimony in this matter forthright and credible. Conversely, I find that Employee's explanation was self-serving, at best.

It is indisputable that Employee did not appear for work at DMPED during the AWOL period in question. I find that Employee did not timely provide a credible medical excuse for being absent from work during the period of alleged AWOL. As noted previously, Employee's Exhibit No. 8 was thoroughly discredited and is given no weight. The scratched off dates are in no way connected to the alleged AWOL dates. This is indicated by her testimony that she was willing to return at a later date but did not timely (or reasonably provide) any sort of credible documentation to support a later start date. I further find that Employee was not incapacitated during this time frame which is corroborated by her ability to email Cuthrell asserting that she would appear for duty on July 17, 2017. I further find that the notice to Employee to either appear for duty no later than July 5, 2017, and/or provide updated medical documentation substantiating her continued absence (or accommodation) was a lawful DMPED Order, not a request. Employee failed to follow that order at her own peril. Accordingly, I CONCLUDE that DMPED has met its burden of proof in this matter.

Appropriateness of the Penalty

When assessing the appropriateness of the penalty, OEA is not to substitute its judgment for that of the agency. *Stokes v. District of Columbia*, 502 A.2d 1006, 1985 (D.C. 1985). The OEA itself recognized in *Employee v. Agency*, 29 D.C. Reg. 4565, 4570 (1982):

> Review of an Agency imposed penalty is to assure that the Agency has considered the relevant factors and has acted reasonably. Only if the Agency failed to weigh the relevant factors or the Agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for this Office to specify how the Agency's penalty should be amended. This office is guided in this matter by the principles set forth in *Douglas v. Veterans Administration, [supra]*.

Although the OEA has a "marginally greater latitude of review" than a court, it may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate. *Douglas v. Veterans Administration, supra*, 5 M.S.P.B. at 327-328. The "primary discretion" in selecting a penalty "has been entrusted to agency management, not to the [OEA]." *Id.* at 328.

> Selection of an appropriate penalty must . . . involve a responsible balancing of the relevant factors in the individual case. The [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.
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> *Id.* at 332-333. *See also Villela v. Department of the Air Force*, 727 F.2d 1574, 1576 (Fed. Cir. 1984).

In this case, I find that the relevant *Douglas* factors were carefully considered when the appropriate penalty for Employee was determined. Also, the resulting removal from service for the sustained charge is within the range set forth in the Table of Illustrative Actions. Accordingly, I find that I have no credible justification for setting aside Agency's selected penalty for this matter.

ORDER

It is hereby **ORDERED** that Agency's action of removing Employee from service is **UPHELD**.

FOR THE OFFICE:

/s/ *Eric T. Robinson*
Eric T. Robinson, Esq.
Senior Administrative Judge