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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

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| In the Matter of: |) | |
| |) | |
| JOHN MAKLE, |) | |
| Employee |) | OEA Matter No. 1601-0006-11 |
| |) | |
| v. |) | Date of Issuance: January 30, 2013 |
| |) | |
| DISTRICT DEPARTMENT OF |) | |
| TRANSPORTATION, |) | |
| Agency |) | MONICA DOHNJI, Esq. |
| |) | Administrative Judge |
| <hr/> | | |
| Ragan Howard, Esq., Employee Representative | | |
| Nana Bailey-Thomas, Esq., Agency Representative | | |

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On October 7, 2010, John Makle (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the District Department of Transportation’s (“DDOT” or “Agency”) decision to terminate him from his position as a Right of Way (“ROW”) Asset Project Manager effective September 17, 2010. Following an administrative review, Employee was charged with violating the following: 1) any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: Unauthorized Absence pursuant to District Personnel Manual (“DPM”) §1603.3(f)(1) and §1619.1(6)(a); and 2) any on duty or employment related act or omission that an employee knew or should reasonably have known is a violation of law: making a threat to do bodily harm, pursuant to DPM §1603.3(e) and §1619.1(5). On December 1, 2010, Agency filed a Motion for Extension of time to file its Answer. On January 10, 2011, Agency submitted its Answer to Employee’s Petition for Appeal. On February 15, 2011, Employee submitted a Response to Agency’s Answer to Employee’s Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge (“AJ”) on July 26, 2012. Thereafter, on August 22, 2012, I issued an Order scheduling a Status Conference in this matter for September 18, 2012. While Employee was present, Agency was a no-show. On September 21, 2012, I issued an Order for Statement of Good Cause, requiring Agency to establish good cause for its failure to attend the September 18, 2012, Status Conference. Agency had until September 28, 2012, to comply. Subsequently, on September 25, 2012, I issued an

Order scheduling another Status Conference in this matter for October 10, 2012. This Order was addressed to Agency's Director. On October 2, 2012, the Order for Statement of Good Cause addressed to Agency's representative's last address on record was returned to this Office marked as: Return to Sender; no such number; unable to forward. Both parties were present for the October 10, 2012, Status Conference. On October 12, 2012, I issued a Post-Status Conference Order requiring the parties to submit written briefs addressing the issues raised at the Status Conference. On October 31, 2012, the undersigned received a Consent Motion for extension of time to file brief from Agency. Thereafter, on November 2, 2012, the undersigned issued an Order granting the above-referenced Motion. Both parties have now submitted their written briefs. After considering the parties' arguments as presented in their submissions to this Office, I have decided that there are no material issues in dispute, and as such, an Evidentiary Hearing is not required. The record is 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 FACTS, ANALYSIS AND CONCLUSIONS OF LAW

According to the record, Employee was hired as a ROW Asset Project Manager in 2006.¹ During a meeting in March 2010 with the Chief of Strategic Planning, Maurice Keys, and Deputy Director of Agency, Terry Bellamy, Mr. Bellamy expressed his disappointment with Employee's job performance.² On March 15, 2010, Employee was notified by Associate Director, Karina Ricks via email that "starting the next pay period I need you to go back to the regular work schedule and not the compressed work week. Sorry, there is just too much going on that I can't have you out. Please let me know if this presents a hardship."³ From March 23, 2010 through March 25, 2010, Employee called in sick. On March 25, 2010, Employee was contacted via email by Ms. Ricks to provide a doctor's note in order for her to approve further leave.⁴ Thereafter, Employee was again absent from work for the period of March 29, 2010 through April 9, 2010.⁵ Agency documented Employee's non-attendance, along with his voicemails requesting sick leave.⁶ On April 8, 2010, Employee, sent an email to Ms. Tenbrook, Agency's Operation Manager, requesting that she file a grievance against Mr. Bellamy for his behavior

¹ Agency's Answer (January 10, 2011). *See also* Employee's Response to the Agency's Answer to Employee's Petition for Appeal dated February 15, 2011.

² Agency's Answer, *supra*, at Exhibit 6 and 8.

³ *Id.* at Exhibit 9.

⁴ *Id.* at Exhibit 10.

⁵ *Id.* at Exhibit 11.

⁶ *Id.* at Exhibit 12.

during the March 2010 meeting, under her jurisdiction.⁷ On April 9, 2010, Ms. Ricks and Ms. Tenbrook contacted Employee via a teleconference to determine the cause of Employee's absences.⁸ Following the teleconference, both Ms. Ricks and Ms. Tenbrook submitted statements recounting their conversation with Employee.⁹ In a letter dated April 23, 2010, and received by Employee on April, 29, 2010, Employee was placed on Administrative leave effective April 26, 2010, pending an investigation.¹⁰ On April 26, 2010, Ms. Ricks received a doctor's note from Employee's Psychologist, Dr. Shane Perrault, stating that Employee had been under his care since April 12, 2010. Dr. Perrault noted the following:

Employee is being seen weekly, with April 26, 2010, being Employee's third meeting. Dr. Perrault explained that Employee came to his office reporting job stress stemming from an alleged "verbal assault" by Mr. Bellamy. Dr. Perrault also mentioned that since the incident in March with Mr. Bellamy, Employee reports feeling traumatized and increasingly anxious while at work, and he specifically expressed further anger towards Mr. Bellamy who allegedly berated, disrespected and mistreated Employee during this incident. Dr. Perrault concluded that he was not aware of any psychological impairment, or other situation that would prevent Employee's ability to perform his job.¹¹

Subsequently, on May 27, 2010, Agency mailed a fifteen (15) day Advance Written Notice of Proposed Removal to Employee.¹² On June 8, 2010, Dr. Perrault submitted a second letter to Agency regarding Employee's treatment.¹³ This matter was referred to a Hearing Officer, and following an Administrative review, the Hearing Officer in her report dated August 9, 2010, concluded that Employee was Absent without Official Leave ("AWOL") for ten (10) consecutive days which constitutes abandonment. She recommended removal as prescribed in the Table of Penalties ("TAB"). However, the Hearing Officer also concluded that the written record is not sufficient to establish that Employee threatened to do bodily harm.¹⁴ On September 16, 2010, Agency issued its Notice of Final Agency Decision ("FAD") with an effective removal date of September 17, 2010.

Employee's Position

Employee does not deny that he was absent from work for the period of March 28, 2010 through April 9, 2010. However, Employee notes that his absence was excusable since he had a mental illness stemming from the March 2010 incident with Mr. Bellamy.¹⁵ Employee notes the following:

⁷ *Id.* at Exhibit 19.

⁸ *Id.* at Exhibit 13 and 14.

⁹ *Id.* at Exhibits 13 and 14. *See also* Exhibit 15 (Affidavit of Karina Ricks, dated January 18, 2011) and Exhibit 16 (Affidavit of Tiffany Tenbrook, dated January 5, 2011).

¹⁰ *Id.* at Exhibit 2.

¹¹ *Id.* at Exhibit 17.

¹² *Id.* at Exhibit 1.

¹³ Employee's Brief in Support of Petition for Appeal (December 17, 2012) at Exhibit 1.

¹⁴ Agency's Answer *supra* at Exhibit 3.

¹⁵ Employee's Brief in Support of Petition for Appeal (December 17, 2012).

His documented illness and leave justification did not constitute abandonment because, his absences were not voluntary nor did it suggest intent to not fulfill his workplace obligations. Employee further states that his absences were medically documented as evidenced in the two (2) letters from Dr. Perrault. Employee explains that he consistently notified Agency about his illness each day, while urging Agency to resolve his grievance against Mr. Bellamy, and to be assured that he could return to a safe, non-volatile environment, given his health concerns. Additionally, Employee asserts that he informed Ms. Ricks and Ms. Tenbrook that he suffered from acute stress disorder as a result of Mr. Bellamy's hostile verbal assault. Employee also notes that prior to being terminated, he had no history of unexcused absences or tardiness or attendance issues. Instead, he had ample sick leave, annual leave and/or personal leave to cover the dates of his absences. Employee states that he repeatedly requested that Agency allow him to utilize his earned leave.

Furthermore, Employee maintains that his action did not constitute AWOL. He explains that while he was not on authorized leave, he called in each day to request sick leave. Employee asserts that his absences demonstrated legitimate health concerns which mitigates against an AWOL determination, specifically in light of the unrefuted medical documentation. Employee notes that his legitimate and properly documented illness makes his absence excusable. Employee contends that Agency intentionally refused to address his legitimate illness. Further, Employee asserts that Ms. Ricks intentionally misinformed him of his leave options and instead initiated action against him despite DPM's mandate for Agency to address Employee's grievances and grant him sick leave. Employee maintains that he was threatened with disciplinary action by Ms. Ricks even though he was ill.

Employee also argues that his termination was in retaliation for filing a grievance against Mr. Bellamy, as the termination occurred after he filed the grievance. Employee notes that Agency failed to respond to his grievance and instead, took action against him. He explains that the grievance was a protected activity and that there is a causal connection between the grievance and his termination.

Employee additionally submits that during the April 9, 2010 teleconference, he never threatened Mr. Bellamy as stated by Ms. Ricks and Ms. Tenbrook. He highlights that he was the one being threatened by Mr. Bellamy in the presence of other employees. He also notes that his wife Stacy Makle was present during the teleconference and she attests that no threats were made by Employee. Employee highlights that the Hearing Officer also concluded that no threats were made. Employee further maintains that, even if the statements "smoke comes out of his ears" and "[Employee] is afraid of what he might do to [Mr. Bellamy]" if he came across him "was actually made...there is no credible or imminent threat represent here." In addition, Employee argues that, Agency failed to apply the Douglas Factors in this matter. Specifically, that Agency failed to consider mitigating and aggravating factors. Employee also notes that his termination was not progressive

discipline; Agency did not provide him with adequate notice of the termination; and Agency failed to notify his attorney of the FAD, although Agency was aware that Employee had an Attorney.¹⁶

Agency's Position

Agency asserts that the evidence in this matter reasonably supports its decision to remove Employee for cause from his position of ROW Asset Program Manager. Agency explains that Employee was absent from work for more than ten (10) consecutive days without authorization, and in violation of DPM §1603.3(f)(1). Agency argues that Employee's action constitutes abandonment. Agency further notes that, Employee willfully refused to return to work, despite being forewarned that any additional days would not be approved for sick leave absent a doctor's note. Agency highlights that Employee provided no acceptable medical note and his action interfered with, and undermined the efficiency and integrity of Agency's operations. Agency also highlights that both letters from Dr. Perrault do not cover the period for which Employee was charged for AWOL (March 29 – April 9, 2010). And neither letter indicated when Employee could return to work and how long treatment would last. Additionally, Agency maintains that, although Employee continued to call in during his AWOL status, this does not negate Employee's responsibility to provide Agency with a doctor's note justifying his absence for ten (10) consecutive days.¹⁷

Agency also states that, the affidavits and written statements by witnesses support the fact that Employee made statements which were reasonably perceived to constitute a threat to Mr. Bellamy's safety. Agency added that Employee's anger toward Mr. Bellamy was also documented in Dr. Perrault's note. Agency concludes that, Employee's perceived threats whether by suggestion, innuendo, or direct, constitutes cause and reasonably permits removal. Additionally, Agency argues that Employee's other allegations are red herrings. Agency explains that, Employee was notified of Agency's proposed and final discipline, and Employee was fully aware of, and had participated in the disciplinary process from the beginning.¹⁸

As to Employee's retaliation claim, Agency contends that Employee was terminated for cause, and not for filing a grievance against Mr. Bellamy. Agency explains that Employee's grievance does not contain a single claim that he was discriminated against for being a member of a protected class, nor, did Employee's grievance allege that Agency engaged in unlawful activity. Agency maintains that Employee's grievance merely alleges that he was disrespected and humiliated after being verbally reprimanded for missing deadlines, causing Agency to lose ten (10) percent in Federal funding. Agency further explains that when Ms. Tenbrook attempted to handle Employee's grievance on April 9, 2010, Employee refused to come to work, and instead noted that, he could not be in the presence of Mr. Bellamy.¹⁹

¹⁶ *Id.* See also Petition for Appeal (October 7, 2010) and Response to Answer to Petition for Appeal (February 15, 2011).

¹⁷ Agency's Answer, *supra*. See also Agency's Legal Brief (November 14, 2012).

¹⁸ *Id.*

¹⁹ *Id.*

In addition, Agency maintains that it was attempting to implement corrective measures in order to assist Employee with managing his job; however, no such actions were taken because Employee never returned to work. Agency highlights that Employee made a choice not to report to work and allowed his daily responsibilities to go unattended, thus abandoning his position. Agency further argues that calling in to request leave is not a mitigating factor for being AWOL. Agency explains that its penalty against Employee was within the range of DPM and it correctly applied the appropriate penalty. Agency also notes that Employee failed to provide acceptable medical documentation, and he willfully refused to return to work despite tasks and deadlines. Thus, Employee was interfering with and undermining the efficiency and integrity of Agency's operation, and therefore, this Office should sustain Agency's termination of Employee.²⁰

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. Further, the DPM § 1603.2 provides that disciplinary action against an employee may only be taken for cause. Under DPM §1603.3(f)(3), the definition of "cause" includes [a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include, unauthorized absences (AWOL and job abandonment). And under DPM §1603.3(e), the definition of "cause" includes [a]ny on duty or employment related act or omission that an employee knew or should reasonably have known is a violation of law, including making a physical threat. Here, Employee's removal from his position at Agency was based upon a determination by Agency that Employee was not fit to serve in his current position because Employee was absent from work for ten (10) or more consecutive days, and Employee made a threat against Mr. Bellamy.

a) Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: Unauthorized Absences

In the instant case, the undersigned must determine if the evidence that Employee was absent from work for ten (10) or more consecutive day is adequate to support Agency's decision to terminate Employee. In AWOL cases such as this one, "[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."²¹ Additionally, if the employee's absence is excusable, it "cannot serve as a basis for adverse action."²² The relevant time period in this matter is March 29, 2010 to April 9, 2010. Employee was absent from work during this period. Employee called in each day during this period to request sick leave, and Employee had enough sick leave to cover this period. According to the record, Employee provided Agency with two doctor's notes in justification for his illness. Based on the doctor's notes from Dr. Perrault, Employee had been under his care since April 12, 2010. However, April 12, 2010 is outside the

²⁰ *Id.*

²¹ *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).

²² *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).

relevant dates in this matter, therefore, I find that these notes from Employee's doctor are not sufficient to justify Employee's AWOL during the relevant periods in this matter.

In addition, Employee argues that Agency was aware of his mental condition at all times and that he did not abandon his job because he called in each day to request sick leave. DPM § 1242.1 read in pertinent parts as follows: “[a]n agency head *shall* grant sick leave to an employee under any of the following circumstances: (a) When the employee requires personal medical, dental, or optical examination or treatment; (b) When the employee is incapacitated for the performance of his or her duties by physical or *mental illness*, injury, pregnancy, or childbirth...” (Emphasis added). However, DPM § 1242.7 further provides that “[f]or an absence in excess of three (3) workdays, the agency *may* require a medical certificate, or other administratively acceptable evidence as to the reason for the absence” (emphasis added). Here, Employee submits that he had a mental illness and he called in each day to request sick leave. However, because DPM § 1242.7 gives Agency the discretion to request evidence of an absence in excess of three (3) workdays such as a doctor's note, Agency was justified in informing Employee in the March 25, 2010 email that it would not grant Employee any more sick leave unless Employee provided a doctor's note. Moreover, although Employee alleges that he was mentally ill during the relevant timeframe, it is worth noting that Employee was actively pursuing his grievance claim against Mr. Bellamy, which brings to question the severity and/or extent of his mental illness. The record shows that while Employee was allegedly mentally ill, he was able to meet with Ms. Tenbrook on March 31, 2010; draft a formal grievance against Mr. Bellamy on April 2, 2010, which he submitted to an Amy Vance on the same day and later to Ms. Tenbrook on April 8, 2010. Also, the letter from Dr. Perrault indicated that Employee suffered from job related stress stemming from the March 2010 incident with Mr. Bellamy. However, Dr. Perrault concluded in his initial letter to Ms. Ricks that, he was not aware of any psychological impairment, or other situation that would prevent Employee's ability to perform his job.²³ Consequently, given the totality of the circumstances, I find that, although Agency was required to grant Employee sick leave, Agency also had the discretion to request acceptable evidence such as a doctor's note as to the reason for the absence.

Employee further argues that he had ample sick leave and annual leave to cover his absence for the relevant time period. DPM § 1268.1 provides that, “[a]n absence from duty that was not authorized or approved, or for which a leave request has been denied, shall be charged on the leave record as absence without leave (AWOL). The AWOL action may be taken whether or not the employee has leave to his or her credit.” Here, while Employee called in each day to request sick leave, and while he had ample sick and annual leave, there is no evidence in the record to show that Agency authorized or approved his request for sick leave. Moreover, Employee conceded in his brief that he was not on authorized leave.²⁴ In addition, according to the March 25, 2010, email, Employee was notified by Ms. Ricks that his request for sick leave will not be approved unless he provided a doctor's note. Accordingly, I find that Employee's

²³ See Agency's Answer, *supra*, at Exhibit 17. See also, Employee's brief in support of Petition for Appeal, *supra*, at Exhibit 1 (Dr. Perrault explains in the June 8, 2010 letter that, their sessions clearly indicated that Employee's cognitive and psychological functioning were intact and Employee was not a risk to himself or others, however, it was apparent that Employee was experiencing workplace related stress. Nonetheless, Dr. Perrault does not shed any light into the severity of Employee's condition).

²⁴ See Employee's Brief in Support of Petition for Appeal, *supra*, at p. 5.

absences were unauthorized and Agency was justified to charge him for being AWOL. DPM § 1268.2 further 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.” Here, Agency determined that Employee was AWOL for the period of March 29, 2010 through April 9, 2010. Moreover, given the record, I also find that because Employee’s leave was unauthorized, and the doctor’s note from Dr. Perrault does not cover the relevant timeframe in this matter, Employee’s absence is not excusable and as such, the charge for AWOL during that timeframe cannot now be charged against Employee’s sick or annual leave as provided in DPM § 1268.4.

Employee also submits that his absence from work during the relevant timeframe does not constitute abandonment. Employee explains that his actions were not voluntary nor did they suggest intent to not fulfill his workplace obligations. He explains that he was ill and his illness was medically documented, referencing the letters from Dr. Perrault. However, I find that, although Employee may not have intended to abandon his job, the mere fact that he decided not to show up for work is sufficient evidence to support a claim of abandonment. Moreover, the letters referenced by Employee from Dr. Perrault do not cover the relevant timeframes in this matter. Consequently, I conclude that Employee abandoned his job and his absence is not excusable, and hence, Agency was justified in charging Employee with Unauthorized Absence as defined under DPM §§1603.3(f) and 1619.1(6)(a).

b) Any on duty or employment related act or omission that an employee knew or should reasonably have known is a violation of law: Making a threat to do bodily harm.

Employee was also charged with violating DPM §1603.3(e) and DPM § 1619.1(5) referenced above. This cause of action includes the following:

- a) Unauthorized smoking in the workplace; incidents of a sexual or ethnic nature involving unwelcome remarks, joking, offensive comments or slurs; and acts of insubordination that are verbally abusive.
- b) Misuse of resources or property; unwanted sexual advances or propositions; etc.
- c) Assault or fighting on duty; battery; *violation of EEO laws; such as incidents of sexual harassment involving physical or financial threats; touching (Class Four felony or stalking); or other violation of EEO law that result in the loss of employment; misuse of funds; resources or property; unfair labor practices or illegal work stoppage; use or distribution of controlled substances; etc.* (Emphasis added).²⁵

During a teleconference on April 9, 2010, Employee threatened Mr. Ballamy with physical injury. Specifically, Agency provides that Employee “repeatedly stated that he could not

²⁵ See DPM § 1619.1(5).

come to work because he did not want to be in the presence of Mr. Bellamy, that when he has been in the same elevator with Mr. Bellamy, ‘smoke comes out of [his] ears’ and that he ‘is afraid of what [Employee] might do to [Mr. Bellamy]’ if he came across him.”²⁶ However, according to another sworn affidavit from Ms. Stacy Makle who was also present during the teleconference, Employee made no physical threats to Mr. Bellamy. Employee also denies making any threats against Mr. Bellamy, explaining that, even if he made the aforementioned statements “there is no credible or imminent threat represented here.”²⁷ Also, in his April 26, 2010, letter to Agency, Dr. Perrault states that, Employee “has been compliant, non-defensive and candid when discussing the incident [with Mr. Bellamy] and how helpless [Employee] felt during and after the incident.”²⁸ He further notes that although Employee felt “frustrated, angry and offended, he exhibited stable mental health and didn’t display any evidence of psychological impairment.”²⁹ Given the totality of the circumstance, I find that while Employee may have made the above-referenced statements, these statements alone are not sufficient to suggest or convey a threat. Furthermore, contrary to Agency’s assertion, I find that Employee’s conduct in this matter does not fall under the banner of DPM § 1619.1(5), which applies to incidents that are sexual or ethnic in nature; incidents involving misuse of resources; acts of insubordination that are verbally abusive; assault or fighting *on duty*; or EEO related threats (emphasis added). The alleged physical threat here does not arise from a violation of any of the aforementioned laws; therefore, I conclude that Agency is not justified in charging Employee with this cause of action.

d) Retaliation

Employee asserts that his termination was in retaliation for filing a grievance against Mr. Bellamy. Employee submits that his grievance against Mr. Bellamy is a protected activity. Employee explains that Agency falsely claimed that he threatened Mr. Bellamy immediately after his grievance was filed. Employee further explains that because Agency used this unsubstantiated charge as grounds for his termination, there is a causal connection between the protected activity (the grievance) and the adverse action (his termination). Agency on the other hand argues that Employee’s grievance against Mr. Bellamy did not allege that Agency was engaged in unlawful activity, but it simply alleged that Employee was disrespected and humiliated after being verbally reprimanded by Mr. Ballamy. Agency also submits that, Employee filed his grievance on April 2, 2010, after receiving the March 15, 2010, and March 25, 2010 emails regarding his leave requests and work schedule. Agency explains that given Employee’s recent work performance, Agency was already in the process of implementing corrective measures in order to assist Employee with managing his job, but Agency could not proceed with these corrective measures because Employee never returned to work. As such, Agency maintains that it had legitimate reasons for the adverse employment action taken against Employee.

To establish a retaliation claim, the party alleging retaliation must demonstrate the following: (1) he engaged in a protected activity by opposing or complaining about employment practices that are unlawful under the District of Columbia Human Rights Act (“DCHRA”); (2)

²⁶ Agency’s Legal Brief, *supra*, at p.6.

²⁷ Employee’s Brief in support of Petition for Appeal, *supra*, at p.11.

²⁸ Agency’s Answer, *supra*, at Exhibit 17.

²⁹ *Id.*

his employer took an adverse personal action against him; and (3) there existed a causal connection between the protected activity and the adverse personnel action.³⁰ A prima facie showing of retaliation under DCHRA gives rise to a presumption that the employer's conduct was unlawful, which the employer may rebut by articulating a legitimate reason for the employment action at issue.³¹ Here, the grievance filed by Employee against Mr. Bellamy was not a protected activity because it did not allege any unlawful employment practices under DCHRA. The grievance simply outlines Employee's work conditions and how he felt following the March incident with Mr. Bellamy.³² While there is no dispute that Agency's decision to terminate Employee constituted an adverse action against Employee, I agree with Agency's assertion that there is no causal connection between Employee's grievance against Mr. Bellamy and his termination for being absent from work for ten (10) or more days. Employee does not dispute the fact that he was absent from work from March 29, 2010 through April 9, 2010. It is also undisputed that Employee was first seen by Dr. Perrault on April 12, 2010, days outside the relevant timeframe, thereby, making Employee's absences inexcusable. While it appears that Employee had some concerns with the way Agency handled the incident with Mr. Bellamy, his concerns do not justify his unauthorized absence from work or his failure to provide acceptable evidence as to the reason for his absences. Accordingly, I find that Employee was not engaged in a protected activity when he was terminated from Agency. I further find that Agency had a legitimate reason for the employment action at issue, and it was not based on retaliation.

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

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).³³ According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties ("TAP"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency. In the instant case, I do not find that Agency has met its burden of proof for the charge of [a]ny on duty or employment related act or omission that an employee knew or should reasonably have known is a violation of law: Making a threat to do bodily harm. Accordingly, Agency can only rely on the following charge in disciplining Employee; "[a]ny on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations: Unauthorized Absence."

³⁰ *Vogel v. District of Columbia Office of Planning*, 944 A.2d 456 (D.C. 2008).

³¹ *Id.*

³² Agency's Legal Brief, *supra*, at Exhibit 4.

³³ See also *Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

In reviewing Agency's decision to terminate Employee, OEA may look to the Table of Appropriate Penalties. Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District government employees. The penalty for "[a]ny on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations: Unauthorized Absence" is found in § 1619.1(6)(a) of the DPM. Employee argues that Agency did not engage in progressive discipline. I disagree. The penalty for a first offense for Unauthorized Absence, ten (10) consecutive days or more is removal. The record shows that this was the first time Employee violated DPM §1619.1(6)(a). Agency notified Employee in an email dated March 25, 2010 that it required Employee to provide a doctor's note for any absences of three (3) or more consecutive days, yet he failed to comply. Employee's conduct constitutes an on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations and it is consistent with the language of § 1619.1(6)(a) of the DPM. Therefore, I find that, by terminating Employee, Agency engaged in progressive discipline, and did not abuse its discretion.

As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.³⁴ When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. I find that the penalty of removal was within the range allowed by law. Accordingly, Agency was within its authority to remove Employee given the TAP.

Penalty was Based on Consideration of Relevant Factors

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.³⁵ The evidence does not establish that the penalty of removal constituted an abuse of discretion. Agency presented evidence that it considered relevant factors as outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching the decision to remove Employee.³⁶

³⁴ *Love* also provided that "[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." citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981).

³⁵ *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985).

³⁶ 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;

In this case, the penalty for a first time offense for this cause of action is removal. In *Douglas*, the court held that “certain misconduct may warrant removal in the first instance.” In reaching the decision to remove Employee, Agency gave credence to the nature and seriousness of the offense; Employee’s type of employment; notoriety of the offense on the reputation of the Agency; and mitigating circumstances. In accordance with DPM §1619.1(6)(a), I conclude that Agency had sufficient cause to remove Employee. Agency has properly exercised its managerial discretion and its chosen penalty of removal is reasonable and is not clearly an error of judgment. Accordingly, I further conclude that Agency's action should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of removing Employee is **UPHELD**.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

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- 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.