THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	
	)	
v.	)	OEA Matter No.: 1601-0059-20
	)	
	)	Date of Issuance: August 7, 2025
D.C. DEPARTMENT OF EMPLOYMENT SERVICES, Agency	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as an Administrative Law Judge ("ALJ") with the Department of Employment Services ("Agency"). On February 28, 2020, Agency issued Employee a Proposed Notice of Removal charging her with unauthorized absence, in violation of Chapter 6-B, Section 1605.4(f)(2) of the District Personnel Manual ("DPM"). The notice provided that Employee failed to return to duty on February 10, 2020, as agreed, after an April 22, 2016, Initial Decision issued by this Office reversed Agency's termination action and reinstated Employee to her former position with backpay and benefits.[2] An Agency hearing officer subsequently

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] *See Employee v. D.C. Department of Employment Services*, OEA Matter No. 1601-0012-14C16 (April 22, 2016). In this matter, Employee was charged with insubordination and absence without official leave. The AJ reversed Agency's termination action, and Employee was ordered to be reinstated with back pay and benefits lost as a result of the adverse action.

conducted a review of Agency's proposed adverse action and issued a Written Report and Recommendation on February 28, 2020, finding that Employee's absences were not excused. On August 14, 2020, Agency issued a Notice of Final Decision on Proposed Removal. The effective date of Employee's termination was August 28, 2020.[3]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on September 14, 2020. She argued that Agency failed to comply with the Administrative Judge's ("AJ") April 22, 2016, directive to reinstate her. As a result, she asked that her petition be granted.[4]

Agency filed its answer on March 30, 2021. It contended that it was within its authority to terminate Employee for unauthorized absences of five days or more in accordance with DPM § 1605.4(f)(2) and the Table of Illustrative Actions. Agency explained that following the AJ's April 22, 2016, Initial Decision, the parties agreed that Employee would return to work on February 10, 2020. It stated that to comply with the Executive Office of the Mayor's ("EOM") order, Employee was requested to submit medical/fitness-for-duty documentation, which she failed to do.[5] According to Agency, effective July 18, 2018, Employee was reinstated with back pay and the AJ did not remove the requirement that Employee pay her portion of the health insurance and/or return to work to receive health insurance. Thus, its position was that the instant termination action was solely based on Employee's failure to return to work as agreed. Since Agency opined that Employee's absences were not excused, it asked that her removal be upheld.[6]

---

[3] *Employee's Petition for Review* (September 14, 2020).
[4] *Employee's Petition for Appeal* (September 14, 2020).
[5] On August 11, 2017, Employee's matter in 1601-0012-14 was certified by OEA to the Executive Office of the Mayor Office of General Counsel to certify compliance with the April 22, 2016, Initial Decision. On July 31, 2018, the EOM issued a decision clarifying that the Agency was in substantial compliance with the AJ's order of reinstatement. The decision further ordered Employee to complete a "fit-for-duty" test as a condition to return to work. Agency subsequently advised Employee that she was required to submit documentation related to her fitness for duty, with or without restrictions, as a prerequisite to returning to duty.
[6] *Agency's Answer to Petition for Appeal* (March 30, 2021).

A new OEA AJ was assigned to this matter in October of 2022.[7] After several continuances, the AJ held a status conference on September 16, 2024. During the conference, the parties conceded that the April 22, 2016, Initial Decision was not at issue, and the only outstanding matter to be adjudicated was Agency's current termination action. As a result, the parties were ordered to submit legal briefs addressing whether Employee's termination was taken for cause and whether the penalty was appropriate.[8]

In its brief, Agency argued that Employee's termination was supported by the record. It explained that Employee could not work as an Administrative Law Judge because she failed to provide the required certificate of good standing from the District of Columbia Bar, in violation of D.C. Code § 1-608.81. Moreover, it maintained that Employee was properly terminated for unauthorized absence of five days or more pursuant to DPM § 1605.4(f)(2). Agency opined that Employee's failure to return to work, coupled with her continued authorized absence for fifteen consecutive business days, warranted Employee's removal. Consequently, it requested that the termination action be sustained.[9]

Employee's brief asserted that Agency was now attempting to create a new, retaliatory basis for her termination. According to Employee, a fitness for duty exam was not required as a prerequisite to employment until Agency was forced to reinstate her. She further argued that there was no mention of a new requirement to waive her law license into the District of Columbia, and had she known, she would have obtained the license prior to returning to duty. Additionally, Employee opined that Agency's assertion that she failed to return to work on February 10, 2020, was a result of its refusal to cooperate with an order from the United States District Court for the

[7] This matter was previously assigned to two different OEA AJs.
[8] *Post-Conference Order* (September 16, 2024) and *Post-Conference Order* (December 6, 2024).
[9] *Agency Brief in Support of Termination* (November 4, 2024).

District of Columbia[10] so that she could obtain medical coverage. Finally, she suggested that the AJ took advantage of the previous AJ's departure from OEA by limiting the issues to be determined during the instant appeal. Since Employee believed that she was eligible for reinstatement, she asked that the AJ reverse the current removal action; require Agency to fully comply with the District Court's Order; and grant all attorney's fees associated with prosecuting this appeal.[11]

In response, Agency contended that in accordance with Chapter 20, Section 2000.2 of the eDPM,[12] each individual selected for an appointment to the District government must be able to perform the functions of his or her job, with or without restrictions. It reasoned that Employee's fitness to return to duty reasonably included the production of medical documentation, particularly in light of her previous request for a reasonable accommodation. As a result, Agency opined that the current termination action was not retaliatory. Further, it highlighted that the requirement that all ALJs employed by the District government be members of the District of Columbia bar became law in 2015. According to Agency, this fact is supported by Employee's 2020 request for a waiver of the licensing requirement or alternatively an extension of time to become a member of the D.C. Bar.[13]

It disagrees with Employee's argument that the current OEA AJ took advantage of the issues to be deciding during this appeal because the parties discussed with the AJ whether the matter decided by the AJ in OEA Matter No. 1601-0012-14 should impact the current matter. Lastly, Agency reiterates its position that Employee's failure to return to work for five or more

[10] On May 13, 2015, Employee filed a lawsuit with the District Court for the District of Columbia asserting various civil rights violations by Agency. On January 2, 2020, Employee accepted Agency's offer of settlement, and on January 3, 2020, the Court issued an order closing the case. *See* Civil No. 1:15-cv-00729 (APM) (D.D.C. January 3, 2020).
[11] *Employee's Response to Agency's Brief in Support of Termination* (December 10, 2024).
[12] Electric District Personnel Manual.
[13] *Agency Reply Brief in Support of Termination* (December 19, 2024).

consecutive days formed the basis of the instant appeal, and it maintains that Employee's brief offered no evidence refuting that she failed to return to work. Therefore, it requests that Employee's termination be upheld.[14]

The AJ issued an Initial Decision on February 13, 2025. As it related to cause, the AJ held that D.C. Code § 1-608.81 requires ALJs and hearing officers to possess a D.C. Bar membership, which Employee provided no credible reason for failing to obtain. He went on to discuss that Employee did not deny the facts underlying Agency's cause of action provided in its termination notice; thus, Agency met its burden of proof in establishing that Employee violated DPM §1605.4(f)(2) for unauthorized absences from February 10, 2020, through February 28, 2020. Concerning the penalty, the AJ concluded that under the Table of Illustrative Actions ("TIA"), the consequence for a first offense for unauthorized absence of five workdays or more includes removal. Because removal was permissible under the TIA, the AJ ruled that Agency's termination action was supported by the record.[15]

Employee disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on March 21, 2025. She argues that the AJ erred by failing to find that ALJs are not classified as safety-sensitive positions requiring medical examination prior to reinstatement. She submits that the previous AJ made a procedural finding that this matter represents a continuation of the compliance matter stemming from the 2016 Initial Decision, which has significant implications affecting how this matter should have proceeded. Thus, she believes that there is no legal basis for the reassigned AJ to override a previous AJ's procedural ruling. Employee further asserts that the Initial Decision failed to address Agency's obligation to engage in an interactive process regarding her 2020 request for a reasonable accommodation. Finally, Employee avers that Agency's medical

[14] *Id.*
[15] *Initial Decision* (February 13, 2025).

examination demand lacks substantial evidentiary support; she submitted all necessary documentation in support of her disability and accommodation request; Agency's demand for any additional documentation constitutes retaliatory and disparate treatment; and the AJ's finding that Employee was properly subject to a fitness-for-duty exam was unsupported by the record. Therefore, she requests that the Board grant her petition.[16]

Substantial Evidence

Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. Under OEA Rule 628.1, 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 "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.

Unauthorized Absence

This Board is tasked with determining if substantial evidence exists to support a charge of unauthorized absence based on Employee's absences from work during the period of February 10, 2020, through February 28, 2020. Under DPM § 1605.4(f)(2), the definition of cause includes attendance-related offenses, including unauthorized absence. In *Murchinson v. Department of Public Works*, OEA Matter No. 1601-0257-95R03 (October 4, 2005) and *Tolbert v. Department of Public Works*, OEA Matter No. 1601-0317-94 (July 13, 1995), this Office held that when an employee offers a legitimate excuse, such as illness, for being absent without leave, the absence is justified and therefore excusable. Additionally, if the employee's absence is excusable, it cannot serve as a basis for adverse action.[17]

[16] *Petition for Review* (March 21, 2025).
[17] *See Murchison* (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)).

By way of relevant procedural background, on April 22, 2016, former OEA AJ (Judge Cannon), issued an Initial Decision reversing Employee's 2013 termination.[18] Employee returned to work briefly after her reinstatement in September of 2016, but her medical insurance lapsed and Employee remained in non-pay status.[19] As part of the reinstatement, Agency issued Employee a check for back pay dated August 4, 2017, in the amount of $129,766.55. On November 5, 2017, Employee's matter was certified by OEA's General Counsel to the Executive Office of the Mayor Office of General Counsel to certify compliance with the April 22, 2016, Initial Decision.

On July 31, 2018, EOM issued a decision finding that Agency was in substantial compliance with Judge Cannon's April 22, 2016, order and that any lapse in Employee's medical benefits was solely attributable to her own failure to pay the medical insurance fees under COBRA.[20] EOM also mandated that Employee complete a "fit-for-duty" exam as a prerequisite to returning to her position.[21] On January 16, 2020, Employee, through counsel, advised Agency that she was cleared to return to duty and inquired as to what was required to effectuate her return. The parties subsequently set a return-to-work date of February 10, 2020, and Employee was advised that she was required to submit a certificate of good standing from the D.C. Bar and documentation from a treating physician to clear her to return to work.[22] On February 3, 2020, Employee informed Agency that she would not be able to produce a note related to her fitness for

[18] While Employee's appeal was pending before OEA, Employee also had a lawsuit pending in the United States District Court for the District of Columbia alleging violations of the American with Disabilities Act against the District of Columbia. After Employee accepted a settlement, the Court issued an Order and Judgment on January 3, 2020. *See Agency's Answer to Petition for Appeal* at Exhibit C.
[19] Employee returned to work from September 6, 2016, until November 14, 2016, following the AJ's order of reinstatement. According to Agency, Employee performed no substantive work as an ALJ during this period. On March 10, 2017, Employee elected not to restore medical or other benefits for the period of 2013-2016. *Agency's Stipulation of Facts* at p. 2.
[20] Consolidated Omnibus Budget Reconciliation Act ("COBRA") is a federal law that allows eligible employees and their families to temporarily continue their employer-sponsored health insurance coverage after certain qualifying events, such as job loss or reduction of hours.
[21] *Agency's Exhibit Table of Contents*, Exhibit D, page 15.
[22] *Id*. at Exhibit G.

duty because her medical insurance lapsed and no primary care physician would treat her. Agency advised Employee that a letter from an emergency doctor would suffice.[23]

Based on the foregoing, there is substantial evidence in the record to find that Employee was absent from her assigned duties, without authorization, for at least five days. Employee did not report for duty from February 10, 2020, through February 28, 2020, as agreed. To date, Employee has not provided "fit-for-duty" documentation as ordered by EOM. Concerning her argument that ALJs are not classified as safety-sensitive positions requiring medical documentation prior to reinstatement, in *Employee v. Department of General Services*, OEA Matter No. 1601-0090-18C21 (January 28, 2021), OEA held that there are regulations in the District Personnel Manual that give agencies the authority to require employees to undergo medical evaluations during the reinstatement process. DPM Chapter 20, Section 2000, provides the following in relevant part:

> 2000.2 Each individual selected for an appointment in the District of Columbia government must be able to perform the essential functions of his or her job, with or without reasonable accommodation(s).
>
> 2000.3 Unless otherwise specified in this chapter, medical evaluations are to be made by physicians or practitioners, and determinations regarding essential functions of the job are to be made by supervisors and managers based on the employee's practical day-to-day responsibilities and the employee's position description….
>
> 2004.1 Personnel authorities may establish physical and mental qualification requirements that are necessary to perform a specific job or class of jobs.

Accordingly, Agency was within its discretion to require Employee to submit medical documentation evincing her clearance to return to duty, especially considering her previous request

[23] *Id*. at Exhibit I

for a reasonable accommodation.[24] EOM provided in its July 31, 2018 decision that "without a medical note, it is unclear whether [Employee] is able to currently fulfill her duty" and "we find that it is appropriate for [Employee] to provide additional medical documentation promptly…to determine whether she is fit for duty and whether she needs a reasonable accommodation that the agency can provide."[25]

We conclude that Agency's request for medical documentation is supported by regulatory authority and was reasonable in light of the posture of Employee's reinstatement proceedings. Notwithstanding, Employee has yet to provide an excusable basis for her absences from February 10, 2020, through February 28, 2020. As such, following the fifth day of unexcused absences, Agency was permitted to initiate an adverse action in accordance with DPM § 1605.4(f)(2). The AJ held that Agency met its burden of proof in establishing that the charge of unauthorized absence was taken for cause, and this Board concludes that the findings are supported by substantial evidence.

Licensing Requirements

As it relates to the practice of law in the District of Columbia, D.C. Code § 1-608.81 provides the following:

> (a)(1) Except as provided by the rules for temporary waiver of this requirement, each attorney, hearing officer, or administrative law judge who is required to be a member of the District of Columbia Bar as a prerequisite of employment, and who is employed by the Mayor…shall file with the Department of Human Resources a Certificate of Good Standing from the Committee on Admissions of the District of Columbia Court of Appeals by December 15 of each year.
>
> (e) The failure of an attorney, hearing officer, or administrative law judge subject to subsection (a) of this section to comply with its requirements shall result in the forfeiture of employment.

[24] Hearing Officer Report, *Agency Exhibit Table of Contents*, Exhibit L.
[25] *Agency's Stipulation of Facts* at Exhibit H.

While Agency's filings identified Employee as an ALJ with the Department of Employment Services, the parties stipulated that her position of record at the time of the termination action was a hearing officer pursuant to D.C. Code § 2-1831.01(2) and (8).[26] Employee was advised that she was required to submit a certificate of good standing from the D.C. Bar as part of her reinstatement process. However, she has failed to produce any documentation representing her ability to practice law in the District of Columbia. The licensing requirement under D.C. Code § 1-608.81 was enacted in 2015; therefore, at the least, Employee was placed on constructive notice of the law at that time.[27] She was on actual notice of the D.C. licensing obligation when she requested a waiver of the requirement, or alternatively additional time to submit an application to become a member of the D.C. Bar in December of 2024.[28] Since Employee is not in compliance with D.C. Code § 1-608.81, she cannot perform the functions of her duties as a hearing officer or ALJ with Agency.

Procedural Posture

Employee's petition argues that Judge Cannon made a procedural finding during a previous status conference that the instant appeal represents a continuation of the compliance issue presented in OEA Matter No. 1601-0012-14C16. According to her, the deciding AJ in this matter deviated from the previously established procedural posture without justification. Further, Employee submits that the DPM does not provide any basis for a substituted AJ to override a procedural determination made by the AJ who initially adjudicated the matter. We disagree.

OEA Rule 622.2 states that "Administrative Judges shall conduct the hearings fairly and impartially, take all necessary action to avoid delay in the disposition of proceedings, and maintain

[26] *See Agency's Stipulation of Facts*, Exhibit and Witness List (June 3, 2024), Exhibit A.
[27] *Reply Brief in Support of Termination,* Attachment F.
[28] *Id*. at Attachment G.

order. They shall have all powers necessary to that end including, but not limited to, the power to…regulate the course of the proceeding." While OEA's rules are silent as to whether a substituted AJ must follow the procedural determinations of a previous AJ, nothing within the procedural posture of this matter indicates that the deciding AJ abused his judicial independence as it relates to determining the course of Employee's appeal.

In his decision, the AJ indicated that "[o]n September 16, 2024, both parties informed the undersigned that AJ Cannon's prior ID was not at issue and that the only issue in the instant matter was Employee's August 28, 2020, termination."[29] Moreover, OEA Matter No. 1601-0012-14 was generated as result of Employee's termination based on 2013 charges of absence without official leave and insubordination; whereas, the current appeal is based on Employee's termination for unauthorized absences in 2020.[30] A new OEA Matter number was assigned to this appeal since it was result of new and separate termination action initiated by Agency. The AJ carefully reviewed the record and consulted with the parties to determine the appropriate case management of this matter. As such, we can find no legal error on his part in concluding that Employee's 2020 termination warranted a separate case designation.

Material Issues of Law and Fact

According to Employee, the AJ failed to address a February 2020 request to engage in an interactive process with Agency regarding her reasonable accommodation request. She further argues that the AJ failed to consider the effect of the COVID-19 Public Health Emergency on work schedules for ALJs. However, the only determinations at issue in this appeal are whether Employee's absences from February 10, 2020, through February 28, 2020, were excused and whether the penalty was appropriate. The AJ adequately addressed both issues in finding that

[29] *Initial Decision* at p. 2.
[30] *See Employee v. Department of Employment Services*, OEA Matter No. 1601-0012-14 (April 22, 2016).

Agency's adverse action was taken for cause and that termination was within the range allowed by law. Employee provides no legal authority to support her argument that the AJ was required to address these issues in the February 13, 2025, Initial Decision. Consequently, we find her argument to be unpersuasive.

Conclusion

This Board finds that the Initial Decision is supported by substantial evidence. Employee's absences from February 10, 2020, through February 28, 2020, were unexcused; therefore, Agency's charge of unauthorized absence pursuant to DPM § 1605.4(f)(2) was taken for cause. Under the Table of Illustrative Action, a first charge of unauthorized absence of five workdays or more carries a maximum penalty of removal. Thus, Employee's termination was within the range of penalty. The AJ did not abuse his discretion in identifying a new OEA Case Number for this appeal. Finally, the Initial Decision addressed all pertinent issues of law. As a result, we must deny Employee's Petition for Review.

ORDER

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

FOR THE BOARD:

Dionna Maria Lewis, Chair

Arrington L. Dixon

Lashon Adams

Jeanne Moorehead

Pia Winston

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.