Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| BERNICE ROBERTS | ) | |
| Employee | ) | |
| | ) | OEA Matter No.: 1601-0127-03 |
| v. | ) | |
| | ) | Date of Issuance: July 24, 2008 |
| DEPARTMENT OF HEALTH | ) | |
| Agency | ) | |
| | ) | |

**OPINION AND ORDER**
**ON**
**PETITION FOR REVIEW**

Bernice Roberts ("Employee") worked as a Program Specialist in the Department of Health's ("Agency") Environmental Health Administration, Bureau of Food, Drug and Radiation Protection, Office of Certification, Licensing and Registration. On March 19, 2003 Agency issued to Employee an advance notice of its proposal to terminate her for the cause of insubordination. The charge was based upon Employee's failure to notify her supervisor when she was going to be late or absent and her failure to attend required

meetings on December 11, 2002, January 30, 2003, and March 12, 2003.[1] The effective date of the removal was July 7, 2003.

On August 5, 2003 Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). The Administrative Judge held a three-day evidentiary hearing in which she heard testimony from Employee's immediate supervisor and second-line supervisor on behalf of Agency and from several co-workers on behalf of Employee. Employee also testified on her own behalf. On May 23, 2005, following the conclusion of the hearing, the Administrative Judge issued an Order.

In the Order the Administrative Judge explained that she had found to be most credible the testimony offered by Employee's immediate supervisor. Specifically the Administrative Judge stated that this particular witness was "consistent and forthright[,] . . . [showed] no indication of any animus against Employee or any other witness[,] . . . [and] presented [herself] as a manager who expected to be obeyed by her subordinates and supported by her superiors."[2] On the other hand, the Administrative Judge found that the testimony given by all of the other witnesses, including Employee's own testimony and that of her second-line supervisor, was "inconsistent and contradictory in parts."[3] Based on these credibility determinations the Administrative Judge held that Agency had met its burden of proving that Employee had in fact been insubordinate when she failed to attend the three aforementioned meetings but had not met its burden of proof with respect to Agency's claim that Employee had failed to notify her supervisor when she would be arriving to work late or planned to be absent altogether.

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[1] Employee was also charged with missing meetings on two other dates. Agency's hearing officer did not sustain those charges.
[2] *Order*, May 23, 2005 at 13.
[3] *Id.*

Because she had sustained only one of the charges that formed the basis of the removal action, the Administrative Judge remanded the appeal to Agency for it to reconsider its penalty and determine whether it still wished to remove Employee. On June 28, 2005 Agency submitted its response and thereafter submitted an affidavit of the deciding official for this appeal. Within the affidavit the deciding official examined each *Douglas* factor and found that "the vast majority of the *Douglas* factors [were] aggravating ones."[4] For this reason Agency concluded that removal remained the appropriate penalty.

On October 14, 2005 the Administrative Judge issued the Initial Decision. Again, she concluded that Agency had met its burden of proof by a preponderance of the evidence. With respect to the penalty, the Administrative Judge recognized that each agency bore the responsibility of deciding the appropriate discipline to impose for employee misconduct and that "[t]his Office has long held that it will not substitute its judgment for that of the agency when determining if a penalty should be sustained."[5] Instead, this Office's "review is limited to determining that 'managerial discretion has been legitimately invoked and properly exercised.'"[6] The Administrative Judge concluded that Agency had appropriately exercised its managerial discretion when it determined that removal was the penalty it wished to impose. Thus the Administrative Judge upheld Agency's action.

Thereafter, Employee timely filed a Petition for Review. In her petition, Employee does not deny having missed the three meetings. Rather, she argues that her failure to attend the meetings should be excused. With respect to the December 11, 2002

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[4] *Affidavit of Monica Lamboy*, Sept. 7, 2005.
[5] *Initial Decision* at 5.
[6] *Id.* (quoting *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985)).

meeting, Employee claims that her second-line supervisor excused her from attending this particular meeting. As for the January 30, 2003 and March 12, 2003 meetings, Employee claims that she was too ill to attend these meetings and should be excused for that reason. Employee also argues that the Administrative Judge applied an "erroneous evidentiary legal standard" by concluding that Agency had presented substantial evidence to prove its case.[7] Lastly, Employee argues that with respect to the penalty, Agency's consideration of the *Douglas* factors was faulty and inconsistent and the "procedure utilized by the Administrative Judge with respect to the remand was harmful error."[8] For these reasons, Employee asks that we grant her petition and reverse the Initial Decision.

As for Employee's claim that her second-line supervisor excused her from attending the December 11, 2002 meeting, he testified at the first day of the hearing that he had no recollection of having a discussion with Employee about this particular meeting. He was never asked either on direct or cross-examination whether he recalled excusing Employee from attending this meeting. Without more we conclude that Employee's claim was not substantiated.

Employee's second claim is that she was too ill to attend the January 30, 2003 and March 12, 2003 meetings. It is noteworthy that even though Employee claims to have been ill on these days, she nevertheless reported to work. In cases where an employee has been removed on the basis of being absent without leave and has offered a legitimate excuse, such as illness, this Office has held that such absence is justified and therefore excusable. Furthermore, in those particular cases the effected employees have provided documentary and testimonial evidence consisting of, *inter alia*, medical notes and

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[7] *Petition for Review* at 9.
[8] *Id.* at 11.

physicians statements detailing the employee's particular illness and scope of treatment. We accepted such evidence as proof that the employee had a medical condition that was indeed incapacitating to the extent that the employee could not perform his or her duties.[9]

Even though Employee was not charged with AWOL, we believe this reasoning should apply to the case at hand. The only evidence Employee presented on this issue was her own testimony and the testimony of a co-worker who said she heard Employee tell her second-line supervisor that she was feeling ill and could not attend the meetings. This testimony fails to prove, however, that Employee had an incapacitating medical condition such that would have excused her from having attended the January 30, 2003 and March 12, 2003 meetings.

Employee's claim that the Administrative Judge utilized an erroneous evidentiary legal standard is not true. In both the May 23, 2005 Order and the Initial Decision, the Administrative Judge concluded that Agency had proven its case by a preponderance of the evidence. Finally with respect to Employee's remaining arguments, there is nothing in the record to support her claims. Based on the foregoing discussion, we must deny Employee's Petition for Review and uphold the Initial Decision.

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[9] *See Chaenda Jones v. Office of the Attorney General for the District of Columbia,* OEA Matter No. 1601-0003-05 (December 13, 2006) ___D.C. Reg.___ ( ); *Murchison v. District of Columbia Dep't of Public Works,* OEA Matter No. 1601-0257-95-R03 (October 4, 2005) ___D.C. Reg.___ ( ); and *Akinde v. Dep't of Human Services,* OEA Matter No. 1601-0204-91 (March 24, 1995) ___D.C. Reg.___ ( ).

## ORDER

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

FOR THE BOARD:

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Sherri Beatty-Arthur, Chair

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Barbara D. Morgan

_____
Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.