THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
EMORY MAVINS Employee	OEA Matter No. 1601-0202-09
	Date of Issuance: November 15, 2011
DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC TRANSPORTATION Agency	Lois Hochhauser, Esq. Administrative Judge

Emory Mavins, Employee, *pro se*[1]
Melissa Williams, Esq., Agency Representative[2]

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Emory Mavins, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on August 13, 2009, appealing the final decision of the D.C. Department of Public Transportation, Agency herein, to terminate his employment, effective July 31, 2009. (Ex A-2). At the time of Agency's decision, Employee was in permanent career status as a Laborer, WS-3502-03, and had been employed at Agency for approximately 19 months.

This matter was assigned to me on or about June 30, 2010. On July 12, 2010, I issued an Order scheduling the prehearing conference for August 11, 2010. At the prehearing conference, the hearing was scheduled for September 30, 2010, and an Order was issued on August 18, 2010, memorializing the matters discussed at the prehearing conference. On September 13, 2010, Employee submitted a request for the issuance of subpoenas. Since the request was made by Employee, who at the time was represented by Clifford Lowery, the undersigned made numerous attempts to contact Mr. Lowery. Those efforts proved unsuccessful. After the subpoenas were prepared, the Administrative Judge telephoned both Mr. Lowery and Employee numerous times to advise them of the availability

[1] Employee listed Clifford Lowery as his representative in his petition for appeal. Although Mr. Lowery had not entered an appearance as representative, he was initially sent all notices. He did not appear at the prehearing conference but participated by telephone and stated that he was representing Employee. Employee later stated that he was not being represented by Mr. Lowery and that he would represent himself and proceeded *pro se.*

[2] Merrick Cosey, legal intern with Agency, assisted Ms. Williams.

of the subpoenas for service. She telephoned Employee at the telephone number listed in his petition. The person answering the telephone stated that the number did not belong to Employee and she did not know him. On September 22, 2010, having been unable to reach Employee or Mr. Lowery and having determined the subpoenas could not be served in a timely manner, the Administrative Judge issued an Order canceling the hearing and directing Employee to notify her of his correct telephone number and whether he was being represented by Mr. Lowery. She directed that Mr. Lowery submit a statement as to whether he was representing Employee and notified him that if he did not respond, she would assume that he was not representing Employee. Submissions were due on October 1, and the parties were advised that upon receiving this information, a new hearing date would be scheduled. The Administrative Judge also telephoned Employee, Mr. Lowery and Agency representative to advise them of the cancellation of the hearing and the reasons for that decision. Another Order was issued on October 5, 2011 when the Administrative Judge became aware that there was nothing in the record confirming that the September 22 Order had been mailed to the parties. The Order, in pertinent part, extended the October 1, 2010 deadline until October 15, 2010.

On October 9, 2010, Employee telephoned the Administrative Judge who advised him of the October 5 Order which he stated he had not received, and read it to him. Employee provided his current address and telephone number and stated that Mr. Lowery was representing him. The Administrative Judge advised him that the information provided by telephone was appreciated, but was not sufficient, i.e., that he had to submit a written response which complied with OEA Rules. She also advised him it was not appropriate for her to discuss the matter with him in the absence of his representative and the opposing party. The Administrative Judge spoke with Employee again on October 25, 2010 when he telephoned to inquire about the status of his case. She advised him that neither he nor Mr. Lowery had responded to the Order in writing as required. He stated that although he thought Mr. Lowery was representing him, he was prepared to proceed without him. The Administrative Judge advised Employee that he would need to request an extension of time to respond to the Order, and that either he or Mr. Lowery would have to contact Ms. Williams, Agency representative, to request her consent as required by the Order. She asked him to contact Ms Williams immediately and advise her of Ms. Williams's response. Employee did not contact the Administrative Judge or request additional time to comply. Therefore, on October 29, 2010, the Administrative Judge issued an Order directing Employee to submit a written statement regarding the reasons for his failure to comply with the October 5 Order and to state in writing whether he was being represented. Employee was given until November 16 to submit his statement, and Agency was given until November 30 to advise the Administrative Judge if it was seeking the imposition of sanctions and if it opposed the late filing. Agency was advised that if it did not respond, the Administrative Judge would assume it was not seeking sanctions. Agency did not respond.

On April 18, 2011, an Order was issued scheduling a status conference for May 18, 2011. On the afternoon of the status conference, the Administrative Judge was notified that the copy of the Order sent to Employee had been returned by the U.S. Postal Service stamped "not deliverable as addressed." It was determined that through clerical oversight, the Order was not sent to the correct address. Numerous attempts by the Administrative Judge to contact Employee were unsuccessful and eventually there was a recording when that number was dialed that stated that the telephone number had been disconnected. The Administrative Judge advised Ms. Williams, who was present, that since

Employee had not received the Order, the matter would be rescheduled. An Order was issued on May 20, 2011, scheduling the status conference for June 15, 2011.

At the June 15, 2011 status conference, Employee was present and notified the Administrative Judge that he was not being represented by Mr. Lowery but rather was representing himself. The hearing was scheduled for July 25, 2011. An Order was issued on June 21, 2011 confirming the matters discussed at the status conference, including the issuance of subpoena. On July 1, 2011, an Order was issued after Agency requested an extension of time until July 8 to file its witness and document list. The Administrative Judge confirmed Ms. Williams's statement that Employee's telephone number remained out of service. On July 1, 2011, an Order was issued granting Agency's request, but noting that since it was unlikely that Employee would receive the Order before July 8 due to the July 4 holiday, he would be given additional time to July 12 to submit his witness and document lists. He was also directed to provide a contact number where he could be reached. On July 11, 2011, Agency Representative requested a continuance of the proceeding due to the lack of availability of witnesses for the scheduled date. Employee did not oppose the request, and it was granted. By Order dated July 13, 2011, the matter was continued until August 10, 2011.

The hearing took place on August 10, 2011. Agency was represented by Melissa Williams, Esq., and Employee represented himself. At the proceeding, the parties had full opportunity to, and did in fact, present testimonial and documentary evidence as well as argument in this matter.[3] The parties chose to present oral closing argument, and the record was thereafter closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

ISSUE

Did Agency meet its burden of proof in this matter?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

On April 24, 2009, Agency issued its "Advanced Written Notice of Proposed Removal" in which it notified Employee that, consistent with the District of Personnel Manual (DPM) §§ 1603.2 and 1602.2, it was proposing that he be terminated due to "unauthorized absence: ten (10) consecutive days or more constitutes abandonment, pursuant to DPM §1603.3(f)(1). The letter stated

[3] Testimony was presented under oath. The transcript is cited as "Tr", followed by the page number. Exhibits are cited as "J" for joint, "A" for Agency and "E" for Employee, followed by the exhibit number. The parties chose to present oral closing arguments in lieu of submitting written briefs.

Since he had not disclosed his witnesses to Agency, Agency initially objected to all of the witnesses but Mr. Glaspie and Employee. However, after it was determined that none of the witnesses would be testifying about any matter in dispute, and since Agency witnesses were available and would be permitted to serve as rebuttal witnesses, most of the testimony was allowed.

that Employee had been absent without official leave (AWOL) between March 24, 2009 and April 10 2009.[4] The letter stated, in pertinent part:

> On these dates you failed to report for work and you failed to call-in to notify your supervisor of a request for leave, as specified in Article 22(G) and Article 21(D) of the Collective Bargaining Agreement (CBA) between DDOT and AFGE Local 1975 employees. Absence without official leave of the duration specified above calls for removal from your position, pursuant to the Table of Penalties DPM §1619.1.6(a). (Ex A-1).

The Notice of Final Decision was issued by Terry Bellamy, Agency Deputy Director on July 14, 2009. It stated, in part, that the "action was proposed in accordance with the provisions of …DPM §1603.3 and is based on the specific cause of Unauthorized Absence: (10) consecutive days or more constitutes abandonment pursuant to DPM §1603.3(f)(1). (Emphasis in original). (Ex A-2). The specific dates were March 24-March 27, 2009 , March 30-April 3, 2009 and April 4 – April 10, 2009. (Ex A-3).

The parties agree, and the record supports the conclusion, that the pertinent facts in this matter are not in dispute. They are:

1. Employee was an asphalt laborer whose tour-of-duty was from 7:30 a.m. to 4:00 p.m. from Monday through Friday.
2. Employee was placed in this position more than a year earlier after completing a training program with the Calvin Woodland, Sr. Foundation.
3. On or about March 11, 2009, Employee advised Anthony Wooten, his supervisor, that he was having problems and needed to take leave the following week. Mr. Wooten approved leave from March 16, 2009 through March 20, 2009. Employee did inform Mr. Wooten that he was scheduled to appear in Court on March 16, 2009. (Tr, 74, 86; Ex A-4, A-5).
4. On March 16, 2009 Employee appeared in D.C. Superior Court for a scheduled hearing. He had not told his supervisor of his need to appear in Court. At the proceeding, he pleaded guilty to one charge of simple assault. Immediately after, he was incarcerated for a period of 30 days.
5. On March 23, 2009, the first day after Employee's leave had expired and the day he was scheduled, prior to 8:00 a.m., Arlene Jackson, a close friend of Employee's, and Robert Donaldson, Employee's brother, brought the Judgment and Commitment/Probation Order and attached print-out to Agency where they gave them to Mr. Wooten and advised him that Employee had been detained for 30 days, beginning March 16, 2009. (Tr, 70; Ex A-8).
6. Mr. Wooten brought the documents to Frank Pacifico, Chief Program Manager at Agency's Street and Bridge Maintenance was Employee's third or fourth "tier supervisor" at the time of the removal. (Tr, 30-31) and related the information that Employee was incarcerated for a 30 day period beginning March 16. Mr. Pacifico told Mr. Wooten to place Employee

[4] Although no year was listed, it is undisputed that the year was 2009.

on AWOL status. (Tr, 72, 87). Employee was placed on AWOL from March 24- March 27, 2009, March 30-April 3, 2009 and April 6-April 10, 2009. (Tr, 68, Ex A-3).

7. On March 23, 2009 at approximately 8:05 a.m., Mr. Pacifico notified Agency personnel that Agency had received documentation on Employee's behalf that Employee had been incarcerated for 30 days.
8. On April 11, 2009, upon his release from incarceration, Employee returned to work, at which time Mr. Pacifico advised him that "he needed to check with the operations manager as to the status of [Employee's] continued employment". (Tr, 24).
9. Agency did not permit Employee to return to work, and placed him on administrative leave. (Tr, 26-27).
10. On April 24, 2009, Agency issued it advanced notice of removal. The final notice was issued on July 31, 2009.

Agency's position is that Employee's failure to report for work for ten consecutive days constitutes abandonment of position and is a basis for removal pursuant to DPM §1603.3(f)(1). It explains that when it became aware of the incarceration on March 23, it began charging him with AWOL on the following day. (Tr, 16). It contends that his absence without approved leave for a period of ten days constitutes abandonment of position. Agency maintains it was not required to hold Employee's job for him (Tr, 17). It asserts it considered the fact that Employee was incarcerated when reaching its decision. Agency contends that it considers cases on an individual basis but as a "general policy" it does not hold a position for an employee who is incarcerated. (Tr, 18). Agency states that although it had not yet issued the proposed notice when Employee returned to work on April 11, 2009, it had already made its decision to terminate his employment. (Tr, 25).

Mr. Pacifico, the proposing official, testified that on March 23, he received the Court document verifying that Employee was incarcerated and understood that a woman had also telephoned on Employee's behalf but he had not spoken with her. (Tr, 33-34). Mr. Pacifico stated that Employee was terminated for abandonment of position, i.e., "because he did not show up for work ten consecutive days or more". (Tr, 62). He stated Agency reached its decision because it does not "condone leave for incarceration" and has "zero tolerance policy" for a charge of assault. He stated that he did not know the specifics of the simple assault charge. (Tr, 51). He said that he considered Employee's positive work history but that his attendance was "not satisfactory". (Tr, 38-39). He said Employee had not requested leave for the period of his incarceration, but that even if he had, Agency would not grant leave based on incarceration. (Tr, 40, 50). The witness stated that he was not aware of any other employee who had been incarcerated for simple assault and had not been terminated. He said he was aware of employees who had been incarcerated and continued to work, but did not know the reasons for the incarcerations, because those individuals had asked to be placed on leave. (Tr, 54). He explained:

> [Employee was] not the first employee that I know that has been incarcerated. He's the first employee that was incarcerated for ten days or more that was marked AWOL. I mean in my tenure, I have been told that employees were incarcerated, for example picked up for drunk driving over the weekend. They were incarcerated for one day, then

> let out on their own recognizance and they returned to work. So that would not follow suit in my mind in this particular case. (Tr, 57).

Mr. Pacifico testified that since Employee's termination, another employee, "in the same type of situation" had been terminated. He stated Employee was the first employee terminated for being absent for ten or more days. (Tr, 58). In response to a question as to whether if the outcome would have been different if Employee had been incarcerated for less than ten days on the simple assault conviction, and Agency was aware of the conviction, Mr. Pacifico responded:

> Not specifically in a termination…I do recall I said that if that was a consideration prior to us putting him on AWOL we found out on the 23rd, we deliberated on the 24th, he began being marked AWOL. the simple assault was a consideration, not the reason his termination. The reason for termination was ten days of consecutive AWOL. (Tr, 60).

Mr. Pacifico recalled receiving a voicemail message from Calvin Woodland, Jr., on behalf of the Calvin Woodland Sr., Foundation regarding Employee but was told not to respond to the message and that Agency would "move forward with the removal". (Tr, 49; Exs A-7, A-9). He did not recall discussing Employee's situation with Mr. Woodland. (Tr, 129). He stated that no one requested a leave of absence for Employee, but even if one had been requested, it would not have been granted. (Tr, 130).

Mr. Wooten did not deny speaking with Ms. Jackson but did not recall telling her, after she told him of Employee's incarceration, that she should calm down and that it would be all right, but he thought the conversation took place after March 16. (Tr, 80-81).

Employee's position is that he accepts "full responsibility for [his] actions, but that he was an "excellent worker" who did whatever he was asked to do. He stated that it was his understanding that "the reason for [his] termination was because [Agency] was not even notified for ten consecutive days of [his] whereabouts and that was the reason for the termination, that's what was told to [him], to [his] understanding, and [he felt] like they did know" where he was. (Tr, 20). Employee asked for another opportunity to "take care and support" his family, stating that he will be 50 years old soon and would have difficulty getting hired. He concluded:

> I just want to work…and just be a decent citizen in this society, and support my family, that's all. (Tr, 22).

Ms. Jackson testified she telephoned Mr. Wooten on March 16 and notified him of Employee's incarceration and he told her to bring the paperwork verifying the incarceration to the office and that Employee "would be all right as far as his job". (Tr, 92).

Calvin Woodland, Jr., chief of staff for Councilmember Jim Graham, is the founder of the Calvin Woodland, Sr. Foundation which trains unemployed residents of the District of Columbia for employment with Agency. Mr. Woodland stated that he is a close friend of Employee and that Employee obtained his position at Agency after training at the Foundation. He stated he spoke to Mr.

Pacifico about Employee's situation and was advised that if Employee was incarcerated for less than a year, Agency could "probably" hold Employee's position open for him. (Tr, 100). He was uncertain if the conversation took place before or after the conviction. (Tr, 103).

Employee testified at the time he went to the March 16 hearing, he did not know what would happen to him, he thought he would be given probation and could have reported back to work. He stated:

> I mean I understand my position because I put myself in this position. And the only thing that I'm asking for is that I'm working so hard…for a whole year to get that position, just to get off that corner and, you know, to get back and steady and to help be strong in the neighborhood that I lived up there.
>
> I understand that I was wrong and I went through therapy, anger management, I worked on all of that…and I understand it's nobody's fault for us being here today but my own and I accept full responsibility…
>
> And the job meant so much to me because it's the first time in my life I felt like somebody. to be honest…I mean that's been a part of the problem and I want to be a part of the solution and I know I made a mistake and it cost me a lot..
>
> And I appreciate the opportunity that they gave me and whatever the outcome is…I'm grateful…for …my chance to be heard. (Tr, 112-113).

Agency has primary responsibility for managing its employees. Part of that responsibility is determining the appropriate discipline to impose. *See, e.g., Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), _____ D.C.Reg. _____ ( ). This Office has long held that it will not substitute its judgment for that of an agency when determining if a penalty should be sustained. OEA's review is limited to determining that "managerial discretion has been legitimately invoked and properly exercised". *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

D.C. Code §1-616.51 (2001) requires that the Mayor "issue rules and regulations to establish a disciplinary system [for agencies over which he has personnel authority] that includes…1) A provision that disciplinary actions may only be taken for cause [and] 2) A definition of the causes for which disciplinary action may be taken." The Mayor has personnel authority of Agency. The D.C. Office of Personnel, the Mayor's designee for personnel matters, published regulations entitled "General Discipline and Grievances" that meet the mandate of §1-616.51 apply to all employees in permanent status. *See* 47 D.C. Reg. 7094 *et seq*. (2000). There is no longer a table of penalties providing agencies with minimum and maximum suspensions that can be imposed for each charge of misconduct. Thus, agencies have considerable discretion in determining penalties. This Office will not usurp managerial responsibility in determining a penalty, it will, however, ensure that the penalty reflects a responsible balancing of relevant factors. *Lovato v. Department of the Air Force*, 48 M.S.P.R. 198 (1991). Only if the Administrative Judge concludes that an agency did not consider

relevant factors or that the imposed penalty constitutes an abuse of discretion will an agency's decision be reversed. *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985).

The facts in this matter are not in dispute. Employee was incarcerated for 30 days beginning March 16, 2009. He was on leave for one week beginning March 16. He did not advise anyone in a supervisory position at Agency that he might be incarcerated when he appeared in Court on March 16, and did not realize he might be immediately detained and unable to contact Agency. However, on March 23, the day he was scheduled to return to work, Ms. Jackson and Mr. Donaldson brought the paperwork from the Court and advised Agency that Employee would be incarcerated for a thirty day period which began on March 16. At that point, Agency began marking Employee AWOL, and determined it would terminate him. The only real disagreement in this matter is whether Mr. Pacifico or Mr. Wooten advised Ms. Jackson, Mr. Donaldson and/or Mr. Woodland that they should not worry, and whether they did or not is not relevant to the outcome of this decision.

Agency based its decision to remove Employee on the fact that he was absent for more than ten days without approved leave which it argues, constitutes abandonment of position. However, "abandonment…connotes a voluntary decision to quit*." Janine v. District of Columbia Department of Employment Services*, 741 A2d 1999 (CADA 1999). The Administrative Judge concludes that given the circumstances presented in this matter, there is no conceivable way that Agency could have reasonably determined that Employee made a voluntary decision to quit his job. Indeed, the evidence supports the conclusion that Employee was not aware that he could be immediately incarcerated and thus unable to notify Agency he could not return to work when he took leave prior to his March 16 hearing; and that although unable to personally notify Agency of his predicament, did so at the earliest time possible on the day he was scheduled to return to work when his brother and friend brought the documents to Agency and explained Employee's situation to his supervisor and manager. Although Employee was on unauthorized leave during this period, such leave did not constitute abandonment of position, as argued by Agency.

Agency is obligated to consider relevant factors when determining the penalty it will impose. *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981). Under the circumstances presented, the reasonable course of action, since Agency was well aware that Employee could not have previously requested leave, would have been for Agency to have allowed Employee to request leave upon his return. However, Agency contends such a decision would have served no purpose since it would have reached the same conclusion because Employee was incarcerated for simple assault and it has "zero tolerance" for that offense. The Administrative Judge concludes that this argument must fail as well for several reasons. First, there was no evidence other than Mr. Pacifico's statement, that Agency has in fact a zero tolerance policy toward individuals convicted of assault. Second, there was no evidence presented that would support Agency's implementation of its policy, if it exists, with regard to Employee. Agency did not know, and did not try to find out, the relevant circumstances in Employee's case, i.e., the bases for the charge and for the conviction. Therefore, those factors were not considered by Agency in reaching its decision to terminate Employee. Agency also failed to establish any nexus between Employee's position and the charge, i.e., why an off-duty conviction should result in automatic termination. Agency concedes that other

employees who have been incarcerated were not removed, and that Employee was the first employee terminated for unauthorized absence for more than ten days, so it does not appear there is uniformity or consistency. Finally, there was little if any evidence that Agency considered any mitigating factors when reaching its decisions, i.e., Employee's work history, his contrition, and his efforts to perform well on his job. Employee presented compelling testimony of how much this job means to him, how it took him off the streets and gave him a purpose, how it changed it life and how hard he has worked to keep the job. He testified with great credibility that he recognized that he was responsible for the circumstances which resulted in Agency's actions, and his great remorse. Agency had no opportunity to review the circumstances of this case because it made its decision to remove Employee as soon as it received the documents pertaining to his incarceration.

For these reasons, the Administrative Judge concludes that Agency's action of terminating Employee was arbitrary and constituted an abuse of discretion. She further concludes that Agency's decision should be reversed. *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985).

ORDER

It is hereby

ORDERED:

1. Agency's removal of Employee from his position is reversed.

2. Agency is directed to reinstate Employee, issue him the back pay and benefits to which he is entitled beginning April 11, 2009, as a result of the removal no later than 45 calendar days from the date of issuance of this Initial Decision.

3. Agency is directed to document its compliance no later than 60 calendar days from the date of issuance of this Initial Decision.

FOR THE OFFICE:

LOIS HOCHHAUSER, ESQ.
Administrative Judge