THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
TIMOTHY JONES,	)	
Employee	)	OEA Matter No. 1601-0043-13
	)	
v.	)	Date of Issuance: October 31, 2014
	)	
DISTRICT OF COLUMBIA DEPARTMENT OF MENTAL HEALTH,	)	
Agency	)	STEPHANIE N. HARRIS, Esq.
	)	Administrative Judge

Timothy Jones, Employee *Pro-Se*
Corey P. Argust, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On January 3, 2013, Timothy Jones ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Mental Health's ("DMH" or "Agency") decision to terminate him. Agency's action was based on a charge that Employee violated District Personnel Manual ("DPM"), Chapter 16, §1603.3(f)(1)-(3).[1] At the time of his removal, Employee was a Recovery Assistant with Agency. On February 4, 2013, Agency filed its Answer in response to Employee's Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge ("AJ") in February 2014. On March 21, 2014, I issued an Order scheduling a Prehearing Conference in this matter for April 15, 2014. Employee contacted OEA with a change of address on March 19, 2014. A subsequent Order was issued on April 15, 2014, scheduling the Prehearing Conference in this matter for June 11, 2014 ("June 11th PHC"). Both parties were present for the June 11th PHC.

A Post Prehearing Conference Order was issued on June 13, 2014, wherein the parties were directed to submit Post Prehearing Conference Briefs to address outstanding issues. On

[1] Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, including: 1) Neglect of Duty- failure to carry out assigned tasks by failing to report for duty; 2) Neglect of Duty- failure to follow procedures for leave request and approval; 3) Unauthorized Absence; and 4) Absence Without Official Leave ("AWOL").

June 26, 2014, Employee submitted documentation ("June 26th submission"), which included a written statement. On July 17, 2014, Agency submitted its response. On August 22, 2014, the undersigned issued an Order giving Employee additional time to submit an optional supplemental brief on or before September 5, 2014. However, no supplemental brief was submitted, therefore, Employee's June 26th submission has been accepted as his brief. All of the required documentation has been submitted. 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 now 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.

BURDEN OF PROOF

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

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

On October 25, 2012, Agency issued an Advance Written Notice ("Advance Notice") proposing to remove Employee for violating DPM §1603.3(f)(1)-(3), any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, including Neglect of Duty, Unauthorized Absence, and AWOL from

August 15, 2012 to October 25, 2012 ("AWOL Period").[2] The Advance Notice stated the following cause of action and specification:

> **Cause 1:** Neglect of Duty: failure to carry out assigned tasks by failing to report for duty.
>
> **Cause 2:** Neglect of Duty: failure to follow procedures for leave request and approval.
>
> **Cause 3:** Unauthorized Absence.
>
> **Cause 4:** Absence Without Leave ("AWOL").

On December 3, 2012, the Hearing Officer ("HO") issued her report and decision in this matter, finding that the evidence supported Employee's proposed removal.[3] Subsequently, on December 7, 2012, Agency issued a Notice of Final Agency Decision removing Employee from his position effective December 14, 2012.[4]

Employee's Position

In his Petition for Appeal, Employee claims that he was not allowed to return to work because of a doctor's letter which stated that he had a damaged spinal cord and needed surgical intervention.[5] In his Brief, Employee acknowledges that he does not have any additional documentation reflecting his absence during the relevant AWOL period. He argues that one doctor's letter in particular led to Agency refusing to let him return to work, and this doctor refused to change the limiting statements that were made.[6]

Agency's Position

In response to Employee's claims, Agency argues that Employee was not directed to remain out of work; instead, Agency claims that it relayed to Employee several times that his continued absences would not be excused without updated medical documentation. Agency submits that the removal was based on Employee's absences during the AWOL period, for approximately forty (40) days between August 15, 2012 and October 25, 2012.

Agency states that initially, on October 21, 2011, Employee injured his lower back at work. On November 22, 2011, Employee filed a public sector workers' compensation claim for this injury with the District of Columbia Office of Risk Management ("ORM"), which was eventually accepted for the injury of low back strain.[7] On March 16, 2012, Employee was examined by Dr. Mason at Georgetown University Hospital, who recommended restrictions to

[2] Agency Answer, Tab 13 (February 4, 2013)
[3] *Id.*, Tab 15.
[4] *Id*., Tab 16.
[5] Petition for Appeal (January 3, 2013).
[6] Employee Brief (June 26, 2014).
[7] Agency Brief, pp. 2-3 (July 17, 2014).

Employee's work duties as a result of Employee's neck condition, which Agency claims is a condition unrelated to Employee's lower back work injury.[8]

After receiving documentation regarding Employee's physical limitations, Agency issued a letter on March, 20, 2012, to Employee informing him that he would be placed on a modified work duty assignment effective March 26, 2012.[9] Documentation also reflects that during a March 26, 2012, visit to Capitol Hill Orthopedic, Employee was released to work with medical restrictions from March 27, 2012, until his next scheduled follow-up visit on April 12, 2012.[10] During the follow up visit on April 12, 2012, a doctor at Capitol Hill Orthopedics placed Employee in an "off-work" status.[11] On June 5, 2012, the Capitol Hill Orthopedics doctor released Employee to full duty work.[12] Further, on June 21, 2012, a doctor at Bradlee Family Health Center also released Employee to full duty effective June 24, 2012.[13]

In a written statement, Assistant Director of Nursing, Martha Pontes relayed that Employee was granted eight (8) hours of administrative leave on March 26, 2012. She further relayed that Employee reported to work from March 27, 2012, through March 29, 2012, but failed to report to work on March 30, 2012. Agency states that Employee's absences continued through May 4, 2012, during which time Employee was placed in a leave without pay status. Ms. Pontes also relayed that on July 25, 2012, she met with Employee to discuss his extended unexcused absence and to inform him that he was required to provide Agency with updated medical documentation regarding his ability to work and that a failure to do so would result in him being charged with AWOL and possible disciplinary action. [14]

On August 3, 2012, ORM ended benefits for Employee's workers' compensation claim.[15] Ms. Pontes also communicated that Employee called her to request compensation the same day that ORM terminated his claim and that she granted him administrative leave with pay from August 7, 2012 to August 14, 2012, in an effort to help him make arrangements to return to work and provide Agency with updated medical documentation. On August 7, 2012, Agency issued a letter to Employee explaining that the prior medical documentation he submitted, dated March 16, 2012, indicated that he was unable to perform the duties and responsibilities of his position and thus, Agency needed medical documentation from his physician releasing him to work, and confirmed the grant of his one week of administrative leave.[16] Agency asserts that Employee did not return to work and remained in AWOL status for approximately forty (40) days from August 15, 2012 to October 25, 2012.

Further, Agency contends that rather than directing Employee to remain out of work, Agency informed Employee both verbally and in writing that his continued absences would not be excused without updated medical documentation. While Agency acknowledges that

[8] *Id.*, Agency Answer, Tab 3 (February 4, 2013).
[9] Agency Answer, Tab 4.
[10] *Id.*, Tab 5.
[11] *Id.*, Tab 6.
[12] *Id.*, Tab 8.
[13] *Id.*, Tab 7.
[14] *Id.*, Tab 12.
[15] *Id.*, Tab 9.
[16] *Id.*, Tab 10.

Employee's absence was permissible during the time he was placed in off-duty status as a result of his work-related lumbar spine injury, Employee's continued absence from work subsequent to being medically cleared for this injury was not excused. Further, Employee failed to communicate with Agency or provide updated medical documentation regarding his non-work related injury to the cervical spine. Thus, Agency asserts that it appropriately removed Employee for his unexcused forty (40) day absence from work.

Termination For Cause

Pursuant to OEA Rule 628.2,[17] Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, DPM § 1603.2 provides that a disciplinary action against an employee may only be taken for cause. Under DPM §1603.3(f), 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, including Neglect of Duty, Unauthorized Absence, and AWOL. Agency submits that Employee's removal was based on undisputed evidence that Employee failed to report for duty and to request or receive approval for leave between August 15, 2012 and October 16, 2012, resulting in approximately forty (40) days of absences. In the instant case, the undersigned must determine if the evidence Agency submitted to corroborate Employee's charge of neglect of duty, unauthorized absence, and AWOL is adequate to support his removal.

DPM section 1268.1 provides that "an 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 AWOL. The AWOL action may be taken whether or not the employee has leave to his or her credit. Section 1268.4 goes on to provide that "if 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."[18] The D.C. Court of Appeals in *Murchinson v. D.C. Department of Public Works*,[19] held that an employee must be incapacitated by their illness and unable to work during the AWOL period for it to be deemed a legitimate excuse for that cause of action.

Employee has not disputed any of the evidence provided by Agency in support of his removal or that he was absent during the instant AWOL period. However, Employee contends that Agency instructed him not to return to work. After a review of the evidence of record, the undersigned disagrees with Employee's contention. There is no evidence in the record to support Employee's allegations that Agency refused to allow Employee to return to work. While Agency did request documentation to clear up the conflicts in his medical records regarding whether he was cleared to return to work, Agency's documentation never instructed Employee not to return to work. In fact, Agency provided Employee with one week of paid administrative leave to assist him in his efforts. Further, Employee had been previously cleared for a reduced duty position on March 26, 2012, resulting from his workplace injury.[20]

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[17] 59 DCR 2129 (March 16, 2012).
[18] *Khalaf Johnson v. DC Dept. of Health*, OEA Matter No. 1601-0162-09, p. 7 (January 30, 2012).
[19] 813 A.2d 203 (D.C. 2002).
[20] Agency Answer, Tabs 4, 12.

The medical documentation submitted by both Employee and Agency shows that there were conflicting documents regarding Employee's work related and non-work related injuries to determine his status in returning to work. Documentation from Georgetown dated March 16, 2012, appears to call into question employee's ability to perform the essential functions of his position due to severe neck stenosis.[21] However, Employee's workers' compensation claim only provided coverage for a low back strain injury from a November 22, 2011 incident.[22] Further, the medical treatment that Employee received for the low back strain injury resulted in him being released to full duty on July 15, 2012.[23] However, even after being released back to work, the evidence reflects that Employee failed to report to work during this time, as he was on leave without pay status.[24] None of the documentation in the record reflects that Employee was incapacitated by illness or that his condition was so debilitating that it prevented him from reporting to work during the instant AWOL period. Agency has a responsibility to ensure that employees are able to perform the essential functions of their job, and Employee's March 2012 medical documentation calls this into question because of the risk for injury. However, this documentation does not restrict him from all work, and Employee could have returned to the modified duty position that was instituted after he submitted the March 2012 medical documentation. Employee has not submitted any evidence showing that his absence was excusable, or that he was incapacitated or debilitated by illness during the AWOL period in question. Accordingly, I find that Agency's submitted documentation corroborates its AWOL and Unauthorized Absence charge.

Additionally, the undersigned's finding that Agency's evidence supports the AWOL and Unauthorized Absence charge, also provides support for Agency's Neglect of Duty charge for failing to carry out assigned tasks, report for duty, and follow procedures for leave request approval. Employee has not provided any arguments or evidence that he carried out assigned duties or followed proper procedure to request leave during the AWOL period in question. Accordingly, I find that Agency had cause to terminate Employee based on the charges of Neglect of Duty, Unauthorized Absence, and AWOL.

Penalty Within Range

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).[25] According to the Court in *Stokes,* OEA must determine whether the penalty was within the range allowed by law,

[21] *Id.,* Tab 3.
[22] Agency Supplemental Brief, Tab 19 (July 11, 2014).
[23] Agency Answer, Tab 8.
[24] *Id.,* Tab 12.
[25] *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).

regulation, and the 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 reviewing Agency's decision to terminate Employee, OEA may look to the TAP. Chapter 16 of the DPM outlines the TAP for various causes of adverse actions taken against District government employees. In this case, Employee was charged with Neglect of Duty- DPM §1603.3(f)(3); Unauthorized Absence- DPM §1603.3(f)(1); and AWOL- DPM §1603.3(f)(2). For Unauthorized Absence, pursuant to DPM §1619.1(6)(a) the penalty for a first time offense is removal. Under DPM 1619.1(6)(b), the range of penalty for a first time offense of AWOL, is reprimand to removal. For a first time offense of Neglect of Duty, DPM 1619.1(6)(c), the range of penalty is reprimand to removal.

As noted above, the undersigned finds that Employee's conduct constituted Neglect of Duty, Unauthorized Absence, and AWOL. Further, Employee's conduct is consistent with DPM §§ 1619.1(6), which lists the range of penalty, including removal, for the aforementioned causes. Thus, because removal is within the range allowed as a penalty for a first offense for Neglect of Duty, Unauthorized Absence, and AWOL, the undersigned finds that Agency did not abuse its discretion by terminating Employee.

When assessing the appropriateness of a penalty, this Office does not substitute its judgment for that of the Agency, but it ensures that "managerial discretion has been legitimately invoked and properly exercised."[26] OEA has previously held that the primary responsibility for managing and disciplining Agency's workforce is a matter entrusted to Agency, not this Office.[27] Agency's reliance on DPM § 1619.1(6) to determine the penalty for the Neglect of Duty, Unauthorized Absence, and AWOL charge is proper. 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.[28]

As provided in *Love v. Department of Corrections*[29] selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[30] When an Agency's charge is upheld, this Office has held that it will leave Agency's

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[26] *See Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

[27] *See Huntley v. MPD*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).

[28] *See Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994);; *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011); *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (February 1, 1996); and *Powell v. Office of the Secretary, Council of the district of Columbia*, OEA Matter No. 1601-0343-94 (September 21, 1995).

[29] OEA Matter No. 1601-0034-08R11 (August 10, 2011).

[30] *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

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 terminate Employee under the TAP based on the charges of Neglect of Duty, Unauthorized Absence, and AWOL.

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.[31] 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.[32]

In this case, the penalty of removal was within the range allowed for a first offense for the cited causes of action. In *Douglas*, the court also 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 and its effect on the efficiency of Agency's operations; consistency of the penalty; Employee's past work record; and mitigating circumstances.[33] In accordance with DPM §1619.1(6), the

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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).

[31] *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).

[32] 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 it's 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;
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.

[33] *See* Agency Answer, Tab 16 (February 4, 2013).

undersigned concludes that Agency had sufficient cause to terminate 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, the undersigned further concludes that Agency's action should be upheld.

ORDER

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

FOR THE OFFICE:

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STEPHANIE N. HARRIS, Esq.
Administrative Judge