THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ANNE McHUGH,	)	
Employee	)	OEA Matter No. 1601-0013-06
	)	
v.	)	Date of Issuance: January 11, 2008
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge
	)	

Frazer Walton, Esq., Employee Representative
Harriet Segar, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On November 11, 2005, Anne McHugh ("the Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the District of Columbia Public Schools ("the Agency") adverse action of removing her from service. After convening a prehearing conference, as well as multiple status conferences, I determined that an evidentiary hearing was warranted in this matter. Accordingly, an evidentiary hearing was held on June 8, 2006. I have since received both parties' respective closing arguments. The record is closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) 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 629.3 *id.* states:

> For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

ISSUE

Whether Agency's action of removing the Employee from service was done in accordance with applicable law, rule, or regulation.

SUMMARY OF THE TESTIMONY

Nathan Saunders ("Saunders") testified in relevant part that: he is the General Vice President of the Washington Teachers Union. He assisted the Employee in attempting to resolve her problems with reporting for duty and for requesting sick leave. Saunders indicated that he made telephone inquiries to the two schools that the Employee was assigned to regarding her leave issues. According to Saunders, he was informed by one of the principals that he contacted that they followed the rules with regards to granting sick leave.

Saunders also indicated that the Employee provided him with two documents that ostensibly buttressed her need for sick leave. According to Saunders, the Employee created one of these letters. The second note was a detailed explanation authored by an unnamed doctor. Saunders is aware of the established procedures that a teacher should undertake in order to properly request sick leave as enunciated interchangeably in the Collective Bargaining Agreement ("CBA") and the District Personnel Manual ("DPM"). Employee's Exhibit No. 1 was an excerpt from the CBA that detailed, in relevant part, what steps an employee of the Agency shall undertake in order to request sick leave. Of note, the CBA indicates that a doctor's note is required for an employee that wants to utilize three or more consecutive days of sick leave.

Valarie Sheppard ("Sheppard") testified in relevant part that: she is the current Director of Staffing and Human Resources for the Agency. Further, at the time of this hearing, she has held said position for approximately two and a half years. The Employee was given an assignment letter, which, *inter alia*, directed the Employee to the new schools to which she was assigned to for school year 2005/2006, as well as her start date. Sheppard indicated that the assignment letter was signed by the Employee (as per standard Agency procedure) in the presence of Sheppard's colleague Tiffany Tenbrook.

Sheppard indicated that if a teacher needed to request extended sick leave, that teacher would have to fill out and sign a leave application form and submit it to his/her principal for approval. If the principal approves, s/he then signs and submits it to the assistant superintendent who, if s/he approve, would sign and forward the form to the Department of Human Resources, where Sheppard signs the form and processes the teachers' extended sick leave. *See generally*, Tr. at 88-89. This process did not occur in the instant matter. Approximately during the first week of the school year, Sheppard contacted M.M. Washington and was informed that the Employee had not reported for duty.

Tiffany Tenbrook ("Tenbrook") testified in relevant part that: she is a Human Resources Specialist working at the Agency. A portion of her job related duties include, *inter alia*, preparing personnel budgets. Tenbrook testified that she was familiar with Agency Exhibit No. 6 which was the aforementioned assignment letter. Tenbrook indicated that on August 22, 2005, pursuant to an order from Sheppard, she provided the assignment letter to the Employee and watched her sign it. Furthermore, she remembers certain salient details of her interaction with the Employee. Most notably, Tenbrook remembers the Employee asking her if she had to report for duty to the locations as stated in the assignment letter. Tenbrook indicated that she answered affirmatively. The Employee also asked what the signing of the assignment letter meant. Tenbrook responded as follows: "I replied in saying that in signing that you know what your assignment is, you know when you're to report and the expectation is that you arrive at the schools that were initialed in the letter at the date and time the letter speaks to." Tr. at 136-137.

Wilma Gaines ("Gaines") testified in relevant part that: at the time of the hearing, she was the principal at M.M. Washington Center. She has held this position since July 2005. This is one of the schools that the Employee was instructed to report for duty as outlined in the assignment letter. On August 23, 2005, Gaines held a teacher orientation at the M.M. Washington Center. According to Gaines, the Employee did not appear for this orientation meeting. Gaines telephoned all of the teachers that did not appear for the orientation meeting to "specifically make sure that they were aware that the school year had started." Tr. at 158. Gaines testified that she had a telephonic conversation with the Employee on or about August 23, 2005, wherein the Employee indicated that she would be reporting for duty. The Employee did not report for duty on the next business day. At some point thereafter, Gaines telephoned the Employee again and asked her if and when she was going to report for duty. Gaines indicated that the Employee instructed her to contact her Washington Teachers Union Representative or her attorney and gave her "no indication at that time whether she was coming she was not coming. Nothing to that extent." Tr. at 162. Gaines placed the Employee on absence without official leave from August 23, 2005, through September 2, 2005. See generally, Tr. at 162. At some point, Gaines contacted the principal at Turner Elementary School. This was the other school the Employee was assigned to according to the assignment letter. The principal at Turner indicated to her that the Employee had failed to report for duty there as well.

Agency's Exhibit No. 12 is a return to duty notice dated September 1, 2005. It was prepared and sent by Gaines to the Employee. It instructs the Employee to, *inter alia*, return to duty on or before September 12, 2005. Further, the return to duty letter instructs the Employee to provide medical documentation that would presumably justify her absence to that date. In the alternative, if the Employee was absent due to other circumstances, such as a death in the family, the return to duty notice instructed her to submit appropriate documentation to that effect. Gaines testified that the Employee did not submit any documentation after having been sent the return to duty letter, nor did she physically report for duty by the September 12, 2005, deadline.

Since the Employee did not respond to the return to duty notice, Gaines prepared and submitted Agency Exhibit No. 13, a memorandum dated September 12, 2005, to Assistant Superintendent Michael Snipes ("Snipes"), recommending that the Employee be terminated for abandonment of her position. On October 12, 2005, Snipes signed the aforementioned memorandum approving the Employee's termination. Gaines testified that one of the reasons that she had to go through the process of removing the Employee is that she was unable to fill the Employee's position with replacement personnel until her removal was processed. Furthermore, she was unable to offer the services of an art teacher at her school during the Fall 2005 school year, because of the Employee's failure to report for duty.

Donald Tatum ("Tatum") testified in relevant part that: he is a labor relations specialist for the Agency's Department of Human Resources. He has held this position since February 2003. Tatum testified that he had no personal involvement in reviewing or processing the Employee's adverse action in this matter. Tatum was admitted as an expert witness regarding the policies and procedures of the labor relations section of the Agency's Department of Human Resources.

A portion of his job related duties include reviewing proposed adverse actions and processing same if it is ultimately approved. Notices of termination are generated by the Agency's Department of Human Resources. Tatum characterized job abandonment as "when the employee just does not come to work and they don't call in to explain their absence. They're not communicating." Tr. at 211-212. For further clarification on job abandonment, Tatum read from the District of Columbia Municipal Regulations Title 5 § 1020.6 which states that: "[f]ailure to report to work after notice shall be deemed a voluntary resignation due to abandonment of position. This voluntary action shall not be construed as an adverse action."

The Employee testified in relevant part that: she was re-hired by the Agency after she prevailed in her prior matter in this Office[1] wherein her position was abolished through a reduction in force. As a part of his decision, the late Senior Administrative Judge Daryl Hollis reversed the Agency's action of abolishing the Employee's position. While that matter was still pending before Judge Hollis, the Employee attempted,

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[1] This matter was docketed as Anne McHugh v. D.C. Public Schools, OEA Matter No. 2401-0075-04, October 15, 2004 ("RIF matter").

unsuccessfully, to process an early-out retirement. According to the Employee, her early-out retirement was rejected because the Agency miscalculated the number of years of service she had, neglecting to include the time she had served with the federal government prior to her taking a position with the Agency. However, since the Employee prevailed in her RIF matter before Judge Hollis, she was seemingly foreclosed from utilizing the Agency's early-out retirement. That option is only available to employee's who both have the requisite years of service and where the Agency was successful in abolishing their position.

Undeterred, the Employee still sought to process her early-out retirement even though she had prevailed in her RIF matter. To that end, she made several inquiries at the Agency regarding her early-out retirement. The Employee contacted both Harriet Segar and Valerie Sheppard, among others, regarding her retirement dilemma. The Employee recalls her interaction with Tenbrook during which she signed the assignment letter. Tenbrook advised her that she should sign the assignment letter and go to the orientation but that it did not seem as if she was, at that time, eligible to retire via the early-out option. *See generally*, Tr. at 258-259. Tenbrook also advised her to contact the Washington Teachers Union ("WTU") regarding her retirement quandary. *See generally*, Tr. at 259.

The Employee testified that she did not report for duty on August 23, 2005, because she thought that her dad had just suffered a heart attack. She related that she called the WTU and spoke to Saunders who instructed her to fax a letter describing her predicament to the WTU and to call the schools she was assigned to in order to inform them of the situation and to verbally request sick leave. The letter that was sent to the WTU was also sent to Turner Elementary via facsimile. It was entered into evidence as Agency's Exhibit No. 11. The Employee recalls telling someone, possibly Gaines, via a telephone call, that she was on sick leave and that the WTU would assist in handling her sick leave situation. The Employee also made her request for sick leave both to Harriet Segar and to the OEA.

After having her position abolished as a part of the RIF matter, the Employee took a position with the Prince Georges County Public Schools ("PGCPS"). The Employee admits that she did not report for duty with the Agency. She further admits that she reported for duty at PGCPS for most of the work days in which she was allegedly AWOL from the Agency. *See generally* Tr. at 313-316. The following excerpt from the Employee's testimony is particularly relevant to the instant matter:

> Q: Let me ask you a question. When you're asking for the extended sick leave here and you're not asking for extended sick leave [at PGCPS], don't you think that is sort of a problem?
>
> A: No, because I was entitled to that early-out retirement. And because of the error that the agency committed, and I found that out through [Sheppard], through the DC government retirement board, that longevity forms should have been in that folder.

> Q: So when you made the request for sick leave [with the Agency] you didn't make a corresponding request for sick leave with [PGCPS], did you?
>
> A: I didn't need to because as my, as my doctor states in some of the correspondence here that because of what has happened with DCPS, I suffered from post-traumatic stress, depression…
>
> Q: Had you been going in to work, if I checked the records with [PGCPS], have you been going to work?
>
> A: Yes, because they don't do things like this to their employees.
>
> Tr. at 315-316.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

The following findings of facts, analysis and conclusions of law are based on the documentary and testimonial evidence as presented by the parties during the course of the Employee's appeal process with this Office.

As was stated previously, the Employee was removed from service for the stated cause of being AWOL from August 22, 2005, until the time of her dismissal, which occurred on or about October 28, 2005. The Employee admits that she did not report for duty at the Agency for the dates and times alleged by the Agency in this matter. The Employee offered three explanations, that when considered conjunctively, would ostensibly explain her failure to report for duty. First, her father suffered a heart attack and required her hands-on assistance in order to ameliorate his situation. Second, she was emotionally unable to work with the Agency because she was suffering from depression. Lastly, her woeful situation was exacerbated by her inability to exercise an early-out retirement option while her RIF matter was pending, which was due to an alleged miscalculation of her creditable years of service.

While the Employee presents a lamentable tale that, on its face, would merit sympathy, there remains one telling admission that completely undermines the Employee's sincerity in this matter. The Employee reported for work as normal with the PGCPS even though she was attempting to utilize her accrued sick leave with the Agency. Generally speaking, the usage of sick leave by employees of the Agency is explicitly reserved for situations arising from that employee either being too ill to perform the functions of their assigned job; being contagious to others; caring for a sick or injured relative; attending scheduled medical and/or dental appointments; or bereavement. Ironically, the Employee attempted to utilize her accrued sick leave because of alleged ailments to both herself and her father. However, she was still able to report for duty as normal to the PGCPS. *See generally* Tr. at 313-316.

Given the aforementioned findings of fact, corroborated by the Employee's own admission, it is readily evident to the undersigned that the Employee was not in fact sick since she was able to report for duty with the PGCPS. Considering as much, I find that the Employee attempted to "cheat" the Agency when she requested extended sick leave, while still reporting for duty at the PGCPS. This miscarriage is even more despicable given the Agency's unique mission of educating the children of the District of Columbia. The Employee's selfish actions served to severely disrupt the access to a quality education that the children attending M.M. Washington elementary and Turner elementary most rightfully need and deserve. The children of the PGCPS had unfettered access to Employee as a teacher. The children of the District of Columbia Public Schools deserve no less given the instant circumstances. Accordingly, I find that the Agency has met its burden of proof in the instant matter.

The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office. *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), __ D.C. Reg. __ ( ); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994), __ D.C. Reg. __ ( ). Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *See Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

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. *See Stokes*, *supra*; *Hutchinson*, *supra*; *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (Feb.1, 1996), __ D.C. Reg. __ ( ); *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (Sept. 21, 1995), __ D.C. Reg. __ ( ).

In accordance with *Stokes* and its progeny, I find that the Agency legitimately invoked and exercised its discretion in this matter when it removed the Employee from service. Neither the Employee's argument nor my own investigation into this matter reveal the sort of managerial indiscretion that would require me to either reverse or modify Agency's action. Accordingly, I find that I must uphold Agency's action in the instant matter.

ORDER

It is hereby ORDERED that Agency's action of removing the Employee from service is UPHELD.

FOR THE OFFICE:

ERIC T. ROBINSON, Esq.
Administrative Judge