

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2011 MSPB 60

Docket No. CH-0752-10-0648-I-1

**Cathleen R. Sambrano,
Appellant,**

v.

**Department of Defense,
Agency.**

June 10, 2011

A. Juan Joaquin, Jr., Esquire, Chicago, Illinois, for the appellant.

Paul N. Bley, Falls Church, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision, issued September 8, 2010, which affirmed her removal. For the reasons set forth below, the Board AFFIRMS the initial decision as MODIFIED in this Opinion and Order, still sustaining the appellant's removal.

BACKGROUND

¶2 The appellant was a YH-610-02 Nurse removed for absence without official leave (AWOL). *See* Initial Appeal File (IAF), Tab 6, Subtabs 4d, 4e. It is undisputed that the appellant was absent from work from August 31, 2009 to

December 7, 2009 and did not have management's approval for this period of absence. *See id.*, Subtab 4e at 1-2, Tab 13 at 2; *see also* Petition for Review (PFR) File, Tab 1 at 8-9. On appeal to the Central Regional Office, the appellant asserted that the agency was not permitted to record her absences as AWOL, and was, instead, required to authorize leave without pay (LWOP). *See* IAF, Tab 1 at 3; *see also* PFR File, Tab 1 at 8.

¶3 Based upon the written record, the administrative judge determined that the agency did not err when it recorded the appellant's absences as AWOL and held that the appellant's removal for AWOL promoted the efficiency of the agency.¹ IAF, Tab 17, Initial Decision (ID) at 2-5. The administrative judge also held that the appellant failed to prove her affirmative defense of harmful procedural errors as a result of the agency's alleged *ex parte* communication and violations of agency policies. *See id.* at 5-8. In her timely petition for review, the appellant restates her assertions with regard to the merits of her claim that the agency wrongfully terminated her. *See* PFR File, Tab 1 at 8-9; *see also* Tab 4. The agency filed a timely response in opposition. *See* PFR File, Tab 3.

ANALYSIS

¶4 It is well-settled that authorization of LWOP is within the agency's discretion. *Oates v. Department of Labor*, [105 M.S.P.R. 10](#), ¶ 11 (2007). However, the Board has held that, in cases involving medical excuses, it will examine the record as a whole to determine whether the agency's denial of LWOP was reasonable under the circumstances. *Murray v. Department of the Navy*, [41 M.S.P.R. 260](#), 263 (1989). Where an employee who is incapacitated for duty has exhausted all of his or her leave, it is not improper for an agency to deny LWOP where there is no foreseeable end to the employee's absence and the

¹ The appellant declined a hearing and requested a judgment based upon the record. *See* IAF, Tab 1 at 2, Tab 13 at 1.

employee's absence is a burden to the agency. *Bologna v. Department of Defense*, [73 M.S.P.R. 110](#), 114, *aff'd*, 135 F.3d 774 (Fed. Cir. 1997) (Table).

¶5 Before the agency recorded the appellant as AWOL, it approved the appellant's use of leave, advanced leave, donated leave and 12 weeks of leave under the Family and Medical Leave Act of 1993 (FMLA). *See* IAF, Tab 6, Subtabs 4o, 4q. After more than a year of absence, the agency informed the appellant, by letter dated August 6, 2009, that because the agency had "not received the required additional [medical] documentation," and neither the appellant nor her representative had "communicated to [management] when [the appellant] plan[ned] to return to work[.]" the agency intended to begin to record the appellant's absences as AWOL beginning August 31, 2009. *See id.*, Subtab 4o at 2. The appellant was warned "that AWOL may serve as the basis for disciplinary action up to and including removal from Federal service." *Id.*

¶6 The appellant asserts on review, as she did below, that the agency's Administrative Instruction (AI) No. 67 created a requirement that the agency authorize LWOP. *See* IAF, Tab 14 at 4-9; PFR File, Tab 1 at 8. However, AI No. 67 specifically states that "LWOP is subject to the approval of the [agency] official" except for a few situations in which the granting of LWOP is mandatory. *See* IAF, Tab 6, Subtab 4s at 11. The appellant's situation does not fall under any of the situations in which the granting of LWOP is mandated.² *See id.* at 11-12. The policy does authorize officials to approve LWOP in a number of circumstances, including for a period of ill health or while an Office of Workers' Compensation Programs (OWCP) claim is pending. *See id.* at 12-13. However, the policy does not *mandate* LWOP for these situations; it indicates that an official is authorized to exercise his or her discretion for such situations. *See id.*

² The situations in which the granting of LWOP is mandated involve disabled veterans entitled to such leave, training for the Reserve Officers Training Corps (ROTC), or family members accompanying their military or Federal civilian employee sponsor to a new duty station. *See* IAF, Tab 6, Subtab 4s at 11-12.

at 11-13. Under the appellant's particular circumstances, the agency's decision not to authorize further LWOP was consistent with its policy. *See id.*; *Bologna*, [73 M.S.P.R. at 114](#).³

¶7 On petition for review, the appellant asserts that “[a]n adverse action based on AWOL cannot be sustained when there is an Office of Worker’s Compensation claim pending[,]” and cites *Brown v. National Archives & Records Administration*, [92 M.S.P.R. 95](#) (2002) in support of this position. *See* PFR File, Tab 1 at 8. This assertion reflects a misunderstanding of the Board’s holding in *Brown*. In *Brown*, the Board held that an adverse action based on AWOL cannot be sustained if OWCP determines that the individual was entitled to compensation benefits as a result of a work-related injury for the entire time period charged as AWOL. *Brown*, [92 M.S.P.R. 95](#), ¶ 6. An agency that implements an adverse action predicated upon a charge of AWOL pending a final determination from OWCP, or while an appeal is pending before the Employees’ Compensation Appeals Board (ECAB), does so at its own risk that the AWOL charge may later be invalidated. *See Bruton v. Department of Veterans Affairs*, [109 M.S.P.R. 271](#), ¶¶ 11-12 (2008); *King v. Department of the Navy*, [90 M.S.P.R. 341](#), ¶ 8 (2001). However, an agency is entitled to take that risk and institute an attendance-related adverse action against an employee who has a

³ The appellant also asserts that the agency violated AI No. 8, which contains guidance for management when considering a disciplinary or adverse action. *See* PFR File, Tab 1 at 8-9; IAF, Tab 6, Subtab 4r. Inter alia, the appellant asserts that the agency lacks “the authority to determine what is [an] incomplete medical statement” or to require a return to duty date. *See* PFR File, Tab 1 at 9; IAF, Tab 6, Subtab 4r at 13. However, even if the appellant believed that management’s instructions were improper, except in circumstances not present here, an employee must comply with a lawful order and grieve the propriety of that order later. *Dias v. Department of Veterans Affairs*, [102 M.S.P.R. 53](#), ¶ 14 (2006), *aff’d*, 223 F. App’x 986 (Fed. Cir. 2007). We have reviewed AI No. 8 and the appellant’s related allegations and find that the appellant has not shown that the agency violated its policy. *See* PFR File, Tab 1 at 8-9; IAF, Tab 6, Subtab 4r at 5-6, 13, Subtab 4e at 4-5.

claim pending with OWCP or the ECAB. *See Brown*, [92 M.S.P.R. 95](#), ¶ 4. Accordingly, the appellant's removal is affirmed.

ORDER

¶8 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.caafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.