

Dorette D. Jackson v. The Library of Congress

LOC-PAB No. 2006-04

Date of Decision: March 31, 2008

Cite as: Jackson v. LOC (3/31/08)

Before: Mary E. Leary, Administrative Judge

Headnotes:

Adverse Action

Determination of Penalty

Efficiency of the Service

Progressive Discipline

Removal/Termination

Dorette D. Jackson, pro se.

Meredith Skowronski, Assistant General Counsel, and Evelio Rubiella, Associate General Counsel, for Defendant, The Library of Congress.

DECISION

Introduction

This matter is before the Personnel Appeals Board (PAB or Board)¹ on the appeal of Dorette D. Jackson (Ms. Jackson or Complainant) challenging her termination from the position of GS-05 Senior Deck Attendant in the Book Services Section of the Collections Access, Loan and Management Division (CALM), Library Services, at the Library of Congress (Library or LOC). Ms. Jackson, who represented herself before the Board, seeks reversal of the decision removing her from employment and requests reinstatement with back pay. In essence, she claims that the Agency failed to consider the reasons that she provided for her tardiness or absence on some occasions, by

¹ Pursuant to a March 2005 Memorandum of Understanding between the Library of Congress and the Government Accountability Office (with a concurrence on the part of the Personnel Appeals Board, GAO), the Personnel Appeals Board assumed responsibility for adjudicatory work for certain categories of Library employees in matters involving adverse actions, grievances, and discrimination complaints.

deeming them insufficient or unacceptable without reviewing the situations. This includes repeated denial of her leave requests necessitated by the medical and special needs of her child as well as her own personal medical needs. She claims that her conduct did not warrant termination. Ms. Jackson also challenges the credibility and objectivity of the LOC officials involved.

Procedural History

On June 13, 2006, Steven Herman, Chief of the Library's CALM Division, issued a Notice of Proposed Adverse Action to remove Complainant from the rolls of the LOC. Library Exhibit (L.Ex.) 1.

On August 22, 2006, the Designated Reply Recipient (DRR), Linda T. Stubbs, Acting Assistant Chief of the European and Latin American Acquisitions Division, issued her Report recommending Ms. Jackson's removal. L.Ex. 10.

On August 28, 2006, Acting Director, Collections and Services, Library Services, Jeremy Adamson notified Complainant of his decision to remove Complainant effective September 1, 2006. L.Ex. 12.

On September 15, 2006, Ms. Jackson and Local 2477, American Federation of State, County and Municipal Employees (AFSCME) filed a Notice of Appeal and Request for Hearing based on alleged denials of leave requested to care for Complainant's children and her medical needs. By letter dated September 25, 2006, Charles M. Carron, Director of Workforce Management at the Library, notified Complainant that her appeal of the adverse action for removal had been accepted for processing under LCR 2020-3 in accordance with the PAB Hearing Pilot Agreement between the Library and AFSCME Local 2477 (May 22, 2006). By memorandum dated November 2, 2006, the Union notified LOC that it had decided not to pursue Ms. Jackson's appeal; however, it had notified Ms. Jackson that she could independently pursue her appeal.²

The case was referred to the PAB where it was received on November 29, 2006. On December 1, 2006 the Board notified the parties that a request for a hearing had been filed. On January 12, 2007, a status conference was held. A second status conference was held on January 22, 2007 at which time a revised discovery schedule was set. Complainant's efforts to obtain counsel were unsuccessful and she, therefore, proceeded *pro se*. A third status conference was held on April 17, 2007, and the hearing was scheduled to commence on July 9, 2007. On June 22, 2007, the LOC filed a Motion for a Continuance due to the substitution of counsel. The unopposed Motion was granted and the hearing was rescheduled for August 6, 2007.

An evidentiary hearing was held on August 6, 2007. At the close of the hearing, the parties delivered oral closing statements in lieu of filing post-hearing briefs.

² These documents are part of the Adverse Action file which was forwarded by the Library in untabulated, unnumbered form.

Findings of Fact

Dorette D. Jackson was employed as a Senior Deck Attendant, GS-05, in the Collections Access, Loan and Management (CALM) Division, Library Services Unit at the Library of Congress. Complainant had been an employee of the Library for approximately seven years prior to the Notice of Adverse Action. TR 122.

In this capacity, Ms. Jackson was responsible for shelving and retrieving materials, sorting and arranging books, distributing books, answering patrons' requests for books, and generally "maintaining the order of the collections." Hearing Transcript (TR) 31, 42. Ms. Jackson worked a part-time schedule consisting of 20 hours per week. During the first week of the pay period, she worked 8:30 am – 12:30 pm on Monday, Tuesday and Wednesday and 8:00 am – 4:30 pm on Thursday. In the second week of each pay period she worked the same tour of duty on Monday, Tuesday and Wednesday, but rather than working a full day on Thursday, she worked a full shift on Saturday. L.Ex. 1.

No evidence was presented about Complainant's time and attendance prior to 2005, nor was there evidence as to her performance of her duties.

On May 10, 2005, Steven Herman, Chief of the CALM Division, issued Ms. Jackson a notice of proposed suspension for reasons of misconduct in violation of the regulation concerning Absence Without Official Leave (AWOL). See L.Ex. 3 (Suspension Decision Letter (Oct. 4, 2005)). There is no evidence as to whether Complainant was counseled prior to issuance of the proposed suspension. The May 10, 2005 proposal letter was not submitted into the record. The official CALM Division "Practice on AWOL" states that "[a] staff member will not be charged with AWOL without prior counseling." L.Ex. 2 at 6. Mr. Herman testified that Complainant had been notified of the Library's policies prior to his taking any action (TR 11), but his testimony only referenced the distribution of a policy memo that followed the May proposal. TR 11-12. There is no evidence of a policy statement or distribution to staff prior to the proposal.

While the proposed suspension was pending, Mr. Herman issued a memorandum to all staff on June 15, 2005 entitled "CALM Leave Practices and Procedures." L.Ex. 2. Mr. Herman testified that the document "went to the whole staff," but he could not "testify first-hand whether Ms. Jackson received it." TR 12.

The June 15, 2005 memorandum describes CALM's practices and procedures governing leave. It explains the categories of leave; how to properly request leave; and the basis upon which leave is granted or denied. TR 11. The document also addresses the LOC's policy on tardiness and provides that all employees are expected to report for work on time and to be present for duty at times assigned. TR 12. An employee's reasons for being tardy are to be reported to the designated official. Frequent or lengthy periods of tardiness may be charged to annual leave or AWOL as determined by the supervisor. TR 12; see L.Ex. 2 (Collective Bargaining Agreement, Art. 30 §11).

Employees are expected to report for work on time and stay until the end of the shift. They are to return from breaks and lunch on time, absent prior approval from the supervisor. Pursuant to the CALM policy, employees who know they will be delayed should call the supervisor and explain the reasons for the delay and the anticipated time of arrival. When a supervisor is unavailable, the employee is to leave a message indicating that he or she will be tardy, the reason, and the anticipated time of arrival. TR 13. The supervisor determines whether the reason is acceptable and the type of leave to be charged. TR 13. Failure to adhere to the requirements of reporting and returning from breaks on time, as well as remaining until the scheduled departure time, may result in the employee being charged with annual leave or absence without leave (AWOL). TR 13-14; see L.Ex. 2 at 5. The employee will not be charged with AWOL for tardiness without prior counseling. TR 13. Chief Herman testified that the policy was enforced throughout the CALM Division. TR 14. He provided no details as to what this enforcement entailed.

By memorandum dated July 8, 2005, Warren Stephenson, Team Leader, LJ (Jefferson Building) and Complainant's immediate supervisor, advised Ms. Jackson of his concerns about her use of leave. He pointed to what he saw as a potential problem in her using both her sick and annual leave as fast as she earned it. Citing Library regulation and the Collective Bargaining Agreement, Mr. Stephenson advised Ms. Jackson that Leave Without Pay (LWOP) was not a third leave option and the granting thereof was at the discretion of management. He continued by telling Ms. Jackson that in the future she would not be granted LWOP for health related absences without providing the Health Services Office with a medical certificate. L.Ex. 4; see TR 14-15.

The July 8, 2005 memorandum also references that Ms. Jackson had been issued a notice of proposed suspension (five days) on May 10, 2005 based on AWOL charges. Further, it specifically warned that she was being "put on notice that additional AWOL charges may result in the initiation of another adverse action, up to and including [her] removal." L.Ex. 4 at 1. The memorandum also advised Complainant to contact the Employee Assistance Program "for comprehensive employee assistance" if a "personal or health-related reason is affecting your ability to report for work as scheduled." *Id.* at 2.

In July 2005—at the time of the Stephenson memorandum—Ms. Jackson was pregnant. TR 118.

By letter dated October 4, 2005, the Associate Librarian for Library Services, Deanna Marcum, concurred in Mr. Herman's May 10, 2005 Notice of Proposed Adverse Action and ordered Ms. Jackson to serve a five-workday suspension from Monday, October 17, 2005 through the close of business on Monday, October 24, 2005. L.Ex. 3. Ms. Jackson served the suspension (TR 71), but disputed that she ever received Ms. Marcum's October 4, 2005 letter. TR 19. The record is devoid of evidence either way.

Ms. Jackson gave birth in November 2005 (TR 118) and was on an approved absence from the Library for the period December 1, 2005 through March 7, 2006. See L.Exs. 1, 5. She returned to work on March 9, 2006. *Id.*

By memorandum captioned Absence Without Official Leave (AWOL), dated April 20, 2006, Mr. Stephenson set out Ms. Jackson's absences for which she was charged with AWOL between March 9, 2006 and April 6, 2006. L.Ex. 5.³

- March 14, 2006 — Ms. Jackson did not report to work, did not speak to a supervisor, but did leave a message on Mr. Stephenson's Audix. When she did report to work the next day, Mr. Stephenson asked why she had been absent. Ms. Jackson's response was "[w]hat difference does it make, you're going to AWOL me anyway." Ms. Jackson was charged four hours of AWOL for the absence and failure to properly request leave.
- March 22, 2006 — Ms. Jackson reported to work twenty minutes late and was charged fifteen minutes of AWOL. Mr. Stephenson found her explanation of having a problem with a babysitter to be an unacceptable excuse.
- March 23, 2006 — Ms. Jackson reported to work fifteen minutes late with no excuse and was charged AWOL for the time.
- March 27, 2006 — Ms. Jackson did not report to work. She was charged AWOL. Mr. Stephenson found that she had no acceptable excuse.
- March 28, 2006 — Ms. Jackson was thirty minutes late reporting to work. She was charged AWOL. Mr. Stephenson found that she had no acceptable excuse.
- April 4, 2006 — Ms. Jackson did not report to work and was charged AWOL. Mr. Stephenson found that she had no acceptable excuse.
- April 5, 2006 — Ms. Jackson was fifteen minutes late for work for which she was charged AWOL. Mr. Stephenson found that she had no acceptable excuse.
- April 6, 2006 — Ms. Jackson was thirty minutes late for work for which she was charged AWOL. Mr. Stephenson found that she had no acceptable excuse.

Mr. Stephenson testified that "in some cases" Ms. Jackson provided explanations for her absences, and that in one instance she provided no reason at all. The explanations included "no babysitter, she had a problem dropping off her child, someone was supposed to pick [up] a child."⁴ TR 46. Complainant testified that "each and every time

³ The memorandum is annotated "refused to sign 4/20/06" next to Complainant's name.

⁴ During the hearing, Ms. Jackson asked her supervisor, Mr. Stephenson, about several documents that she submitted to explain her absences or tardiness. In response to almost

that I was told to bring sufficient evidence to cover my absences, I did so, but they still told me that they were unacceptable.” TR 115; see *also* TR 116, 118. In conclusion, Complainant testified “If I was told to bring documentation to protect my absences or to protect my tardiness, I did so, and for each and every one to be claimed to be unacceptable, what do they call acceptable reasons? . . . What are acceptable reasons if medical documentation, judge’s orders are non-acceptable, and for this write-up it’s plain and simple, they just wrote down memos.” TR 123.

Complainant testified as to the May 31 absence, “[a]fter being turned down from previous leave requests, health issues involving my son, myself, it took a toll on me where I had to seek therapy.” TR 114. She went on to explain “I was on medication, Zyprexa and Prozac. That was a conversation [I was] having with Mr. Roache in June. I’m telling him, Mr. Roache, this is the medication. I’m sick. Here is the doctor’s notice, and so I placed a leave slip for those days as well.” TR 115. The undersigned Administrative Judge asked Complainant whether she had been granted leave as a result of the two leave slips that she produced at the hearing. Complainant replied “[n]o.” TR 117.

Ms. Jackson introduced a Court Order as evidence that she was responsible for transporting her son, who required special education in Charles County, Maryland, during alternate weeks. She testified that this resulted in a need to adjust her starting time by 15 minutes during the applicable times. Complainant’s Exhibit (C.Ex.) 1. See *also* TR 112. It appears that she was allowed an adjustment for a brief period several years ago, but not a continuing arrangement. See TR 92-93. This request was denied; there is no evidence in the record as to why it was denied. Complainant’s assertion that another CALM employee, Thelma Brown, was allowed a thirty minute adjustment of schedule for unknown reasons while her request for a smaller adjustment was denied was not refuted. TR 93, 115.

By memorandum captioned “Absence Without Official Leave (AWOL),” dated April 27, 2006,⁵ Mr. Stephenson informed Ms. Jackson that she was being charged with fifteen

every inquiry, Mr. Stephenson stated he did not recall. He did not recall that she telephoned him from either the Emergency Room when her child was hospitalized or subsequently on May 1, 2006 due to follow-up care for her son, notwithstanding documentation from the hospital. He did not recall that she was pregnant. He did not recall receiving any of the documentation that she provided to explain her numerous absences. When asked whether he recalled her showing up for work on time and there was a discrepancy about her being AWOL because she was assigned to the reading room, he again testified that did not recall. TR 72. He did, however, unequivocally testify that she did not provide a reasonable excuse on each occasion. In clear contrast, during direct examination, he not only knew dates, but the corresponding day of the week. Based on his total lack of recollection in response to any questions on cross-examination and his demeanor on the stand, I find Mr. Stephenson to lack credibility. See *Colbert v. USPS*, 93 MSPR 467, 470 (2003) (*citing Hillen v. Dept. of Army*, 35 MSPR 453, 458 (1987)). This raises question as to his exercise of discretion in the denial of leave without pay or schedule change.

minutes of AWOL for returning twelve minutes late from her thirty minute break. Because Mr. Stephenson was on leave, the supervisor on duty, Shirley Johnson, imposed the AWOL. L.Ex. 6. Mr. Herman testified that he did not know first hand whether this memorandum was provided to Ms. Jackson. TR 27.

By memorandum to Ms. Jackson, dated May 4, 2006,⁶ Mr. Stephenson addressed the issue of AWOL. L.Ex. 7.

- April 18, 2006 — Ms. Jackson called in and said that she had an emergency and was not coming into work. Mr. Stephenson said that because she did not provide an explanation and had no annual leave, she was charged AWOL.
- April 20, 2006 — Ms. Jackson was thirty minutes late for work for which she was charged AWOL because Mr. Stephenson concluded that she did not have an acceptable excuse.
- April 26, 2006 — Ms. Jackson reported for work thirty minutes late and was charged AWOL because Mr. Stephenson concluded that she did not have an acceptable excuse.

By memorandum dated May 4, 2006,⁷ Mr. Stephenson memorialized a counseling

⁵ While dated April 27, 2006, it appears that it was delivered to Ms. Jackson on June 5, 2006. The memorandum is initialed “RBR” for Ronald Roache, the second level supervisor, and bears the handwritten date of June 5, 2006. Mr. Roache testified that he presented Complainant with the April 27, 2006 memorandum on June 5, 2006. TR 84. Indeed, Mr. Roache testified that “Ms. Jackson had not been to work . . . she had not reported to her supervisor or to her position for several weeks now, and she just happened to come into the Division office . . . and I took the opportunity to meet with her, and I believe I gave her more than just one memo. There were a few that were pending that Warren Stephenson, her immediate supervisor was waiting to issue her at the time.” TR 85.

⁶ While dated May 4, 2006, it appears that it was delivered to Ms. Jackson on June 5, 2006. It is initialed RBR for Ronald Roache. It is hand dated June 5, 2006. Mr. Stephenson testified that it was presented to Ms. Jackson on June 5, 2006. TR 47. Mr. Roache’s testified: “I believe I gave her more than just one memo. There were a few that were pending that Warren Stephenson, her immediate supervisor was waiting to issue her at the time.” TR 85. The Notice of Proposed Adverse Action claims that Ms. Jackson was not at work on June 5, 2006. Ms. Jackson told the Administrative Judge that the Library had not honored her request for her sign-in sheets for May and June 2006. TR 5. Mr. Roache testified that Complainant was in the Office on the 5th to meet with the Administrative Officer and that he took the opportunity to meet with her and provide her with the memoranda. TR 85.

⁷ Again, while dated May 4, 2006, this counseling memorandum appears to have been delivered to Ms. Jackson on June 5, 2006. It is initialed RBR for Ronald Roache. It is hand dated June 5, 2006. Mr. Stephenson testified that this document also was provided to Ms. Jackson on June 5, 2006. TR 48-49. However, the Notice of Proposed Adverse Action states that Ms. Jackson was not at work on June 5, 2006. Ms. Jackson told the Administrative Judge that the Library had not honored her request for her May and June 2006 sign-in sheets. TR 5.

session he held with Ms. Jackson on April 20, 2006 regarding her extra time (ET) work schedule. He recounts that he told Ms. Jackson that her ET schedule was to be treated in the same manner as her regular schedule in terms of notification of absences. Failure to meet the ET rules “will result in you not being scheduled to work ET.” L.Ex. 8.

By memorandum dated May 8, 2006,⁸ Mr. Stephenson counseled Ms. Jackson. He said that he had come to her assigned work area thirty minutes before the end of her tour of duty and she was not there nor did her co-workers know where she was. He waited fifteen minutes and she did not return. Ten minutes later, when Ms. Jackson came to sign out, she offered no explanation for her absence. He allowed her to take fifteen minutes of annual leave. L.Ex. 9.

On June 5, 2006, Complainant was in the office to meet with the Administrative Officer. As discussed *supra* in footnote 5, Mr. Roache took the opportunity to speak with her about her AWOL and present her with a number of memoranda, including the counseling memoranda of May 4 (L.Ex. 8) and May 8 (L.Ex. 9) and the AWOL memoranda of April 27 (L.Ex. 6) and May 4 (L. Ex. 7). TR 83. Mr. Roache testified that during the meeting he told Ms. Jackson that “we were in the process of, you know, an adverse Notice for Proposed Adverse Action, for removal, and she needed to come back to work.... Complainant “asked...was it a done deal...?” Mr. Roache testified that he responded: “...yes, the process was still going forward and that she had certain appeals rights and all after that....” TR 86. He also testified that he told Ms. Jackson that resignation was an option. TR 95. He further testified that Complainant at that time told him that she was seeking psychiatric therapy. TR 96.

On June 13, 2006, the Library issued a Notice of Proposed Adverse Action, the removal of Ms. Jackson based on a “continuing pattern of misconduct in violation of LCR 2015-15, *Tardiness and Brief Absence . . . , Absence Without Official Leave (AWOL) . . . , Personal Conduct and Personal Activities of the Staff of the Library of Congress: Purpose, Policy, and General Standards of Conduct. . .* In addition to the absences chronicled in the earlier memoranda from Mr. Stephenson to Ms. Jackson discussed *supra*, the Notice provided the following:

- April 29, 2006 — Ms. Jackson left a message on Mr. Stephenson’s Audix prior to her scheduled starting time to the effect that she wasn’t coming in because her son was ill. She neither contacted another supervisor nor left a phone number where she could be reached to discuss her leave request. Ms. Jackson was charged 8 hours AWOL for failure to properly request leave and failure to provide documentation to the Health Services Office in support of her absence.⁹

⁸ As with the memoranda of April 27, 2006 and the two dated May 4, 2006, it appears that this memorandum was provided to Ms. Jackson on June 5, 2006. While dated May 8, it too bears Mr. Roache’s initials and the handwritten date of June 5, 2006.

⁹ At the hearing, Ms. Jackson asked Mr. Stephenson: “...[Y]ou don’t recall me calling you from the emergency room on that date [April 29, 2006] which was a Saturday, and you directed me to

- May 3, 2006 — Ms. Jackson called Mr. Stephenson and told him that she had to go to court. Mr. Stephenson told her that her reason was not acceptable and she was charged AWOL.
- May 4, 2006 — Ms. Jackson told Mr. Stephenson that she was not coming to work and offered no excuse. She was charged AWOL.

The Notice went on to conclude that “[f]rom Monday, May 8, 2006 through the date of this Notice of Proposed Adverse Action [June 13, 2006], you have failed to report for duty as scheduled and to contact your supervisor to request leave. Between March 14, 2006 and May 31, 2006, you were charged AWOL on thirty-two separate occasions, totaling 115.3 hours AWOL.” Thereafter, the Notice provided a chart showing the alleged date of each instance of AWOL and the hours charged. The chart included Monday, May 29, Memorial Day, a Federal holiday for which Ms. Jackson was charged AWOL for her regular tour of duty.¹⁰ It also included May 1, 2006, a day covered by the Children’s National Medical Center Confirmation of Emergency Visit, which, signed by Dr. Suzanne Levin, provided in pertinent part that: “Complainant’s son was in the Emergency Room on April 28, 2006 through April 29, 2006; he would require additional care by his parent; and “[t]his additional care may cause the parent . . . to miss work.” C.Ex. 4. At the hearing, Ms. Jackson questioned Mr. Stephenson regarding May 1, 2006: “[D]o you recall me calling in, talking to you, speaking to you [about] what had occurred on that date?” Mr. Stephenson’s replied: “I don’t recall.” TR 56. The chart of alleged AWOL also included May 15, 2006. At the hearing, Complainant questioned Mr. Roache regarding her Exhibit 5, a Notice of Hearing and Order to Appear on May

Mr. Roache?” He responded: “I don’t recall it, but I could have.” TR 56. *See also* C.Ex. 2, captioned “Children’s National Medical Center” “Confirmation of Emergency Visit,” signed by Suzanne Levin, MD. The exhibit reads:

The parent ...for [Complainant’s son] was at Children’s National Medical Center Emergency Department on 4/28/06 – 04/29/06. This child will need additional care by the parent...after this Emergency Department visit. This additional care may cause the parent . . . to miss work.

At the hearing, Ms. Jackson asked Mr. Roache whether he recalled her calling him from the Emergency Room about her son being there overnight. Mr. Roache testified that he wasn’t certain, “[i]t rings a bell, but I’m not certain of the days or anything.” TR. 97. Ms. Jackson then asked Mr. Roache whether he recalled asking her to bring in documentation to cover the 29th. He responded “yes,” but he wasn’t sure of the date. TR 97-98. When shown Complainant’s exhibits 4A (Confirmation of Emergency Visit on 4/28/06 – 4/29/06; “This child will need additional care by the parent/guardian after this Emergency Department visit. This additional care may cause the parent/guardian to miss work”) and 4B (Request for Advance Sick Leave, 4/29/06 – 5/11/06), Mr. Roache could not recall them. TR 98-99. Mr. Roache also could not recollect Complainant’s Exhibits 3 (Temporary Protection Order) or 5 (Notice of Hearing and Order to Appear in Superior Court on May 15, 2006 concerning request for protective order against child’s father).

¹⁰ This error in the information on the charging document is made more troubling by Complainant’s unrefuted statement that the Library had not honored her request for her sign-in sheets for May and June of 2006. TR 5.

15, 2006 in Superior Court of the District of Columbia. Mr. Roache testified that he did not recognize the document. TR 99-100.

The Notice referenced Ms. Jackson's five day suspension in October 2005 which was based on misconduct due to excessive AWOL. It went on to say that Ms. Jackson's misconduct demonstrated her failure to maintain the high standard of conduct required by the Library; that her history of tardiness had a negative impact on her dependability, reliability, and her supervisor's confidence that she would report for work as scheduled; and that the misconduct undercut the efficiency and economy of the LOC. Further, the Notice stated that Ms. Jackson's failure to follow the proper process for requesting leave was additional evidence of her misconduct. It repeated what had been in prior memoranda to Ms. Jackson to the effect that she had been urged to use the Library's Employee Assistance Program as well as the Health Services Office. In conclusion, the Notice stated: "in light of your frequent and prolonged accrual of AWOL charges after being placed on clear notice of the consequences of [such] charges, your failure to correct your behavior in reporting for work as scheduled as well as your misconduct through your failure to follow supervisory instructions, despite numerous verbal and written counseling, this proposal to remove you ... is both warranted and appropriate." L.Ex. 1.

Mr. Herman testified that he believed that the Notice was mailed to Ms. Jackson; that the normal procedure was to use both regular mail and Registered Mail addressed to the employee's last known address. TR 33. Library Exhibit 1 contains a "Library of Congress-Mail and Freight Record." It shows that on June 13, 2006 an item was sent to Ms. Jackson at a residential address in Northeast Washington, DC. TR 36. The service indicated was "Freight."¹¹ The "Postal" box was not checked on the form. Under "Special Service," two boxes were checked: "Certified" and "Return Receipt Requested." The Library exhibit contains a copy of the Certified Mail Receipt. There is no copy of a Return Receipt (*i.e.*, "green card") showing that Ms. Jackson actually received the delivery.

The Notice of Proposed Adverse Action included a statement of the right to reply, orally and/or in writing, and to submit affidavits in support of the answer, to Linda T. Stubbs, DRR "not later than 15 work days after the day you receive this notice." Notice, page 2 ¶4. The acknowledgment of receipt was not signed or dated.

Pursuant to Library policy (LCR 2020-3, §7 ¶E-7), Complainant was entitled to 15 work days after receipt of a notice of proposed adverse action in which to reply. The regulation does provide that delivery should be personal and receipted for "if possible;" if not, delivery should be at the last known address by "either certified or registered mail, return receipt requested; and by first-class mail; such processes shall be deemed sufficient." *Id.* ¶C. According to the Library, a reply to the proposed removal was to be submitted to Ms. Stubbs by Wednesday, July 12, 2006. TR 105. No reply was received by that date. TR 104.

¹¹ The form requires that a phone number of the recipient be provided when there is a freight shipment. The form does not contain a phone number for Ms. Jackson.

On Tuesday, July 11, 2006, Juanita Betts, First Deputy/Chief Steward AFSCME 2477 (Ms. Jackson's Union representative), and Daryl Clark, Chief Steward, AFSCME 2477, met with Linda T. Stubbs, the DRR in Ms. Jackson's case. During the meeting, the Union officials advised Ms. Stubbs that a "report would be done by the end of the week and that Ms. Jackson was working with Health Services to establish FMLA entitlement." L.Ex. 10.

At the end of the week, on Friday, July 14, 2006 at 5:27 pm, Ms. Betts sent an email to Linda R. Knight, Senior Employee Relations Specialist, requesting an extension of time to reply. The request simply stated: "After Darryl Clark and I had the oral reply 7/11/06 with Linda Stubbs it's at her request we are request[ing] that we get a exception for the adverse action case involving Dorette Jackson." L.Ex. 11. The Library treated the request for extension as if it had been received by the Employee Relations Team, Office of Workforce Management, Human Resources Services on Monday, July 17, 2006. *Id.* The request was denied as being untimely and not providing extenuating circumstances. L.Exs. 10, 11. No reference was made to Ms. Stubbs' knowledge of the effort to secure FMLA entitlement or to such considerations amounting to extenuating circumstances sufficient for an extension. Nor was any reference made to Complainant's having alerted Mr. Roache, and thereby management, that she was seeking psychiatric help at the time. At the hearing, Ms. Stubbs testified: "The reply date was I think July 12th, and an additional five days were given due to the fact that I believe the Notice for Proposed Adverse Action had been mailed, so it added on a few additional days for the reply period." TR 105.

By memorandum dated August 22, 2006, Complainant's DRR, Linda T. Stubbs, notified the Associate Librarian for Library Services, Deanna Marcum, that she was recommending that the proposal to remove Ms. Jackson be sustained. L.Ex. 10. She found a "continuing pattern of misconduct in violation of LCR 2015-15, *Tardiness and Brief Absence*, LCR 2015-14, *Absence Without Official Leave (AWOL)*, and LCR 2023-1, *Personal Conduct and Personal Activities of the Staff of the Library of Congress*." Ms. Stubbs noted that Complainant did not submit an oral or written reply, although the Union representative for Complainant, Juanita Betts, and the Union chief steward, Daryl Clark, met with Ms. Stubbs on July 11, 2006 "to advise that a report would be done by the end of the week and that Ms. Jackson was working with Health Services to establish FMLA entitlement. They did not submit a reply on behalf of Ms. Jackson but they did suggest that there would be paperwork submitted later. A reply extension was requested but it was denied. However, no further paperwork was submitted to the Designated Reply Recipient by Ms. Betts on behalf of Ms. Jackson." L.Ex. 10 at 2.

The DRR summarized her findings as follows:

Documentation of counseling began in July 2005 to address M. Jackson's use of leave and included guidance on division policy on granting leave/approving absence, particularly in those cases when there is a lack of leave upon which to draw. Ms. Jackson returned to duty status on March 9, 2006, after an approved absence for the period December 1,

2005 through March 7, 2006. A memorandum dated April 20, 2006, was issued which documented Absence Without Official Leave (AWOL) and the repeated charges that were accrued by Ms. Jackson on nine separate occasions. There were four separate counseling memoranda. Covering the complete time period from March 14 through May 31, 2006 there were charges of AWOL on thirty-two separate occasions. . . . The counseling memos addressed the need to improve her conduct in regard to her failure to report for work as scheduled and failure to follow supervisory instructions and division guidelines for requesting leave. Ms. Jackson was reminded in each counseling memorandum that the decision letter issued regarding her 10-workday suspension for misconduct (AWOL) in October 2005 gave her strict notice that any future instances of similar misconduct could subject her to further disciplinary action, up to and including removal from the Library. . . . Ms. Jackson was also encouraged to seek assistance from the Employee Assistance Program or Health Services Office.

Id. (emphasis added).

Ms. Stubbs concluded that absent a reply, “the facts of the case stand as presented.”
Id.

In terms of the appropriate penalty, Ms. Stubbs wrote:

In considering the range of penalties possible in this case, the proposed removal is appropriate and in accordance with applicable Douglas factors. In examination of similar cases in HRS/WFM, it was found that removal was supported for misconduct (AWOL) . . . in cases where the employee had previously served a 10 workday suspension for similar misconduct.

Id. at 3 (emphasis added). There was no discussion of the *Douglas* factors nor any mention of Complainant’s length of service or performance in her position. Nor was there reference to any counseling before the May 2005 notice of proposed suspension.

Four business days later, by letter dated August 28, 2006 (Decision Letter), Jeremy Adamson, Acting Director, Collections and Services, Library Services, concurred in Ms. Stubbs’ recommendation that Ms. Jackson be removed from the Library. The effective date given was September 1, 2006. Mr. Adamson’s decision basically tracks the report of the DRR. It recounts that two Union representatives met with the DRR “but did not present a written or oral reply. The deadline for your reply was July 12, 2006 and no reply was submitted by that date. A request for an extension of time to reply was received . . . on July 17, 2006, and was subsequently denied. No reply or additional documentation was received by the DRR. In the absence of a reply, the facts of the case stand as presented. The report of the DRR confirms the facts presented in the proposal.” L.Ex. 12 at 1.

Also like Ms. Stubbs, Mr. Adamson relied on what he termed the “decision letter, dated October 4, 2005, suspending you for 10-workdays for misconduct (AWOL). . . .” *Id.* (emphasis added).

As to penalty, the removal decision concurred with the DRR conclusion:

In considering the range of penalties possible in this case, the proposed removal is appropriate and in accordance with applicable Douglas Factors. The nature and seriousness of your misconduct as well as the lack of rehabilitation since your previous 10-workday suspension for AWOL in October 2005, as evidenced by your continued AWOL since the proposed adverse action was issued, support your removal from the Library.

Id. (emphasis added).

Mr. Adamson testified that he had considered “some of the Douglas factors.” When questioned further by Library counsel he explained that he had considered “...Factor Number 3 which is the fact that this is the second time. There was a previous disciplinary action. It would appear that the recipient to this letter had not in fact engaged in behavior modification to allow her to remain on the staff.” TR 77. Mr. Adamson did not specifically refer to any of the other *Douglas* factors. *Id.* Ms. Jackson pointed out to Mr. Adamson that one of the days listed in the Notice as reflecting her being on AWOL was Memorial Day. TR 79-80. She then elicited from him that he did not look behind the information that was supplied to him by his underlings in the Notice of Proposed Adverse Action or the Designated Reply Recipient Report. He “assumed” the accuracy of what he was given. TR 80-81.

DISCUSSION

The Parties’ Arguments

Library of Congress

In the Notice of Proposed Action (June 13, 2006), Complainant was advised of the proposal to remove her from employment as a Senior Deck Attendant “based on [her] continuing pattern of misconduct in violation of LCR 2015-15, *Tardiness and Brief Absence*; LCR 2015-14, *Absence Without Official Leave (AWOL)*, and LCR 2023-1, *Personal Conduct and Personal Activities of the Staff of the Library of Congress: Purpose, Policy, and General Standards of Conduct*. Proposal to Remove at 1 (citations omitted) (L.Ex. 1). The Notice also cited LCR 2020-3, *Policies and Procedures Governing Adverse Actions*, for the general rules governing removal. It is the Library’s position that Complainant’s removal was “appropriate and in accordance with applicable Douglas Factors,” based on the following:

The nature and seriousness of your misconduct as well as the lack of rehabilitation since your previous 10-workday suspension for AWOL in

October 2005, as evidenced by your continued AWOL since the proposed adverse action was issued, support your removal from the Library.

Decision Letter (Aug. 28, 2006), L.Ex. 12 at 1 (emphasis added). Counsel for the Library summarized their case near the close of the hearing:

Basically this case involves Ms. Jackson's removal from her position as Senior Deck Attendant based on her habitual tardiness in violation of the Library's regulations.

She was charged with 32 separate occasions of AWOL from March 14th to May 31st. She was notified of these specific problems on numerous occasions through the memos that we admitted as exhibits.

She was counseled on the options available to her directed by her conduct. She made no effort to provide satisfactory or in most cases any explanation to her supervisors.

On June 13th, 2006, she was mailed a Notice of Proposed Adverse Action for her removal. Thereafter Ms. Jackson was given the opportunity to respond, and in this notice she was informed of her right to respond. She continued to remain silent. She provided absolutely no response to the notice, and then didn't reply to any of the Library's assertions about this unacceptable behavior.

Thereafter on August 28th, 2006, the Library issued its final decision. The deciding official, Jeremy Adamson, set in motion the removal process for Ms. Jackson.

The Library offered testimony that the charged conduct had occurred, that this directly affected the efficiency of the CALM Division, and that based on her past behavior and her continued absences and her refusal to abide by the Library's regulations that the penalty of removal was reasonable in light of those factors.

TR 120-21.

Consequently, in LOC's view, the penalty of removal was the only reasonable option. The Decision Letter states in conclusive fashion that the *Douglas* factors were considered. L.Ex. 12 at 1.

Complainant

In her Notice of Appeal, Complainant states that she believes the removal decision should be reversed "because I had gone to Rohn Roche [sic] and spoke with him regarding a court order involving my oldest son; asking for an extra 15 minutes to avoid

AWOL status. My kids were sick, I was suffering from Post Partum depression. I asked for leave in which I was denied each and every time. I became sick behind the whole matter.” At the close of the hearing, Complaint testified that she asked for a 15 minute schedule adjustment to transport a child with a disability to school, and that the request was denied. She also testified that, in her experience:

regardless of where I went within the CALM Division, no matter who I worked under, I was going to be written up and removed regardless of what might occur.

The evidence speaks for itself. If I was told to bring documentation to protect my absences or to protect my tardiness, I did so, and for each and every one to be claimed to be unacceptable, what do they call acceptable reasons? I’m stuck on that one. What are acceptable reasons if medical documentation, judge’s orders are nonacceptable, and for this write-up it’s plain and simple, they just wrote down memos. These half of the memos I never got. The record shows each and every memo that I received were signed for or if I denied it, why wasn’t it put denied to sign.

* * *

My information was denied to answer the adverse action. The day they had the meeting, my information was denied to put into evidence, and the record shows there was a discrimination act placed upon me to have me removed,¹² and I did my job.

TR 123-24.

Procedural Matters

By statute, Complainant is entitled to 30 days advance written notice, stating the specific reasons for the proposed removal. 5 U.S.C. §7413(b)(1). In addition, she is entitled to “a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer.” *Id.* (b)(2). She also is entitled to “a written decision and the specific reasons therefore at the earliest practicable date.” *Id.* (b)(4). The Library implementing regulation governing adverse actions allows for a period of not more than “15 workdays” in which to respond to a notice of proposed adverse action, absent extenuating circumstances. LCR 2020-3, §7 ¶7.

¹² Complainant appears to have raised the argument that the removal action involved discrimination. Although she did not elaborate or specify a basis for the discrimination, the record reveals that she is an African-American female with a belief that she suffered from post-partum depression. As to any affirmative defense based on discrimination, Complainant bears the burden of proof by a preponderance of the evidence. 5 C.F.R. §1201.56(a)(2)(iii); *Lambe v. Dept. of Defense*, 2005 MSPB Lexis 7309 at 28 (2005). Complainant did not develop this theory; nor is there sufficient evidence in the record on which to conclude that discrimination was involved in her removal.

In this case, Complainant's Notice of Proposed Adverse Action is dated June 13, 2006.¹³ The final decision sustaining removal was issued on August 28, 2006, effective September 1, 2006. Thus it appears the Library allowed ample time between the Notice and the implementation of the removal decision.

As to the reply period, whether the procedural requirements were met is less clear. The Library regulation (and the acknowledgment page of the Notice) provide that an employee is entitled to "15 work days" following receipt of a notice of proposed adverse action in which to reply, and that "[i]f you are unable to comply within that time period because of extenuating circumstance, you are advised to submit a written request for an extension to the Office of Workforce Management, as only that office has the authority to extend the reply period." Notice at 2 (citing LCR 2020-3 §7.E(7)). The record does not reveal whether "work days" is computed based on the individual's schedule or on a general standardized schedule. Since Complainant was a part-time employee scheduled to work only eight days per pay period, arguably the "15 work days" rule should have extended through two and a half pay periods to allow her ample time for 15 work days and 5 days additional for service by mail.

Assuming that Complainant's 15-day reply period (plus 5 days for mailing) was computed based on a 5-day work week, the handling of the request for an extension of time to reply was less than ideal. Two Union officials met with the DRR on the day before Complainant's reply was due, and stated that a reply would be forthcoming by the end of the week. They advised the DRR that family care issues were involved. The meeting took place on July 11, 2006; the reply deadline was July 12, 2006. The DRR Report states that the Request for Reply Extension was received by Employee Relations Team, Office of Workforce Management on July 17, 2006 and notes that it was denied. Specifically, the Report stated:

Dorette D. Jackson did not make a reply to the NPAA [Notice of Proposed Adverse Action], neither oral or written. Juanita Betts, Ms. Jackson's representative from AFSCME 2477, did meet with me on July 11, 2006, and was accompanied by Daryl Clark, chief steward AFSCME 2477. They advised the DRR that the purpose of the meeting was to advise that a report would be done by the end of the week and that Ms. Jackson was working with Health Services to establish FMLA entitlement. They did not submit a reply on behalf of Ms. Jackson but they did suggest that there would be paperwork submitted later. A reply extension was requested but it was denied. However, no further paperwork was submitted to the Designated Reply Recipient by Ms. Betts on behalf of Ms. Jackson.

L.Ex. 10 at 2. The DRR provided no explanation for the denial of an extension.

¹³ The actual date of receipt is unclear, as the acknowledgment of receipt was not completed. Complainant designated a Union official, Juanita Betts, as her representative on June 21, 2006; she obviously had knowledge of the proposal by that time. See L.Ex. 11.

Library Exhibit 11 contains the email request for an extension, submitted by Juanita Betts at 5:27 p.m. on 7/14/06. It simply stated that the Union was requesting an exception on behalf of Complainant, without explanation. The email denial of the extension, dated 7/17/06, noted that the request for an extension was untimely (it was due on 7/12/06) and that it failed “to indicate any extenuating circumstances that prevented a timely reply.” L.Ex. 11. The denial of an extension does not appear to have been in the DRR’s hands, but rather, under the Office of Workforce Management. Under the circumstances, the opportunity to respond to the proposed adverse action appears to minimally comply with the formal requirements set forth in LCR 2020-3. See *Stephen v. Department of Air Force*, 47 MSPR 672, 684 (1991).

Nevertheless, such a strict reading of the time requirements seems at odds with the development of a full record and the desirability of providing a reasonable opportunity for response to a proposed adverse action, especially when removal is at stake. This is particularly true in light of the circumstances that Complainant described and documented during the evidentiary hearing before the PAB. She produced evidence of personal circumstances that would render a timely response difficult for the average employee, such that if it had been communicated properly would seem to meet the standard of “extenuating circumstances” required by LCR 2020-3. Since the Board is not privy to the communication between the Union and the DRR at the meeting on July 11, 2006, it is difficult on this record to conclude that the formal requirements were not met. Nevertheless, the process could have been more accommodating in light of the penalty at issue. Both the Library and the Complainant would have benefited from a fuller record development prior to the removal decision.

Legal Standard for Removal on the Basis of Misconduct

In a removal case based on misconduct, the Library has the burden of proving by a preponderance of the evidence that: (1) the alleged misconduct took place as charged; (2) the disciplinary action promotes the efficiency of the service; and (3) the penalty of removal is appropriate under the circumstances. *Douglas v. Veterans Admin.*, 5 MSPR 280, 302 (1981); see 5 U.S.C. §7513; 5 C.F.R. §1201.56(a)(1). Preponderance of the evidence is defined as the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. §1201.56(c)(2).

Review of an agency decision as to discipline is in the context of “appropriate deference to the primary discretion . . . entrusted to agency management.” *Douglas*, 5 MSPR at 301. For an agency’s determination to withstand review, the agency must show that it has considered all relevant mitigating factors. The question on review is whether the agency’s “managerial judgment has been properly exercised within tolerable limits of reasonableness.” *Id.* at 302.

1) The Charged Conduct

In this case, the Library charged Ms. Jackson with violating LCR 2015-15, *Tardiness and Brief Absence*; LCR 2015-14, *Absence Without Official Leave*; and LCR 2023-1, *Personal Conduct and Personal Activities of the Staff of the Library of Congress*. The particular requirements of these three LOC regulations will be discussed below.

The proposal specifically recounts:

You were issued a counseling memorandum, dated July 8, 2005, concerning your use of leave. . . . In that memorandum, you were advised that in cases when you do not have enough sick leave to cover your absence due to illness, you will no longer be granted LWOP or annual leave in lieu of sick leave unless you provide the Health Services Offices a medical certificate to support your illness. You were further advised that failure to provide an acceptable medical certificate would result in a charge of Absence Without Official Leave (AWOL) in accordance with LCR 2015-14 and may subject you to disciplinary action in accordance with LCR 2020-3.

By memorandum dated April 20, 2006, your supervisor, Warren Stephenson, documented AWOL you were charged on nine (9) separate days between Tuesday March 14, 2006 and Thursday, April 6, 2006, as follows. . . .

L.Ex. 1 at 2. The Notice continued to detail eight further incidents of AWOL up through May 4, 2006, and then noted that “[f]rom Monday, May 8, 2006, through the date of this Notice of Proposed Adverse Action, you have failed to report for duty as scheduled and to contact your supervisor to request leave.¹⁴ Between March 14, 2006 and May 31, 2006, you were charged AWOL on thirty-two separate occasions, totaling 115.3 hours AWOL.” *Id.* at 3. The Notice also reviewed the previous five-day suspension for excessive charges of AWOL in October 2005, including the warning that future similar instances may lead to further discipline, up to and including removal from employment. *Id.* at 6.

The Notice concluded as follows:

Your continued misconduct demonstrates a failure on your part to maintain a high standard of conduct as required by the Library. Your history of tardiness has a negative impact on your dependability, reliability and your supervisor’s confidence that you will report for duty as

¹⁴ While the Notice charges that Complainant failed to contact her supervisor, she did come into the Library to meet with the Administrative Officer and she did meet with Mr. Roache on June 5, 2006. During the meeting with Mr. Roache, she discussed her medical condition and received numerous memos that had been prepared by her supervisor but not delivered to Complainant at the time they were prepared.

scheduled. Such conduct will not be tolerated as it impedes the Library's efficiency and economy. In addition, your misconduct is also evident in your continued failure to follow supervisory instructions on the proper procedures for requesting leave. You have been urged on numerous occasions to seek the assistance of Cascade, the Library's Employee Assistance Program, for comprehensive employee assistance, and the Health Services Office; however, all attempts to counsel and assist you have been unsuccessful. Therefore, in light of your frequent and prolonged accrual of AWOL charges after being placed on clear notice of the consequences of continued AWOL charges, your failure to correct your behavior in reporting for work as scheduled as well as your misconduct through your failure to follow supervisory instructions, despite numerous verbal and written counseling, this proposal to remove you from your position is both warranted and appropriate.

Id. at 7.

In proposing discipline, an agency must notify the employee of the charged conduct “in sufficient detail to permit the employee to make an informed reply.” *LaChance v. MSPB*, 147 F.3d 1367, 1371 (Fed. Cir. 1998) (quoting *Pope v. USPS*, 114 F.3d 1144, 1148 (Fed. Cir. 1997)); *Otero v. USPS*, 73 MSPR 198, 202 (1997); see *Ragolia v. USPS*, 52 MSPR 295, 301 (1992). An agency “need not affix any specific label to its charges, but can instead describe actions that constitute misbehavior in narrative form,” including the use of “a broad label such as ‘improper conduct’” if the specifications allow for a meaningful reply. *Faciane v. USPS*, 2005 MSPB Lexis 7982, *aff'd*, 2006 U.S. App. Lexis 5999 (Fed. Cir.). If a charge appears too vague, the reviewing authority may examine the specifications to see what conduct the agency relied on as the basis for its action. See *LaChance*, 147 F.3d at 1371; *Otero*, 73 MSPR at 204.

In this case, Complainant made no written reply. Both her Notice of Appeal and her testimony at the hearing reflected that she believed that it was futile to discuss her reasons for absence with her supervisor because no excuse would be deemed acceptable—e.g., “each and every time that I was told to bring sufficient evidence to cover my absences, I did so, but they still told me that they were unacceptable” (TR 115); “[t]he record shows when I was told to bring documentation, I brought it, showed it to the proper people who I had to show it to, but I was still written up claiming to be unacceptable, for being absent, for being tardy” (TR 116); “I asked for leave in which I was denied each and every time” (Notice of Appeal).

A. Complainant's Incidents of Tardiness and Brief Absence

LCR 2015-15 sets forth the Library's policy as to tardiness and brief absences from duty. Noting the expectation that employees report on time, the order states that “[r]easons for tardiness or brief absence shall be reported promptly to the designated supervisor who shall determine whether or not the tardiness or brief absence is justifiable.” LCR 2015-15 §2. The order gives further discretion to the supervisor by

allowing for brief absence from duty during the day, which “for adequate reasons, typically of an emergency character and not in excess of one hour, may be excused by the designated supervisor. Request for brief absence from duty must normally be made in advance.” *Id.* ¶B. However, with respect to frequent infractions, the order does not allow for discretion, specifying that “[f]requent instances of tardiness or brief absence shall not be excused and shall be charged to leave.” *Id.* ¶C (emphasis added).

Specifically, the Library alleges that Complainant’s “history of tardiness has a negative impact on [her] dependability, reliability and [her] supervisor’s confidence that [she] will report for duty as scheduled. . . . In addition, [her] misconduct is also evident in [her] continued failure to follow supervisory instructions on the proper procedure for requesting leave.” Notice at 7 (L.Ex. 1).

The Library has established that Complainant repeatedly was late for her tour of duty and occasionally disappeared or returned late from breaks during her shift. As to the tardiness, Complainant contends that she had numerous worthy excuses that were rejected as unacceptable. In her closing, Complainant argued that no excuse was deemed acceptable by her supervisors.

On this record, I find that the Library did prove that Complainant was improperly and repeatedly late and occasionally disappeared for unacceptable periods during her shifts. Nevertheless, I note that Complainant has produced evidence that raises questions as to the proper exercise of supervisory discretion in refusing a number of apparently acceptable excuses. I would also note that several instances of AWOL for tardiness appear to be of a *de minimis* nature, especially in view of the complications with which Complainant was faced at the time. I do not find the tally of AWOL incidents to be compelling, but the overall pattern and repetition of major incidents are clear.

B. Complainant’s Abusive Use of AWOL

The Library also alleges that Complainant engaged in misconduct by means of abusive use of Absence Without Leave (AWOL), in violation of LCR 2015-14. That order states as follows:

Absence from duty without prior approval, including absence from official duty station during the workday, is not permitted, except in justifiable emergency cases, and shall be made the subject of special inquiry. A staff member who is absent without approval for any cause must explain to the supervisor authorized to approve [her] leave, at the earliest practicable time, the reason for [her] absence and the reason for [her] failure to ask permission to be absent. If [her] reasons are unacceptable, the time lost will be counted as absence without official leave (AWOL); pay will be forfeited for the entire period of such absence, and disciplinary action may also result. Absence without official leave which extends

beyond one workday shall be reported immediately by supervisors to the Personnel Relations Section, Personnel Office.

L.Ex. 1, Attach. C.

The extensive recitation of AWOL incidents detailed in the Notice of Proposed Removal stands essentially unrefuted. At the hearing, Complainant did point out that she was charged AWOL on a Federal holiday, when she would not have been expected to be on duty. For this improper AWOL charge, the Library is obligated to reimburse if indeed Complainant was in an employment category entitled to pay for Federal holidays.

Complainant also argued that counsel for the Library had not complied with her request to obtain copies of sign-in sheets for the days in question. Nevertheless, the unquestioned incidents are sufficient to establish misconduct on the basis of excessive AWOL, particularly since Complainant had been warned and disciplined for such behavior in 2005.

Complainant contends that she had numerous worthy excuses that were rejected as unacceptable, including a court appearance, babysitter difficulty, a child's hospitalization, and related follow-up care. In her closing, Complainant argued that no excuse was deemed acceptable by her supervisors.

Complainant does raise a question about whether any excuse would have been deemed sufficient to justify her absence, particularly in light of the multiplicity of factors with which she was faced during the Spring of 2006. It is understandable that she would have felt frustrated in trying to get approval for leave from her supervisors, yet such frustration does not warrant an extensive absence and abandonment of the effort to secure leave approval.

It should be noted that during this same period the Library made no attempt to engage in meaningful counseling. While memoranda were prepared concerning the absences, there was no apparent effort to deliver the counseling memoranda during Complainant's absence. Complainant was simply presented with a cumulative series of such memoranda on June 5, after the Library had already determined to propose an adverse action.

C. Charge of Impeding Library Efficiency or Economy

The Library also alleges that Complainant violated LCR 2023-1, *Personal Conduct and Personal Activities of the Staff of the Library of Congress: Purpose, Policy, and General Standards of Conduct*. This order states in general terms the standards expected of LOC employees, including that "maintenance of high standards of . . . conduct by staff members is essential to assure the proper performance of the Library's business" and that the "avoidance of misconduct . . . through informed judgment is indispensable to the maintenance of these standards." LCR 2023-1, §2. The order further states that

staff “shall avoid any action which might result in or create the appearance of . . . [i]mpeding Library efficiency or economy.” *Id.* ¶C.

In the Notice of Proposed Adverse Action, the Library advised Complainant that her “continued misconduct demonstrates a failure on [her] part to maintain a high standard of conduct as required by the Library.” Notice at 7. In addition, the Notice stated: “Your history of tardiness has a negative impact on your dependability, reliability and your supervisor’s confidence that you will report for duty as scheduled. Such conduct will not be tolerated as it impedes the Library’s efficiency and economy. In addition, your misconduct is also evident in your continued failure to follow supervisory instructions on the proper procedures for requesting leave.” *Id.*

Complainant’s conduct falls within the description of this charge, rendering her appearance for work unreliable and thus impacting on the operations of the Library. Moreover, her repeated failure to follow established procedures for reporting absence and seeking leave also establishes misconduct under the regulation.

Accordingly, the Agency has proved its charge of conduct unbecoming a Library employee—*i.e.*, impeding the efficiency of the Agency’s operations.

The Library’s charge is sustained in all respects. Complainant engaged in misconduct based upon excessive tardiness and brief absences, abuse of AWOL, and conduct unbecoming an employee of the Library of Congress.

2) The Efficiency of the Service

Once the charged misconduct has been established, the Library must also demonstrate that the disciplinary action imposed will promote the efficiency of the service. *Douglas*, 5 MSPR at 303. In this case, the Decision Letter states as follows:

I have reviewed the entire record, including the Notice of Proposed Adverse Action and all of its supporting documentation. You received a memorandum dated April 20, 2006, which documented your AWOL on nine (9) separate occasions, as well as four (4) subsequent counseling memoranda. Between March 14, 2006 and May 31, 2006, you were charged AWOL on 32 separate occasions totaling 115.3 hours of AWOL. These counseling memoranda addressed the need for you to report to work and follow Library of Congress regulations, supervisory and Division guidelines for requesting leave. You were additionally reminded in each counseling memorandum that the decision letter, dated October 4, 2005, suspending you for 10-workdays for misconduct (AWOL) put you on strict notice that any future instances of similar misconduct could subject you to further disciplinary action, up to and including your removal from the Library in accordance with LCR 2020-3. You were also encouraged to seek assistance from the Employee Assistance Program or Health

Services Office if there was a personal or medical condition which was affecting your behavior.

L.Ex. 12 at 1.

An adverse action promotes the efficiency of the service, and thus satisfies the nexus requirement of 5 U.S.C. §7513, if the “grounds for the action relate to either the employee’s ability to accomplish his duties satisfactorily or to some other legitimate government interest.” *Benitez v. Dept. of Defense*, 2006 MSPB Lexis 381 at 22-23. An agency need only show that the penalty imposed will increase the efficiency of the service—by showing a nexus between the challenged conduct and the efficiency of the service—and that it is not arbitrary and capricious. *Graybill v. USPS*, 782 F.2d 1567, 1574 (Fed. Cir.), *cert. denied*, 497 U.S. 963 (1986).

An employee’s “frequent, unscheduled absences” support removal for the efficiency of the service, since they “have an obvious and direct effect on [the employee’s] work and the ability of the agency to meet its mission.” *Williamson v. DHHS*, 3 MSPR 18, 21 (1980). Moreover, failure to follow procedures for requesting leave—in addition to the absences themselves—also may support removal, because “an agency is entitled to have an employee respect its rules and regulations relating to attendance and procedures for authorized absence so that it can plan its work activities accordingly.” *Hubble v. Department of Justice*, 6 MSPR 659, 661 (1981); *see Williamson*, 3 MSPR at 20-21.

Clearly, Complainant’s unreliability in reporting for work and failure to follow procedures for requesting leave would be harmful to the CALM and its ability to pursue its mission. The record sufficiently supports this element. Accordingly, LOC has established that Complainant’s removal promotes the efficiency of the service.

3) The Penalty of Removal

Following a determination that an employee has engaged in wrongdoing, the employing agency has the responsibility for determining the appropriate penalty. The penalty assessed by agency management is entitled to deference; ordinarily “the penalty for employee misconduct is left to the sound discretion of the agency.” *LaChance v. Devall*, 178 F.3d 1246, 1251 (Fed. Cir. 1999) (quoting *Miguel v. Dept. of Army*, 727 F.2d 1081, 1083 (Fed. Cir. 1984)). Such a decision will not be disturbed if the discipline authority has been “legitimately invoked and properly exercised.” *Douglas*, 5 MSPR at 301. Review of an agency decision involves making sure that the penalty is proportional to the charges, consistent with the principle of like penalties for like offenses, and is otherwise reasonable under the circumstances. *Id.* at 302. The burden is on the agency to establish the propriety of the penalty imposed by a preponderance of the evidence. *Id.* at 308. Like the MSPB, the PAB will modify or mitigate an agency-imposed penalty only where it finds “the agency failed to weigh the relevant factors or the agency’s judgment clearly exceeded the bounds of reasonableness.” *Brown v. Dept. of Treasury*, 91 MSPR 60, 64 (2002).

The Library, therefore, like other agencies, must make clear in its adverse action decisions what factors led to the determination of a particular penalty.¹⁵ By statute, written notice of proposed adverse actions must include the “specific reasons” for the proposed action and the decision on such a proposal must also specify in writing the reasons on which it is based. 5 U.S.C. §§7513(b)(1) and (b)(4); *Douglas*, 5 MSPR at 304. While neither the merit system statutory provisions nor the implementing regulation (5 CFR §752.404(f)) requires an agency’s decision letter to contain information demonstrating that the agency has considered all relevant mitigating factors and reached a responsible judgment that a lesser penalty is inadequate, a decision notice which does demonstrate such detailed consideration may be entitled to greater deference upon review. *Douglas*, 5 MSPR at 304.

The Executive Branch implementing regulation for adverse actions states that the agency’s decision may not consider “any reasons for action other than those specified in the notice of proposed action.” 5 CFR §752.404(f). While the MSPB has held that an agency may not rely on misconduct that was not included in its proposal notice, it does not consider such mistaken reliance to be fatal; in these circumstances, the MSPB has remedied the error by undertaking its own analysis of the relevant *Douglas* factors in light of the proven misconduct to determine the appropriate penalty. *Biniak v. SSA*, 90 MSPR 682, 687 (2002). The clarity with which the employee “was placed on notice of the wrongfulness” of the type of misconduct can be a factor in whether the agency imposed penalty is sustainable. *Id.* at 689; see *Devall v. Navy*, 83 MSPR 434, 437 (1999). The administrative judge must ensure that the administrative decision contains a reasoned explanation of the deciding official’s action with respect to sustaining or modifying the penalty to demonstrate that there was proper consideration of all relevant factors and reasonable exercise of judgment in this regard. *Douglas*, 5 MSPR at 308.

Consideration of *Douglas* Factors

In *Douglas*, the MSPB enumerated the factors that may be relevant to a determination of discipline in a particular case: 1) the nature and seriousness of the offense, and its 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

¹⁵ Many agencies have a table of penalties, which lists examples of misconduct and a recommended range of penalties based on whether it is the employee’s first, second, or third offense, with increasing penalties for each offense. While not required, a table of penalties provides guidance to employees and managers and a useful framework for determining the reasonableness of a penalty upon review. If the Library had a table of penalties, it would have facilitated the determination as to the appropriateness of the penalty under the circumstances here presented.

perform at a satisfactory level and its effect upon supervisors' confidence in the 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 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. *Douglas*, 5 MSPR at 305-06. In deciding whether the penalty is reasonable, the Board need not consider every *Douglas* factor, only the relevant ones. *Lewis v. GSA*, 82 MSPR at 263.

In the instant case, the imposition of the penalty cannot be sustained on the record before me. Both the Decision Letter regarding removal, as well as the Report of the Designated Reply Recipient, are premised on Complainant having served a 10-workday suspension in October 2005. In fact, the supporting documentation for that earlier discipline makes clear that Complainant served a 5-workday suspension at that time. See L.Ex. 3 ("It is my decision that you be suspended from duty (without pay) for five (5) workdays, effective Monday, October 17, 2005 through the close of business Monday, October 24, 2005"). The Designated Reply Recipient made two references to the incorrect length of the prior suspension in her Report. First, she noted that "Ms. Jackson was reminded in each counseling memorandum [2006] that the decision letter issued regarding her 10-workday suspension for misconduct (AWOL) in October 2005 gave her strict notice that any future instances of similar misconduct could subject her to further disciplinary action, up to and including removal from the Library. . . ." L.Ex. 10 at 2 (emphasis added). Again, in considering the appropriate penalty for the misconduct in 2006, the DRR Report specifically stated as follows:

In considering the range of penalties possible in this case, the proposed removal is appropriate and in accordance with applicable Douglas factors. In examination of similar cases in HRS/WFM, it was found that removal was supported for misconduct (AWOL) (05-34, 05-06, 04-31, 03-20) in cases where the employee had previously served a 10 workday suspension for similar misconduct.

Id. at 3. Thus, the recommendation of the DRR is premised on a faulty statement as to the record of prior discipline.

Similarly, the Decision Letter sustaining the penalty of removal is premised on the same error as to Ms. Jackson's record of prior discipline. That Letter, issued by Jeremy Adamson (Acting Director, Collections and Services, Library Services), stated that Complainant was "additionally reminded in each counseling memorandum that the decision letter, dated October 4, 2005, suspending you for 10-workdays for misconduct

(AWOL) put you on strict notice that any future instances of similar misconduct could subject you to further disciplinary action, up to and including your removal from the Library. . . . “ L.Ex. 12 at 1 (emphasis added). With specific reference to the penalty choice, Mr. Adamson stated: “In considering the range of penalties possible in this case, the proposed removal is appropriate and in accordance with applicable Douglas Factors. The nature and seriousness of your misconduct as well as the lack of rehabilitation since your previous 10-workday suspension for AWOL in October 2005, as evidenced by your continued AWOL since the proposed adverse action was issued, support your removal from the Library.” *Id.* at 1.

The Library’s own regulation, LCR 2020-3 (Adverse Actions) bars the final decision in an adverse action from relying on “reasons which were not noted in the original notice.” LCR 2020-3, §8 ¶A. Since the Notice expressly referenced the 5-day suspension, the Decision Letter’s erroneous reliance on a 10-day suspension contravenes this provision. Complainant was not on notice of this error and had no opportunity to refute it or to point out the mistake.

Neither the Report of the DRR or the Decision Letter itself reflect any specific consideration of any other *Douglas* factors, but just a conclusory statement that they have been taken into account. Since the Complainant’s past disciplinary record is both expressly relied upon and in error, the Library’s imposition of penalty in this matter cannot be sustained.

In light of this conclusion, I am remanding the removal decision for a new determination of penalty based upon an accurate foundation of the facts. The Board does not have access to Library records as to penalties imposed in other cases where the prior discipline was a 5-day suspension for similar misconduct. The only references supplied by the Library are to 10-day suspensions, which are not applicable here. On this record, it is not possible for me to recalculate or reassess the appropriateness of the penalty, in particular to determine whether it is consistent with penalties imposed in similar cases.

In reaching this conclusion, I am mindful that the foremost consideration in evaluating a penalty determination is the nature and seriousness of the misconduct and its relation to the employee’s duties, position and responsibilities. *Hylick v. Dept of Air Force*, 85 MSPR 145, 153 (2000). In addition, another *Douglas* factor for consideration is the “employee’s past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.” *Douglas*, 5 MSPR at 305. Full consideration of these factors may or may not lead again to imposition of the penalty of removal.

The only testimony as to *Douglas* consideration was provided by the deciding official, Mr. Adamson. When asked what factors he considered, he stated: “Well certainly . . . the fact that this is the second time. There was a previous disciplinary action. It would appear that the recipient of this letter had not in fact engaged in behavior modification to allow her to remain on the staff.” TR 77.

On the other hand, *Douglas* also requires consideration of relevant 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. In this regard, Complainant has raised considerable question as to the pre-determination that she be removed, in view of her difficulty in getting supervisory approval for leave for court appearances or for caring for a child who had been subjected to physical trauma resulting in hospitalization overnight,¹⁶ and her reference to post-partum depression. She advised her second level supervisor, during the June 5 encounter, that she was seeking psychiatric help. There has been no development of the record of any employer duty to engage on the need for a possible accommodation, such as a leave or absence or altered work schedule, or at the very least, such as to warrant an extension of the reply period for responding to the Notice of Proposed Adverse Action.¹⁷

Accordingly, the Library's own recitation of the consideration of penalty is based on an inaccurate statement of Complainant's prior disciplinary record. Under the circumstances, it is appropriate to remand the matter for reconsideration of the penalty. While this Board could, under *Douglas*, refashion the penalty based on the record developed, because of the inaccuracy and unavailability of pertinent comparative information for adverse actions at the Library, remand for this single purpose is warranted.

CONCLUSION

The Library has proven by a preponderance of the evidence that Complainant engaged in the misconduct as charged. In addition, the Library has established that the removal action promotes the efficiency of the Federal service. However, the Decision Letter and the Report of the Designated Reply Recipient plainly are premised on an inaccurate assessment as to Complainant's prior disciplinary record. The Library thus has failed to establish that it appropriately considered all the relevant *Douglas* factors and imposed a penalty—removal—within the bounds of reasonableness in this case.

For this reason, the case is remanded to the Library for reconsideration of the appropriate penalty. The Library has 30 days from service of this Decision to submit its

¹⁶ While Complainant apparently did not qualify for FMLA entitlement because she worked too few hours, many of her reasons provided in support of absences were the type that would support FMLA entitlement otherwise. Such reasons should have been treated as a minimum standard of "acceptable excuse" when Complainant attempted to provide justification to her supervisor.

¹⁷ In this connection, I note that the EEOC has recognized the need to be cognizant of the disproportionate impact of caregiver responsibilities on single-parent, African-American women and also among lower-paid workers. See *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* §1.A (5/23/07).

revised Decision Letter on Complainant's Notice of Proposed Removal to the Board and to Complainant.

Further, the Library is ordered to review Complainant's record to determine if she is entitled to back pay for the AWOL charge for Memorial Day 2006 and if so, to make such reimbursement promptly.

In addition, the LOC is ordered to promptly provide Complainant with the sign-in sheets from May and June 2006 that she requested prior to the evidentiary hearing.

Finally, the Library is ordered to review the AWOL charges for Complainant's absences due to the hospitalization of her son and the court appearance that followed. If paid leave should have been granted, then the Library must take the necessary steps to achieve that result; if not, then the charges for those two days should at least be changed from Absence Without Official Leave to Leave Without Pay.

Following submission of the revised Decision Letter, a subsequent Order will issue. The standard procedures for appeal will apply at that time and will be explained in the attachment to that Order.

SO ORDERED.