THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE,	)	OEA Matter No. 1601-0068-23
	)	
	)	Date of Issuance: June 26, 2024
v.	)	
	)	Joseph E. Lim, Esq.
D.C. DEPARTMENT OF PUBLIC WORKS,	)	Senior Administrative Judge
Agency	)	

Charles Tucker Jr., Esq., Employee Representative
Daniel Thaler, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On September 12, 2023, Employee filed a Petition for Appeal with the Office of Employee Appeals ("Office" or "OEA") appealing the District of Columbia Department of Public Works' ("DPW" or "Agency") final decision terminating her from her position as a Parking Enforcement Officer ("PEO") for Inability to Carry Out Job Duties effective September 8, 2023. In response to OEA's September 13, 2023, request for an Agency Answer, Agency filed its Answer to the Petition for Appeal on October 13, 2023. This matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on October 13, 2023. A Prehearing Conference was convened on January 22, 2024. Following that conference, I issued an order requiring the submission of legal briefs on March 18, 2024. At the January 22, 2024 Prehearing Conference, Employee conceded that Agency had cause for adverse action, but argued that the penalty should be overturned. After consent motions to extend the deadline were granted by the undersigned, the parties submitted their briefs on or before March 25, 2024. Upon consideration of the briefs, I have determined that an Evidentiary Hearing is not warranted. The record is now closed.

JURISDICTION

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

ISSUE

Whether Agency had cause for adverse action, and if so, whether the penalty of termination was appropriate under the circumstances.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

The following facts are undisputed:

Agency hired Employee as a PEO in 2019. PEOs perform "enforcement field work by patrolling assigned areas" to enforce "city ordinances and regulations governing non-moving traffic violations." The physical demands of the position include "extensive walks up to ten (10) miles during a period of up to seven (7) hours." Additionally, the "majority of the work is performed outdoors in all types of weather and involves substantial risks with exposure to serious harassment and/or attack from hostile members of the general public protesting the issuance of citations."

In June 2022, Employee was admitted to Sibley Memorial Hospital with severe headaches that were making it difficult for Employee to stand or move. Neurologist Nanak Chugh, M.D. ("Dr. Chugh") diagnosed Employee with Idiopathic Intercranial Hypertension ("IIH"). At a follow-up visit with Dr. Chugh on July 19, 2022, Employee reported that her IIH symptoms were increasing with exposure to sunlight, stress, standing, and working long hours. Dr. Chugh filled out a medical questionnaire for Employee that documented her work restrictions. Dr. Chugh specified that Employee cannot stand for long hours or work in the sun and recommended that she have reduced hours of work with less time in the sun and less stress. He elaborated that Employee's condition should improve within six to eight weeks depending on her response to his prescribed treatment.

On August 4, 2022, Employee submitted the medical record to Agency as part of an Americans with Disabilities Act ("ADA") reasonable accommodation request. On August 16, 2022, Agency granted Employee's accommodation request by permitting her excused leave for ten and a half weeks through October 30, 2022. Agency advised Employee that she would be required to provide updated medical documentation at the conclusion of the excused leave period.

On October 31, 2022, Agency advised Employee that her accommodation period had ended and requested updated medical documentation for clearance for her return to work. Dr. Chugh cleared Employee to return to work with modified duties. On November 2, 2022, it was determined that Employee would return to work with accommodations, which would consist of the night shift to mitigate sun exposure and vehicle assignment to limit walking.

Despite these accommodations, on the third day of Employee's modified duties, Employee experienced an IIH episode around 10:00 p.m. on November 9, 2022.[1] Employee suffered a sudden onset of lightheadedness and blurry vision triggered by her exposure to bright

1 Employee Legal Brief Statement of Facts (March 11, 2024).

headlights while on duty. Employee called her supervisors, who picked her up and drove her back to her home because she was unable to finish her shift.

Following this medical episode, Agency requested the D.C. Department of Human Resources ("DCHR") to arrange a Fitness for Duty assessment ("FFD") of Employee. In the meantime, Agency temporarily detailed Employee to a desk job within its Office of Communications to assist with social media projects and the development of an online calendar. This temporary assignment began on January 12, 2023, and was to last 180 days. During this time, Employee was exposed to computer screen lights for the majority of her shift.

The FFD assessment was ultimately conducted on May 17, 2023, by Taisha Williams, M.D., ("Dr. Williams), of the Police and Fire Clinic. Dr. Williams conducted a thorough evaluation, including a physical examination, review of medical records, and telephone consultations with Dr. Chugh. In the final FDD report, Dr. Williams concluded that Employee was not capable of performing the essential job function of a PEO with or without accommodations. Dr. Williams explained that Employee's IIH condition prevents her from being able to walk ten miles a day and from performing her duties under the constant threat of harassment from the public.[2]

On July 3, 2023, Employee had Dr. Chugh fill out another medical questionnaire. In the questionnaire, Dr. Chugh stated that Employee could return to work but recommended "light work" and for Employee to avoid "excess time in the sun" while also taking "frequent breaks." In addition, Dr. Chugh noted that "excessive computer use" could trigger Employee's IIH. Employee submitted this questionnaire to Agency with a request for accommodations on July 5, 2023.

On July 10, 2023, Agency denied Employee's reasonable accommodation request. Agency explained that Dr. Chugh's "light work" recommendation with limited exposure to the sun was in line with the same work restrictions that already failed back in November 2022, when Employee experienced an IIH episode on the third day of her modified duties. Agency also notified Employee that it was ending her temporary assignment with the Office of Communications because Dr. Chugh had noted that Employee could not spend too much time in front of the computer.

On July 19, 2023, Agency issued an Advance Written Notice of Proposed Removal ("Proposed Removal") to Employee. The Proposed Removal notified Employee of cause for her removal under 6-B DCMR 1607.2(n), Inability to Carry Out Assigned Duties. It explained that Employee was unable to endure the physical requirements of her position with or without accommodations. The Proposed Removal specified that Employee was unable to walk up to ten miles a day and input data into her handheld device for the entirety of a shift. The Proposed Removal further noted that Agency already provided Employee the excused leave, modified duties, and temporary assignment accommodations without success.

2 Employee legal brief, Employee exhibit A (March 11, 2024).

On August 28, 2023, the Proposed Removal was upheld by an independent hearing officer, Tonya Robinson, Esq. ("Ms. Robinson"). Ms. Robinson reviewed the Proposed Removal and Employee's response thereto and found that the preponderance of the evidence supports that Employee is unable to perform the essential functions of a PEO with or without accommodation. She elaborated that the medical documentation reflects that Employee "suffers from an unpredictable medical condition that when triggered causes debilitating headaches and blurred vision." On September 5, 2023, Agency issued a Final Decision on Proposed Removal ("Final Decision") removing Employee pursuant to the inability to carry out assigned duties charge.

On September 12, 2023, Employee appealed the Final Decision to OEA. At the initial conference on January 22, 2024, Employee admitted to Agency's cause for adverse action but argued that her penalty is incorrect.

Whether Employee's actions constituted cause for adverse action.

In its July 19, 2023, Advance Notice of Adverse Action and the September 5, 2023, Final Written Notice of Proposed Removal, Agency cited Chapter 16, Corrective and Adverse Actions; Enforced Leave; and Grievances, section 1623, as authority to propose removing Employee. It also cited Chapter 16 Sections 1607, 1614, and 1618 of the District Personnel Manual regulations indicating "Inability to Carry Out Assigned Duties" as cause for the proposed adverse action. In an adverse action, this Office's Rules and Regulations provide that the agency must prove its case by a preponderance of the evidence. "Preponderance" is defined as "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."[3]

Inability to Carry Out Assigned Duties.

The Inability to Carry Out Assigned Duties is defined as "[a]ny circumstance that prevents an employee from performing the essential functions of his or her position, and for which no reasonable accommodation has been requested or can be made, unless eligible for leave protected under the D.C. Family Medical Leave Act."[4] The DCHRA requires employers to engage in an "interactive process" to identify potential accommodations that could overcome a disabled employee's limitations. *See Hunt v. District of Columbia*, 66 A.3d 987, 992 (D.C. 2013). This interactive process is mandated because an employer that does not engage in an interactive process "risks not discovering a means by which an employee's disability could have been accommodated." *Id*. This interactive process is codified in 6-B DCMR § 2006.2 which states that:

> *2006.2 Whenever a medical evaluation establishes that an employee is permanently incapable of performing one (1) or more of his or her essential job functions, the personnel authority shall:*

3 OEA Rule 631.1, 68 DCR 012473 (2021).
4 6-B DCMR § 1607 (amended May 12, 2017) Table of Illustrative Actions.

(a) *Collaborate with the employee and the employing agency ADA Coordinators to determine whether a reasonable accommodation can be made that will enable the employee to perform the essential job functions*, involving the D.C. Office of Disability Rights for technical assistance and guidance when necessary;

(b) If no such reasonable accommodation can be made, work with the employing agency to non-competitively reassign the employee to another position for which the employee qualifies and can perform the essential job functions with or without a reasonable accommodation;

(c) If the employee cannot be reasonably accommodated or reassigned to a new position, the personnel authority shall advise the employee of applicable disability and retirement programs, and the program eligibility requirements; and

(d) Separate the employee, either through a retirement program or Chapter 16.

As far as what the interactive process entails, the D.C. Circuit Court has held that in order to meet its obligations, an employer needs information about the nature of the individual's disability and the desired accommodation.[5]

In this matter, when Employee first presented Agency with information regarding her medical conditions, the facts indicate that Agency attempted to accommodate Employee by temporarily relieving Employee of the more physically demanding aspects of her job and assigning her to a desk job within its Office of Communications for 180 days. In this assignment, Employee was exposed to computer screen lights for the majority of her shift. Additionally, when Employee submitted the letter from Dr. Chugh which stated that Employee return to work with recommended accommodations, Agency placed Employee on modified duties to further accommodate her restrictions. In line with her doctor's recommendations, Employee worked the night shift to limit her sun exposure and provided a vehicle to limit walking. Nonetheless, despite these accommodations, it is undisputed that Employee suffered another IIH episode while on the job. Dr. Chugh's prescription against Employee's exposure to computer screen lights precluded Employee from resuming her prior desk assignment.

Agency also referred Employee for an FFD assessment to evaluate Employee's fitness for duty and "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations"[6] on a permanent basis. By the time that Agency determined it could not reasonably accommodate Employee, it possessed adequate information—including Employee's desired accommodations communicated through her doctor—to make an informed decision.

As noted above, the FFD medical exam found that Employee could not perform her job even

5 *See Ward v. McDonald*, 762 F.3d 24, 31 (D.C. Cir. 2014).
6 *Id. Ward* at 32.

with her requested medical accommodations. At the Prehearing Conference, Employee also admitted that she could not perform her job as she did previously. The OEA Board has previously held that an employee's admission is sufficient to meet Agency's burden of proof.[7]

The undisputed facts in this matter indicate that Employee is unable to perform the major duties of a Parking Enforcement Officer, DS 1802-06, as enumerated in its position description.[8] Accordingly, I conclude that Agency has met its burden of establishing cause for taking adverse action.

Whether the penalty of a termination was appropriate under the circumstances

Agency argues that removal is the correct discipline in this matter because it is the *only* appropriate discipline for an inability to carry out assigned duties. The DCMR's Table of Illustrative Actions lists removal as the sole penalty for an inability to carry out assigned duties. 6-B DCMR § 1607.2(n). Agency states that any penalty less than removal, such as a suspension, would defeat the purpose of the discipline as it would result in Employee eventually returning to the position for which she is unfit.

Employee counters that Agency's action of terminating her employment was improper. She argues that her removal because of inability to carry out assigned duties is applicable only if the employee does not request reasonable accommodation or accommodation cannot be provided. She states that even after she asked for a reasonable accommodation, Agency did not provide her with reasonable accommodation to help her carry out assigned duties, nor did Agency articulate why reasonable accommodation cannot be provided. Moreover, Employee asserts that the FFD assessment was not conducted properly as required under the District Personnel Manual as Agency did not contact her supervisor before requesting the D.C. Department of Human Resource to arrange for the FFD evaluation.

Based on the undisputed facts and the documents in the record, I find Employee's argument that her FFD evaluation was not properly conducted to be without merit. The FFD evaluation complied with 6-B DCMR § 2005, which provides: "A personnel authority may require an employee to undergo a medical evaluation when there is a reasonable concern as to the employee's continuing ability to physically or mentally carry out the essential functions of his or her position or when an employee's work-related conduct or performance raises concerns relating to the health or safety of the employee or others."[9] If this criteria is met, the agency must provide the employee with a written order to attend a scheduled FFD evaluation.[10] The medical provider conducting the FFD evaluation must consider the employee's position description and any medical records provided by the employee's personal doctor.[11]

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7 *See*, *Employee v. Agency*, OEA Matter No 1601-0047-84, 34 D.C. Reg. 804, 806 (1987).
8 Employee Petition for Appeal, unlabeled attachment (September 12, 2023).
9 Agency's reply, Attachment 1 (March 25, 2024).
10 6-B DCMR § 2005.2.
11 6-B DCMR § 2005.7-8.

In the instant matter, a FFD evaluation was warranted because there was reasonable concern regarding Employee's "continuing ability to . . . carry out the essential functions . . . of her position." Agency's reasonable concern stemmed from Employee experiencing an on-duty medical emergency on November 9, 2022. Employee suffered this medical emergency despite being accommodated with a modified nighttime shift with a vehicle assignment and having previously been provided ten weeks of excused leave. Employee's medical condition also raised "concerns relating to the health or safety of the employee or others." Employee's position of PEO relates directly to the safety of the public because PEO duties include the enforcement of city ordinances and regulations to reduce hazards to drivers and pedestrians. Additionally, Employee's heightened risk of suffering a medical emergency while on-duty threatened her own health and safety. Agency presented its concerns regarding Employee's fitness to the DCHR and, in an April 4, 2023, Memorandum authored by Interim Associate Director of Policy and Compliance Mr. Farhangi, DCHR affirmed that Agency's concern was reasonable and warranted a FFD evaluation under 6-B DCMR § 2005.1.[12]

After it was determined that a FFD evaluation was warranted, Agency provided Employee written notice of her FFD evaluation.[13] As part of the FFD evaluation, the assigned medical provider, Dr. Williams of the Police and Fire Clinic, reviewed Employee's position description and medical records from Employee's personal doctor, Dr. Chugh.[14] Dr. Williams also spoke with Dr. Chugh twice by telephone regarding Employee's condition and ultimately determined that Employee was not fit for the essential duties of a PEO even with accommodation.[15]

Employee states that Agency did not contact Employee's supervisor before requesting the FFD evaluation and references a passage from DCHR Issuance I- 2021-1316 that instructs supervisors to work with the human resources department to prepare relevant documentation for a FFD request.[17] Employee fails to specify what documentation she claims Agency did not retrieve from her supervisors that would be relevant to the FFD request. I find that Agency collected all the relevant documentation, including incident reports from her supervisors about the November 9, 2022, medical emergency and the documents required by 6-B DCMR § 2005 (i.e., Employee's position description and medical records).[18]

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12 Agency's Answer to Petition for Appeal ("Ans.") at Tab 13 (October 13, 2023).
13 *Id*. at tab 14 and 15.
14 *Id*. at Tab 16.
15 *Id*.
16 Attachment 2.

17 The DCHR Issuance I-2021-13 passage that Employee references states in full:

> Prior to submitting an FFD request to DCHR, an employee's supervisor or manager must work with the agency's HR advisor to prepare detailed documentation regarding the employee's deteriorating behavior or performance. This documentation may include:
> a. Performance evaluations and improvement plans;
> b. Notice(s) of counseling or corrective action (if any); and
> c. Any other relevant employee records or documents.

18 Ans. at Tabs 8, 9, & 16.

Next, Employee asserts that Dr. Williams was unqualified to conduct the FFD evaluation because she is not a neurologist. However, 6-B DCMR 2005.3(b) provides that "the personnel authority may direct that the employee: Be examined by a physician or practitioner ***designated by the personnel authority***" (emphasis added). Using its reasonable discretion, DCHR assigned Dr. Williams, who is a qualified doctor with an accredited medical degree. Dr. Williams conducted a thorough physical examination and reviewed Employee's medical records and job description. Employee's argument also ignores that Dr. Williams consulted Employee's treating neurologist, Dr. Chugh, twice by telephone to discuss Employee's condition. As documented in Dr. Williams' report, Dr. Chugh told Dr. Williams that "in spite of medication, [Employee] is still at risk of developing symptoms that are triggered by sunlight or other bright light." Dr. Chugh "recommended [Employee] consider a different position."[19]

Employee asserts that Agency failed to provide accommodation after she requested it. The undisputed facts belie Employee's contention. Prior to requesting the FFD evaluation in January 2023, Agency accommodated Employee with ten weeks of excused leave from August 16, 2022 through October 30, 2022 and modified duties in November 2022.[20] It was *after* these accommodations failed and Employee experienced the November 9, 2022 on-duty medical emergency that Agency ultimately requested the FFD evaluation out of reasonable concern.

Employee also argues that she should have been accommodated with part-time work. However, in the FFD evaluation, Dr. Williams unequivocally concluded that Employee is not capable of performing the essential job functions of a PEO even with an accommodation.[21] Dr. Williams made this determination with input from Dr. Chugh, who reported that Employee was still at risk of suffering IIH symptoms while on-duty regardless of whether she works part time or full time.[22] Additionally, Employee was already provided two accommodations in the form of excused leave and modified duties yet still failed to successfully complete the duties of a PEO.[23] Therefore, there was no available accommodation, part-time work or otherwise, for Employee's IIH condition.

Moreover, Employee fails to explain how part-time work would accommodate her debilitating IIH condition. Employee's IIH condition is triggered suddenly by bright lights, including sunlight and headlights.[24] Therefore, regardless of the length of Employee's shift, Employee would still be exposed to bright lights while performing PEO duties and would therefore be at risk of having another medical emergency on-duty. In fact, Employee's medical emergency on November 9, 2022, occurred just two hours into her shift that day.[25] Employee's symptoms can arise suddenly even when she is only at work for a short period of time.

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19 Ans. at Tab 16.
20 Ans. at Tabs 2 & 6.
21 Ans. at Tab 16.
22 *Id*.
23 Ans. at Tabs 2 & 6.
24 Ans. at Tabs 1, 8, & 16.
25 Ans. at Tab 8.

The last issue to be resolved is the question of whether the agency's penalty was appropriate. In *Employee v. Agency*,[26] this Office held that it would leave a penalty undisturbed when it is satisfied on the basis of the charge(s) sustained, that the penalty is within the range allowed by law, regulation, or guideline, and is not clearly an error of judgment.

When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."[27] When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."[28]

As stated above, the DPM states that the Agency's only option in dealing with an employee it deems unable to perform his/her duties is removal.[29] The facts of the instant matter support that removal is the only appropriate penalty. Employee was already accommodated with her treating doctor's recommended work accommodations as well as the ten-and-a-half weeks of excused leave that failed to remedy her medical fitness.

Consequently, I find that Agency properly exercised its managerial discretion and that its chosen penalty of termination was reasonable and it is not clearly an error of judgment. Accordingly, I conclude that Agency's action should be upheld.

ORDER

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

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FOR THE OFFICE:

s/s *Joseph Lim*
JOSEPH E. LIM, ESQ.
Senior Administrative Judge

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26 OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review,* 32 D.C. Reg. 2915, 2916 (1985), *Employee v. ABRA*, OEA Matter No. 1601-0006-20 (August 26, 2021).
27 *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).
28 *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Holland v. D.C. Department of Corrections,* OEA Matter No. 1601-0062-08 (April 25, 2011); *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (February 1, 1996); and *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (September 21, 1995).
29 D.C. Personnel Regulations, Chapter 16, §1607.2 (n).