THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1],	)	
Employee	)	OEA Matter No. 1601-0053-22
	)	
v.	)	Date of Issuance: May 2, 2023
	)	
D.C. DEPARTMENT OF EMPLOYMENT SERVICES,	)	
	)	
Agency	)	MICHELLE R. HARRIS, ESQ.
	)	Senior Administrative Judge
	)	

Morris E. Fischer, Esq., Employee Representative
Tonya Robinson, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On May 13, 2022, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Employment Services' ("Agency" or "DOES") decision to terminate him from his position as a Tax Examiner.[2] The effective date of the termination was April 14, 2022. OEA issued a letter on May 16, 2022, requiring Agency to submit an Answer on or before June 15, 2022. Agency filed its Answer on June 22, 2022. Following an unsuccessful attempt at mediation, this matter was assigned to the undersigned Senior Administrative Judge ("AJ") on August 2, 2022. On August 3, 2022, I issued an Order convening a Prehearing Conference in this matter for September 15, 2022. Both parties appeared for the Prehearing Conferenced as required. A Post Prehearing Conference Order was issued on September 16, 2022, that required the parties to complete all outstanding discovery as discussed during the Prehearing Conference. Discovery was to be completed by October 28, 2022, and amended Prehearing Statements were due on or before November 9, 2022. On October 31, 2022, Employee, by and through his counsel, filed a Motion to Compel Discovery citing that Agency had not been responsive. On November 1, 2022, I issued an Order requiring Agency submit a response on or before November 7, 2022. On November 8, 2022, Agency filed a response and noted that discovery had been provided to Employee. Both parties submitted their Amended Prehearing Statements as required.

During the Status Conference on November 16, 2022, the parties noted their positions in this matter. Accordingly, that same day, I issued an Order requiring the parties to submit briefs in this matter. Agency's brief was due on or before December 19, 2022. Employee's brief was due on or before January 19, 2023, and Agency had the option to submit a sur reply brief on or before January

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] Employee was charged with "Unauthorized absence of five (5) workdays or more under DPM §1605.4(f)(2).

30, 2023. Agency filed its brief on December 20, 2022, and Employee filed his brief on January 19, 2023. Agency did not file a sur-reply brief. Upon consideration of the briefs and documents submitted by the parties, I determined that an Evidentiary Hearing was not warranted in this matter. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. If so, whether the penalty of termination was appropriate under the circumstances and administered in accordance with all applicable laws, rules and regulations.

BURDEN OF PROOF

OEA Rule § 631.1, 6-B District of Columbia Municipal Regulations ("DCMR") Ch. 600, et seq (December 27, 2021) states:

> The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > 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.[3]

OEA Rule § 631.2 *id.* states:

> For appeals filed under § 604.1, the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Employee was employed by Agency as a Tax Examiner with the DOES Office of Paid Family Leave. In a Final Written Notice dated April 14, 2022, Agency terminated Employee from service pursuant to DPM § 1605.4 (f)(2) - *"Unauthorized absence of five (5) workdays or more."* The effective date of the termination was April 14, 2022.

Agency's Position

Agency asserts that it had cause to terminate Employee from service and that it did so in accordance with all applicable laws, rules and regulations. Agency asserts that Employee was advised

[3] OEA Rule § 699.1.

to return to work on December 3, 2021 via email on December 1, 2021.[4] Agency avers that Employee failed to report to work on "December 3, December 6, December 7, December 8, December 9, December 10 and December 13, 2021 and January 3 through 7, 2022, January 10 through 14, 2022, and January 17 through January 21, 2022."[5] Agency assert that Employee failed to request leave and also failed to request a reasonable accommodation and provide supporting medical documentation that covered these absences.[6]

Agency cites that during the time frame involved in this matter, the Mayor issued Mayor's Order 0202-045 and Mayor's Order 2020-046, which declared a public health emergency due to COVID-19.[7] Further, Agency maintains that on May 29, 2020, the Mayor "announced Phase One of the reopening of the District, in Mayor's Order 2020-067" and that on "June 19, 2020, the Mayor announced Phase Two of the reopening of the District, in Mayor's Order 2020-075."[8] Agency asserts that the Mayor's Order noted that "*The Mayor has ordered that employees telework to the greatest extent possible during the COVID-19 emergency*" and that this order remained in effect based on issuances and their effective dates.[9] Agency avers that pursuance to Issuance 1-2021-23, and Issuance 2021-27, that it required "*As of July 12, 2021, all employees must report to their regularly assigned duty stations, consistent with any approved routine telework agreements*." Agency asserts that the effective dates of these were July 18, 2021, to July 30, 2021, and July 30, 2021, to August 25, 2021, respectively. Agency also avers that these provisions provided that "*though emergency situational telework is ended, agencies may offer their employees a host of flexible scheduling options including routine telework. With routine telework, agencies may approve employees to telework up to two days per week."* Agency also avers that these issuances required employees to complete an application to telework for the agency head to approve.

Agency notes that on "June 14, 2021, Employee submitted medical documentation that stated in pertinent part, *"[Employee] is advised to work from home for [the] next 2 months for the following reasons cited by him in email communication: there are still unpredictable coronavirus variants, people are not required to be vaccinated at work, social distancing is not required at work, co-work[ers] that travel are not required to quarantine for any time, work area has poor ventilation and windows cannot be opened. Complaints were made about ventilation prior to the pandemic. His workstation is located in a high traffic area at the entrance and exit into and out of my department."*[10] Agency maintains that on June 16, 2021, "DOES HR emailed Employee, acknowledged the supporting medical documentation and provided additional forms that needed to be completed by Employee and the medical provider." Agency explains that on July 7, 2021, "DOES HR communicated with Employee's supervisor to determine whether Employee's position was eligible for full time telework." Employee's supervisor responded on July 9, 2021, and confirmed that Employee's position was eligible for full time telework.[11] Agency further notes, that on July 28, 2021, "Employee signed the

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[4] Agency's Prehearing Statement (September 14, 2022).
[5] *Id*.
[6] *Id*.
[7] Agency's Brief in Support of Adverse Action pgs. 1-2 (December 20, 2022).
[8] *Id*.
[9] Agency asserts that the following issuances and dates were applicable under these Orders:
Issuance 1-2020-6 – March 24, 2020, to March 29, 2020;
Issuance 1-2020-8 – March 29, 2020, to June 2, 2020;
Issuance 1-2020-13 – June 2, 2020, to September 1, 2020;
Issuance 1-2020-19 – September 2, 2020, to October 6, 2020;
Issuance 1-2020-21 – October 6, 2020, to December 21, 2020;
Issuance 1-2020-30 – December 22, 2020, to June 1, 2021.
[10] *Id*.
[11] *Id.* at Page 3.

Application for Reasonable Accommodation." Agency maintains that on July 29, 2021, "DOES approved the Application for full time telework from July 9, 2021 to August 3, in accordance with the support medical documentation which prescribed full time telework for 2 months from June 14, 2021."[12] Agency also asserts that after this approval, Employee's annual and sick leave were restored from July 19, 2021 to August 13, 2021. Agency avers that Employee was notified of the restoration of his annual and sick leave. Agency asserts that it advised Employee that his medical documentation dated June 14, 2021, expired on August 14, 2021, because "based on plain language, prescribing the need for full time telework for the next 2 months." Further, Agency contends that it also notified Employee that many of his stated reasons for requesting telework had been addressed, and that this was done "in an effort to get Employee to return to in person work, since his supporting medical documentation expired on August 14, 2021." Additionally, Agency maintains that it "would have moved Employee's workstation to a less busy or more secluded portion of the office to address his stated concern about the location of his workstation in the medical documentation dated June 14, 2021, had he provided medical documentation to support the need for the move, after August 14, 2021."[13]

Agency asserts that it advised Employee that he had to return to work on December 3, 2021, via email that was sent on December 1, 2021. Agency also asserts that in interim time period before its December 1, 2021 email that "Employee was previously advised to return to work in October 2021 and he failed to return, provide updated medication documentation to support his continued absence or need for a reasonable accommodation. DOES took no action on the Employee's unexcused absences from October 2021 to December 1, 2021, as it continued to work with Employee to submit the required medical documentation to support his request for full time telework." Agency avers that Employee failed to appear on December 3 as required, and also failed to appear for the subsequent dates through January 21, 2022. Agency maintains that Employee failed to provide documentation as required, and as a result it had the authority to take adverse action. Agency asserts that the emergency situation for full telework ended on July 12, 2021, and that Employee did not have a telework agreement at that time. Agency notes that Employe provided medication documentation on October 6, 2021, which noted that Employee was seen at a clinic and that Employee should be allowed to telework for two months due to concerns about unsafe conditions.[14] Agency avers that it requested additional information, but Employee failed to provide it. Agency also asserts that it "continued to attempt to engage in the iterative [sic][15] process to determine what work limitations Employee was experiencing and how full time telework would address those limitations."[16] Agency contends that without further documentation from Employee, it could not allow him to continue to telework and that his absences were unexcused.

Agency avers that it followed all applicable guidance from the Equal Employment Commission's guidance on reasonable accommodation and undue hardship under the Americans with Disabilities Act ("ADA"). Agency asserts that "when an individual's disability or need for reasonable accommodation is not obvious and the individual fails to provide reasonable documentation requested by the employer, the employer will not be held liable for failure to provide the requested accommodation."[17] Agency argues that Employee's disability and need for reasonable accommodation were not obvious. Further, Agency avers that the notation of concerns of "unsafe work conditions" were not defined or identified, such that there was an explanation of how this would limit Employee's

[12] *Id* at Page 4.
[13] *Id* at Page 5.
[14] *Id*. at Page 6.
[15] The undersigned believes this to be a typo and that Agency meant to reference the "interactive process" as noted in the ADA.
[16] *Id.* at Page 7.
[17] *Id.* at Page 7. Citing to Questions 5, 6, and 9 of the Enforcement Guidance on Reasonable Accommodation and Hardship under the ADA.

ability to perform the essential functions of the job. Agency maintains that because it was not able to determine how the requested accommodations would meet Employee's needs, it could not address the accommodation. As such, Agency argues that it should not be "penalized for Employee's failure to properly engage in the interactive process."

Agency also avers that the Hearing Officer issued a written report and recommendation sustaining its action and finding that it had provided sufficient cause to terminate Employee from service for unauthorized absences. As a result, Agency maintains that it followed applicable laws, rules and regulations in its administration of this action and that the termination should be upheld.

Employee's Position

Employee asserts that Agency's application of the reasonable accommodation procedures did not comply with applicable laws, rules or regulations and that the action of separating him from service was not taken for cause. Employee avers that he was "disabled and had repeatedly notified Agency of his disability."[18] Employee also argues that Agency, by its own admittance, failed to properly process his request for a reasonable accommodation, citing it as an "administrative error." Employee avers that during the COVID-19 State of Emergency, he successfully worked and fulfilled all the functions of his job, while being in a full remote status. Employee asserts that once he received notification regarding a return to the office, that he notified Agency of his anxiety attacks due to his health. Employee also avers that on June 14, 2021, he filed a reasonable accommodation request, which included a medical note from his doctor disclosing [his] hypertension and inability to report to the office."[19] Employee's request was to continue to work remotely, and his doctor's note cited to that request for at least two (2) months. Following this correspondence, Employee cites to several instances of communication with Agency over the next several months. Employee notes that he received an email response on July 30, 2021, wherein, Agency thanked him for his OHR request and cited that they were reviewing the documentation. Employee also asserts that he corresponded by email and telephone with Agency regarding subsequent anxiety attacks and the request for accommodation.

Employee also asserts that during this timeframe, he repeatedly asked Agency the status of his reasonable accommodation request. Employe also avers that he submitted another request for reasonable accommodation on October 13, 2021, which included a note from his doctor. Employee asserts that it was not until November 18, 2021, that he received an email from ShaQuana Carter noting that his reasonable accommodation (telework) request was approved from July to August 2021. In that time, Employee avers that he exhausted both his annual and sick leave. Employee avers that he responded again, to ascertain the status of his request. Employee maintains that Agency responded on November 29, 2021, citing that while the previous request from June (which covered July and August 2021), was approved, that Agency did not understand why he still needed a request for accommodation and how telework would approve the functions of his position. [20] Further, Employee asserts that on December 1, 2021, Agency emailed him and told him he had to return to work on December 3, 2021. Employee avers that he contacted Agency on December 1, 2021, asking for the original approval of his previous accommodation.

[18] Employee's Response in Opposition to Agency's Motion for Summary Judgment and Employee's Cross-Motion for Summary Judgement (hereinafter referred to as "Employee's Response") at Page 2. (January 19, 2023).
[19] *Id*. at Page 3.
[20] *Id.* at Page 5.

Employee avers that "without ever receiving a decision on the original accommodation request [Employee] had no way of knowing what was deficient about his first reasonable accommodation request, because when the [Agency] made this document update request, it had not even processed the employee's original accommodation request."[21]

Employee cites that it was not until December 16, 2021, that he received correspondence wherein, Agency noted that "due to an administrative error, that his application was not processed in timely manner and that was why he did not receive a letter."[22] Further, Employee asserts that Agency was aware of how the accommodation would help him with the essential functions of his job, because they had already granted it. Employee argues that Agency failed to provide evidence regarding notification sent to him during the course of this matter. Employee contends that Agency represents that on July 29, 2021, it notified him that his accommodation was approved, but that this document was never produced in discovery. Employee asserts that he received an email the following day, on July 30, 2021, wherein, Agency cited that it was "looking into his request."[23] Employee also avers that he never signed the July 29, 2021, letter and that it contradicted other communications from Agency.

Employee maintains that he suffered from several conditions including agoraphobia, anxiety attacks, and hypertension, all of which prevented him from physically working outside of his home. Employee argues that Agency's reliance on Mayoral Orders during the pandemic, conflate with his reasonable accommodation request, [24] and violated the Rehabilitation Act and American with Disabilities Act in its actions. Employee avers that he notified the Agency of his requests and that pursuant to those laws, Agency should have engaged in an interactive process to determine a reasonable accommodation. Employee also asserts that a request for a reasonable accommodation need not be formal in nature, nor does it require "precise notice" of disability or "medical evidence" for a reasonable accommodation request. Employee maintains that all that was required was that he notify Agency, and he did so in this matter. Further, Employee avers that he provided medical documentation in both July and October 2021. Employee also argues that Agency has "admitted that [Employee] was able to perform his job function remotely." Employee notes that Agency's position in this matter is "undermined by its change in position from granting the initial request for remote work (albeit months late) without requiring precise notice."[25] As a result, Employee avers that Agency did not act in accordance with all applicable laws, rules and regulations and that it wrongfully terminated him from service.

ANALYSIS[26]

Whether Agency had cause for Adverse Action

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

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[21] *Id*. at Page 6.
[22] *Id*.
[23] *Id*. at Page 7. Employee also references Agency's Exhibit E.
[24] *Id*. at Page 8.
[25] *Id*. at Page 13.
[26] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See. Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), *an adverse action for cause that results in removal*, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. *(Emphasis added).*

Pursuant to OEA Rule § 631.2, 6-B District of Columbia Municipal Regulations ("DCMR") Ch. 600, et seq (December 27, 2021)**,** Agency has the burden of proof by a preponderance of the evidence, that the proposed disciplinary action was taken for cause. In a Final Written Notice dated April 14, 2022, Agency terminated Employee from service pursuant to DPM § 1605.4 (f)(2) - *"Unauthorized absence of five (5) workdays or more."* The effective date of the termination was April 14, 2022. Agency avers that it has cause to terminate Employee from service for unauthorized absences of five (5) days or more, following Employee's failure to return to work in what Agency notes as "Employee's failure to properly engage in an interactive process" for a reasonable accommodation. Employee argues that Agency failed to adhere to regulations in its administration of his reasonable accommodation request, and as a result separated him from service without cause.

Reasonable Accommodation Request

Agency argues that it followed the appropriate regulations pursuant to the Equal Employment Commission's Guidance on Reasonable Accommodation and Undue Hardship under the ADA.[27] Agency asserts that Employee failed to provide it with medical documentation for it to evaluate his reasonable accommodation after a previously approved accommodation time period. Further, Agency cites that it followed the District Government rules regarding the COVID-19 State of Emergency and Mayoral Orders regarding Return-to-Work Guidelines that were applicable at that time. Agency maintains that it worked to engage in an interactive process with Employee, but that Employee failed to reciprocate those efforts. As a result, Agency asserts that Employee's absences were unauthorized and that it had cause to terminate Employee from service. Employee avers that Agency failed to follow appropriate procedures regarding his disability and request for reasonable accommodation- namely to work remotely. Employee maintains that he provided all information and attempted on several occasions, over several months, to ensure his requests were being processed. Employee asserts that Agency failed to notify him of the approval of his original reasonable accommodation request for several months, and only later restored the leave (sick and annual) that he had forfeited in the time for which he was waiting for Agency's decision.

The District of Columbia Office of Disability Rights' Manual for Accommodating Employees with Disabilities ("ODR Manual")[28], includes the procedures and guidelines regarding reasonable accommodation requests for District employees. The ODR Manual includes the relevant ADA guidelines as applied to District employees. Accordingly, the undersigned's review of the instant matter relies upon this manual/guidance. The ODR Manual cites that a reasonable accommodation "can be described as any change or adjustment to the job, work environment or the manner or

[27] Agency's Brief at Page 7 (December 20, 2022).
[28] *See*. Office of Disability Rights – Manual - https://odr.dc.gov/book/manual-accommodating-employees-disabilities.

circumstances in which the work is customarily done, which permits a qualified applicant or employee with a disability to perform the essential functions of a job or to enjoy the equal benefits and privileges of employment as are available to a similarly situation employee without a disability."[29]

The ODR Manual cites that the purpose of a reasonable accommodation is to "provide employment opportunities with persons with disabilities who otherwise would not be able to perform the essential functions of their job, and to allow employees with disabilities to perform or be more productive." The ODR Manual notes that reasonable accommodations include, but are not limited to, items such as change of work schedules or place of work, telecommuting, and others. Further the ODR Manual specifically cites that "***Reasonable accommodations must be provided in a timely manner***." (Emphasis added). Further, this process "of considering requests for accommodations and providing reasonable accommodations must always include an "interactive process" of mutual communication and consultation between the qualified individual with a disability and the District agency providing the accommodation." In assessing reasonable accommodations, agencies are meant to consider several factors. Agency may deny an accommodation if there is undue hardship. The ODR Manual also provides that "the agency may decline to provide an accommodation because accommodation is unduly: expensive, extensive, substantial, disruptive or would fundamentally alter the nature or operations of the agency." To request an accommodation, the ODR Manual provides that "employees…may request reasonable accommodations of the employer. Further, "this request does not have to be in writing, be formal or use any special language."[30]

The ODR Manual references the ADA as it relates to the requirements for the "interactive process." "The ADA requires that the employer engage in an interactive dialogue with the individual with a disability concerning reasonable accommodations. It is best to take a methodical approach in addressing requests for reasonable accommodation from employees."[31] Of note, this process cites to

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[29] *Id*. at Pages 4 -5. Further, the ODR Manual cites that accommodations occur in three areas, the application process, in the performance of the essential functions of a job, or in the receipt of all benefits of employment. In application in this instant matter, the provision would entail the performance of the essential functions of a job. "Reasonable accommodation must be provided to enable a qualified person with a disability to perform the essential functions of the job. This may include changes or adjustments to the work environment, to the manner or circumstances in which the position is customarily performed, or to employment policies." "Essential functions" are those that are fundamental and central to the purpose of the position."

[30] *Id*. at Page 6.

[31] *Id* at Page 7. Further, the ODR Manual provides the following for the interactive process:

> "Immediately upon receiving the reasonable accommodation request, the agency ADA Coordinator/EEO Counselor should schedule a meeting with the employee as soon as possible. The employee's collective bargaining agent or other person(s) of his/her choosing may assist the employee during this meeting. The agency's ADA Coordinator should conduct an informal, interactive discussion with the employee. The discussion should include the following steps:
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> 1) A review of the agency's detailed, written job description/vacancy announcement delineating the "essential functions" of the position from the "marginal functions."
>
> 2) A determination of how the employee's impairment/disability limits his/her ability to perform the essential functions of his/her job in order to identify the employee as a qualified individual with a disability.
>
> 3) An identification of potential accommodations and assessment of the effectiveness of such accommodations on the employee's job performance.
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> 4) Identification of the type of accommodation needed. The Job Accommodation Network can be contacted for assistance in making this assessment at 1-800-232-9675 (Voice/TTY) or http://janweb.icdi.wvu.edu/.
>
> 5) Consideration of the preference of the employee; however, the agency has the right to select among the alternatives available, as long as they are effective.

ensuring that there is open dialogue with the employee and discussing "timelines for obtaining the accommodation and follow up with employee on unexpected delays." Additionally, the ODR Manual cites that "if the disability is not obvious, and there is no other medical documentation already on the record for employee, the agency can require employee to submit documentation from a physician or other medical professional concerning the existence and extent of the disability." Following this interactive process, the ODR Manual cites that "after the initial meeting and review of medical documentation (if submitted by the employee's healthcare professional), the agency will make a determination whether the employee is a qualified individual with a disability and develop a Reasonable Accommodation Plan for the employee." That plan should note the types of accommodation and determine whether any accommodation causes an undue hardship.

In consideration of the prescribed guidelines, I find that Agency failed to appropriately conduct the reasonable accommodation process for Employee. I further find that Agency failed to engage in a genuine interactive process with Employee. Additionally, I find that Agency's "administrative error" over the course of months, reflects a lack of diligence within the interactive process and is also not in line with the ODR Manual's guidelines regarding the timeliness of processing a request for reasonable accommodation. The instant matter involves a timeframe in which the District Government operations were guided by different Mayoral Orders as it addressed the COVID-19 Pandemic. Here, Agency asserts that once it received notice in Mayor's Order 2020-075 and pursuant to DPM Issuance 2021-23, that it required all employees to return to work by July 12, 2021, including Employee. Employee, upon receipt of this notice, requested a reasonable accommodation and provided medical documentation to support this request. The record reflects that Employee communicated this request in and around June 16, 2021. That request was responded to via email by ShaQuana Carter, Agency's HR specialist. That email cited that it was a Review of Reasonable Accommodation letter was attached and noted what was needed to move forward with the request.[32] Additionally, the record reflects a letter from Employee's doctor dated June 14, 2021, highlighting Employee's conditions and noting the request for telework.[33] Of note, that letter highlighted that Employee had a history of hypertension, making him at risk for Covid infection. It also noted issues with unpredictable Covid variants, as well as workspace and ventilation concerns. In an email communication dated July 7, 2021, ShaQuana Carter contacted Janira Ramirez, Employee's supervisor, and noted the following:

> "This is confidential communication, please do not share the information contained in this email with the employee at issue or anyone else outside of Human Resources. ***[Employee] has submitted a medical request for reasonable accommodation*** to remain in a telework capacity full-time until August 14, 2021. Is the employee's position telework eligible? ***Please advise if this accommodation would create an undue hardship on the program? If so, please share how***. Please respond by the close of business on July 9, 2021. As information, we are in the beginning phase of this interactive process and ***no decisions have been made at this time***." (Emphasis added).

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6) Selection and implementation of the effective reasonable accommodation by the agency as expeditiously as possible. **Keep the dialogue open with the employee and discuss timelines for obtaining the accommodation and follow up with the employee on unexpected delays**. (Emphasis added).
The agency may find it difficult to accommodate the disability because it is not well understood or because neither the employee nor the ADA Coordinator know what equipment, modification or accommodation will enable the employee to perform the essential functions of the job. The agency ADA Coordinator should consult the Office of Disability Rights (ODR) for additional reference material and service organizations that may help in identifying appropriate accommodations.

[32] *See*. Agency's Brief at Exhibit B. (December 20, 2022).
[33] *See*. Agency's Brief at Exhibit A. (December 20, 2022).

In an email response dated July 9, 2021, Janira Ramirez responded and indicated the following:

> "Good Morning, Thank you for your e-mail ShaQuana. ***Yes, [Employee]'s position is telework eligible. This reasonable accommodation should not create an undue hardship on the PFL program.*** Please let me know if additional information is needed." (Emphasis added.)

Following this series of communications, there is an email from Employee to Ms. Carter on July 28, 2021, citing that he signed the ADA form and requested that she confirm receipt.[34] Employee sent an email to DOES HR on July 28, 2021 (subject matter "Absence Request"), asking about the processing of his telework request and noted in that communication that he no longer had leave available and that his supervisor advised he had to request leave without pay. A response from DOES HR dated July 30, 2021, thanked Employee for his email and only noted that it was "moving forward with reviewing your request."[35] Following this, the record is void of evidence of when Agency communicated the results of the request to Employee, until much later in 2021. The record reflects numerous emails from Employee requesting updates of the status of his request. This includes communications in July, August, September, October, and November 2021. Further, the record reflects that there were also telephone communications with Employee during this time frame. Further, Agency sent correspondence again to Employee on December 1, 2021, noting that he was required to return to work on December 3, 2021, or face corrective or adverse action. However, it was not until an email communication dated December 16, 2021, that Agency's Human Resource Officer, Tracey Langley, responded to Employee and cited the following regarding his initial (July 2021) request:

> "I believe there is a lapse in communication. **Due to an administrative error, your application wasn't processed in a timely manner and you never received an approval letter for your initial request**. That being said, in an effort to recompense you for the error, your leave was restored. I apologize for any confusion and inconvenience. We stand ready to provide any additional information you require. However, awaiting a response from HR does not relieve you of your responsibility to report to work. As previously advised, you were expected to report on December 3, 2021. Please contact Ms. Carter for questions concerning leave options." (Emphasis added)

Additionally, communications on December 16, 2021, from Ms. Carter, reflected that Agency cited that Employee's "intent to return to work is unknown to the Department of Employment Services. As a District Government employee, you are required to obtain advance authorization for extended leave." Furthermore, Ms. Carter noted that Agency was concerned for Employee's well-being and referenced the Inova Employee Assistant Program (EAP) for him to seek services. Lastly, Ms. Carter's email stated that Employe was to return to work, or provided supporting documentation, as soon as possible and that further "unexcused absences may result in the agency taking corrective or adverse action against him.[36] As previously mentioned, the record reflects numerous communications between June 2021 and December 2021 regarding Employee's request. Of note, on August 6, 2021, Employee emailed DOES Reasonable Accommodation and cited that "because of my health conditions and the coronavirus pandemic, I am afraid of working in a shared work environment. Therefore, I am

[34] *See.* Agency's Brief at Exhibit D. (December 20, 2022).
[35] *See*. Employee's Response at Tab 4. (January 19, 2023).
[36] *See*. Employee's Response at Tab 3. (January 19, 2023).

requesting to continue to work at home Monday through Friday." This followed an email from DOES Reasonable Accommodation that same day which said, "Please advise how many days you are seeking to telework."

Agency avers that after the initial reasonable accommodation request, that it no longer was able to ascertain Employee's needs regarding his request. Further Agency avers that it engaged in an interactive process to evaluate Employee's request, but that Employee failed to provide documentation needed. Additionally, Agency avers that it followed the applicable Mayoral Orders related to this request, and as a result, it charged Employee with unauthorized absences when he did not appear on site for work as required. Thus, Agency argues that in review of all the circumstances, its action was taken for cause. While Agency asserts that after the initial request, it no longer understood Employee's needs regarding the reasonable accommodation, I find this assertion to be contraindicated in the record. Again, the record reflects several communications from Employee. In addition to the correspondence previously referenced in August 2021, the record reflects a communication between Employee and Ms. Carter on September 30, 2021. Ms. Carter notes in this email that it was a pleasure speaking with Employee and that the email was sent to memorialize "the jewels from our conversation and share specifics." Of note, Ms. Carter cites that "based on the medical documentation" that certain items had been addressed, including Employee's concerns about vaccination and masks."

At the end of that communication, Ms. Carter cited that Employee was to return to work on October 4, 2021. On October 4, 2021, Employee emailed and cited that while preparing to come into the office, he became ill, and that his fear precluded him from being able to leave home.[37] Following this, email exchanges occurred between Employee and Carter on October 13 and 14, 2021, citing to a follow up about a request.[38] Here, Carter asserts that "*more information was required and I am unable to identify what essential functions you are unable to perform at work*?" Carter also referenced the September 30, 2021, meeting and cited that Employee needed to submit a Form SF-71 to an immediate supervisor in advance of leave request. Employee responded and cited that he was waiting for a doctor's note, and submitted one once received. Employee told her he had an appointment scheduled for October 8, 2021.

Ms. Carter then replied and noted that the issued with Employee's medical documentation was that Employee specified "that your physician was not willing to complete the additional information request form because your medical need was not permanent and tied to COVID-19." A noted dated October 6, 2021, cited that Employee was seen that day and that it was recommended that Employee telework for the next two months due to concerns about unsafe conditions.[39] Essentially, Agency asserts that this medical documentation was insufficient, however I find that the record does not support what Agency relied upon to come to this conclusion. Here, Employee notified Agency of his illness and provided physician's notes. These physician's notes were generally the same nature as the original, in that it cited to Employee's fears for unsafe conditions in catching COVID-19 due to his underlying health conditions of hypertension etc. Thus, I find it disingenuous for Agency to assert that it did not know what Employee's requests entailed or what his needs were. Moreover, I find that the actions by Agency do not fall in line with the ODR Manual's requirements for consideration, particularly as it relates to undue hardship considerations.

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[37] *See*. Employee's Response at Tab 5. (January 19, 2023).
[38] *See*. Agency's Brief at Exhibit G. (December 20, 2022).
[39] Agency's Brief at Exhibit I. (December 20, 2022).

Instead, the record reflects that Employee's original request was not an undue hardship, as cited by Employee's direct supervisor on July 9, 2021. Further, there is nothing in the record citing any subsequent undue hardship assessments conducted by Agency. Rather, Agency just asserts that it needed more medical documentation. To the extent that more documentation may have been needed for Agency to assess, I find that Agency's failures to communicate in a timely manner fall short of what is prescribed by the ODR Manual. Further, Agency relies upon the Mayor's Order to support its positions regarding its inability to consider Employee's request. While the undesigned agrees that those Orders are indeed applicable to District employees, I also find that Agency failed to consider other applicable Mayoral Orders in this time frame. Specifically, I find that Agency failed to consider the Mayor's Order 2021-147 dated December 20, 2021, wherein due to the increased numbers of COVID-19 cases due to the Omicron Variant of COVID-19, postures in the government returned to previously issued orders. Notably, this Mayor's Order cited that masks were required to be worn indoors and cited that Omicron variant caused the daily rates of COVID-19 to quadruple in the District. Further, Section III, Part 6 of that Order specifically noted that "the authorities set forth in section II of the Mayor's Order 2020-45, dated March 11, 2020, and section II of Mayor's Order 202-46, dated March 11, 2020, shall apply to the public emergency declared by this Order." To the extent of Agency's reliance on the orders regarding return to work in its assessment of the instant action, I find that Agency failed to consider this Order in its assessment of Employee's requests. This is of particular note given that Employee's initial request and note from his doctor specifically identified concerns regarding COVID-19 variants. In this regard, I also find that Agency failed to appropriately consider the *Douglas* Factors[40] in its assessment of adverse action, namely the mitigating factor of "unusual job tensions and circumstances", surrounding the COVID-19 pandemic.

The District Personnel Manual ("DPM) Section 1268.2, provides that "an agency head is authorized to determine whether an employee absence should be carried as an AWOL." Further, DPM § 1268.4 notes that "if it is later determined that the absence was excusable, or that the *employee was ill*, the charge to AWOL may be changed to a charge against annual leave, compensatory time, sick leave or leave without pay as appropriate." (Emphasis added.) Here, Agency asserts that Employee had unauthorized absences following his failure to provide documentation for his reasonable accommodation request. For the reasons highlighted above, I find that Employee was ill and notified

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[40] *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and 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 perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7) consistency of the penalty with any applicable agency table of penalties;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10) potential for the employee's rehabilitation;
11) mitigating circumstances surrounding the offense such **as unusual job tension**s, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. (Emphasis added).

Agency of his illness. I also find that Agency was aware of Employee's illness, as many of its communications to Employee noted a "concern for his wellbeing" and referred him to the EAP program. As a result, I find that Agency failed to appropriately consider whether Employee's illness should be attributed to leave without pay or charged against his annual or sick leave given the circumstances. I also find that Agency did not follow the ODR guidelines in processing Employee's reasonable accommodation request. The undersigned finds that Agency's failure to provide timely notification to Employee of his initial request (July 2021), puts into question all its subsequent actions regarding the process. Further, I conclude that Agency's assertion that it would have moved Employee or made other adjustments if Employee had complied with the interactive process, to be unsupported by its actions in the record. Additionally, I find that Employee did actively engage in the interactive process for his request and sought confirmation and information consistently over the timeframe for which this occurred. For these reasons, I find that Agency has failed to meet its burden of proof and that this cause of action cannot be sustained.

Whether the Penalty was Appropriate

The undersigned finds that Agency has not met its burden to establish cause for adverse action in this matter. Consequently, for the reasons outlined in this decision regarding Agency's failure to meet the burden of proof for cause in this matter, the undersigned finds the charges cannot be sustained and that the penalty of termination was not appropriate under the circumstances.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of terminating Employee from service is **REVERSED**.
2. Agency shall reimburse Employee all back pay and benefits lost as a result of the termination.
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

/s/ Michelle R. Harris
Michelle R. Harris, Esq.
Senior Administrative Judge