**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | OEA Matter No.: 1601-0041-22 |
| EMPLOYEE, | ) | |
| | ) | |
| | ) | Date of Issuance: November 26, 2024 |
| v. | ) | |
| | ) | |
| DEPARTMENT OF YOUTH REHABLITATION SERVICES, Agency | ) | JOSEPH LIM, ESQ. |
| | ) | Senior Administrative Judge |

Amanda Price, Esq., Employee Representative
Conner Finch, Esq., Agency Representative

## INITIAL DECISION

### INTRODUCTION AND PROCEDURAL HISTORY

On or about February 8, 2022, Employee filed a Petition for Appeal with the Office of Employee Appeals ("Office" or "OEA") challenging the District of Columbia Department of Youth Rehabilitations' ("DYRS" or "Agency") decision to terminate her from her position as a Youth Development Representative ("YDR") effective December 23, 2021. Employee was terminated based on a charge of Inability to Carry Out Assigned Duties. In response to OEA's February 17, 2022, letter, Agency filed its March 18, 2022, Answer disputing Employee's claims and Motion to Dismiss, asserting that her appeal should be dismissed for late filing.

Following Agency's May 12, 2022, declination of mediation, this matter was reassigned to the undersigned Senior Administrative Judge ("SAJ"). On June 17, 2022, Employee responded to Agency's Motion to Dismiss by asserting that Agency provided service to a former address despite having been notified of her new address. On July 19, 2022, I issued an Order wherein I concluded, based on the parties' representations and arguments, that equity requires that this appeal be decided on its merits instead of being dismissed on a technicality.

I held a Prehearing Conference on January 18, 2023, wherein the parties discussed their desire to discuss settlement of this matter. Following several reports submitted by the parties on February 21, 2023, November 17, 2023, February 21, 2024, due to discovery and settlement discussions, a Prehearing Conference was convened on June 17, 2024. At the Prehearing Conference, I ordered the parties to submit a Joint Statement of Facts along with the parties' individual briefs on or before September 20, 2024. Following the submission of legal briefs by the parties, I determined that an Evidentiary Hearing was not warranted. The record is now closed.

## JURISDICTION

This 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 removal was appropriate under the circumstances.

## FINDINGS OF FACT[1]

Agency hired Employee on February 24, 2002, as a YDR. The physical requirements of a YDR are as follows:

> Must be able to physically perform the basic operational functions of walking, standing, bending, grasping, talking, repetitive motions, squatting, running, jumping and climbing; to carry or drag an individual (125 pounds, or more) a minimum of seventy-five (75) feet; and to fully perform DYRS approved restraint techniques and to apply restraining devices to aggressive and assaultive youths. Must have visual and hearing acuity to fully observe the behaviors and interactions of youth and other persons within the facility during official travel and activities, and to effectively receive and transmit communications by two-way radios and telephones.

On August 3, 2017, Employee injured her right wrist, left wrist, right knee, and left knee while at work. Immediately after the injury, Employee sought medical attention, and Agency notified the Public Sector Workers' Compensation Program ("PSWCP") of the accident. Since August 3, 2017, to the present, Employee has been unable to meet the physical demands of a YDR. On September 11, 2017, the PSWCP awarded Employee Temporary Total Disability (TTD) wage-loss compensation benefits and medical benefits.

On May 22, 2019, Mark Sheer, M.D., an orthopedist retained by the PSWCP, performed an Additional Medical Evaluation ("AME") of Employee authorized under 7 DCMR § 136. He found that Employee had permanent physical restrictions that would preclude her from working anything more demanding than a sedentary job. On June 27, 2019, the PSWCP, through a Notice of Termination of Temporary Wage-Loss Compensation ("TTD Termination Notice"), terminated Employee's TTD benefits because her disability was no longer temporary in nature. The TTD Termination Notice notified Employee that she could appeal the TTD Termination Notice to the Office of Administrative Hearings ("OAH"). The TTD Termination Notice also provided Employee instructions on how to request permanent disability benefits.

On August 29, 2019, the PSWCP issued Employee a Notice of Career and Educational Services Retention Rights ("2019 NORR") notifying Employee that her right to return to her position

[1] Parties' Joint Stipulation of Facts (August 16, 2024).

with Agency would expire on May 21, 2021, two (2) years after Dr. Sheer determined that Employee's work restrictions had become permanent in nature.[2] On November 8, 2019, Employee appealed the TTD Termination Notice to OAH. On February 24, 2020, Employee and the District of Columbia, through the PSWCP, fully resolved both the TTD Termination as well as Employee's claim to permanent disability compensation through settlement.

On November 18, 2020, the PSWCP, through an Amended Notice of Career and Educational Service Retention Rights ("Amended NORR") rescinded the 2019 NORR, after determining that it was issued in error. On December 3, 2020, Employee filed an appeal of the Amended NORR to the Chief Risk Officer ("CRO") of the District of Columbia Office of Risk Management pursuant to 7 DCMR § 156. On January 4, 2021, the CRO determined that (1) the 2019 NORR was correct; (2) the Amended NORR rescinding it was in error; and (3) that the PSWCP should reinstate the 2019 NORR.

On March 2, 2021, counsel for Employee, Ananda Price, Esq., contacted Agency's general email inbox and stated the following by email:

> "… I represent Karen McDonald. As a correctional officer with the Department of Youth Services she suffered some injuries while on the job that left her with permanent workplace restrictions. I am reaching out to see if there are any positions within Department of Youth Services that adhere to Ms. McDonald workplace restrictions. I know that some positions within the department are classified as light duty and I wanted to see if any of those positions open and available. She intends to remain in District employment. Her Career & Educational retention rights were restored and I want to see that she is able to maximize them by her deadline of May 21, 2021. Please feel free to respond to this message or reach out to me directly at my mobile number below. Thank you for your time."

Agency subsequently directed the email to Lennie Moore, Human Resources Officer. Moore then contacted the PSCWP to ascertain the status of the workers' compensation matter. After conferring with the PSWCP, Agency confirmed that Employee's retention rights would expire on May 21, 2021. On April 15, 2021, Moore contacted Employee's Counsel to notify her that "I have sourced agency management and we are not able to identify a position to accommodate permanent work-place restrictions. Please let me know if I can assist you any further."

On April 16, 2021, in response to Moore's email, Employee's counsel inquired about positions as a "front lobby/gate entrance (New Beginnings), warehouse (New Beginnings), YSC w/ Uniform orders, or any of space [sic] that has work that will adhere to Ms. McDonald's restrictions" She also asked about a detail position. On April 20, 2021, Moore wrote to Employee's counsel: "A detail is not an appropriate action to address a permanent accommodation request. Has [Employee] applied for an ADA accommodation? Here is the email for such requests: dyrs.fmal@dc.gov [sic]." The following day, Employee's counsel responded, "I will reach out to them directly to make that request. Thank you for your help!" On May 7, 2021, Employee's counsel followed up with Lennie Moore concerning the ADA Accommodation stating that she had not received a response and were there any steps that could be taken to expedite the process.

[2] District employees injured in workplace accidents have a right to return to their position if they recover to the point where they can return to their duties within a period defined by statute and regulation. D.C. Code § 1-623.45; 7 DCMR § 143.

On May 11, 2021, Employee's counsel wrote to dyrs.fmla@dc.gov inquiring about a request for an accommodation, copying Employee on the email.[3] On the same day, Employee spoke directly to Alesha G. Wajid-Ali, M.S, PHR, a Lead Human Resources Specialist who administered requests under the Americans with Disabilities Act ("ADA") and had access to the dyrs.fmla@dc.gov email address. In an email memorializing that conversation, Wajid-Ali, from the dyrs.fmla@dc.gov address, wrote that Employee, by phone, had requested a transfer to another agency or reassignment to a different position within Agency as an accommodation. Wajid-Ali further noted that, as they had discussed by phone, Agency would need Employee's resume to process any accommodation request.

On May 18, 2021, Employee's Counsel emailed Wajid-Ali to ask about the status of the accommodation request. On May 21, 2021, Wajid-Ali responded to Employee's Counsel, copying Employee, to reiterate the need for Employee's resume. On June 4, 2021, Employee's Counsel, copying Employee, again wrote that Employee had not received instructions for requesting an accommodation. On June 10, 2021, Wajid-Ali responded again to both Employee and Employee's Counsel, attaching the May 11, 2021, email and requesting Employee's resume.

On June 22, 2021, Agency received an email signed by Karen McDonald from the email address of Feaster.Aurelia@epa.gov indicating that Employee was unable to download an attachment. As noted in the May 11, 2021, email, Agency did not require that Employee download an attachment; rather it required a copy of Employee's resume to determine whether Employee could be accommodated. Agency does not have any record of a response to this email.[4] On July 20, 2021, through a Notice of Career and Educational Services Retention Rights ("2021 NORR"), consistent with the January 4, 2021, decision of the CRO, the PSWCP notified Employee that her retention rights expired on May 21, 2021.[5]

On August 9, 2021, relying on the 2021 NORR and Employee's inability to return to work as a YDR, Agency issued Employee an Advance Notice of Proposed Removal ("Advance Notice") based on her Inability to Carry Out Assigned Duties. On September 3, 2021, Employee filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") asserting that the Advance Notice constituted unlawful discrimination on the basis of disability.

While the EEOC action was pending, on September 21, 2021, a hearing was held before a Hearing Officer concerning the Advance Notice. Employee testified that she could return to work, but she did not present any medical documentation supporting that testimony. Employee requested time to present additional evidence and argument. The Hearing Officer granted Employee additional time and directed her to appear on October 13, 2021. Employee did not appear for the October 13, 2021, hearing before the Hearing Officer. On October 25, 2021, the Hearing Officer found that Agency established that it had cause to take adverse action based on Employee's Inability to Carry Out Assigned Duties and that removal was appropriate.

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[3] Agency uses a single secure email address for requests under both the Family and Medical Leave Act and Americans with Disabilities Act.

[4] According to Agency, it no longer employs Wajid-Ali and is unclear whether Wajid-Ali responded. Agency cannot find any record of such a response.

[5] Agency has no role in decisions concerning retention rights. It is unclear why the 2021 NORR was not issued for over seven months after the CRO's decision.

On November 16, 2021, Employee's Counsel sent Employee's most recent resume to Agency by email. On November 23, 2021, Agency and Employee settled the EEOC action. Agency agreed to take no adverse action against Employee until at least November 29, 2021, during which time it would consider potential accommodations for Employee's disability. On or about November 29, 2021, Moore reviewed every current vacancy and determined that there were no union positions at Agency at or below Employee's grade for which she was qualified based on review of Employee's resume and qualifications. On November 29, 2021, Agency, through Chanel Hall, Esq., Interim General Counsel, informed Employee and Employee's Counsel that there were no positions to which Employee could be reassigned.

On December 23, 2021, Agency issued the Final Decision – Removal ("Removal Notice"). Employee was removed because she could no longer perform the essential functions of her position. The Removal Notice adopted the evidence, recommendations, rationale and conclusions of both the proposing official and the Hearing Officer. At the time of Employee's removal, Employee's position was a Grade 8, Step 9 YDR. Employee has not proposed any accommodation that would allow her to perform all essential functions of a YDR, and it is undisputed that none exist.

## ANALYSIS AND CONCLUSIONS OF LAW

### Whether Agency had cause to take adverse action against Employee

In accordance with D.C. Official Code §1-616.51(2011) and 68 DCMR §1602.1, disciplinary actions may only be taken for cause. The District of Columbia Municipal Regulations ("DCMR") and the corresponding District Personnel Manual ("DPM") regulate the manner in which agencies in the District of Columbia administer adverse and corrective actions. The new DCMR and DPM chapters (DCMR 6-B Chapter 16 and DPM Chapter 16) regulating the manner in which agencies administer adverse actions went into effect in the District on May 12, 2017. Consequently, all adverse actions commenced after this date were subject to the new regulation. In the instant matter, Employee was terminated effective December 23, 2021, when the new version of the DPM was already in effect.

Agency removed Employee under 68 DCMR § 1605.4(11) "Inability to carry out assigned duties". 68 DCMR §1607.2 (n) define the cause of "Inability to carry out assigned duties" as "Any 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." Thus, OEA must determine whether circumstances prevented Employee from carrying out her assigned duties, and if so, whether any reasonable accommodation could enable her to perform those functions.

### Agency's Position

Agency argues that District of Columbia law permits the removal of a career service employee based on "[a]ny circumstance that prevents an employee from performing the essential functions *of her 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." 6-B DCMR § 1607.2(n)

(emphasis added). There is no dispute that, since 2017, Employee has been unable to work as a YDR because of her physical limitations, and that no reasonable accommodation would enable her to perform her essential functions. Thus, Agency asserts that it was justified in terminating Employee's employment.

Employee's Position

Employee argues that Agency failed to sufficiently consider the possibility of reassignment and/or accommodation before removal. Although she concedes that Agency made some unsuccessful effort towards reassignment, Employee alleges that Agency did not engage in the interactive process in good faith. Employee believes there are accommodated positions within the agency as she was informed by active staff members of such positions. While Employee agrees with Agency that OEA lacks jurisdiction over disability discrimination claims, she asserts that Agency could have provided some workplace accommodation that would allow her to continue employment. However, in her brief, Employee did not identify those positions for which she believes she is qualified for nor did she specify how Agency was deficient in the interactive process.

Analysis

Like the Americans with Disabilities Act ("ADA"), the D.C. Human Rights Act ("DCHRA") requires employers to engage in an "interactive process" to identify potential accommodations that could overcome a disabled employee's limitations.[6] 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."[7]

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:*
>
> (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;
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> (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

[6] *See Hunt v. District of Columbia,* 66 A.3d 987,992 (O.C. 2013).
[7] *Id.*

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.

*"Reasonable accommodation to perform essential job duties" under the relevant statutes and regulations.*

6B DCMR § 1607.2(n) provides that an employee may be removed based on "any 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." (Emphasis added). Thus, prior to removing an employee pursuant to this regulation, the Agency must explore reasonable accommodations that have been requested or can be made. In this instance, based on the parties' Stipulations of Facts, I find that Agency attempted to find positions for Employee before giving her notice of its intended adverse action.

Unlike other sections of 6B DCMR § 1607, section 1607.2(11) does not specifically make reference to the DCHRA or other laws to provide context or further meaning to the language it incorporates.[8] Rather, section 1607.2(n) includes the term "reasonable accommodation" without attaching it to the term's meaning under the DCHRA, or its federal counterpart ADA.[9] As the DCHRA and/or ADA do not govern this review of OEA's decision, OEA is only required to determine if the proposed accommodations were "reasonable" in the context of its plain meaning - not the provisions or judicial construction of the aforementioned laws based on a review of the record and the representations of both Agency and Employee. Nonetheless, it is extremely helpful to this tribunal to look to the DCHRA and ADA for guidance when defining "reasonable accommodation" under 6B DCMR § 1607.2(n).[10]

The Courts have established what does *not* constitute a reasonable accommodation. For instance, the D.C. Circuit affirmed a finding that an accommodation was not reasonable because the employer "could not function normally without having others do [employee's] work on a daily basis."[11] Furthermore, the Seventh Circuit has repeatedly held that "to have another employee perform a position's essential function, and to a certain extent perform the job for the employee, is

[8] For instance, 68 DCMR § 1607.20 specifically references the DCHRA and the Civil Rights Act of 1964 to give context to the "protected" classes that it covers. If "reasonable accommodation" was intended to cany the same meaning and invoke the same analysis under § 1607.2(n) as it does in the ADA, then such context would have been provided as it was in §1607.20.

[9] Under DCHRA/ADA, the plaintiff, or employee, would carry the burden of persuading the factfinder that reasonable accommodations were available and that he or she could perform the essential functions of her job with the accommodations. *Floyd* at 328.

[10] The ADA provides that a "reasonable accommodation" may include making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. *See* 42 uses § 12111(9).

[11] *Carr v. Reno,* 23 F.3d 525, 529 (D.C. Cir. 1994).

not a reasonable accommodation"[12] Moreover, "[i]f a particular job function ... is an essential function, then it is irrelevant whether the employer could have someone else perform the function without undue hardship" because "'as a matter of law, [that is] not reasonable.'"[13] Likewise, guidance from the EEOC provides that employers are not required to reallocate essential functions to someone else as a reasonable accommodation.[14]

In the same manner, the Seventh Circuit has held that an employer is not required to change the essential functions of a job to accommodate an employee, and that a full-time employee must be able to work full-time, not just part-time, with the accommodation for it to be reasonable.[15] A reasonable accommodation must also allow for an employee to "complete assigned tasks within a reasonable period of time" because that is "an essential job function of any job."[16]

Additionally, as cited above, the judicial construction of the DCHRA and ADA provides that a reasonable accommodation need not be made if it would impose an undue hardship on the employer.[11] As the District Court recognized in *McIntyre v. Wash. Metro. Area Transit Auth.,*[17] "an accommodation is [only] reasonable if it allows the employee to fulfill *all* essential functions of [his] job *without imposing an undue hardship* on the employer." (Emphasis added)[18]

In *McIntyre,* the District Court found that the employee's request to change her daily start time from 6:00 am to 8:00 am was unreasonable because it would prevent her from fulfilling her essential duties and impose undue hardship on the employer.[19] The Court reasoned that by removing the employee from the early shift rotation, it would force other employees to "conduct the initial operations more frequently, giving them less opportunity to work on their own administrative tasks and evaluations."[20] Thus, the later shift would cause an undue hardship by requiring others to cover for the employee, and "an accommodation that would cause other employees to work harder, longer, or be deprived of opportunities is not mandated."[21] Further, the law is clear that an employer is not required to provide an employee with his or her preferred accommodation.[22] The employer must simply provide a *reasonable* accommodation *if* one can be made.[23]

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[12] *Stern v. St. Anthony's Health Ctr.,* 788 F.3d 276, 289-90 (7th Cir.) (quoting *Majors v. Gen Elec. Co.,*714 F.3d 527, 534 (7th Cir. 2013)).
[13] *Id.* at 290.
[14] *Id.*
[15] *See Ammons v. Aramark Unif. Servs.,* 368 F.3d809, 819 (7th Cir. 2004) (finding that the employee could not perform the essential functions of his job even with reasonable accommodations because "[a]lthough tending to the boiler with assistance and repairing the plant's sewing machines are reasonable accommodations for [the employee's] disability, these tasks would account for only approximately half of [his] workday").
[16] *Morris v. Jackson,* 994 F.Supp. 2d 38, 47 (D.D.C. 2013); *See also Carr* at 530 (finding that an accommodation was not reasonable because an essential function of any government job is an ability to appear for work and complete tasks within a reasonable period of time, and employee could not be counted on to "fulfill these minimum expectations").
[17] 2019 U.S. Dist. LEXIS 81839, *21, 2019 WL 2120324.
[18] (quoting *Graffius v. Shineski,* 672 F. Supp. 2d 119, 126 (D.D.C. 2009).
[19] *Id.* at 31-32.
[20] *Id.* at 37.
[21] *Id.* (quoting *Rehn, v. Jams Co.,* 486 F.3d 353, 357 (8th Cir. 2007)).
[22] *See Aka v. Wash. Hosp. Ctr.,*156 F.3d 1284, 1305 (D.C. Cir. 1998).
[23] *Id.*

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.[24] Likewise, the District Court has explained that the "interactive process is designed to ensure that an agency is fully aware of its employees' purported disabilities and desired accommodations and possesses information it needs to comply with its obligations," and that the employer may require the employee to provide documentation.[25] Accordingly, to determine the appropriate reasonable accommodation, it may be necessary for the agency to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.[26]

The *Ward* Court explained that "the process contemplated is a flexible give and take between employer and employee so that together they can determine what accommodation would enable the employee to continue working."[27] The D.C. Circuit Court further provided that in evaluating an interactive process, "courts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary... courts should attempt to isolate the cause of the breakdown and then assign responsibility. For instance, when the parties are missing information that can only be provided by one of the parties, the party withholding the information may be found to have obstructed the process. In sum, to establish that her request was "denied," plaintiff must show either that the defendant in fact ended the interactive process or that it participated in the process in bad faith."[28]

As part of the reasonable accommodation process, the DCCA has identified an "interactive process" between the employer and employee as a tool that "serves to identify potential accommodations that could overcome the employee's limitations;" however, neither the ADA nor the DCHRA explicitly requires this interactive process.[29] The DCCA has recognized that "there is no per se liability under the ADA if the employer fails to engage in an interactive process," but that "the failure to do so is prima facie evidence that the employer *may* be acting in bad faith."[30] (emphasis added and internal quotation marks and punctuation omitted).

The United States District Court for the District of Columbia ("District Court") has found that in attempting to establish that an employer failed to participate in an interactive process, the employee "retains at all times the burden of persuading the [fact-finder] that reasonable accommodations were available" and must show that he *could* have been reasonably accommodated.[31] Moreover, the interactive process "is not an end in itself" and thus "it is not

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[24] *See Ward v. McDonald,* 762 F.3d 24, 31 (D.C. Cir. 2014).
[25] *See Lenkiewicz v. Castro,* 145 F.Supp. 3d 140, 143 (D.D.C. 2015).
[26] *Ward* at 32.
[27] *Id.*
[28] *Id.*
[29] *Sparrow v. D.C. Off. o f Human Rights,* 74 A.3d 698, 704, 705 n.8 (D.C. 2013).
[30] *Id.* at 705.
[31] *See Floyd v. Lee,* 968 F. Supp. 2d308, 327-328 (D.D.C. 2013) (quoting *Holbrook v. City of Alpharetta,* 112 F.3d 1522, 1526 (11th Cir. 1997)).

sufficient for the employee to show that the employer failed to engage in the interactive *process."*[32]

The courts have made it clear that the ultimate inquiry when evaluating an interactive process is whether the employer acted in bad faith. Hence, evidence that an interactive process did not occur does not result in per se liability for the employer under ADA law, but rather merely serves as prima facie evidence that the employer may have acted in bad faith.[33] As with any *prima facie* evidence, it can be overcome with a showing to the contrary.

In the instant matter, both parties agree that Agency engaged in the interactive process. The agreed upon facts indicate that Agency collaborated with Employee regarding any possible work accommodations, and while there was some delay in Employee's submission of a resume, the parties stipulated that Agency reviewed its then current vacancies and determined that there were no union positions at Agency at or below Employee's grade for which she was qualified based on review of Employee's resume and qualifications.

The parties also stipulated that although Employee testified before Agency's Hearing Officer that she could return to work, Employee never presented any medical documentation supporting that testimony. Despite Employee being granted additional time to secure such documents and being directed to appear on October 13, 2021, it is undisputed that Employee did not appear for the October 13, 2021, hearing before the Hearing Officer. Not only did Employee fail to submit a response within the allotted time, but she also neglected to respond even after being granted an extension. 6B DCMR § 1621.6 provides that "[ a]s a written part of his or her response, an employee shall raise every defense, fact, or matter in extenuation, exculpation, or mitigation of which the employee has knowledge or reasonably should have knowledge or which is relevant to a reason for which the employee took an action (of failed to take an action) which is a subject of the proposed or summary action. The failure of the employee to raise a known defense, fact, or matter shall constitute a waiver of such defense, fact, or matter in all subsequent proceedings." Based on the above undisputed facts, I find that Employee cannot claim bad faith on the part of Agency as she has failed to fully cooperate with the interactive process.

The parties stipulated that there are no specific workplace accommodations that Agency could provide that would enable her to continue performing her job as a YDR while still being consistent with the medical guidelines and limitations identified by the medical doctors who have treated and/or examined her. As Dr. Mark Sheer indicated in his medical evaluation, Employee's permanent disability precludes any job other than a sedentary one.

Here, Employee has failed to meet her burden under *Floyd* and has presented no evidence of a *reasonable* accommodation that would have allowed her to perform her essential duties. Therefore, even if this Office were to adopt Employee's argument that a good faith interactive process did not occur, it is not enough to warrant reversal.

The undisputed facts indicate that Agency acted in good faith to fulfill any obligation to accommodate Employee's disability. After the PSWCP determined that Employee had a permanent disability and Employee first presented Agency with information regarding her medical conditions,

[32] *Pantazes v. Jackson,* 366 F. Supp. 2d 57, 70 (2005).
[33] *See Sparrow* at 705.

the Agency responded by attempting to find a suitable position for Employee that accommodate her physical limitations. By the time that Agency determined it could not reasonably accommodate Employee, it possessed adequate information regarding Employee's physical limitations as communicated through her doctors to make an informed decision.

Based on her arguments, Employee's only rationale in asserting that Agency did not engage in the interactive process in good faith is her assertion that there must be some "active light duty positions" available for her.[34] However, Employee presents no statute or regulation requiring Agency to continue searching for a position for her even after it had already determined that there was no suitable vacancy.

This tribunal must then proceed on whether Agency had cause for terminating Employee's employment. And what is dispositive of whether Agency had cause under 6B DCMR § 1605.4(n) "Inability to carry out assigned responsibilities or duties," and 1607.2(n) "Inability to carry out assigned duties: Any 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" is a determination, based on the uncontroverted evidence, that there is no reasonable accommodation that can be made to enable a permanently disabled employee to perform the essential functions of his/her position.

As the Courts have found in the opinions cited above,[35] the Agency's written job description and opinion of the essential duties are owed substantial deference. The record is definitive regarding the essential job functions of a YDR at Agency. The YDR job description provides a host of general duties which include walking, standing, bending, grasping, talking, repetitive motions, squatting, running, jumping and climbing; to carry or drag an individual (125 pounds, or more) a minimum of seventy-five (75) feet; and to fully perform DYRS approved restraint techniques and to apply restraining devices to aggressive and assaultive youths. None of these are compatible with Employee's permanent disability.

The undisputed facts in this matter indicate that Employee is unable to perform the major duties of a YDR as enumerated in its position description. Accordingly, I conclude that Agency has met its burden of establishing cause for taking adverse action.

Whether the penalty of removal was appropriate under the circumstances.

As noted above, the only remaining issue is whether the discipline imposed by the agency was an abuse of discretion. Any review by this Office of the agency decision selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[36] Therefore, 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

[34] Employee's brief (September 23, 2024).
[35] *See Adams* and *Floyd, supra*.
[36] *See Huntley* v. *Metropolitan Police Dept.,* OEA Matter No. 1601-011 1-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson* v. *District of Columbia Fire Dept.,* OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

and properly exercised."[37]

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."[38] 6B DCMR §1607(n) Table of Illustrative Actions prescribe removal as the penalty for a first occurrence. For the foregoing reasons, I conclude that the Agency's decision to select removal as the appropriate penalty for Employee was not an abuse of discretion and should be upheld.

## ORDER

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

**FOR THE OFFICE:** */s/ Joseph Lim*
Joseph E. Lim, Esq.
Senior Administrative Judge

[37] *Stokes* v. *District of Columbia,* 502 A.2d 1006, 1009 (D.C. I985).

[38] *Employee* v. *Agency,* OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review,* 32 D.C. Reg. 2915, 2916 (1985).