THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
[redacted]	OEA Matter No. 1601-0036-19
v	
	Date of Issuance: February 3, 2022
DISTRICT OF COLUMBIA DEPARTMENT OF YOUTH REHABILITATION SERVICES Agency	LOIS HOCHHAUSER, ESQ. Administrative Judge

Employee, *Pro Se*
Connor Finch, Esq., Agency Representative[1]

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Employee filed a petition with the Office of Employee Appeals ("OEA") on February 28, 2019, appealing the final decision of the District of Columbia Department of Youth Rehabilitation Services ("Agency"), to terminate her employment, effective January 31, 2019. Agency filed its *Motion to Dismiss and Answer to Employee's Petition for Appeal* ("Motion") on April 1, 2019. The matter was assigned to this Administrative Judge ("AJ") on or about April 8, 2019.

In its *Motion*, Agency argued that the appeal should be dismissed for lack of jurisdiction, asserting that Employee filed a grievance challenging her removal on February 7, 2019. The AJ directed the parties to respond to jurisdictional issues in Orders issued between May 2019 and February 2020.[2] On February 11, 2020, several weeks before oral argument was scheduled on this issue, Agency informed the AJ by email that it "withdr[ew] its motion to dismiss [and] conced[ed]…OEA's jurisdiction [of] this appeal." The prehearing conference ("PHC") initially scheduled for March 18, 2020, was held remotely on November 12, 2020. The decisions reached in the PHC was summarized by Order dated November 25, 2020.

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1 Andrea Comentale, Esq. represented Agency until March 2020.

2 For multiple reasons, this threshold issue remained unresolved for an extensive period of time. *See., e.g.,* Orders issued February 3, 2020.

The hearing took place on July 21, 2021 at the Office of Employee Appeals, located at 955 L'Enfant Plaza S.W. in the District of Columbia.[3] At the proceeding, the parties[4] had the opportunity, and did, present evidence and argument.[5] Written closing arguments were submitted, and the record was closed on November 23, 2021.[6]

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3.[7]

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[3] The cover page of the transcript erroneously states that hearing was held by "video teleconference," *See,* Agency's "Praecipe Regarding Transcript Error," dated September 10, 2021.

[4] The A.J. allowed Employee to present evidence, denying Agency's objection that, pursuant to 6-B DCMR§1625 7, she was barred from doing so based on her failure to submit a response to the Hearing Officer, finding Employee's testimony that she did submit a response to be credible. (Agency's Closing Argument, pp 12-13, Tr, 95-96)..

[5] Witnesses testified under oath and the proceeding was transcribed. The transcript is cited as "Tr" followed by the page number. Exhibits ("Ex") are cited as "J" for Joint and "E" for Employee followed by the exhibit numbers. Exhibits J-1 – J-26 and E-1, and E-5 – E-10, were entered into evidence.

[6] Employee's *pro se* status and the Pandemic, individually and combined, caused extensive but unavoidable delays. The AJ adhered to the dual mandates of exercising "special care" because of Employee's *pro se* status, while ensuring that Employee was not given "special treatment [or] substantial assistance." *Padou v. District of Columbia*, 998 A.2d 286, 292 (D.C. 2010), and *Berkley v. D.C. Transit, Inc.* 950 A.2d 749, 756 (D.C. 2008). Initially, Employee had difficulties following unfamiliar requirements. For example, despite written and verbal directives by the AJ, Employee did not serve Agency with copies of submissions. This problem was exacerbated since Employee had no copier; and due to her financial and mobility problems, it was difficult for her to have submissions copied and mailed. However, soon after the AJ and parties found a mutually acceptable procedure allowing Employee to make copies at OEA or Agency's office, the District of Columbia Government closed its offices, and a new alternative was needed. The closing of Government offices and other COVID restrictions, caused multiple cancellations of the hearing and extensions of deadlines. In addition, resolution was delayed since the AJ was unable to work on this matter for months due to lack of authorization or multiple quarantines during which she lacked access to her files. Finally, the need for the parties to remove all personal identifying information from submissions and eliminate multiple duplications from submissions took considerable time. The AJ returned certain documents to Employee, as agreed, at the start of the hearing. Agency asked, and was given additional time to complete the sanitization process. (Tr, 7).
The AJ stayed in constant verbal and written communication with the parties throughout the Pandemic, to address and resolve issues so that this matter could proceed as expeditiously as possible. Both parties are commended for their cooperation and professionalism. They successfully resolved almost all evidentiary issues before the hearing; an achievement that often eludes the most experienced attorneys. Mr. Finch merits special recognition for coordinating these efforts; and organizing exhibits, including Employee's. Employee also deserves credit for learning and becoming compliant with this Office's Rules and the AJ's directives, and then adjusting to the changes required after the Pandemic required adjustments to both Rules and directives.

[7] The AJ notified the parties that, even though Agency withdrew its jurisdictional challenge, the issue was not completely resolved. *Rebecca Barnes v. Office of Employee Appeals*, Civil Action No. 2010CA9389P(MPA) (2012). She directed the parties to obtain additional information to resolve the issue. *See* November 5, 2020 Order. The necessary information was provided by Agency at the start of the November 12 proceeding, and the AJ determined that sufficient evidence was presented to establish this Office's jurisdiction. (Tr, 16-17).

ISSUE

Did Agency meet its burden of proof regarding its decision to terminate Employee?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Undisputed Findings of Fact ("UFF")

1. Agency is the District of Columbia Government entity tasked for housing and providing services for "court-involved youth" ("CIY") remanded to its custody. The Youth Services Center ("YSC") is the secured facility run by Agency serving CIY between ages 13 and 20 while they wait to be tried on criminal charges, including violent crimes; or to be transferred following conviction. (Tr, 45-46, 69; Ex J-1). It is "common" for CIY to have "behavioral issues" and/or "mental health diagnoses." (Tr, 45- 47).

2. The Youth Development Representative ("YDR") has primary responsibility for the supervision of CIY, and for the "security and safety" of youth and staff. YDRs are required to "physically restrain" combative youth, break up fights, administer "appropriate disciplinary sanctions" and know "self-defense" (Ex J-1, Tr, 45). Therefore, the YDR Position Description ("PD") includes physical requirements and standards:

> running, jumping and climbing; carry[ing] or drag[ging] an individual (125 pounds, or more) a minimum of ...75 feet; and... fully perform [Agency] approved restraint techniques and...apply restraining devices to aggressive and assaultive youth. (Ex J-1).

3. Employee began her tenure as a YDR on October 17, 2005. At the time of removal, she was in permanent and career status, and worked the midnight shift at YSC. Until about March 2017 she was supervised by Supervisory Youth Development Representative ("SYDR") Richardson. (Ex E-10). Alisha Hunt then became her supervisor and was her supervisor at the time of termination. (Tr, 30, 35).

4. Agency was under a Court-ordered mandate from approximately 1990 to 2020, which required it to maintain specific YDR staffing levels. (Tr, 58-59).

5. Employee sustained on-duty injuries throughout her employment, including cervical and lumbar injuries in 2009, 2015 and 2017.[8] The 2009 and 2015 injuries were reported the D.C. Office of Risk Management ("ORM") by her supervisor. (Tr, 103).

6. As a result of back injuries sustained over the course of three days in November 2009, Employee remained out of work for a period of tune,[9] during which she received worker's compensation through ORM. (Tr, 104-107, Ex E-1).

7. Employee sustained an on-duty injury to her neck in 2015. (Tr, 103).

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[8] There is scant, if any, information in the record regarding the nature and extent of these injuries. Employee contended that she "broke fingers" during her employment.

[9] Employee did not know how long she stayed out of work, stating only it was for "quite a while." (Tr, 106).

8. On July 8, 2017, Employee sustained a work-related back injury when she saved the life of a CIY who tried to commit suicide. The youth fell on Employee after Employee cut the rope used by the youth to hang herself. (Tr, 108; Ex E-7). The incident was not reported to ORM. Employee did not take off time from work after, due to financial worries and her view that the injury was not "that severe." (Tr, 111). Employee continued to perform her duties, requiring physical actions to, *e.g.*, break up fights between residents; but experienced increasing physical pain. (Tr, 109).

9. Employee received commendations during the course of her employment.[10] On March 14, 2017 SYDR Richardson commended Employee for her "exemplary" job performance, stating that Employee set a "positive" example for new employee and "showed great initiative and effective follow through:"

> On…March 14, 2017…you were asked to hold a youth accountable for being blatantly disrespectful toward staff and a supervisor… [O]n occasions when youth are disruptive or exhibit negative behaviors, intervention and accountability is necessary and appropriate….[Y]ou effectively and with great detail outlined the youth's infractions and accurately accounted for the total number of fines to be issued. Your immediate and appropriate action showed great initiative and effective follow through…to correct negative behaviors, while encouraging cooperation from the youth…Further, you were working with a newly hired employee which set a positive example for her to model…Thank you for taking the program seriously and demonstrating exemplary performance in this aspect of your job responsibilities. Please continue to lead in this way and keep up the great work! (Ex E-10).

10. On August 3, 2017, Employee was commended by SYDR Richardson for her "model and exemplary" diligence:

> I wanted to formally acknowledge your deliberate efforts in effectively Maintaining Eyes on Supervision… On numerous occasions…you have been observed consistently executing timely room checks of the youth secured behind their doors…. Your constant commitment to this standard has not gone unnoticed and is greatly appreciated. Thank you for consistently exhibiting model and exemplary behavior in this regard – it shows that you take seriously your responsibility to monitoring the wellbeing of our youth. Please continue to lead in this way and keep up the great work!
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> [O]n …July 8, 2017 because of your continuous maintenance of eyes-on-supervision… you executed quick intervention involving a youth…attempting to commit suicide while secured in her room…Your vigilance and timely response…prevented a successful suicide. (Ex E-9).

11. Employee did not report to work after February 12, 2018, due to the increased severity of the pain following the 2017 injury. She notified Agency of her absences. She contacted ORM to

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[10] Employee entered two commendations into evidence. It is unknown if she received more.

reopen the 2009 claim, but was told that it was closed and could not be reopened. She tried to file a claim related to the July 8, 2017 incident, but her efforts to do so were unsuccessful. (Tr, 110, Ex J-13).

12. Employee had exhausted all available leave. Agency notified her on March 22, 2018, that she might qualify for leave pursuant to the District of Columbia Family and Medical Leave Act ("FMLA"), and gave her the necessary forms which she completed. (Ex J-2). On May 18, 2018, Agency notified her that based on her "serious health condition," it approved her request for FMLA leave, retroactive to February 13, 2018. She was instructed to report for duty on June 5, 2018 or her next scheduled work day." (Ex J-4).

13. Employee provided Agency with "The Standard Benefits Administrators – Respiratory Questionnaire" ("SBA form) dated April 25, 2018, completed and signed by Dr. James Tansinda, her treating physician. It was signed by Dr. Tansinda on May 11, 2018, and transmitted by facsimile on that date. Dr. Tansinda gave primary diagnoses of "lower back pain and lumbar spine stenosis" and a secondary diagnosis of neck pain. He noted Employee's physical limitations, and concluded that, "depending on her symptoms," Employee could return to work on August 18, 2018, after she completed physical therapy ("PT"). (Ex J-3).

14. On or about June 6, 2018, Employee submitted a "Request for Advance Leave or Leave Without Pay ("LWOP") seeking "any available annual, sick or LWOP," from June 5 to August 19, 2018. She stated that she was "still out of work…as a result of a severe lower back injury…sustained at work in 2009." Alisha Hunt, Employee's supervisor, signed the form, approving the request. (Ex J-5).

15. On June 11, 2018, Loise Kago, HR Lead Management Liaison Specialist notified Employee by letter, that she had exhausted FMLA leave on June 5, 2018, and sent her the form needed to request LWOP. (Ex J-6).

16. On August 29, 2018, Allison Fax, Agency Program Analyst, notified Employee that she had "neither returned to work nor submitted medical documentation to substantiate [her] time off" after her LWOP ended on August 19, 2018. She directed Employee to contact her "immediately" about her intention to return to work, cautioning that failure to respond by August 31, 2018, could result in disciplinary action. (Ex J-8).

17. On August 31, 2018, Employee responded to Ms. Fax by email, stating that she had not been notified that she was required to return to work on August 19, 2018, and informing her that she was still unable to work and under medical care. She said that she would forward paperwork from her doctor with a return-to-work date as soon as she received it. (Ex J-9).[11]

18. On September 8, 2018, Employee faxed Agency another SBA report dated May 17, 2018 and signed by Dr. Tansinda on August 20, 2018.[12] The report lists primary diagnoses of lower

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[11] This information derives from the Administrative Review, and is supported by a reference to a letter identified as Exhibit 6. (Exs J-14, J-18).

[12] The dates in the first section of this UFF may be confusing; and the AJ accepts that some dates in this section may not have been reported accurately. However, Agency did not deny receiving these documents, or contend that the discrepancies affected its decision to terminate Employee.

back pain and lumbar spinal stenosis and a secondary diagnosis of cervical spinal stenosis, noting that her treatment "complicated" by her depression. The report also identifies Employee's physical limitations. Dr. Tansinda anticipated that Employee would be able to return to work on February 20, 2019. (Exs J-7).

19. On September 10, 2018, Agency issued a Notification of Charge of Absence Without Official Leave ("AWOL") charging Employee with AWOL for eight hours on August 20-21, 2018 and August 24-26, 2018, a total of 40 hours. The Notice stated that Agency was taking this action because Employee "exhausted her LWOP as on 8/19/18…[had] no approved leave, her return-to-work date is not known, [and] she did not call out or report for her scheduled tour of duty on the dates noted." (Ex J-10).

20. In his November 2, 2018 "Excuse Slip." Dr. Tansinda stated that Employee was still unable to work, but did not include a return-to-duty date. On the same date, he referred Employee to an "ER" doctor for "diagnosis and treatment of "major depression." (Ex J-12).

21. Employee took prescribed medications for pain and depression, including at various times, including Oxycodine, Wellbutrin and Trazodone in 2018 and 2019. (Tr, 138, Exs J-11, J-15). In November 2018, she was hospitalized for five days in a psychiatric facility for major depression and suicidal ideations.

22. The Advance Written Notice of Proposed Removal ("Advance Notice") was issued on November 29, 2018, and Alisha Hunt was the Proposing Official ("PO"). The Advance Notice stated that Agency intended to remove Employee "for cause" based on charges of: "inability to carry out assigned responsibilities or duties [and] attendance related offenses: unauthorized absence." [13] Agency stated that Employee had not report to work since February 13, 2018; and that after exhausting all leave, she had not returned to work on August 19, 2018. It noted that she responded to the August 28, directive to notify Agency by August 31 of when she could return to work, on that date, responding that she did not know when she could return and would submit medical information; and that on September 17, 2018, she submitted a doctor's note dated May 17, 2018 that included a return-to-work date of February 20, 2019.

Agency based the "inability to carry out assigned duties" charge on Employee's position that she was incapable of returning to work until February 20, 2019 because of her medical status, and stated that although she had not requested an accommodation, none could be offered based on her position.. Agency concluded that removal was the "appropriate penalty. It also concluded removal was also the appropriate penalty for the attendance related offenses. ("AWOL), which was based on her failure to return to work after all leave was exhausted. The Advance Notice stated that "the relevant *Douglas*[14] factors [were considered], particularly the effect [Employee's] conduct has had on [her] supervisor's confidence in [her] abilities; the consistency of the penalty with the table of…penalties; and the nature and seriousness of the offense." in reaching the decision that removal was warranted. Agency concluded:

[Employee's] unauthorized absences [have] interfered with the efficiency

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[13] "Inability to carry out assigned responsibilities or duties" cited as "inability to perform duties" herein; and " attendance related offenses: unauthorized absence." Cited as "AWOL" herein.

[14] *Douglas v. Veterans Administration*, 5 MSPB 313 (1981).

> and integrity of [Agency] and negatively impacted on [its] operations and ...ability to provide services to youth. (Ex J-13)

23. Dr. Tansinda stated in his letter of December 18, 2018, that Employee was "not yet released" to return to work due to back pain and depression. (Ex J-14).

24. On December 19, 2018, Dr. Memunatu Bangura wrote that Employee was "currently under [his] care for Mental Health," stating that the reader should "please feel free to contact" him with any questions. (Ex J-17).

25. The Administrative Review of Advance Written Notice of Proposed Removal ("Review") was issued by Hearing Officer ("HO") Hanifa Pressley, on December 28, 2018. In the Review, the HO referenced eight exhibits submitted by Agency, *i.e.,* the YDR PD and communications between Employee and Agency regarding leave status beginning March 22, 2018 and ending September 10, 2018. The HO stated that Employee had not submitted a response or asked for an extension to do so. She concluded that had Agency met its burden of proof by a preponderance of evidence on the charges and the penalty. (Ex J-18).

26. The Final Agency Decision ("FAD") was issued January 29, 2019. After citing the two charges, *i.e.,* "Inability to carry out assigned responsibilities or duties" and "Attendance Related Offenses," Adam Aljoburi, the Deciding Official ("DO"), stated that Agency was "compelled" to terminate Employee because her "unauthorized absences have interfered with the efficiency and integrity of [Agency] and negatively impacted [Agency's] operations and ability to provide services to youth. The DO stated that he adopted the "evidence, recommendations, rationale and conclusions" reached in the Proposed Notice and Review, noting that since Employee failed to submit a response to the proposed removal, he "did not have any additional information" to review in reaching his decision. (Ex J-19).

27. In his February 1, 2019 letter, Dr. Tansinda stated that since November 2018 Employee has been diagnosed with major depression, which has required medication and hospitalization. He explained that he had not given her that diagnosis before then because he assumed she was "bereaved" by the "sudden" death of her husband. (Ex J-20).

28. In his February 13, 2019 report, Dr. Tansinda diagnosed Employee with left spinal stenosis and cervicalgia/radiculopathy, and major depression; stating that her mental illness was "severe enough to prevent [her] from working." He anticipated that her impairment would continue until February 13, 2020. (Ex E-8).

29. Dr. Tansinda stated in his November 12, 2020 letter that Employee needed to use crutches due to "multiple surgeries" after fracturing her ankle, that she could return to light duty, and could not lift more than ten pounds or "engage in settling disputes among [CIY]." (Ex J-23).

30. In his March 25, 2021 letter, Dr. Tansinda stated that Employee still used crutches, and was released for light duty work, prohibiting her from "physical and strenuous interventions" and limiting her to lifting to 15 pounds. (Ex J-24). In his letter dated March 26, 2021, Dr. Tansinda included some of the same information contained in his letter of the previous day, adding that Employee "underwent a long period of physical therapy in a rehab facility," her "gait lacks

stamina," and that she cannot lift more than 10-15 pounds, cannot push or pull more than 20 pounds, and cannot engage in breaking up fights or physical altercations." (Ex J-25).

POSITIONS OF THE PARTIES AND SUMMARY OF EVIDENCE

Agency's position is that acted appropriately and followed required procedures, in this matter. It asserts that Employee did not seek a reasonable accommodation, but maintains that it could not have provided one if requested, since all YDRs must meet the physical requirements in the PD. (Tr, 9-13).

Alisha Hunt, Agency's first witness, testified that she placed Employee on AWOL status because she failed to return to work on August 19, and had no leave available. (Tr, 39-40; Exs J-5, J-10). She could not recall[15] if Employee had contacted her and explained why she could not report to work on August 19 or if she and Employee communicated after the AWOL charge was issued. (Tr, 40, 52-53). Ms. Hunt testified that she proposed removal because Employee did not report to work after exhausting all leave, explaining that she lost confidence in Employee because "she wasn't there." (Tr, 41-42). The witness testified that due to Employee's absence, she had to hire additional staff or require current staff to work additional shifts in order to meet the Court-imposed staffing levels. (Tr, 43-44). On cross-examination, Ms. Hunt testified that Employee had communicated with her by email and telephone about her absences, but did not recall specific dates. (Tr, 49- 50). She did not know if Employee received the AWOL notice, explaining that she brought it to HR, but did not know if HR sent it to Employee. (Tr, 52).

Lennie Moore, Agency's Chief HR Officer, began as a Supervisory HR Specialist in 2016 and was promoted to his current position in August 2018. He testified that he had no "personal knowledge" of Employee. (Tr, 56-57). Mr. Moore testified that all YDRs, even those assigned to positions with no direct contact with youth, must meet the physical requirements in the PD, because all YDRs must respond in emergencies and must be able to use physical force when necessary. (Tr, 62-64). On cross-examination, Mr. Moore testified that Agency has no "light duty" program for YDRs. He said that when a YDR who was injured on duty is allowed to return only to light-duty work by ORM, Agency will inform ORM that it has no such positions, and ORM will contact other agencies about the availability of light duty positions. The witness said that he did not know if this was the procedure followed in 2018 or 2019. (Tr, 69).

Adam Aljoburi, Agency Chief of Staff for about six years, testified that he did not know Employee. He stated that that he reviewed the Advance Notice, the HO's Review and attached exhibits in reaching his decision. He testified that he reviewed the relevant *Douglas* factors in the Advance Notice and agreed with the analysis; and that he also concurred with the penalty. (Tr, 75-77). The witness testified that although there is no discussion of the *Douglas* factors in the FAD, his practice is to review the factors in the Advance Notice, and also conduct an "independent assessment" of the factors before reaching a decision. He explained that his review is "driven" [by and] depends on, an employee's response to the allegations" and that in this matter "there was no response for [him] to review, which could have provided mitigating factors in line with the *Douglas* factors." (Tr, 85).

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[15] In response to the AJ's request for clarification on whether or not Employee communicated with her about her absences and reasons she could not return to work, Ms. Hunt testified that the communications "could have happened [but] I don't remember." (Tr, 53).

On cross examination, Mr. Aljoburi reiterated that his review was limited to the documents given to him. He could not recall if those documents included information about Employee's on-duty injuries, length of service, performance evaluations, commendations for her diligence and hard work, or that she was under doctor's care at the time; but would have had that information if provided in the documents given to him to review. (Tr, 79-80, 91-92). He explained, when asked by the AJ, that his "independent assessment" of the *Douglas* factors depends on the employee's response," but that there was no response from Employee which "could have provided mitigating factors in line with the *Douglas* factors." (Tr, 83-85).

Employee's position is that Agency wrongfully terminated her. (Tr, 19). She contended that she complied with the deadlines imposed by Agency and maintained verbal and written communication with Agency. Employee testified that she submitted medical reports and other "paperwork" within the required timeframe in response to the H.O.'s request. Employee testified that she left several voicemails for the H.O., and recalled complaining to her Union representative that she "tried to reach the Hearing Officer by telephone to no avail." (Tr, 162-163, 166-168). With regard to the AWOL charge, Employee testified that she maintained verbal and written communication with Agency throughout her absence, keeping it informed of her status and providing documentation, including statements from her doctor regarding her medical condition and projected return-to-work dates. She stated that Agency never notified her that she was required to return to work on August 19, 2018. She testified that after exhausting all paid leave, she applied for benefits from the disability policy she obtained as a D.C. Government employee, and Agency received copies of documents related to that policy. She stated that she was receiving payments through her disability policy at the time of the AWOL charges. (Tr, 22-25).

Employee testified that she had "been through a lot" with Agency and ORM. She said that she was "disappointed" with how Agency treated her since she had served Agency "with [her] entire soul" throughout her tenure as a YDR, and was often assigned the most difficult cases. (Tr, 96). Employee asserted that Agency did not care about her injuries incurred while performing her duties; and felt Agency "stigmatized" her by "making [her] look like somebody who doesn't like work." (Tr, 103). She testified that after sustaining "three back-to-back" lumbar injuries on November 14, 15, and 17, 2009, she eventually received worker's compensation benefits from ORM, but had great difficulty with that process. (Tr, 104). She did not recall how long she remained out of work, only that it "quite a while." (Tr, 107). She testified that her supervisor filed claims with ORM following her on-duty injuries in 2009 and 2015, but did not do so after her injury in 2017.

Employee testified that she continued to work after the 2017 injury because she was concerned about her leave and finances, and thought the pain could be controlled with medication. (Tr, 97). She testified that she continued to work, despite the increasing pain which was exacerbated by the physical exertion required of her when breaking up fights, and performing other duties. She testified that by February 13, 2018, several days before her 56th birthday, the pain was so severe, that despite her efforts to get to work, she "could not make it." (Tr, 97, 108). She stated that she contacted ORM in February 2018, and asked that the 2009 claim be reopened, since she maintained the pain related back to the 2009 injury. She said that ORM informed her the 2009 claim was closed and could not be reopened. She said that she asked ORM to close the 2015 claim which was based on a neck injury, so that she could be treated for pain caused by the back injuries, but that ORM declined to do so. She testified that she continued to contact ORM asking what she

needed to do to obtain assistance related to the 2017 injury, but ORM would not assist her, and finally "stopped taking [her] calls." Employee stated that during that time, "nobody want[ed] to take [her] calls because she was a "beggar." (Tr, 99-101). She did not know if ORM provided her with a written denial or with any correspondence, and did not recall if she appealed ORM's decision to the Office of Administrative Hearings. (Tr, 110).

Employee maintained that she did not receive a notice from Agency granting her LWOP and directing her to return to work on August 19, 2018. She was uncertain why she gave August 19 as the date she could return to work on her request for LWOP. (Tr, 115, 122). She testified, however, that she maintained in contact with Agency throughout August 2018, and Agency was aware that she was unable to work on August 19, and that she complied with the August 31 deadline. Employee testified that she spoke with Ms. Hunt throughout her absence, calling her and informing her that her doctor had not released her to return to work, and providing verbal and written information of her medical condition. (Tr, 125). She testified, however, that at some point before August 29, 2018, Ms. Hunt told her that she would no longer talk with her and directed her to contact HR about these matters in the future. (Tr, 128-129). Employee stated that she provided Agency with medical documentation, but was uncertain of specific dates because she was heavily medicated throughout this time. (Tr, 142-143).

Employee testified that she knew that she had to notify Agency if she was unable to return to work on August 19, and that she "kept calling" Agency. In addition to speaking to Ms. Hunt during this time, Employee said she also spoke with Mr. Chambers or Mr. Allen, the "P.M supervisors" who "always" asked when she was returning and reminded her to bring a doctor's note on her return. (Tr, 116). Employee asserted that Agency had her doctor's note listing February 20, 2019 as the anticipated return-to-work date, and that throughout her absence, she provided Agency with copies of forms completed by her doctor related to the disability policy and other notes, stating that she was unable to work for medical reasons and with anticipated return-to-work dates. (Tr, 117). Employee stated that she broke her ankle in November 2019, while packing to move after she lost her home, and was confined to a wheelchair for about a year, and after which she started using crutches. (Tr, 159).

Employee testified that although she "tried [her] best," she became increasingly depressed, and that she was admitted to a psychiatric hospital on November 5, 2018 after suicidal ideations. (Tr, 138). Employee testified that she was taking heavy medications for pain and depression throughout this time, listing Oxycodone, Trazodone, and Tramadol as some of the medicines she was prescribed, which caused problems with memory and general functioning, but that she is no longer on those medications. She stated that even while she was heavily medicated with experiencing negative side-effects, she continued to communicate with Agency. (Tr, 100).

The remedy requested by Employee was reinstatement to her YDR position, noting that with some accommodations, she could meet all requirements. She stated that Agency should place her in a position that did not require contact with CIY while she was required to use a crutch, but and anticipated that she would only need a crutch for a few more weeks. (Tr, 155-157). Employee agreed, that as of the date of the proceeding, she could not meet all physical requirements of the YDR position. She did not dispute Dr. Tansinda's statement that she "could only work in a [position] that didn't require any strenuous physical work," noting that she still is "not as strong" as before. (Tr, 112-113, 136, 141).

ANALYSIS, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Pursuant to OEA Rule 629.3, 46 D.C. Reg. 9317 (1999), Agency has the burden of proof in appeals of adverse actions. Agency must meet this burden by a "preponderance of the evidence," which is defined as "the 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." *See* 6-B DCMR § 628. "Preponderance" is the lowest quantum of evidence, and the burden is met if the party with the burden presents just enough evidence to tip the scale in its favor. The AJ assessed credibility, consistency and reliability in deciding the "weight" accorded to evidence. In this matter, the AJ found that witnesses testified credibly, but due to problems witnesses had remembering dates and facts, and inconsistencies in responses, impacted negatively on the reliability of evidence. The AJ review the transcript and exhibits multiple times, assessing the quantity and quality of evidence presented by each party on each relevant issue in order to decide the weight to assign the evidence; and determining findings of fact, and conclusions of law, including the burden of proof.

Charges: With regard to the AWOL charge, it is undisputed that Employee did not report to work on the five days cited by Agency. The issue is whether Agency was aware of Employee's medical condition and her inability to report to work. Ms. Hunt, the only Agency witness offering testimony on this issue was uncertain, testifying that she thought that Employee communicated with her about these matters, but uncertain of the dates (Tr, 40, 52-53). On the other hand, Employee presented consistent and credible evidence that she stayed in contact with Agency throughout the time of her absence, including August 2018, keeping it apprised of her medical condition and her inability to work at that time. She reported that she spoke primarily with Ms. Hunt, but also spoke with Mr. Chambers and Mr. Allen, other supervisors when she called to explain her absences and the status of her condition. She testified that after Ms. Hunt told her that she would no longer communicate with her, and to contact HR if necessary, Employee communicated with Ms. Kagl and Ms. Fax. Employee testified that she notified Agency that she was unable to return to work on August 19, although she gave contradictory information on whether she received notification that she had to notify Agency if she could not report to work on that day.

In addition, Agency had ample documentation and information regarding Employee's medical incapacity well before November 29, 2018, when it issued the Advance Notice. First, Employee responded to Ms. Fax's directive that, based on her failure to return to work after her LWOP expired on August 19, 2018, she had to notify Agency by August 31 of her intention to return to work or risk disciplinary action. (Ex J-8). Employee responded by email on August 31 notifying Ms. Fax, that she was still unable to work and under medical care; and that she would provide Agency with a note from her doctor with an anticipated return-to-work date as soon as she received it. (Ex J-9). In addition, Agency had reports of Employee's medical incapacity and inability to report to work in various applications and documents submitted by Employee. Most notably, by September 8, 2018, Agency had received the SBA report in which Dr. Tansinda provided medical information on Employee's condition and stated that he anticipated she would be able to return to work by February 19, 2019. (UFFs 7-22). *Redding v. Department of Public Works*, OEA Matter No. 1601-0112, *Opinion and Order on Petition for Review* (March 15, 2011).

There is an alternative basis for reaching the same conclusion. It is well established that an AWOL charge may be reversed if an employee presents sufficient evidence of illness or

disability at the time covered by the AWOL charge at the evidentiary hearing. In this matter, Employee presented ample documentary and testimonial evidence at the hearing that she was unable to report to work during the 40 hours she was charged with AWOL due to medical disability. *Murchison v. Department of Public Works*, OEA Matter No. 1601-0275-95, *Opinion and Order on Petition for Review* (July 15, 1998), _D.C. Reg. ____ ( )

In sum, the AJ concludes that Employee presented sufficient testimonial and documentary evidence, unrefuted by Agency, that she was unable to report to work due to illness and incapacity during the period that she was charged with AWOL, that she kept Agency apprised of her medical condition through telephone calls and with documentation, and that Agency had sufficient information regarding her medical incapacity at the time it charged her with AWOL. For these reasons, the AJ concludes that Agency did not meet its burden of proof on the AWOL charge.

Agency also charged Employee with "inability to carry out assigned responsibilities." Agency maintained, and Employee did not dispute, that at the time Agency proposed removal, Employee could not meet the physical requirements of the YDR position. Agency presented sufficient evidence and argument, undisputed by Employee, that it is essential for all YDRs, even those assigned to non-contact duties, to meet all physical requirements since they must respond in emergencies and other situations which will require them to use physical force in order to ensure the safety of the CIY and staff. The AJ therefore concludes that Agency met its burden of proof that Employee was unable to meet the physical demands of the YDR position, at the time it proposed her removal.

Penalty: Agency has the authority to determine the penalty. This Office's review is limited to assessing the process used by Agency to determine the penalty. The penalty cannot be disturbed if Agency weighed "relevant factors" in a fair and unbiased manner. *See., e.g., Lovato v. Department of the Air Force*, 48 M.S.P.R. 198 (1991). Agency's decision to terminate Employee was based on two charges. Its decision-making process was based on two charges. It did not argue or present evidence that it would have proposed removal based solely on the inability to perform duties charge. In fact, both the Proposing and Deciding Officials refer only to the AWOL charge to support Agency's decision to terminate Employee, stating that Agency was "compelled" to terminate Employee because her "*unauthorized absences* have interfered with the efficiency and integrity of [Agency] and negatively impacted [Agency's] operations and ability to provide services to youth." Agency must review and reassess the penalty since the AWOL is reversed.. The AJ concludes that this matter must be remanded for Agency to determine what penalty, if any, is appropriate based solely on the remaining charge.

There is an alternative basis for remanding this matter to Agency. Since 1985, the District of Columbia Court of Appeals has set criteria that District of Columbia Government agencies must follow in determining the penalty; and the scope of review that this Office must utilize in deciding if Agency adhered to the criteria. *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). The Court has supplemented and refined the requirements in subsequent decisions. In 2019, the Court in *Belynda Roebuck v. D.C. Office of Aging,* (CAP-6482-15 (October 3, 2019) held that in deciding on a penalty, an agency must assess factors, including but not limited to the twelve cited in *Douglas,*[16] and decide if a fact mitigated and could reduce the penalty, "point[ed] in a different

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[16] The twelve *Douglas* factors are:

direction," or was "neutral or inapplicable." (*Id*). The Court cautioned that an agency's "conclusory assertion" that it met the required standard was "insufficient" and absent support would be rejected. It tasked this Office with reviewing the quality and scope used by agency to determine the penalty, and if it determined the process did not meet the required standards, to remand the matter to agency with "specific" information to enable it to meet those standards on remand:

> If the agency fails to show that it "conscientiously" weighed the relevant factors, the OEA's duty is to "specify how the agency's decision should be corrected" and remand the matter to the agency for the necessary consideration. (*Id*, p. 10)

The AJ carefully reviewed the process used by Agency in determining the penalty. The only information provided by Agency of how it determined relevant factors, was provided in the testimony of the Deciding Official who stated that his practice is to review the *Douglas* factors cited in the Advance Notice, and then conduct an independent assessment of the *Douglas* factors before reaching a decision. However, he testified that his review depends on information provided by the employee which could include mitigating factors; and since Employee did not submit a response, he was unable to conduct an independent assessment.

Agency's obligation to conduct a reasoned and sufficient review does not depend on whether or not Employee submitted information. Although there may be instances when an employee has relevant information that is not otherwise available to an agency, in this matter Agency had sufficient information in its possession to meet its responsibility even if, as it contends,

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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 supervisor's confidence in the employee's ability to perform assigned duties;
6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7. Consistency of the penalty with any applicable 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 tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and,
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Employee did not submit a response.[17] Agency had documentation that Employee worked as a YDR for about 13 years, and that she received commendation for her job performance, worth ethic, reliability as well as specific acts of merit. These factors are recognized by courts as "significant" mitigating factors; and if Agency had considered them, may have led it to impose a less severe penalty than removal, particularly for first "offenses." *Walsh v. Department of Veterans Affairs*, 46 M.S.P.R. 177 (1990) and *Sterling v. Department of Defense*, 46 M.S.P.R. (1990).

Agency's review is not limited to the *Douglas* factors. Although adverse actions are generally based on charges of misconduct and many *Douglas* factors reference misconduct, Agency had documentation to establish that the charges were not based on misconduct. However, in this matter, there was no allegation of misconduct. Agency had ample documentation that Employee's inability to report to work and perform her duties were not the result of misconduct or failure to adhere to requirements, but were the result of disability, likely related to her on-duty injuries. This information not only could serve as a mitigating factor, but could also move Agency to ascertain if a different course of action should be taken.

An agency may terminate an employee for cause if the employee cannot perform required duties, even the employee's inability to perform those duties is the result on an on-duty injury. cannot meet if the reason those duties cannot be performed. However, Agency must ascertain, based on relevant facts, if it should explore other options before removing Employee. In this matter, the evidence established that during her 13 year tenure Employee received commendations for her job performance, work ethic and specific meritorious actions. She also sustained three injuries in the performance of her duties. She received worker's compensation through ORM as a result of the 2009 injury. The record does not contain any information about the status of the 2015 claim. The record does establish that following the 2017 injury, sustained when Employee saved a youth who had hung herself in a suicide attempt, Employee continued to report to work despite increasing pain because of concerns about leave status, financial problems, and the expectation that the problem could be controlled with medication. There was no evidence presented that Agency filed a claim or report with ORM following the 2017, although agencies are mandated to report any "probable work-related injury' within three days after learning of the injury. Agency knew of Employee's actions in saving the youth in 2017, and that the young woman fell on her when she cut the rope, thereby injuring herself. Agency was required to report this probable injury to ORM. *See*, ORM Procedure Manual, p. 7. Employee's efforts to file a claim in 2018, which would have been timely, were unsuccessful. However, if Agency had filed a claim, Employee may have received worker's compensation and been afforded other benefits of her duties can be terminated for cause. Agency may still be allowed to file a claim at this time, and Employee may

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[17] Employee testified, however, that she submitted a timely written response to the HO which included documents regarding her medical condition. The AJ credits testimony for several reasons. First, she testified under oath, and the AJ assessed her demeanor. Also, her testimony on this issue was consistent and supported by evidence she offered of trying to reach the H.O. and her comments to the Union official (Tr) Further, throughout these proceedings, Employee always provided timely responses. Initially, she submitted lengthy handwritten documents with multiple attachments, even when not directed to do; and regularly telephoned the A.J., to check on the status or ask about deadlines. The AJ finds, based on these experiences and observations over a course of several years, that it is far more likely that Employee would have responded to the H.O.'s request. However, this does not mean that the AJ rejects the HO statement that she did not receive any response. Rather, she finds that it is reasonable to assume that the HO did not receive Employee's response and that for the same reason it was not provided to the DO.

still be entitled to benefits.

Agency may determine that it had lacked sufficient information about Employee's ability to perform all essential duties, when it proposed her removal. In the Advance Notice, in fact, Agency stated that the charge of "inability to carry out assigned duties" was based on Employee's position that due to medical problems, she could not report to work until February 2019. However, based on relevant factors, including her tenure with Agency, the multiple injuries sustained in the performance of duties, her citations for reliability, job performance and specific acts of courage, it should have utilized the provisions in Chapter 20B of the District Personnel Manual before proposing removal. Agency could then order a medical and/or psychiatric evaluation to determine if Employee could meet essential physical requirements of the YDR position. If it was determined she was "permanently incapable" of performing even one essential job function, then pursuant to Section 2006.2, the personnel authority would be required to:

> (a) Collaborate with the employee and the employing agency ADA Coordinators to determine whether a reasonable accommodation can be made…
> (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; [and]
> (c) If the employee cannot be reasonable accommodated or reassigned to a new position, the personnel authority shall advise the employee or applicable disability and retirement programs, and the program eligibility requirements;

If these efforts are not successful, Agency could then separate Employee "either through a retirement program or Chapter 16." *See, e.g., Employee v. Criminal Justice Coordinating Counsel*, OEA Matter No. 1601-0024-20 (February 17, 2021).

In sum, based on the findings of facts, conclusions of law, and analysis herein, the AJ has determined that Agency did not meet its burden of proof regarding the AWOL charge, and that the charge must be, and is hereby, reversed; and the matter is remanded with directions to Agency to propose a penalty, if it chooses to do so, based on the one remaining charge. The AJ has further determined that Agency did not establish that it considered all relevant factors when it determined the penalty, and the matter is remanded for Agency to propose a penalty, if it chooses to do so, consistent with *Roebuck* and the guidance provided in this *Initial Decision.*

ORDER

The AWOL charge is reversed. The matter is remanded to Agency to propose the penalty, if any, based solely on the remaining charge, consistent with *Roebuck* and the guidance provided in this *Initial Decision.* within 45 calendar days the date this decision is issued.

Agency shall immediately restore Employee to LWOP status retroactive to August 19, 2018, and restore any benefits to which she is entitled.[18] It shall submit documentation to this Office of its compliance within 30 calendar days of the date of issuance of this decision.

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[18] The AJ is authorized to return Employee to the *status quo ante. See, e.g., Covert v. Department of the Navy,* 31 M.S.P.R. 376 (1986).

The deadline for proposing a penalty based on the remaining charge shall be extended if, within 30 calendar days from the date this decision is issued:

> The parties jointly file a statement signed by both parties that they have entered into negotiations to bring this matter to a mutually-agreeable resolution. The parties may seek to avail themselves of this Office's mediation services in lieu of direct negotiations.
>
> Agency submits documentation, signed by the personnel authority, that it has ordered a medical and/or psychiatric examination to determine if Employee can perform all essential duties, and that the personnel authority will proceed in accordance with Section 2006.2 if the examination concludes that Employee cannot perform at least one essential job function with or without a reasonable accommodation; or
>
> Agency submits documentation, signed by ORM, that ORM will expeditiously process the claim of Employee's 2017 injury, and will consider, based on medical analysis, its relationship to the 2009 injuries.

FOR THE OFFICE:

/s/Lois Hochhauser
Lois Hochhauser, Esq.
Administrative Judge