THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
EMPLOYEE, Employee	OEA Matter No. 1601-0020-19R22
v.	Date of Issuance: December 6, 2022
D.C. DEPARTMENT OF CORRECTIONS, Agency	JOSEPH E. LIM, Esq. Senior Administrative Judge

Ann-Kathryn So, Esq., Employee Representative[1]
Bradford Seamon, Esq., Agency Representative

INITIAL DECISION ON REMAND

PROCEDURAL HISTORY

On December 19, 2018, Employee filed a Petition for Appeal with the Office of Employee Appeals ("Office" or "OEA") challenging the Department of Corrections' ("Agency" or "DOC") decision to terminate him. At the time of his termination, Employee was a Painter. Employee was terminated for incompetence; specifically, being unfit for duty after it was determined that he was not capable of performing his essential job functions as a painter without accommodations. The effective date of Employee's termination was November 30, 2018. On January 24, 2019, the DOC filed its Answer disputing Employee's claims and asserting that the removal should be upheld.

Following a failed mediation attempt, I was assigned this matter in March 2019. Following extensions requested by the parties, a Prehearing Conference was convened on May 14, 2019. At the Prehearing Conference, I ordered the parties to submit a Joint Statement ofFacts along with the parties' individual briefs. Following the submission of legal briefs by the parties, I issued an Initial Decision ("ID") on October 29, 2019, whereby I upheld Employee's removal.

Employee filed an appeal of the ID, and on February 23, 2022, the Superior Court of the District of Columbia ("DCSC") issued an Order remanding this matter back to OEA.[2] Subsequently, both parties submitted the required briefs. After status conferences held on March

[1] Employee's spouse represented Employee in 2019 and is not an attorney. In 2022, Attorney Ann-Kathryn So represented Employee.

[2] *Employee v. District of Columbia, et. al.* Case No. 2019 CA 008286 (D.C. Super. Ct. February 23, 2022).

30, 2022, and June 15, 2022, I determined that, based on the filings of both parties, 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[3]

1. Agency is responsible for operating one of the largest municipal jail systems in the country with an average daily population of approximately 1,700 inmates.

2. Employee had been employed with DOC as a Painter, Position RW-4102-08, in the Career Service since October 13, 2009.

3. Employee was a member of the Fraternal Order of Police Department of Corrections Labor Committee ("FOP/DOC" of "Union").

4. Employee was Agency's only Painter during his tenure at DOC.

5. As a Painter, Employee's job duties included indoor and outdoor painting, lifting paint cans weighing between 11.5 and 13 pounds per gallon, bending, climbing, reaching, standing, cleaning, preparing surfaces for painting by scraping, sanding, and wire brushing. The "General Duties" listed on his job description, among others: Preparing surfaces for painting by scraping, sanding, wire brushing, dusting and/or applying paint remover.... Preparing coating materials... Clean[ing] up spots and other debris [u]pon completion of assignment. Replace hardware, fixtures, furniture and equipment; assists in carrying paint and equipment to and from work sites; cleans paint brushes, pots and other equipment...May serve as lead worker and/or provide on-the-job training to inmate workers…Paints a variety of surfaces, including the interior and exterior of buildings, stationary and mobile equipment and facilities, such as office sites; various types of equipment, flag poles, benches, cabinets, tables, chairs, desks, frames, signs and plaques…The work involves considerable movement of the arms and legs. Cans of up to 20 gallons of paint occasionally must be lifted.[4]

6. Employee's duties as a Painter often required him to work with and around inmates. The July 2009 job description for Painter, RW-4102-08, allowed him: (1) to oversee and supervise the work details of inmate workers;, (2) serve as a lead worker to inmate workers;, and (3) provide

[3] Parties' Joint Stipulation of Facts (May 2, 2022), documents of record, and undisputed facts.

[4] *See* Agency Answer, Tab 2, Job Description, pg. 3.

on-the-job training to inmate workers.

7. However, the July 2009 job description for Painter, RW-4102-08, does not mandate that the painter obtain assistance from inmates in performing his duties. Instead, the job description makes it clear that the painter should be able to perform the full range of his duties on his own.[5]

8. On September 13, 2016, Dr. Rodney Brooks conducted a medical examination of Employee and completed an October 14, 2016, Health Care Provider Certification Form.[6] It stated that Employee suffered from a permanent condition which limited his ability to stand, walk, bend, and lift, and checked boxes recommending unspecified "Job Restructuring, Modified Work Schedule and Flexible Leave Policies, and Modification of Policies."

9. Dr. Brooks listed the following accommodations of essential job functions which Employee would require in order to perform his essential job functions: Bending – limited to 15 minutes; Lifting – limited to 25 pound maximum; Walking – limited to 20 minutes; Reaching – limited to 10 minutes; and Standing – limited to 45 minutes.

10. Employee submitted the completed Health Care Provider Certification Form that Dr. Brooks completed to Rosetta Taylor-Jones, DOC Human Resource Specialist, on October14, 2016.

11. Dr. Brooks completed another Certification of Health Care Provider for Employee's Serious Health Condition dated February 9, 2017. In the February 9, 2017, Health Form, Dr. Brooks stated Employee's condition could"cause episodic flare-ups periodically preventing [him] from performing his job functions." Dr. Brooks also stated that Employee would not be incapacitated for a single continuous period of time due to his condition, but that treatments or reduced number of work hours would be medically necessary. Dr. Brooks further stated that employee was unable to perform his job functions due to his condition, but did not identify those job functions.

12. On February 17, 2017, Employee submitted a Family and Medical Leave Application ("FMLA") Form requesting 640 hours of intermittent leave to be used between March 1, 2017, and March 1, 2019.[7]

13. On February 27, 2017, Employee included the February 9, 2017, Certification of HealthCare Provider for Employee's Serious Health Condition, completed by Dr. Brooks with his FMLA application.

14. DOC approved Employee's FMLA application on March 3, 2017, for 640 hours ofintermittent leave to be used between March 1, 2017, and March 1, 2019.[8]

15. From March 1, 2017, to March 1, 2019, Employee began using his 640 hours of intermittent leave under the Family and Medical Leave Act ("FMLA"). Thereafter, Employee resumed full duty.

---

[5] *See* Painter Job Description (2009).
[6] *See* Agency Answer, Tab 6, Health Care Provider Certification Form.
[7] *See* Agency Answer, Tab 5, FMLA Application.
[8] *See* Employee Prehearing Statement, Tab 5, FMLA Application.

16. In Employee's December 28, 2017, performance evaluation covering the period of October 2016 to September 2017, Employee's supervisor, Bobby Lacy, noted that "[Employee] is not currently working in his trade capacity, he currently distributespaints and supplies to officers. He is currently not performing any preventative maintenance services…[Employee] is constantly late and take[s] extensively long lunch breaks and heneeds a lot of time off of work."

17. On May 4, 2018, Dr. Melis Sener, Employee's personal physician, submitted a letter to the Agency stating that "[h]e has been treated for lumbar disc disease with neuropathy. He can perform his regular duty with following recommendations; limited bending, limited lifting (maximum 40 lbs.), limited standing 2 hours, limited standing on ladder (30minutes)."

18. On May 4, 2018, the DOC requested that Employee undergo his first Fitness for Duty evaluation ("FFD evaluation"). Prior to May 4, 2018, Employee had never been required to submit to a FFD evaluation.

19. Sometime between May 7 and May 13, 2018, the Agency made the decision to place Employee on desk duty pending the outcome of the FFD evaluation. Employee did not request to be put on desk duty. On desk duty, Employee completed clerical duties inlieu of his typical painter duties.

20. On June 11, 2018, Employee was seen for a Fitness for Duty evaluation by Dr. Karen Singleton, a physician at Washington Occupational Health Associates. She was not one of Employee's treating physicians.

21. In a June 13, 2018, letter, Dr. Singleton concluded that Employee was unable to carryout the essential functions of his position with the DOC without accommodation.

22. Dr. Singleton's June 13, 2018, letter identified the following accommodations which Employee would need in order to perform the essential functions of his job: Limit standing to two hours total in an 8-hour work day; Limit lifting to 20 pounds or less on an occasional basis; No climbing ladders; Limit bending to an occasional basis; Limit stooping to an occasional basis; Limit walking to 10 minutes at a time, and Must be able to take breaks as needed from standing or walking.[9]

23. On June 26, 2018, DCHR informed the DOC of Dr. Singleton's FFD evaluation findings.

24. Employee continued to work at DOC, completing clerical duties, until October 10, 2018.

25. By letter dated October 10, 2018, Agency issued to Employee an Advanced Written Notice of Proposed Separation (Advance Notice) which proposed removing Employee from his position of Painter, RW-4102-08. The October 10, 2018, letter stated that Employee was not fit for duty after discussing the physical risks of his continued employment.[10]

---

[9] *See* Agency Answer, Tab 4, 6/13/18 Report of Fitness for Duty Evaluation and Letter.
[10] *See* Agency Answer, Tab 3, 10/10/18 Advance Notice.

26. On October 30, 2018, Dr. Sener stated "[i]n reference to letter on 05/04/2018; he can perform his job in full duty, but he needs to take a break for 5 minutes after standing 30 minutes on a ladder. He needs to take a 5-minute break after standing for 2 hours. I also recommended him to avoid heavy lifting (lifting objects heavier than 40 lbs. at a time)."

27. Employee received a November 8, 2018, decision made by the assigned Hearing Officer, Karen R. Calmeise, Esq., stating that removal was appropriate based on Employee's inability to perform the essential functions of his position, and that no reasonable accommodation could be made. The decision also noted that Employee had not been released to work at full duty by his doctors for over two years and that his disability is permanent.

28. On November 21, 2018, the DOC issued its final decision finding Employee "unfit for duty" and terminating his employment. DOC concurred with the Notice of Proposed Separation and the Hearing Officer's written decision, and sustained the proposed separation of Employee, effective November 30, 2018.[11]

ANALYSIS AND CONCLUSIONS OF LAW

The D.C. Superior Court ("DCSC") agreed with OEA's determination that it does not have jurisdiction to review claims of disability-based discrimination under the D.C. Human Rights Act ("DCHRA") or the federal Americans with Disabilities Act ("ADA").[12] OEA Rule 600.1. states that OEA is "an independent administrative adjudicatory agency created by the District of Columbia Government Comprehensive Merit Personnel Act of 1978." As the D.C. Court of Appeals ("DCCA") has stated, "[a]gencies are creatures of statute and their authority and discretion are limited to that which is granted under their founding statutes." *D.C. v. Brookstowne Cmty. Dev. Co*., 987 A.2d 442, 449 (D.C. 2010). Accordingly, the DCSC held that OEA correctly ruled that Employee's "claims of human rights violations by Agency due to his disability status and request for workplace accommodations/restrictions are outside the scope of OEA's jurisdiction."

The Court held that one way to reconcile the tension between (1) OEA's duty to decide whether a reasonable accommodation by DOC would have enabled Employee to perform the essential functions of his position and (2) OEA's lack of jurisdiction to decide whether DOC violated the DCHRA or the ADA is the way chosen by OEA in *Falls v. D.C. Department of General Services*, OEA Matter No. 1601- 0044-12, *Opinion and Order on Interlocutory Appeal* (Oct. 29, 2013). In *Falls*, OEA concluded that while it did not havejurisdiction to determine whether the removal violated the DCHRA, it did have jurisdiction to determine whether the agency had cause to remove the employee. Thus, OEA had jurisdiction to determine whether DOC had cause to remove Employee because no reasonable accommodation would permit him to perform the essential duties of his job. The Court held that although this issue was intertwined with issues involving the DCHRA and the ADA, this intertwinement did not eliminate OEA's jurisdiction or relieve it of the obligation to decide whether DOC had cause for removal under 6B DCMR §

[11] *See* Agency Answer, Tab 1, 11/21/18 Final Notice.
[12] *See also Davidson*, 886 A.2d at 74 (OEA does not have jurisdiction to consider petitioner's claim that his removal violated his rights under the ADA); *El-Amin v. D.C. Department of Public Works*, 730 A.2d 164, 165 (D.C. 1999).

1607.2(n). That is true even if the term "reasonable accommodation" for a disabled employee held the same meaning both in § 1607.2(n) and in disability law.

In remanding this matter to the OEA, the Superior Court set aside OEA's decision after concluding that OEA failed to adequately provide a complete and reasoned explanation of its conclusion that no reasonable accommodations would have enabled Employee to do his job. It stated that OEA did not cite any record evidence that Employee had insisted that "Agency allow him to work at a much slower and limited pace with assistance from others."[13] The Court pointed out that under § 1607.2(n), reasonable accommodations are required to enable a disabled employee to continue his employment.

The Court did not agree with Employee that DOC could not lawfully terminate him for failing to perform his duties as the whole premise of Employee's request for accommodations was that he could not continue to perform his duties without them indefinitely. Employee stresses that he experienced pain and hardship when he continued to perform his duties without the accommodations to which the ADA entitled him. The DCSC stated that the basic problem with OEA's analysis was not that it concluded Employee could not perform essential job functions without reasonable accommodation, but instead that it did not provide a complete and reasoned explanation of its conclusion that no reasonable accommodations would have enabled Employee to do his job.

Whether Agency had cause to take adverse action against Employee

In accordance with D.C. Official Code §1-616.51(2001) and 6B 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 November 30, 2018, when the new version of the DPM was already in effect.

Based on the above mandate by the DCSC, the following analysis attempts to decide whether Agency lawfully removed Employee under 6B DCMR §1605.4(n) "Inability to carry out assigned duties" as its basis for terminating Employee. 6B 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 his assigned duties, and if so, whether any reasonable accommodation could enable him to perform those functions.

Agency's Position[14]

[13] OEA Decision at p. 5.
[14] Agency's Briefs (May 13, 2022, May 31, 2022, and September 13, 2022).

Agency asserts that it had cause to terminate Employee for incompetence. Agency states that due to Employee's various permanent medical conditions, Employee could no longer perform the essential functions of his job as a Painter. Agency relies on D.C. Personnel Regulations ("DPM") § 1605.4(n) and 1607.2(n) to argue that an employee with a Career Service appointment may be removed from his or her position if he or she is unable to perform the assigned responsibilities and duties of his or her position. The inability to carry out assigned duties is listed as cause for adverse action under DPM §1607.2(n).

Agency asserts that it also acted in good faith as it sought to determine what reasonable accommodation was possible for Employee to continue to perform the essential duties of his position as a Painter. Finding none, Agency maintains that it had to terminate Employee's employment when it determined that there were no reasonable accommodations available.

Employee's Position[15]

Employee asserts that he was wrongfully terminated as the Agency made no efforts to provide him the reasonable accommodations required under 6-B DCMR § 2006.2(a) to enable him to continue to perform his job as a painter. He accuses Agency of failing to initiate an interactive process to determine what reasonable accommodations could be provided to him and instead terminated him because of his physical condition. Employee also states that Agency's handpicked examining physician, Doctor Singleton, was biased. Accordingly, Employee states that because the DOC failed to engage in the requisite interactive process, it had no legal basis to conclude reasonable accommodations could not be provided. As such, there was no cause for his termination. Employee concludes by stating the only proper remedy is for OEA to reverse Agency's adverse action.

Employee's main argument is that Agency failed to engage in the interactive process required by 6-B DCMR § 2006.2(a) of determining the reasonable accommodations necessary to enable him to continue in his job as a painter. This dereliction by Agency, Employee asserts, can only be remedied by restoring him to his position, not by excusing Agency's failure or allowing it to do a make-over.

Analysis

Like the ADA, the DCHRA requires employers to engage in an "interactive process" to identify potential accommodations that could overcome a disabled employee's limitations. *See Hunt v. District of Columbia*, 66 A.3d 987, 992 (D.C. 2013). This interactive process is mandated because an employer that does not engage in an interactive process "risks not discovering a means by which an employee's disability could have been accommodated." *Id*. The DCSC held that despite DCHR's directive, DOC did not complete or even start this interactive process.

This interactive process is codified in 6-B DCMR § 2006.2 which states that:

[15] Employee's Briefs (May 13, 2022, May 31, 2022, and September 22, 2022).

> *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;
>
> (b) If no such reasonable accommodation can be made, work with the employing agency to non-competitively reassign the employee to another position for which the employee qualifies and can perform the essential job functions with or without a reasonable accommodation;
>
> (c) If the employee cannot be reasonably accommodated or reassigned to a new position, the personnel authority shall advise the employee of applicable disability and retirement programs, and the program eligibility requirements; and
>
> (d) Separate the employee, either through a retirement program or Chapter 16.

As far as what the interactive process entails, the D.C. Circuit Court has held that in order to meet its obligations, an employer needs information about the nature of the individual's disability and the desired accommodation. *See Ward v. McDonald*, 762 F.3d 24, 31 (D.C. Cir. 2014). 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 theemployer may require the employee to provide documentation. *See Lenkiewicz v. Castro*, 145 F.Supp. 3d 140, 143 (D.D.C. 2015). 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.

Ward at 32. 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 accommodationwould enable the employee to continue working." *Id*. 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." *Id.*

In the instant matter, the first problem with Employee's argument is that an interactive[16] process must be one participated by both parties. While there is no evidence presented that Agency collaborated with Employee regarding any possible work accommodations,[17] neither is there any evidence that Employee attempted to outline to the DOC the accommodations he needed, other than to present his doctor's reports of his physical limitations in support of his FMLA application. In addition, as Agency pointed out, Employee did not respond to Agency's contention in its Notice of Proposed Separation to Employee that no reasonable work accommodation was possible. This was true even after Employee was granted seven additional days to rebut the Agency's notice. Lastly, when Employee was asked by the undersigned to identify the specific workplace accommodations that he seeks from Agency that would enable him to continue performing his job as a painter while still being consistent with the medical guidelines and limitations identified by the medical doctors who have treated and/or examined him, Employee declined to do so.[18] Thus, both parties do not come with clean hands.

The second problem with Employee's argument that his termination should immediately be overturned due to the lack of an interactive process is the fact that the legislative construct of 6B DCMR § 2006.2 indicates that it is merely directory, not mandatory, and that any error in compliance may be found harmless. The regulation provides that the personnel authority "shall" collaborate with employee to determine whether a reasonable accommodation can be made. *Id*. As the DCCA has often noted, the word "shall" is "sometimes found to be merely directory for obvious reasons founded in fairness and justice." *Brown v. D.C. Pub. Employee Relations Bd*., 19 A.3d 351, 355 (D.C. 2011). Under the DCCA's analysis in *Brown*, "shall" is generally directory, not mandatory, unless the statute provides a sanction for the agency's failure to act. *Id.* Here, 6B DCMR § 2006.2 imposes no consequence(s) for an agency that fails to comply with its guidance. For instance, it does not state that a failure to comply renders a termination ineffective. Thus, as this regulation is only directory, non-compliance does not mandate such a drastic measure as a reversal of Agency's action.

Lastly, the relevant case law is clear that a reasonable accommodation analysis does not stop at whether an interactive process took place. The DCCA has emphasized that in a discrimination context, there is no per se liability under the ADA if an employer fails to engage in an interactive process. *See Sparrow v. D.C. Off.Of Human Rights*, 74 A.3d 698, 704, 705 (D.C. 2013). Furthermore, 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. *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)). Moreover, the interactive process "is not an end in itself" and thus "it is not sufficient for the employee to show that the employer failed

---

[16] Interactive: mutually or reciprocally active. (Merriam-Webster definition)

[17] Apart from sending Employee for medical fitness for duty exam by Dr. Singleton to ascertain his physical disabilities.

[18] Employee also declined to provide specific and detailed information such as requested starting and end times of his workday shift, the specific assistance/accommodations that he requires (example: number of assistant(s), specific tools to enable him to do any required lifting of an object that exceeds the doctor's recommendations, amount of rest time needed and when during the work shift, etc.)

to engage in the interactive process."*Pantazes v. Jackson*, 366 F. Supp. 2d 57, 70 (2005). Here, Employee has failed to meet his burden under *Floyd* and has presented no evidence of a *reasonable* accommodation that would have allowed him to perform his essential duties.[3] Therefore, even if this Office were to adopt Employee's argument that an interactive process did not occur, it is not enough to warrant reversal.

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. *Sparrow v. D.C. Off. Of Human Rights*, 74 A.3d 698, 704, 705 n.8 (D.C. 2013). 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." *Id*. at 705 (emphasis added and internal quotation marks and punctuation omitted). The DCCA stated that where an interactive process did not occur, "a factual question exists as to whether the employer attempted to provide reasonable accommodation." *Id*.

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. *See Sparrow* at 705. As with any *prima facie* evidence, it can be overcome with a showing to the contrary.

Agency asserts that the facts show that it acted in good faith to fulfill any obligation to accommodate Employee's disability. When Employee first presented Agency with information regarding his medical conditions, the Agency responded by temporarily relieving Employee of the more physically demanding aspects of his job and assigning him to more clerical tasks such as answering calls and creating work tickets. This relief is evidenced by Employee's October 2016 – September 2017 performance evaluation, in which his supervisor noted that "[Employee] is not currently working in his trade capacity, he currently distributes paints and supplies to officers. He is currently not performing any preventative maintenance services." Employee, himself, admitted to Dr. Singleton during his FFD evaluation that he was only doing "some painting" along with other work "outside of his job description." Agency points out that when Employee submitted his FMLA application requesting 640 hours of intermittent leave on February 17, 2017, the Agency approved the application within two weeks on March 3, 2017. Additionally, when Employee submitted the letter from Dr.Sener in May 2018 with recommended accommodations, Agency almost immediately placed Employee on desk duty in an official capacity to further accommodate his restrictions.[19] Agency also referred Employee for an FFD to evaluate Employee's fitness for duty and "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations"[20] on a permanent basis. By the time that Agency determined it could not reasonably accommodate Employee, it possessed adequate information—including Employee's desired accommodations communicated through his doctors—to make an informed decision.

[19] *See* Joint Stipulation of Facts, #19.
[20] *See Ward* at 32.

Agency also points out that in its Notice of Proposed Separation, it specifically advised Employee to respond to the Notice if he disagreed with Agency's determinations regarding the lack of accommodations.[21] Agency submits that this Notice invited Employee to raise any reasonable accommodations that he believed could be made or had not been considered. Not only did Employee fail to submit a response within the allotted time, but he 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."

Thus, Agency submits that Employee's failure to respond to the proposed separation precludes him from now asserting that Agency failed to engage him in the interactive process and/or reasonably accommodate him. Agency avers that this constituted a failure to participate and a breakdown in a back-and-forth process between Agency and Employee.[22] Thus, Employee waived an opportunity to make a reasonable effort to identify an available accommodation.

Thus, the DCCA is clear that the lack of an interactive process is not dispositive and does not unequivocally place an employer at fault, but rather it necessitates an analysis by the factfinder concerning the employer's attempt and/or ability to provide reasonable accommodations. To this point, the United States District Court for the District of Columbia ("District Court") has found that in order to establish that an employer failed to participate in an interactive process, a disabled employee must show that 1) the employer knew about the employee's disability; 2) *the employee requested accommodation or assistance for his or her disability*; 3) the employer did not make a good faith effort to assist the employee in seeking accommodation; and 4) *the employee could have been reasonably accommodated* but for the employer's lack of good faith.[23]

Therefore, notwithstanding a failure to engage in an interactive process, such failure is inconsequential if the evidence demonstrates that the process would not have brought about a reasonable accommodation.[24] The District Court also recognized this concept by noting:

---

[21] The Notice of Proposed Separation was issued on October 10, 2018. The Employee remained employed with DOC until his termination on November 30, 2018. If Employee had submitted a response as asked, his response would have been considered prior to his termination pursuant to 6B DCMR § 1623.2.

[22] *See Ward* at 32.

[23] *See Floyd v. Lee,* 968 F. Supp. 2d 308,327 (D.D.C. 2013) (holding that the plaintiff's claim failed because she cannot rely on the employer's refusal to engage in the interactive process but rather must establish that a reasonable accommodation would have allowed her to perform the essential functions of her job); *See also Alston v. Washington Metro. Area Transit Auth*., 571 F. Supp. 2d 77, 82 (D.D.C. 2008) ("plaintiff must show more than her employer failed to engage in the interactive process. She must demonstrate that a reasonable accommodation was possible") (internal quotation marks omitted).

[24] The United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") echoed this sentiment by finding that "failure to engage in an interactive process cannot support [a claim] in the absence of evidence that accommodation was possible." *Reagan-Diaz v. Whitaker*, 748 Fed. Appx. 353, 355 (D.C. Cir. 2019) (internal citations omitted).

> Because the interactive process is not an end in itself, it is not sufficient for the employee to show that the employer failed to engage in an interactive process. Rather, the employee must show that the result of the inadequate interactive process was the failure of the employer to fulfill its role in determining what specific actionsmust be taken by an employer in order to provide the qualified individual a reasonable accommodation.[25]

As noted in the findings of fact, since both parties failed to attempt to engage in the forementioned interactive process, 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 DPM § 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.

"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, Employee made no specific requests regarding accommodations other than his physical limitations stated by his doctors while Agency used a FFD medical exam to verify Employee's limitations but failed to interact with Employee regarding possible accommodations before giving him notice of its intended adverse action.

Unlike other sections of 6B DCMR § 1607, section 1607.2(n) does not specifically make reference to the DCHRA or other laws to provide context or further meaning to the language it incorporates.[26] 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.[27] 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—

---

[25] *Pantazes v. Jackson*, 366 F. Supp. 2d 57, 70 (2005) (internal quotations and punctuation omitted).

[26] For instance, 6B DCMR § 1607.2(j) 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 carry 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 § 1607.2(j).

[27] Agency also points out that 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.

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"[28] under 6B DCMR § 1607.2(n).

Agency's requirements under the DCHRA and the ADA.

While OEA has no jurisdiction over DCHRA and ADA claims, examining Agency's requirements under the DCHRA and ADA helps our inquiry regarding issues No. 1 and No. 2 identified in this ID. As recognized by the D.C. Court of Appeals ("DCCA"), an employer's obligations under the DCHRA and the ADA are essentially the same.[29] The DCHRA, which is codified under D.C. Official Code §§ 2-1401.01 – 2-1404.04, expressly prohibits an employer from failing or refusing to hire, discharging, or otherwise discriminating against any individual with respect to his or her employment on the basis of disability. *See* D.C.Official Code § 1402-11. Likewise, the ADA, which is codified as 42 USCS §§ 12111-12117, provides that "no covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 USCS § 12112.

Although the DCHRA does not reference reasonable accommodations as it relates to disability, the DCCA has provided guidance on the subject. In *Hunt v. D.C.*, 66 A.3d 987, 991 (D.C. 2013), the DCCA advised that pursuant to both the DCHRA and the ADA, in order to qualify as an individual with a disability for purposes of the statutes, the employee must be "someone who with or without reasonable accommodation can perform the essential functions of the employment position that such individual holds or desires."(Internal quotation marks and punctuation omitted). Accordingly, an employer must "make reasonable accommodation to the known physical or mental limitations of a disabled employee *unless the employer can demonstrate that the accommodation would impose an undue hardship*[30] *on the operation of its program*." *Id*. (emphasis added).

---

[28] 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 USCS § 12111(9).

[29] In *Hunt v. D.C.*, 66 A.3d 987, 991 (2013), the DCCA explained that "[o]ur decisions under the DCHRA regarding whether an employee was discriminated against because of "disability" effectively incorporate judicial construction of related anti-discrimination provisions of the [ADA]."

[30] The ADA provides that the term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of: 1) the nature and cost of the accommodation needed under [the ADA]; 2) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect of expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; 3) the overall financial resources of the covered entity; the overallsize of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; 4) the type of operations of the covered entity, including the composition, structure, and functions ofthe workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity. *See* 42 USCS § 12111(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." *Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994). 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 not a reasonable accommodation'" *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)). 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.'" *Id.* at 290. Likewise, guidance from the Equal Employment Opportunity Commission provides that employers are not required to reallocate essential functions to someone else as a reasonable accommodation. *Id*.

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.[31] 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." *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").

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*., 2019 U.S. Dist. LEXIS 81839, *21, 2019 WL 2120324, "an accommodation is [only] reasonableif it allows the employee to fulfill *all* essential functions of [his] job *without imposing an undue hardship* on the employer." (Emphasis added) (quoting *Graffius v. Shineski*, 672 F. Supp. 2d 119, 126 (D.D.C. 2009). 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. *Id*. at 31-32.
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." *Id*. at 37. 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." *Id*. (quoting *Rehrs v. Iams Co*., 486 F.3d 353, 357 (8th Cir. 2007)). Further, the lawis clear that an employer is not required to provide an employee with his or her preferred accommodation. *See Aka v. Wash. Hosp. Ctr*., 156 F.3d 1284, 1305 (D.C. Cir. 1998). The employer must simply provide a *reasonable* accommodation *if* one can be made. *Id*.

---

[31] *See Ammons v. Aramark Unif. Servs*., 368 F.3d809, 819 (7th Cir. 2004) (finding that the employee could not perform the essential functions ofhis 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").

Lastly, in defining "reasonable accommodation to perform essential job duties," one must also consider the definition of an "essential job duty." EEOC regulations define essential functions as the fundamental job duties of the employment position the individual with the disability holds. *See Adams v. District of Columbia*, 50 F. Supp. 3d 47 (D.D.C. 2014). On this subject, courts have consistently held that employers are owed "substantial deference" from the court in determining essential job functions. *See Id.* at 54. In *Adams*, the employee claimed that travelling was only a voluntary, ad hoc aspect of his job. *Id*. at 55. However, the court heavily relied on the employer's written job description (in addition to the employee's past representations that his ability to complete his work was limited by his inability to travel) as evidence that travelling was indeed an essential job function. *Id*.; *See also Floyd* at 510 (finding that evidence of essential functions "can include the employer's judgment, written job descriptions prepared before advertising or interviewing applicants for the job, the consequences of not requiring the [employee] to perform the function, and the work experience of past [employees] in the job.") (Internal quotation marks and punctuation omitted).

3. *The application of 6B DCMR § 1607.2(n) in the instant matter.*

The cardinal question before this tribunal is how it should all be applied in the instant matter. DCSC's Order did not hold that the ID must be reversed due to a perceived failure on the part of the Agency. Rather, DCSC has simply instructed this tribunal to provide a "complete and reasoned explanation of its conclusion that no reasonable accommodations would have enabled [Employee] to do his job" in light of DCHRA and ADA guidance regarding reasonable accommodations.

As the Courts have found in the opinions cited above,[32] 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 Painter at DOC. The Painter job description provides a host of general duties which include indoor and outdoor painting, preparing surfaces for painting, sanding, cleaning up debris, replacing hardware, fixtures, furniture, and equipment, carrying paint and equipment, etc. The job description also provides that the work requires considerable movement of the arms and legs with occasional lifting of up to 20 gallons of paint. The full range of work as a Painter carried essential functions such as standing for long periods of time, bending, stooping, squatting, kneeling, accessing elevated or confined areas, climbing stairs, moving furniture, climbing ladders, lifting of up to 20 gallons of paint, etc. Agency has noted that even a 5-gallon bucket of paint weighs more than 40 pounds. Since a Painter is required to be able to lift up to 20 gallons of paint, he must be able to lift more than 40 pounds.

The overriding concern to this tribunal is that Employee should not be subjected to work that jeopardizes his health or aggravates his permanent condition. Thus, whatever accommodations that Agency can provide must cater to the most conservative limitations identified by the medical doctors who have treated or examined Employee. Based on the medical reports of all the doctors, including Employee's own treating doctors, it is undisputed that Employee has permanent disabilities that limit his performance of his painter position. Dr. Brooks' September 13, 2016, report described Employee's permanent condition as "neuropathy of both feet"and "lumbar disc disease" with "permanent titanium rods in [Employee's] back." Dr. Brooks further described

[32] *See Adams* and *Floyd*, *supra*.

Employee's condition as including permanent "nerve pain of both feet." The doctor enumerated the time limitations on Employee's movements: bending to 15 minutes, lifting to 25 pounds, walking to 20 minutes, reaching to 10 minutes, and standing up to 45 minutes.

In the February 9, 2017, health form, Dr. Brooks elaborated that Employee's condition could "cause episodic flare-ups periodically preventing [him] from performing his job functions." Dr. Brooks also stated that Employee would not be incapacitated for a single continuous period of time due to his condition, and that treatments or reduced number of work hours would be medically necessary. Dr. Brooks further stated that employee was unable to perform his job functions due to the condition, but he did not identify those functions. Dr. Brooks also noted that it would be medically necessary for Employee to be absent from work during his flare-ups.

Dr. Melis Sener, Employee's personal physician, submitted a May 4, 2018, letter to the Agency stating that "[Employee] has been treated for lumbar disc disease with neuropathy. He can perform his regular duty with following recommendations; limited bending, limited lifting (maximum 40 lbs.), limited standing 2 hours, limited standing onladder (30 minutes)." Dr. Sener stated on October 30, 2018, "[i]n reference to letter [sic] on 05/04/2018; he can perform his job in full duty, but he needs to take a break for 5 minutes after standing 30 minutes on a ladder. He needs to take a 5-minute break after standing for 2 hours. I also recommended him to avoid heavy lifting (lifting objects heavier than 40 lbs. at a time)."

Employee cast doubts on the accuracy and objectivity of Dr. Singleton's June 13, 2018, FFD Report. Dr. Singleton had identified Employee's required workplace accommodations as: no more than a total of two hours standing in an 8-hour workday; lifting 20 pounds or less on an occasional basis; no climbing ladders; limit bending and stooping to an occasional basis; limit walking to 10 minutes at a time and be able to take breaks as needed from standing or walking. Considering that Dr. Singleton's recommendations are essentially similar to Employee's treating doctors, I do not find Employee's doubts about Dr. Singleton's objectivity to be credible.

The sum of these doctors' reports all indicate that Employee has a permanent medical condition that put significant limits on his physical capacities to perform his job as a painter. For Agency to ignore these limitations would invite legal liability for aggravating Employee's health and would be *per se* unreasonable. The next question is what workplace accommodation would take into account Employee's physical condition or should be afforded Employee to enable him to perform the essential functions of a painter? Although Employee refused to specify his desired accommodations, he did state that he would need the assistance from at least one inmate or other Agency personnel to perform his job. Employee claimed that his job description clearly outlines that the use of inmate labor as part of his job as a Painter. The undersigned finds that Employee misreads that part of a painter's job description. The job description states that a painter may oversee, supervise, and train inmate workers, as well as serve as a lead worker to them. Nowhere in the Painter's job description is there a mandate that the painter obtain assistance from inmates in performing his duties. Instead, the job description makes it clear that the painter should be able to perform the full range of his duties on his own.[33]

[33] *See* Painter Job Description (2009).

It is undisputable that based on the opinions of all three doctors—Dr. Brooks, Dr. Sener and Dr. Singleton— Employee has permanent physical limitations on his ability to effectively perform his required tasks throughout an 8-hour workday. Agency submits that although Dr. Singleton's recommendations are the most restrictive, they are also the most accurate (limited standing to 2 hours throughout 8-hour workday, limited lifting to 20 pounds or less, no climbing ladders, limited bending, limited stooping, limited walking to 10 minutes at a time, and ability to take breaks as needed from standing or walking). Dr. Singleton's FFD evaluation is the most thorough and comprehensive medical report in the record, whereas Dr. Brooks and Dr. Sener either completed standard forms or submitted brief letters. Dr. Singleton considered several factors in making her recommendations, including the previous recommendations of Employee's treating doctors. Thus, Dr. Singleton's recommendations are given considerable weight.

Of the three doctors, Dr. Sener recommended the most flexible restrictions—limited bending, standing limited to 2 hours, standing on ladder limited to 30 minutes, and lifting limited to 40 pounds. Thus, *even* in the light most favorable to Employee, such restrictions still would not allow him to perform at a full duty level without assistance.

Based on the relevant law, it is of equal concern to this tribunal that whatever accommodation provided by Agency must be reasonable. The definition of a "reasonable accommodation" under 6B DCMR § 2006.2 is succinctly set forth by 6B DCMR § 2099.1, which provides that a reasonable accommodation is "a change in the workplace or the way things are customarily done that permits an employee to perform the full duties and responsibilities of the given position (excludes removing essential functions of the position)," to include:

> (a) Changes to a job application process to permit an individual with a disability to be considered for a job;
>
> (b) Changes to enable a qualified individual with a disability to perform the essential functions of the job; and
>
> (c) Changes that enable employees with disabilities to enjoy equal benefits and privileges of employment.

Under 42 U.S.C. § 12111(10)(B), when an employer is determining whether an accommodation request would cause undue hardship, Agency must consider:

> (i) the nature and cost of the accommodation needed…
>
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, andlocation of its facilities;

(iii) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

It is axiomatic that a Painter with the aforementioned job functions cannot consistently limit basic movements such as bending, standing, climbing and lifting. Such movements are what allow a Painter to perform tasks (i.e., preparing surfaces, indoor/outdoor painting, cleaning debris etc.) on a regular basis. Furthermore, as Employee admitted, thereis no light duty option for DOC maintenance jobs. To remain a Painter, Employee would need to regularly perform the required physical tasks, and his restrictions clearly would not allow him to do so. Agency avers that as the sole Painter at DOC, Employee's constant need to take breaks, as suggested by all three doctors, would have imposed an undue hardship on the Agency. As the Court found in *Morris*, an accommodation is only reasonable if it would allow an employee to complete tasks within a reasonable period of time.[34] Timely completion of tasks had already been an issue for Employee. In his performance evaluation covering October 2016 to September 2017, Employee's supervisor noted, "[Employee] needs to complete assigned tasks" andthat Employee "take[s] extensively long lunch breaks and he needs a lot of time off work." Again, in his next performance evaluation covering October 2017 to September 2018, Employee's supervisor noted that he "need[s] to work on completing daily assignments." Here, the slowed pace and limited capability caused by Employee's condition would prevent him from timely completing certain essential tasks.

Given the courts' stance that it is unreasonable to require other employees to simply cover for a disabled employee,[35] it would certainly be unreasonable to require Agency to hire a second Painter because there is no one else who holds Employee's position to cover for him. Ultimately, the recommended accommodations would not enable Employee to perform his essential job functions without causing the Agency undue hardship.

Aside from the recommended accommodations of the doctors, Employee has suggested that when he is unable to perform an essential job duty, such as lifting or bending, one of the DOC inmates could perform it in his stead. However, as demonstrated above, the courts have been clear that an accommodation is not reasonable if others would be required to perform Employee's essential job functions.[36] Just as the Court in *McIntyre* rejected an accommodation as reasonable because it would create more cumbersome work for other employees, the same can be applied to the DOC inmates, who cannot realistically be relied upon by Agency to complete tasks that are designated for employees.[37] Inmates are not trained painters, pose security risks, and their availability is subject to the length and terms of their incarceration. Moreover, Employee acknowledged that there were areas of the jail where inmate labor was not available, and that in order to paint those areas, he utilized the assistance of a co-worker who was not a Painter.[38] This

---

[34] *Morris* at 47.
[35] See McIntyre at 37.
[36] *See Carr and Stern.*
[37] *See McIntyre*, *generally.*
[38] As Employee was the only Painter at DOC, it follows that this other co-worker who assisted him with painting these areas of the jail was not a Painter.

is the type of undue hardship described by the Court in *McIntyre* concerning other employees who are deprived of working on their own tasks due to assisting the disabled employee.[39]

Employee has also suggested that because some of his duties entailed lesser physical tasks, such as training inmates, ordering supplies and managing paint inventory, he could be accommodated by being allowed to continue performing those duties as a Painter. However, this suggestion is akin to the facts of the *Ammon* case, in which the Court found that a reasonable accommodation must permit an employee to work full-time as opposed to changing his essential duties so that his tasks only comprise half of the job's responsibilities.[40] Thus, as a Painter, Employee would require an accommodation that enabled him to meet *all* of the essential demands of the job at a reasonable pace and without the assistance of others.[41] Such an accommodation does not exist.

Moreover, just as the Court in *Adams* considered the employee's past complaints as evidence of his essential job functions, Employee's complaints regarding "… the physical constraints and limitations that [he] was experiencing because of the effects of having lumbar disc disease and neuropathy and having to perform [his] essential job functions" denote that these physical tasks were essential job functions. *Adams* at 55. Taking these essential job duties and the evidence into account, I find that neither the recommended restrictions nor any other reasonable accommodations would permit Employee to perform his essential duties considering his permanent restrictions.

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.[42] 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 and properly exercised."[43]

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."[44] 6B DCMR §1607 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.

---

[39] *See McIntyre* at 37.
[40] *See Ammons* at 819.
[41] *See McIntyre* at 21.
[42] *See Huntley v. Metropolitan Police Dept.*, OEA Matter No. 1601-0111-91, *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).
[43] *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).
[44] *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

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