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OFFICE OF ADMINISTRATIVE HEARINGS
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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
20 OSP 01100

Regina McLymore Petitioner, v. NC Department of Public Safety Division of Adult Correction and Juvenile Justice Respondent.	**FINAL DECISION**

This contested case was heard before Michael C. Byrne, Administrative Law Judge, at the Office of Administrative Hearings in Raleigh, North Carolina on December 14, 2020. Following the hearing, the Tribunal requested that the parties submit memorandums of law. The parties did so on January 4 and 5, 2021.

APPEARANCES

Mr. Kirk J. Angel
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Attorney for Petitioner

Mr. Norlan Graves, Assistant Attorney General
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Post Office Box 629 Raleigh, NC 27602
Attorney for Respondent

WITNESSES

Called for Petitioner:

Regina McLymore
Kathleen Black
Judith Bradshaw
Anthony Taylor

Called for Respondent:

Kathleen Black

Judith Bradshaw
John D. Murphy
Anthony Taylor
Danyel Williams

ISSUE

Whether Respondent discriminated against Petitioner and/or violated the Americans With Disabilities Act by failing to reasonably accommodate Petitioner's disability.

STIPULATIONS

The parties stipulated, and entered into the record:

1. Petitioner is employed as an Administrative Officer II with the NCDPS at the Adult Correction and Juvenile Justice facility in Raleigh, North Carolina.

2. Prior to October 2019, Petitioner was in a private office that had been modified at her request to eliminate all lighting from overhead and outside the windows, using only a desk lamp for lighting. This office's light levels were measured to be at 10 LUX [a unit of light measurement] with the door closed and the lights off. When one lamp was turned on, the light levels were measured to be 12 LUX.

3. On June 20, 2019, Respondent advised Petitioner that she would be moved out of her private office space into the common work area, which is lit by overhead fluorescent lights.

4. On June 28, 2019, Petitioner filed a Request for Reasonable Accommodation with Respondent, which is a required form for NCDPS to process such a request. The NCDPS Request for Reasonable Accommodation form requires the employee to sign a medical release for her request to be processed.

5. Petitioner has a qualifying disability under the Americans with Disabilities Act.

6. NCDPS communicated with Petitioner's physician, Dr. Charles Matthews, about her disability claim and Request for Reasonable Accommodation. Dr. Matthews advised that continued exposure to fluorescent lights were a severe migraine trigger for Petitioner and that she needed a closed office setting with total block out coverage on her windows to control the lighting in her workspace.

7. Dr. Matthews's office further advised that Petitioner's workspace should have no higher lighting than a 25-watt bulb and that she would need a printer within her low-light workspace to limit fluorescent light exposure.

8. Respondent denied Petitioner a closed office setting and moved her to a cubicle in the collective work area on October 24, 2019. Petitioner's provided cubicle is several feet away from others and has the fluorescent lights directly overhead turned off. A partition wall was installed, and brown paper was installed to filter light out. The light levels in this space were measured by NCDPS to be 23 LUX.

9. Petitioner subsequently filed a grievance with NCDPS. A grievance hearing was held on January 8, 2020, and the Hearing Officer recommended that the NCDPS's decision be upheld. Timothy Moose, Chief Deputy Secretary for NCDPS upheld the decision on February 5, 2020.

BASED UPON careful consideration of the sworn testimony of the witnesses at the hearing and the entire record, as well as any stipulations, Tribunal makes the following findings of fact and conclusions of law. In making the findings of fact, the undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witness, any interests, bias, or prejudice the witnesses may have, the opportunity of the witnesses to see, hear, know or remember the facts or occurrences about which the witnesses testified, whether the testimony of the witnesses is reasonable, and whether the testimony is consistent with all other believable evidence in the case. Based on the above, the Tribunal makes the following:

FINDINGS OF FACT

1. Petitioner Regina McLymore is a person with a disability. Her disability is migraine headaches. These migraine headaches are severe, disabling, and make Petitioner extremely sensitive to light.

2. Petitioner works at a DPS facility located on Yonkers Road in Raleigh, North Carolina. This facility is not owned by the State. It is leased from a local owner. DPS, as a tenant, is not free to make major unilateral structural changes to the Yonkers Road facility. Respondent's witnesses testified credibly that while the landlord provides a small "budget" for making changes or improvements, a major improvement such as constructing a private office far exceeds that allotment.

3. Petitioner's work involves access to sensitive information which requires confidentiality, as it involves both persons subject to and working in the North Carolina criminal justice system (criminal offenders and law enforcement personnel). Access to Petitioner's work area is controlled and secured. Respondent's witnesses testified credibly that Petitioner's job duties do not permit working remotely or "teleworking." Even under the current COVID-19 pandemic, employees in Petitioner's section work in the DPS facility as opposed to remotely.

4. Petitioner's migraines substantially impact her major life activity of Petitioner's employment. Petitioner missed time at work as a result of them, and Respondent's witnesses testified credibly that Petitioner is unable to carry workloads commensurate with

most or all of her colleagues. Other staff are sometimes tasked with addressing Petitioner's backlog of work.

5. Petitioner's disability was further proven by documentation from her treating physician. While Petitioner's physician did not testify, his medical documentation was both admitted into evidence and was contemporarily provided to Respondent (at its request) when Petitioner requested changes to her work area to reduce her migraines.

6. Petitioner's job duties and status do not provide for her to receive a private, fully enclosed office in the Yonkers Road facility. Despite this, for a period of time Petitioner's managers gave her temporary use of an unoccupied, fully enclosed storage room, which Petitioner used as an office. Petitioner was further permitted to bring a personal desk lamp into her "office."

7. At one point during the efforts between Petitioner and Respondent to resolve Petitioner's workplace conditions, the light in her "office" was measured by Respondent's witness John D. Murphy, a DPS Industrial Hygienist, at 10-12 "LUX," which is a measure of brightness. The average office workspace, per Murphy, is illuminated at up to 700 LUX. In short, Petitioner's "office" was very dark. Murphy's testimony on these issues was credible, and Murphy came across as both professional and knowledgeable.

8. Petitioner, again supported by documentation from her physician, testified credibly that when she was in her enclosed storeroom "office," the debilitating effects from her migraines considerably improved.

9. However, Respondent's witnesses testified credibly that subsequent increases in staff at the Yonkers Road facility led to a both corresponding decrease in workspace and an increase in supervisory personnel. These supervisors are provided with private, enclosed offices in order to exercise supervisory responsibilities under conditions of confidentiality. While it is possible that these duties could be as easily (or almost as easily) exercised in an enclosed conference or meeting room, Petitioner at the hearing did not contest DPS' stated reasons for enclosed offices for its supervisory personnel.

10. Petitioner, accordingly, was informed that to place a supervisor in her enclosed storeroom "office," she would need to vacate that space. Petitioner was then placed in what amounts to a "cubicle," with partition walls separating her work area from the general employee workspace. These partitions were quite high, but they did not run all the way to the ceiling. Petitioner continued to use her personal desk lamp; DPS also provided her with a darkening screen for her computer monitor and brown paper to reduce outside light. The overhead fluorescent lighting was removed, and Petitioner was provided with a personal printer and toner, to reduce the frequency with which she had to leave her workspace. See DPS Final Agency Decision, February 5, 2020.

11. Despite these efforts, Petitioner's work area was "brighter" than the enclosed storeroom where she previously worked. The brightness in Petitioner's new work area was measured (again by Murphy) at approximately 50 LUX. While this is several times brighter than the

10-12 LUX of the storeroom space, it is considerably darker than the up to 700 LUX, according to Murphy, associated with a typical office work area.

12. When Petitioner was put in her new work area, problems with her migraines resurfaced. Petitioner submitted a "reasonable accommodation" request to her supervisor, who passed it up the chain of command.

13. Eventually, both Petitioner and her physician represented a need for Petitioner to have a fully enclosed workspace akin to her former storeroom "office." Respondent's witnesses testified credibly that the agency was unable to provide this to Petitioner due to the space restrictions at Yonkers Road and the difficulty in making modifications given DPS does not own the facility. Respondent's witnesses testified that the cost quoted by the facility landlord for creating just two new enclosed offices was in the $70,000.00 range.

14. When asked by the Tribunal why the partitioning around Petitioner's new workspace could not simply be raised to the ceiling, Respondent's witness Murphy testified credibly that fire code regulations would not permit this modification, as they required 18 inches between the partition and the ceiling so that sprinkler systems could operate properly in case of a fire.

15. Though at least two of Respondent's human resources personnel (Kathleen Black and Judith Bradshaw) worked to address the reasonable accommodations requested by Petitioner, neither of them involved Petitioner personally in this process. Respondent's primary stated justification for failing to personally involve Petitioner was that Respondent acted on the medical information from Petitioner's physician.

16. Black and/or Bradshaw additionally claimed that there were "safety concerns" connected with meeting Petitioner personally. Given the proffered reasons for them (Petitioner "stared" during meetings, for example) the Tribunal finds the "safety concerns" testimony lacks credibility and does not justify excluding Petitioner from the accommodation process. Barring this issue, however, the Tribunal finds that Respondent, particularly Respondent's more senior management, acted reasonably and in good faith in attempting to resolve Petitioner's reasonable accommodation concerns.

17. As a result of failing to involve Petitioner in the accommodation process, Respondent's human resources personnel were unaware for some time that one solution advanced by Petitioner for her situation was transfer to another position or unit. Despite this, there was evidence that Respondent did make some inquiries into the prospect of changing Petitioner's assignment; however, Respondent ultimately concluded that it could not simply "give" Petitioner a new job. Moreover, the Tribunal finds that the primary accommodation sought by Petitioner was restoration of her former enclosed workspace.

18. When Respondent and Petitioner were unable to interactively (or otherwise) resolve the issue of Petitioner's workplace conditions to their mutual satisfaction, Petitioner filed a grievance. This contested case eventually followed.

CONCLUSIONS OF LAW

1. All parties received proper notice of hearing and there are no issues as to joinder or misjoinder.

2. Findings of fact do not need to include every evidentiary fact, but only those necessary for the ultimate determination. Kelly v. Kelly, 228 N.C. App. 600, 606–07, 747 S.E.2d 268, 276 (2013).

3. An initial question is whether OAH has subject matter jurisdiction. While the parties do not raise this issue in their filings, subject matter jurisdiction may be raised at any time, including by the Tribunal. Heritage Pointe Builders, Inc. v. N.C. Licensing Bd. of Gen. Contractors, 120 N.C. App. 502, 504, 462 S.E.2d 696, 698 (1995), disc. review denied, 342 N.C. 655, 467 S.E.2d 712 (1996). It is axiomatic that a reviewing Tribunal may not adjudicate matters over which it lacks subject matter jurisdiction.

4. The gravamen of Petitioner's status as a person aggrieved by agency action is that she has a disability, that she made a request for an accommodation of that disability, and that the agency failed to offer her reasonable accommodation. This, Petitioner claims, violates the Americans With Disabilities Act, or "ADA," 42 U.S.C. § 12101 et. seq.

5. Petitioner further alleges that Respondent failed to involve her, as opposed to her physician, in the "interactive process" appropriate to resolving reasonable accommodation issues. "This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3). For the interactive process to be effective, it requires "bilateral cooperation, open communication, and good faith." Allen v. City of Raleigh, 140 F. Supp. 3d 470, 483 (E.D.N.C. 2015).

6. OAH has previously held that the 2013 repeal of N.C.G.S. 126-34.1 divested OAH of jurisdiction over ADA claims. Michelle M. Byrd v. N.C. Department of Public Safety, 2014 WL 3698424 (N.C.O.A.H.), 14 OSP 01928 (May 21, 2014).The former OAH appeals statute, N.C.G.S. 126-34.1, gave the right to appeal to OAH for "Violation of any of the following federal statutes as applied to the employee, including at subsection (d) "The Americans with Disabilities Act, 42 U.S.C. § 12101, et seq." N.C.G.S. 126-34.1(11) The current OAH appeals statute, N.C.G.S. 126-34.02, does not include this language, nor does it reference ADA violations at all.

7. Further, N.C.G.S. 126-34.02(c) states, "Any issue for which an appeal to the Office of Administrative Hearings has not been specifically authorized by this section shall not be grounds for a contested case hearing." See Empire Power Co. v. North Carolina Dept. of Environment, Health and Natural Resources, Div. of Environmental Management, 337 N.C. 569, 447 S.E.2d 768 (1994) (no inherent right to appeal from an administrative decision to OAH unless the right is granted by statute. Id., at 586).

8. Byrd is not binding, but it is well-reasoned and convincing. The case law is largely consistent that failure to include a previously existing administrative appeal right in a subsequent statute on the same subject acts, in most cases, to extinguish that appeal right. Jailall v. N. Carolina Dep't of Pub. Instruction, 196 N.C. App. 90, 96, 675 S.E.2d 79, 83 (2009), but see Vincoli v. State, 250 N.C. App. 269, 272, 792 S.E.2d 813, 815 (2016) (employee could appeal exempt designation under N.C.G.S. 126–5(h) despite elimination of that right in N.C.G.S. 126-34.02). The Tribunal agrees that OAH lacks subject matter jurisdiction for appeals of ADA violations under N.C.G.S. 126-34.02. Thus, despite Petitioner making well beyond a prima facie case that Respondent violated the "interactive process" required by the ADA by its human resources personnel failing to involve the Petitioner herself in that process, her claims for ADA violations are **DISMISSED** with prejudice for lack of subject matter jurisdiction.

9. The question then arises whether OAH has subject matter jurisdiction over any matter of which Petitioner complains. To determine this, the Tribunal reviews the pleadings.

10. The petition, filed March 6, 2020, contains neither a specific allegation that Respondent violated the ADA nor a specific allegation that Respondent engaged in illegal discrimination against Petitioner based on a disability. The word "discrimination" (or "discriminated") does not appear in the Petition. However, Petitioner's Prehearing Statement, which is part of the pleadings, lists as the issues to be determined in this case "Whether Respondent violated the ADA **and discriminated against Petitioner** by denying her reasonable accommodation." (emphasis supplied).

11. The Administrative Procedure Act, N.C.G.S. 150B, does not require petitioners to plead "magic language" elements of a legally recognized claim, and their filings should be "liberally construed" to accomplish substantial justice. Winbush v. Winston-Salem State Univ., 165 N.C. App. 520, 523, 598 S.E.2d 619, 622 (2004). Further, N.C.G.S. 126-34.02 (b)(1), while it does not mention the ADA, lists "discrimination and harassment" based on (among other things) "disability" as matters which may be appealed to OAH.

12. The Tribunal thus concludes that Petitioner's pleadings make sufficient allegations to provide the Tribunal with jurisdiction over Petitioner's claims of **discrimination based on disability**.

13. That does not mean OAH has jurisdiction to grant all relief requested by Petitioner. Her petition contains in its "Prayer for Relief" a request for "an Order awarding compensatory damages to Petitioner." Compensatory damages are not available in contested cases filed under N.C.G.S. 126-34.02, barring claims made under the Whistleblower Act. While OAH may award back pay in appropriate cases, including circumstances where an ALJ finds "discrimination" (see N.C.G.S. 150B-33), Petitioner presents no evidence of lost pay due to any discriminatory act by Respondent. Petitioner's claim for "compensatory damages" is **DISMISSED** with prejudice.

14. The petition also asserts that Respondent "violated its legal duty to provide Petitioner with a reasonable accommodation," and requests, "among other things, to have Respondent

ordered to follow the law and provide the reasonable accommodations." OAH is not a constitutional court, but rather is a quasi-judicial agency of state government. It is not a court of equity. Under N.C.G.S. 150B-33, while administrative law judges may issue temporary restraining orders and preliminary injunctions, they lack authority to order, by way of permanent injunction, an agency (or anyone else) to "follow the law." Accordingly, this claim for relief is also **DISMISSED** with prejudice.

15. However, N.C.G.S. 126-34.02 does provide additional specific statutory remedial authority to OAH:

> In deciding cases under this section, the Office of Administrative Hearings may grant the following relief:
> (1) Reinstate any employee to the position from which the employee has been removed.
> (2) Order the employment, promotion, **transfer**, or salary adjustment of any individual to whom it has been wrongfully denied.
> (3) **Direct other suitable action to correct the abuse** which may include the requirement of payment for any loss of salary which has resulted from the improper action of the appointing authority.

N.C.G.S. 126-34.02(a) (emphasis supplied); Harris v. N. Carolina Dep't of Pub. Safety, 252 N.C. App. 94, 109, 798 S.E.2d 127, 138, aff'd per curiam, 370 N.C. 386, 808 S.E.2d 142 (2017).

16. Directing that "other suitable action," however, requires first finding that Respondent discriminated against Petitioner due to her disability by failing to provide (or more accurately restore to) Petitioner a separate, fully enclosed office as opposed to the low light cubicle it provided. No authority submitted by either party supports requiring the agency to provide a separate, fully enclosed office to an employee, whose duties and status do not provide for such, when the agency made other reasonable efforts to accommodate her disability. Rittelmeyer v. Univ. of N. Carolina at Chapel Hill, 252 N.C. App. 340, 342, 799 S.E.2d 378, 380 (2017) (agency employer did not violate ADA in case involving termination of light-sensitive employee who suffered from migraines).

17. Respondent acted in good faith and was reasonable and non-discriminatory in providing Petitioner a working environment substantially darker than the average office, as well as other accommodations to reduce brightness and the associated strain of Petitioner's undoubtedly severe and disabling migraines.

18. Also, due to fire codes, space restrictions, ownership interests, and cost factors, it was untenable and an undue hardship to Respondent to create and provide a wholly enclosed office for Petitioner. Federal regulations, by way of guidance, define "undue hardship" in the relevant context as "[Significant difficulty or expense incurred by [an employer], taking into consideration factors such as the nature and cost of accommodation, the type of operation of the covered entity, and the impact of the accommodation upon the operation of the facility, including the ability of other employees to perform their duties and the

facility's ability to conduct business." 29 CFR § 1630.2(p)(1)-(2)[.] Under the facts and this guidance, it cannot be said that Respondent's actions constituted discrimination against Petitioner because of her disability.

19. Accordingly, Petitioner is entitled to no additional relief from the Respondent agency. This contested case is **DISMISSED** with prejudice.

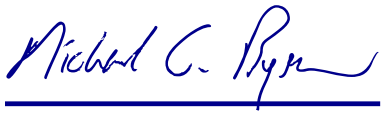
NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C.G.S. 150B-34 and N.C.G.S 126-34.02(e).

Under the provisions of N.C.G.S. 126-34.02, an aggrieved party in a contested case under this section shall be entitled to judicial review of a final decision by appeal to the Court of Appeals of North Carolina as provided in N.C.G.S. 7A-29(a). The procedure for the appeal shall be as provided by the North Carolina Rules of Appellate Procedure. **The appeal shall be taken within 30 days of receipt of the written notice of final decision. A notice of appeal shall be filed with the Office of Administrative Hearings and a file-stamped copy of the notice of appeal shall be served on all parties to the contested case hearing**. In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision.

IT IS SO ORDERED.

This the 6th day of January, 2021.



Michael C. Byrne
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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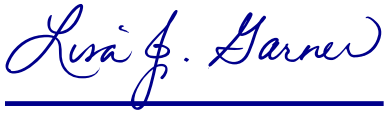
This the 6th day of January, 2021.



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