

**COMMONWEALTH OF VIRGINIA
Department of Human Resource Management**

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

**In re:
Case Number: 11918**

Hearing Date: April 10, 2023
Decision Issued: April 17, 2023

PROCEDURAL HISTORY

The Grievant filed a Grievance Form A dated December 1, 2022 alleging the grievance occurred November 16, 2022. The relief requested by the Grievant was as follows: An Americans with Disabilities Act (ADA) accommodation to put into place allowing me to telework on days when I do not feel well enough to travel into the office. I am seeking restoration of the sick/vacation leave time that I was required to take when I should have been allowed to telework. I am also requesting that new language requiring physical presence to complete my tasks in my EWP be removed during the period(s) that I require an ADA accommodation.

The Hearing Officer in this matter upon being appointed effective February 14, 2023 conducted a pre-hearing telephone conference on February 17, 2023 at which time the parties agreed to a hearing date of April 10, 2023, with the Grievant to appear remotely.

In the letter from the Hearing Officer dated February 20, 2023, it was set out that a copy of exhibits, in the form of hard copy, a party intends to introduce at hearing and a list of witnesses to be called was to be provided to the Hearing Officer and the other party no later than April 3, 2023. Both the Agency and the Grievant provided a notebook with exhibits and a list of witnesses to be called.

APPEARANCES

Grievant

Agency's Party Designee

Agency's Attorney

ISSUES

1. As a Public Relations & Marketing Specialist III (29093) at the Library of Virginia what are the Grievant's core responsibilities as set out in the Grievant's Employee Work Profile?
2. Is working on site an essential job function?
3. Is the Grievant qualified and able to perform the tasks and satisfy the core responsibilities as set out in the Employee Work Profile?
4. Is the Grievant experiencing a condition which impacts a major life function as defined by the ADA?
5. Did the Agency retaliate against the Grievant?
6. Is the Agency required to grant the relief requested by the Grievant in Grievant's Form A?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the Agency is required to grant the relief requested by the Grievant in Grievant's Form A. Grievance Procedure Manual (GPM). A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not.

EXHIBITS

The Grievant's Exhibits admitted into evidence are contained in one notebook with page numbers 1-76. In addition, in the Grievant's exhibit notebook is a copy of Grievant's employee work profile effective October 25, 2021; the Grievant's employee work profile effective October 25, 2022; Grievant's Form A with attachments; and ADA Medical Assessment Form and medical care documentation.

The Agency Exhibits admitted into evidence are contained in one notebook with tabs 1-54.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Grievant is employed by The Library of Virginia as a Public Relations & Marketing Specialist III (29093), with a working title of Communications & Marketing Specialist as described in the Employee Work Profile, effective October 25, 2021 (Agency Exhibit 4) and subsequently as set out in Employee Work Profile effective October 25, 2022 (Agency Exhibit 3).

The Agency and the Grievant entered into a Standard Telework Agreement with a start date of July 5, 2022 and an end date of July 4, 2023 which provided that the Grievant would work on site at 800 East Broad Street on Monday, Wednesday and Friday from 8:00 a.m. until 5:00 p.m. and at the Grievant's residence at 11 North Stafford Street on Tuesday and Thursday from 8:00 a.m. until 5:00 p.m. In the Grievant's Telework Request dated May 18, 2022 the Grievant stated "I understand that the telework schedules requested by our department may need to be adjusted once the new Communications & Marketing Director joins the team." (Agency Exhibit 8)

The Agency received from VCU Department of Family Medicine a letter dated August 12, 2022 advising that the Grievant was currently suffering acute onset of vertigo and further stated as follows:

"It is not yet clear that this will be a single isolated incidence or if it becomes a periodic recurrent pattern. Vertigo impacts ability to safely drive. This is true for both the condition and the possibly sedating medication that improves symptoms. An episode can last for days to weeks. It should not cloud judgment or render a person unable to work (except perhaps if the acute stages of vomiting is occurring). Please allow (Grievant) to work from home as (Grievant) recovers so that (Grievant) will not need to endanger (Grievant) by driving." (Agency Exhibit 9).

Grievant followed this up with an email to Grievant's supervisor Monday morning, August 15, 2022 at 7:39 a.m. which stated in part: "If my working from home appears to interfere with any work productivity, something I feel not to be true as all of my work is done on a computer, I will walk into work today. Tomorrow is a normal work from home day. I would likely choose to walk again on Wed. And see from there. I am also happy to get my doctor to put an end date of a week or two." (Agency Exhibit 10) A follow up letter from the doctor at VCU dated August 17, 2022 repeated that "Vertigo impacts ability to safely drive" and added "I

anticipate that (Grievant) will fully recover to return to driving by August 30, 2022.” (Agency Exhibit 11) In addition, the Agency was provided with a handwritten note from Patient First dated August 18, 2022 stating that the Grievant “is advised to not drive starting 8/9/22 until 8/30/22. At that time (Grievant) is to be re-evaluated.” (Agency Exhibit 12)

Upon receiving that above documentation, the Agency Human Resource Director emailed the Grievant on August 19, 2022 setting out the response to the medical accommodation request in which a schedule of telework and use of annual leave between August 9, 2022 and August 31, 2022 was set out. In addition, the email indicated September 1, 2022 as a regular telework day and September 2, 2022 as the anticipated return to the office at 800 East Broad Street. (Agency Exhibit 13) The Agency also received an additional letter from the doctor at VCU dated September 6, 2022 stating that the Grievant was seen on that day and “(Grievant) has recovered and is able to drive and work without restrictions as of September 6, 2022.” (Agency Exhibit 14)

On Monday, October 10, 2022 the Grievant set out in an email addressed to “Hi All” the following (in part):

As you know, I fell this past Wednesday...with a recurrence of the vertigo. I had 5 stitches in my lip...I did walk into work on Friday and thought I would be okay. However, the walk home proved really taxing and perhaps due to that push or just the way a vertigo, since Friday night it has gotten and stayed worse, at a level I don't feel comfortable walking outside. I went back to Retreat today, in a friend's car and the ride also pushes on the vertigo....I would very much appreciate not having the added stress...and would like to work from home on my computer. The video is the only portion of my work that I cannot do from home, and I have arranged for a new video set up that I believe Mike can finish and show to Outreach should a program come up. (Agency Exhibit 18)

In support, Grievant provided a note from Retreat Doctor's Hospital stating, “(Grievant) was recommended not to drive or ride in vehicles because of (Grievant's) condition”, with a start date of 10/5/22 and a return date of 10/31/22.

The Agency Human Resources Director emailed the Grievant on October 11, 2022 and stated the following: “Please remember that you are on your personal available leave hours for the days that you are scheduled to report to the office until a review of the information has been completed.” (Agency Exhibit 18) In addition, by email dated October 13, 2022 Human Resources emailed the Grievant the following:

Your temporary telework agreement has been approved based on the medical status considered as an emergency. This is a one-time option for the temporary medical telework agreement with an end date of October 31, 2022. If this is a

continuation or a repeat medical condition, the following options are available:

- Use of personal leave hours available
- Leave without pay (LWOP)
- Initiate a short-term disability claim with ReedGroup (Agency Exhibit 20)

By email dated October 18, 2022, Human Resources provided the Grievant with the forms necessary for ADA request. (Agency Exhibit 21)

Following the Human Resources office receiving necessary documentation, the Human Resources Director by letter dated November 2, 2022 advised the Grievant of the approval for a request to telework based on the medical accommodation request received on November 1, 2022 with the dates of approval being November 1, 2022 through November 9, 2022. The letter went on to state the following:

In several conversations the following options have been discussed and provided to you to continue on a leave of absence beyond the October 31, 2022 date. These are the options available and presented until the interactive Americans with Disabilities Act (ADA) paperwork has been submitted and reviewed for determination: Short-term disability (STD) claim and/or an approved Family Medical Leave Act (FMLA). Effective November 10, 2022 your scheduled will resume as follows: ...(Agency Exhibit 26)

The letter went on to emphasize that effective November 10, 2022 the Grievant's work schedule for Mondays, Wednesdays and Fridays would require reporting to the office or in the alternative using available leave hours, taking leave without pay, or initiating a short-term disability claim. The letter also advised that the Family Medical Leave Act (FMLA) provides 12-weeks of job protection and that an ADA accommodation request once received, will be reviewed to determine if it is reasonable or whether or not it is an undue hardship for the Agency/Department. (Agency Exhibit 26)

The Human Resources Director by letter dated November 16, 2022 advised the Grievant that the request to telework based on the ADA medical accommodation request received on November 9, 2022 was approved for the period from November 17, 2022 through December 5, 2022, with a scheduled return-to-work date of Tuesday, December 6, 2022. The letter emphasized the following:

Any future accommodations related to your current medical condition must be reviewed and approved through a ReedGroup short-term disability claim....A continuation to refuse to initiate a STD claim places the Agency in the position to deny future accommodations for a long-term medical condition. (Agency Exhibit

The next day, November 17, 2022, Grievant responded by email seeking an explanation of how ADA and STD worked together and expressing (Grievant's) concern that the Grievant was being forced to use leave days in order to work from home on Monday, Wednesday and Friday. (Agency Exhibit 29, Page 4)

The Grievant, on Grievant's Form A, sets out that the grievance occurred on November 16, 2022 (Agency Exhibit 1). On November 16, 2022 the Human Resource Director emailed the Grievant advising the Grievant of approval for the ADA telework request through December 5, 2022 with a scheduled return-to-work on December 6, 2022 and that any future accommodations related to Grievant's current medical condition "must" be reviewed and approved through a ReedGroup short-term disability claim. (Agency Exhibit 31). In response, the Grievant sent a return email on the morning of November 17, 2022 which said in part:

"How does the Short Term Disability allow me to work for LVA and continue my daily tasks at the 100% with which I'm capable from my home computer?...While I have reasons to hope that my illness will go away...and while it's fully my intention to work in the office with everyone as much as I possibly can once it feels safe to travel, I am also trying to establish some kind of protocol that makes my job the least disrupted during any times I do not feel my perceptions and reflexes are safe for travel...Can you let me know why the Library doesn't seem to be interested in the long term ADA, something I'm reading as widely considered a reasonable situation: vertigo with telework as an ADA accommodation?" (Agency Exhibit 31, Page 1 and 2).

The evidence indicated that the Grievant continued to suffer from vertigo. By letter dated December 7, 2022 from the doctor at VCU Health it was recommended that the Grievant continue to work from home in order to promote safety and continue to recovery, that the Grievant would complete physical therapy at the end of December and would be reevaluated the second week of January "...in order to determine the status of (Grievant's) recovery and ability to return to driving and in-person work." (Agency Exhibit 33). Again, the Human Resources Director advised the Grievant by letter dated December 13, 2022 that the Grievant's request to telework was approved through January 13, 2023, with a return-to-work date of January 13, 2023. The letter went onto recap other alternatives previously reviewed. (Agency Exhibit 35) An additional letter from the doctor at VCU Health dated January 10, 2023 set out that the Grievant is still unable to safely drive or travel and that the Grievant would be reevaluated in the doctor's office on March 1, 2023. The Human Resources Director followed up with a letter to Grievant dated January 17, 2023 approving telework through March 3, 2023, with a return-to-work date of March 6, 2023 and again set out the other alternatives available to the Grievant. (Agency Exhibit 37)

The next doctor's letter came from a doctor in practice in Henrico, Virginia stating that

the Grievant was seen on March 1, 2023 and “Please allow patient to work from home until 6/1/2023.” (Agency Exhibit 38) In response, the Human Resources Director on March 7, 2023 provided the doctor with a list of questions to answer and noted that the initial request for the information was sent to the doctor on November 22, 2022. A transcription of the doctor’s responses to the ADA questions are contained at Agency Exhibit 39, Page 11.

Following the Grievant advising Human Resources that the Grievant had changed primary care physician, the new primary care physician completed ADA Medical Form with the doctor’s answers dated March 21, 2022 and in part stated the following:

Patient’s medical illness negatively impacts balance, mobility and endurance...(patient) is not able to safely drive...ambulation to and from forms of public transport may pose fall risk to patient. If job tasks can be completed from home accommodations made that allow patient to work from home. This will allow the patient to work more safely...the patient condition appears chronic with unpredictable flares of symptoms. (Agency Exhibit 41)

The evidence indicates that the episodes of vertigo the Grievant experiences are unpredictable both in terms of timing and duration. The exhibits presented by the Agency and the exhibits presented by the Grievant indicate that Grievant’s Employee Work Profile includes tasks which cannot be performed at home.

The Agency’s first witness was the Director of Marketing for the Library of Virginia. After reviewing the organization chart (Agency Exhibit 2) the witness testified that she was hired in June 2022 as a result of a “brand” study in anticipation of the 200th anniversary of the library. The witness testified that the library is the world’s most complete resource for Virginia history, culture and government, and she was to implement a plan to promote the Library and the 200th anniversary.

The witness testified that all employees were asked to provide the Director of Marketing with a breakdown of how much time was spent on the various aspects of their jobs. As part of the process, a new EWP for the Grievant became effective October 25, 2022, at a time when the Grievant was already performing extended telework due to the Grievant’s vertigo. The witness further testified that the Grievant has not performed the Grievant’s purpose as set out in the EWP since the Grievant’s extended telework began. The witness pointed out that the purpose of the Grievant’s position includes “performs image gathering, writing, and copy editing/proofreading for publications and promotional educational materials manages marketing related processes involving the Library social media efforts; events, programs, and exhibitions; lobby monitor; photo and video assets; websites; and supplies. She estimated that 35-40% of the Grievant’s job is performed on site.

The witness further testified that on June 23, 2023 the National Geological Association is

coming to Richmond and the Library of Virginia will have a booth. She stated that Grievant should be there because it is a "Big deal!" In further reviewing the Grievant's core responsibilities set out on page 2 of the EWP, the witness testified that 21.B. (30% of work time) is impossible to do adequately when not physically attending an event. She noted that the Can Can Café is now in the lobby area of the Library and because the Grievant is not on site the Grievant asked another employee to video activities at the café. She further testified that as to 21.C., representing 20% of the Grievant's work time is "to some degree impacted" and that as to 21.D., representing 15 % of the Grievant's work time, is also impacted because even when professional photographers are hired, they need supervision by the Grievant.

The witness testified that the EWP for Grievant's supervisor does not include tasks which are to be performed by the Grievant, but because the Grievant is not on site the Grievant's supervisor has been required to do some of the Grievant's work.

Specifically referring to statements set out by the Grievant in the Grievant's notebook of exhibits, the witness disagreed with the Grievant's statement "I am successfully completing my job tasks" (Grievant Notebook Page 2, Paragraph 4) and "I have been doing 95% of my core responsibilities." (Grievant Notebook Page 17)

The next witness who testified was the Human Resources Director. She reviewed the chronology of the Grievant's telework requests related to the Grievant's vertigo symptoms. She testified that it appeared from the information provided by the Grievant and by the Grievant's medical professionals that the issue was getting from the Grievant's home to the Library. She testified that she discussed with the Grievant various options including walking the approximately 2.5 miles from home to the Library, mass transit, riding in with the Grievant's supervisor and Uber. She testified that the Grievant explained that none of those were possible.

The Agency's next witness was the Grievant's Supervisor. She testified that after the new Marketing Director was hired she assisted with creating the new EWP for the position held by the Grievant. She testified that it is essential for the person filling that position to be on site and gave examples. She testified that the work which the Grievant can complete remotely is only part of the tasks required of the position. She testified that she and the Marketing Director prepared the exhibit at Agency Exhibit 42 showing how the Grievant's job cannot be adequately performed without being on site. She testified that she has been covering events which the Grievant would normally be expected to cover and that with a small marketing staff, when the Grievant is not on site an additional burden is placed on other employees.

The final witness for the Agency was the Librarian of the Library of Virginia. She testified that she started with the Library in 1978 and became the Librarian in 2007. Looking forward towards the 200th anniversary of the Library, she testified that two years ago the Library began a "brand study," which concluded that the Library had to tell the story of the Library because too many people were unfamiliar with all that the Library offered. She testified that in

order to do this a marketing plan was needed, resulting in the hire of the Marketing Director. She testified that she believed that on site work is essential for the Grievant's position.

The Librarian testified that the Library made a large budget commitment for "LVA On The Go" with sixteen or seventeen events across Virginia in 2023 alone. She testified that the position filled by the Grievant required real time engagement. She testified that she was familiar with Grievant's video work and that the Grievant did a "terrific job", but the impact of Grievant's absence from the Library and events resulted in losing opportunities and over burdening other employees.

Among Agency's Exhibits were a series of cases demonstrating that the employer is granted great leeway in ADA accommodation cases. A case from the United States Court of Appeals, 10th Circuit dated April 8, 2021 stated "Indeed, we will not second guess the employer's judgment when its description is job-related, uniformly in support, and consistent with business necessity...the District Court properly found physical presence on a set and predictable schedule was an essential job function..." (Agency Exhibit 49, Page 13, 17). The Agency provided additional authority in its notebook of exhibits. In addition, Policy 1.60 Standard of Conduct states the following:

An employee unable to meet the working conditions of their employment due to circumstances such as those listed below may be removed under this section. Reasons include but are not limited to ... inability to perform the essential functions of the job after reasonable accommodation (if required) has been discussed, applied and alternative accommodations will result in undue hardship. (Agency Exhibit 53)

In addition to the Grievant's notebook of exhibits, much of which duplicated Agency Exhibits, the Grievant testified regarding her experience with vertigo. In addition, she emphasized the following points:

- Grievant believes that at least 95% of Grievant's job can be accomplished from home.
- Grievant believes the Agency practiced discrimination by requiring Grievant to use leave time for the three days of the week Grievant was required to be on site (as the Grievant believes Grievant can accomplish her job by working all five days of the week remotely).
- Grievant noted that Grievant's EWP was changed without consulting Grievant (with the change becoming effective just after Grievant began Grievant's battle with vertigo).
- Grievant testified that the only part of Grievant's job that cannot be accomplished at home was the collecting of content, which could be done by other employees.

During questioning by the Agency's Attorney, it was established that the Grievant has not been able to come in to the Library since October 5, 2022; that the Grievant's most recent doctor deemed the Grievant's condition as "chronic"; that Grievant's major life functions effected by the vertigo (to greater and lesser degrees at different times) include cooking, shopping, showering, sleeping and commuting; and that Grievant's physical therapist said that the Grievant cannot drive but did not restrict riding.

In closing, the Agency's Attorney emphasized the following:

1. Driving is not a major life function under ADA (Agency Exhibit 48, Page 8)
2. Based on the Grievant's EWP and the Grievant's inability to work on site, the Grievant is not qualified to do the Grievant's job as defined.
3. Case law establishes that an employee unable to travel to a job site is not "qualified" within the meaning of the ADA; that employers can decide that physical presence at the work place is an essential function; that an accommodation is unreasonable if it requires the employer to eliminate an essential function of the job and that an employer is not required to reassign existing workers to assist an employee in the employee's essential duties. (Agency Exhibit 49 and 50)

The Grievant in closing testified that during the pandemic employees at the Library of Virginia learned how to do their jobs virtually and that prior to the pandemic the Grievant did not use telework. The Grievant testified that the Grievant met every deadline and continued to produce the same quality work as when the Grievant worked on site. The Grievant emphasized that neither the Grievant nor the Grievant's supervisor had ever been expected to attend all events and that they worked as a team. The Grievant testified that the Grievant's EWP was changed without the Grievant's consultation, adding tasks which required Grievant to be on site despite Grievant's condition. The Grievant does not understand why there cannot be a long-term ADA accommodation which would essentially change the Grievant's EWP to allow teleworking at such times as the Grievant and the Grievant's doctors deem it unsafe for Grievant to travel to the Library.

CONCLUSIONS

The Grievant's evidence did not establish by a preponderance of the evidence that the Grievant was entitled to the relief Grievant requested, namely:

I would like the long-term ADA Accommodation to be put into place for me until such times as the vertigo subsides and to continue to accommodate any future recurrences of vertigo. I would also like to be given back the leave time which

was unnecessarily forced into usage for the days when I could have preformed all of my work duties

Contrary to Grievant's argument, the Hearing Officer finds no evidence of retaliation on the part of the Agency. The Agency established that following the "brand study", as part of the build up to the 200th anniversary of the Library of Virginia, a director of marketing was hired and all EWP's were reviewed, including the EWP of the Grievant. The evidence established that the Agency had legitimate business reasons for modifying the Grievant's EWP, defining the positions core responsibilities and determining whether on site work was necessary.

The Hearing Officer concludes the following:

1. The Grievant's core responsibilities set out in the EWP require work on-site.
2. Working on-site is an essential job function.
3. Grievant is not qualified and able to perform tasks and satisfy the core responsibilities if Grievant cannot travel to the Library.
4. The evidence is ambiguous as to whether the Grievant's episodes of vertigo impact a major life function (sometimes yes, sometimes no).
5. The Agency did not retaliate against the Grievant.
6. The Agency is not required to grant the relief requested by the Grievant.

DECISION

For the reasons stated herein, the Grievant's request for relief is denied.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resources Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

ENTERED: 4/17/2023
Date



John R. Hooe, III
Hearing Officer

[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.