



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11859

Hearing Date: November 16, 2022
Decision Issued: December 7, 2022

PROCEDURAL HISTORY

On March 4, 2022, Grievant filed a grievance to challenge her removal from employment. On June 16, 2022, the Office of Employment Dispute Resolution issued Ruling 2022-5398 qualifying the grievance for hearing. On July 11, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 16, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant's removal was consistent with State policy?
2. Whether a reasonable accommodation would have allowed Grievant to perform her essential job duties, and whether the College failed to grant such an accommodation.

3. Whether the College failed to carry out its mandatory responsibilities under Policy 4.57 to assist the grievant with understanding and coordinating her disability benefits in the context of separation from employment, or whether its approach to these responsibilities was so unfair as to amount to a disregard of the policy's intent.
4. Whether the College misapplied policy by automatically paying Grievant's insurance premium after she was no longer employed and then deducting that amount from her pay.

BURDEN OF PROOF

The burden of proof is on Grievant to prove that the College's acts and omissions were a misapplication or unfair application of State policies. The College has the burden of raising and establishing any affirmative defenses. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

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 Virginia Community College System employed Grievant as an Administrative Assistant III at one of its Colleges. She had been employed by the College for over ten years. Grievant reported to Dr. W, the Associate Vice President.

Grievant did not testify or call any witnesses to testify. Her evidence consisted of documents presented during the hearing.

When Grievant began working for the College, she worked in an office with office hours from 8:00 a.m. until 4:30 p.m. or 5 p.m. Office hours were Monday through Friday when the College was open. Grievant's position was a "public-facing" position. She was responsible for greeting students and visitors when they came to the office to speak with other employees. Grievant was also expected to answer questions and provide services to students and visitors.

Grievant's position description required her:

To provide office support for the Associate Vice President, faculty and staff in the division, administrative oversight and support for the ... City Early College program, and work in collaboration with division staff to ensure quality services for faculty and students.¹

¹ Agency Exhibit p, 12.

Her core responsibilities included, in part:

Serves as the office manager and receptionist for the Arts and Sciences Division. Provides excellent customer service to students, colleagues, and the general public.

Provide a warm and welcoming atmosphere.

Oversee the general office.

Serve as an assistant to the Associate Vice-President.

Supervise work study students.

Assists all faculty with supplies, forms, copying needs, and related office needs pertinent to instruction and division events.

Provides general information regarding program pathways and instructors for phone and in-person questions.

Maintains informational boards and TV monitors as appropriate.

Proctors classes/tests for faculty as needed.

A measure of her core responsibilities included, in part:

All faculty and students entering the office are warmly greeted and requests are met as necessary. All faculty and students entering the office are warmly greeted and requests are met as necessary. ***

In-person requests, phone calls and emails regarding division information are answered in a timely and appropriate manner.²

In March 2020, the campus closed due to the COVID19 pandemic. Students did not attend classes in-person. The College operated virtually due to the COVID-19 pandemic. Grievant teleworked full-time during this period.

In January 2021, Grievant contracted COVID19 which materially affected her health. Grievant continued to experience long-term complications of the illness, but she remained able to perform some of her job duties remotely.

In mid-2021, the college began preparations to re-open its facilities for in-person services, including mandatory onsite work for most employees. On June 28, 2021, the College President sent employees an email stating

we will reopen the campus to the public on Tuesday, July 6, the date on which employees will return to campus. *** While we will review individual requests to telework on a case-by-case basis, as a rule, we will require that employees carry out their duties on campus, just as they did before we transitioned to remote services. We will entertain exceptions to that rule as

² Agency Exhibit p. 13.

we respond to documented needs and compelling situations, but we will not permit employees to work routinely and exclusively from home for the sake of personal ease, convenience, or preference.³

Grievant presented a note dated June 29, 2021 from her Nurse Practitioner stating Grievant:

experienced a pretty significant case of Covid in January of this year. She continued to have complications including ongoing fatigue and episodes of weakness. As we do not know the extent of post covid symptoms, I feel it would be in her best interest to have the ability to work from home at minimum 3 days per week. At this time we agree she may try to return full time with these accommodations. She may increase on campus time if she tolerates her return to work with these accommodations.⁴

On July 6, 2021, the College resumed normal working operations. Its campus was open for in-person education with faculty, staff, and students returning to the campus. Grievant's full time teleworking privileges were removed. She was expected to report to the office. She was not able to report to work five days per week because of her medical condition.

Beginning July 6, 2021, Grievant worked in the office on Mondays and Thursdays from 8 a.m. to 5 p.m. For the other three days, she took leave or was on disability status.

If Grievant was not in the office, her absence could disrupt the work of other employees. For example, if the Associate Vice President was in a meeting and someone came to the reception area of the office, the Associate Vice President would have to interrupt the meeting to attend to the visitor.

On July 12, 2021, Grievant completed a Workplace Accommodation Request Form. She described the conditions limiting the essential functions of her job as:

Walking due to post covid syndrome swelling in joints.
Sitting due to post covid syndrome swelling in joints.
Dizziness to the point of not driving when it is an issue.
Breathing – super sensitive lungs from covid pneumonia, oxygen level drops low which makes tiredness and weakness more of an issue.
Ear pain and headaches, hard to tolerate noise and concentrate.⁵

Grievant sought an accommodation to telework three days per week.

³ Agency Exhibit p. 10.

⁴ Agency Exhibit p. 121.

⁵ Agency Exhibit p. 122.

On August 3, 2021, Grievant completed a Request for Family or Medical Leave for a serious health condition making her unable to perform her work duties. Grievant's medical provider concluded Grievant could return to work on August 13, 2021 with restrictions of "ability to work from home with a maximum 2 days in office."⁶

On August 12, 2021, Grievant sent the Dean an email stating:

I am carrying a ton of stress over this. My entire body has been affected from Covid. One of my struggles right now is my lungs. For instance, Tuesday my oxygen level was 84. And that is just one of the many post Covid issues I have.⁷

During July and August 2021, while waiting for a determination on her accommodation request, Grievant reported for onsite work two days each week and drew on her paid leave balances for the remaining three weekdays.

At some point, the College suggested Grievant file for Short-term Disability (STD). Grievant submitted a claim and was awarded STD effective August 13, 2021. Grievant was approved by the College to work a reduced in-person work week throughout the short-term disability period. She received STD through February 10, 2022.

On February 11, 2022, the Third Party Administrator granted Grievant continuous long-term disability (LTD) from February 11, 2022 through August 31, 2022.

On February 14, 2022, Grievant reported to work. The Associate Vice President was surprised Grievant came to work. She instructed Grievant to speak with the Human Resource Director. Grievant met with the HR Director who told Grievant to leave work since her long-term disability had been confirmed.

The College did not consider placing Grievant on LTD-Working because the Virginia Sickness and Disability Policy required employees to work 20 hours. Grievant was authorized to work only two days for a total of 16 hours.

On February 16, 2022, the Associate Vice President sent an email to staff, "Unfortunately, [Grievant] will no longer be working in the Arts & Sciences Division, effective this past Friday."⁸

On July 25, 2022, the HR Director sent Grievant an email:

Option to be reinstated to your previous position – The position is currently open. If you are willing to return to work at [College] that is a viable option.

⁶ Grievant Exhibit p. 40.

⁷ Agency Exhibit p. 16.

⁸ Agency Exhibit p. 114.

The position is still public facing. However, we are allowing employees to telework one day per week as a relief for the high gas prices. If you are able to work on campus the other four days, we would love for you to return.⁹

CONCLUSIONS OF POLICY

Grievant asserted that the College failed to reasonably accommodate her medical condition and otherwise took actions against her because of her impairment. She asserted she was discriminated against because of her disability, in violation of the Americans with Disabilities Act (“ADA”) and State policy. DHRM Policy 2.05, Equal Employment Opportunity, “[p]rovides that all aspects of human resource management be conducted without regard to ... disability. . .” Under this policy, “‘disability’ is defined in accordance with the [ADA]”, the relevant law governing disability accommodations.

The ADA prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual’s disability. A qualified individual is defined as a person who, “with or without reasonable accommodation,” can perform the essential functions of the job. As a general rule, the ADA requires an employer to make reasonable accommodations to the known physical or mental limitations of a qualified employee with a disability, unless the employer “can demonstrate that the accommodation would impose an undue hardship on the operation of the business [or government].”

“Reasonable accommodations” include “[m]odifications or adjustments that enable [an employee] with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.”

The College has established that working in the office is an essential function of Grievant’s job. The College’s office was open five days per week and Grievant’s position was responsible for providing assistance to students and visitors entering the office. If Grievant was absent, assistance would not be given to students and visitors. If assistance was given to students and visitors, it would sometimes cause other employees in the office to interrupt or delay their duties to provide assistance.

Grievant argued that she continued to accomplish many of her job duties while telecommuting. Grievant established that some of her duties could be performed while teleworking. Grievant asserted she could perform duties such as collecting faculty syllabi and managing book orders, coordinating student applications and enrollments, editing the division’s website, handling department purchasing, tracking attendance and grades meeting with high school students and families who still prefer virtual communications, preparing recommendation letters, and responding to emails. Grievant could not, however, perform any of her in-person office duties while teleworking.

Grievant presented a note from her Nurse Practitioner indicating:

⁹ Agency Exhibit p. 136.

I feel it would be in her best interest to have the ability to work from home at minimum 3 days per week. At this time we agree she may try to return full time with these accommodations. She may increase on campus time if she tolerates her return to work with these accommodations.

Grievant did not testify. She did not establish that “[s]he may increase on campus time if she tolerates her return to work with these accommodations.” As the evidence stands, it appears Grievant can only work 16 hours per week. Allowing Grievant to telecommute three days per week would pose an undue hardship on the Agency’s business operations. Other employees would have to alter their work duties to assume Grievant’s duties for three days per week. The College was not obligated to accept Grievant’s preferred accommodation because doing so caused the College an undue hardship.

Policy 4.57 governs the Virginia Sickness and Disability Program. This policy defines Long-term Disability – Working as:

An income replacement benefit that commences upon the expiration of the maximum period for which the employee is eligible to receive STD benefits, and allows employees to continue to work for their agencies from STD working status into LTD-W. In LTD-W the employee must work at least 20 hours or more per workweek in his own position. Qualified part-time employees continue to work for their agency when moving from STD into LTD-W for 20 or more hours per week.

The College denied Grievant LTD-W status because she was only working 16 hours per week. Grievant did not present evidence showing that she could work at least 20 hours per week. Grievant did not qualify for LTD-W because she worked fewer than 20 hours per week.

The College presented evidence that the HR Consultant was involved in an interactive process to consider Grievant’s request for accommodation. Policy 4.57 required the College to assist Grievant with understanding and coordinating her disability benefits in the context of separation from employment. Neither party presented sufficient evidence for the Hearing Officer to determine whether the College met its obligation. Grievant did not present arguments regarding what the consequences were for the College if the College failed to fully assist Grievant as required. It is unclear what actions Grievant might have taken differently if she had been better informed of her rights in the interactive process. The facts are insufficient for the Hearing Officer to determine if the College unfairly applied policy.

Grievant argued that the College discriminated against her based on her disability because the College took so long to get back with her. This assertion has not been established. It is unclear what response time was necessary.

Grievant argued that she frequently requested guidance from College staff and failed to receive appropriate assistance. Grievant has not established this allegation. She did not testify regarding her interactions with College staff and the requests she made that were unanswered. It is unclear whether Grievant asked her Nurse Practitioner for a better suited accommodation or whether the College staff asked for additional options from Grievant or the Nurse Practitioner.

Grievant raised several other issues in her grievance such as administrative leave, reimbursement for auto insurance charges, working 40 hours in 16 hours. Grievant did not present testimony to explain the issues or establish any errors by the College that the College had not yet corrected.

DECISION

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

APPEAL RIGHTS

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

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource 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 EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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