Issue: Misapplication of policy, discrimination and retaliation; Hearing Date: 04/27/05; Decision Issued: 04/29/05; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 8030

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8030

Hearing Date: April 27, 2005
Decision Issued: April 29, 2005

PROCEDURAL ISSUE

Grievant requested as part of the relief she seeks that, if she is reinstated, an alternate supervisor or director be designated. A hearing officer does not have authority either to transfer an employee, or to direct the personnel by which work activities are carried out.[1] Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

APPEARANCES

Grievant
Representative for Grievant

[1] § 5.9(b) 3 & 7. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual,* effective August 30, 2004.

Human Resources Manager
Advocate for Agency
One witness for Agency

ISSUES

Did the agency misapply any state policy? Was the grievant subjected to discrimination or retaliation?

FINDINGS OF FACT

The grievant filed a timely grievance asserting that the agency misapplied policy, discriminated, and retaliated against her.[2] The agency declined to qualify the grievance for a hearing and grievant requested a compliance ruling from the Department of Employment Dispute Resolution (EDR). The EDR Director ruled that the grievance qualified for hearing.[3] The Department of Mental Health, Mental Retardation, and Substance Abuse Services (Hereinafter referred to as agency) has employed grievant as a Registered Nurse for two years.

On March 19, 2004, grievant filed two grievances.[4] One grievance, grieving issuance of discipline, was subsequently resolved when the agency rescinded the disciplinary action. The second grievance asserted that grievant was subjected to a hostile work environment and retaliation; the grievance was qualified for hearing and a hearing officer issued a decision that has now become final.[5]

All state employees are expected to work overtime hours as required by their supervisor or manager.[6] Nurses at grievant's facility are required to be able to work at least two extra eight-hour shifts per week if necessary to fill staffing shortages.[7] The facility has a written policy (280ss) governing the accommodation of nurses who submit medical restriction requests.[8] The policy provides that when medical restrictions limit the number of hours or the shifts a nurse can work, the agency will accommodate the restrictions for up to 45 days, one time per year. After that, the nurse is required to revert to the previous work schedule. During 2004, the agency accommodated grievant's requests for

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[2] Grievant Exhibit 4. Grievance Form A, filed November 4, 2004.
[3] Agency Exhibit 1. *Qualification Ruling of Director* No. 2004-933, March 15, 2005.
[4] Grievant Exhibit 1, pp. 70-71.
[5] Grievant Exhibit 1, pp 38-48. *Decision of Hearing Officer* Case No. 7917, issued January 18, 2005.
[6] Department of Human Resource Management (DHRM) Policy 1.25, *Hours of Work*, September 16, 1993.
[7] Grievant Exhibit 1, p.65. Grievant's *Employee Work Profile* Work Description, effective June 24, 2004.
[8] Grievant claims the agency did not comply with this policy but she failed either to proffer a copy of the policy as part of her evidence, or to specify what of the policy the agency is purportedly not in compliance with.

temporary medical restrictions on *three* occasions.[9] The policy also requires employees who seek temporary restrictions to complete and submit to their physician a Physical Abilities Report and a copy of the employee's Employee Work Profile (EWP) Work Description. The physician is to review these documents, add comments, and sign the Report. It is grievant's responsibility to assure that the completed report is submitted to the agency. Grievant submitted a copy of the Report at the hearing indicating that the physician did not sign the form until December 9, 2004.[10] Human Resources never received the form until grievant submitted her exhibits for this hearing.

In March 2004, grievant submitted a letter from her physician stating that she was undergoing treatment for anxiety and insomnia.[11] The physician advised grievant to consistently obtain eight hours of sleep each day and prescribed medication to facilitate sleeping soundly. He recommended that grievant not work more than 12 hours per day or later than 8:30 p.m. In April 2004, the physician added an additional restriction specifying that grievant should not work more than 44 hours per week.[12] In September 2004, the physician further restricted grievant's availability to 40 hours per week and not later than 7:30 p.m.[13] On October 28, 2004, the physician stated that grievant should not work more than 40 hours per week or after 7:00 p.m.[14]

Three days later, grievant decided that she wanted to work a different schedule. She went to her physician and asked him to recommend a completely different schedule that allowed her to work up to 48 hours per week, in up to 16-hour shifts that could end as late as 11:30 p.m.[15] The physician agreed to grievant's request and wrote a letter to that effect.

In late October, when the monthly schedule for November was distributed, grievant advised the Director of Nursing (DON) that the schedule was unacceptable. Because the agency had already accommodated grievant three times during the year, the DON said that she could not grant further accommodations. Not only does the accommodations policy restrict such accommodation to only one episode per year, but the DON was also concerned that other nurses might begin to expect such extraordinary treatment. Grievant sent a letter to the DON stating, "I expect that this schedule will be changed to be in compliance with my physicians' restrictions."[16] When the DON advised grievant that the schedule would not be changed, grievant did not return to work after October 31, 2004.

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[9] Grievant Exhibit 1, p. 9. Letter from Human Resources Manager to grievant, November 3, 2004.
[10] Grievant Exhibit 1, p.33. Physical Abilities Report.
[11] Grievant Exhibit 3, p.2. Letter from physician to agency, March 1, 2004.
[12] Grievant Exhibit 3, p.1. Note from physician, April 9, 2004.
[13] Grievant Exhibit 3, p.6. Note from physician, September 4, 2004.
[14] Grievant Exhibit 3. p.7. Note from physician, October 28, 2004.
[15] Grievant Exhibit 1, p.1. Letter from physician, November 1, 2004.
[16] Grievant Exhibit 1, p.2. Letter from grievant to DON, October 23, 2004.

Sometime on or after November 1, 2004, the agency received a letter from grievant's physician with the completely revised restrictions cited above. Because the new restrictions were such a significant change from those the physician had recommended only three days earlier, the facility sought the assistance of a Central Office Human Resources Consultant. As a result, the facility developed three proposed schedules that met the physician's restrictions and agency needs. Grievant's supervisor gave her a memorandum and the three proposed schedules.[17] Grievant rejected all three options.[18] During early November, the agency had renewed its request that grievant sign a medical release so that the agency could send a Physical Abilities Report and grievant's EWP to her physician; grievant would not agree to do so.[19] The agency asked the physician to comment on the proposed work schedules for grievant.[20] The physician responded that the options offered to grievant met the restrictions. The agency again requested grievant to provide a signed release in early December 2004.[21]

Although grievant has not worked since November 1, 2004, she remains on the agency rolls as an employee. Grievant has not submitted a resignation and the agency has taken no action to terminate her employment. The agency has prepared work schedules for the months of April and May 2005 and grievant can return to work at any time.[22] When an employee has been denied long-term disability (LTD) through the Virginia Sickness and Disability Plan (VSDP), the agency takes the position that it will not remove the employee from employment until such time as the appeal period has expired. The VSDP third party administrator (TPA) denied LTD benefits on March 23, 2005 and advised grievant that she has 180 days within which to appeal the determination.[23] Therefore, grievant remains on the agency's employment rolls at this time.

Grievant does not have a disability. The TPA undertook a detailed review of grievant's case by contacting both of grievant's physicians, interviewing them by telephone, and reviewing medical records sent by the physicians to the TPA. The TPA's review is summarized in a four-page letter to grievant and concludes that the medical documentation does not support a disability.[24] Moreover, grievant acknowledges that both of her physicians have determined that she does not have a disability.[25]

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[17] Grievant Exhibit 1, pp. 16-19. Memorandum from supervisors to grievant, November 18, 2004.
[18] Grievant Exhibit 1, p. 20. Letter from grievant to human resource manager, November 19, 2004.
[19] Grievant Exhibit 1, pp. 22-23. Letter from human resource manager to grievant, November 23, 2004.
[20] Grievant Exhibit 1, p.7. Letter from human resource manager to physician, November 30, 2004.
[21] Grievant Exhibit 1, pp. 29-32. Letter from human resource manager to grievant, December 2, 2004.
[22] Agency Exhibit 4. Letter from Human Resources Manager to grievant, March 23, 2005.
[23] Grievant Exhibit 1, pp 57-58. Letter from TPA to grievant, March 23, 2005.
[24] Grievant Exhibit 1. *Ibid.*
[25] Grievant Exhibit 1, p. 8. Letter from grievant to agency Medical Director. (Although the letter is undated, grievant avers that she wrote the letter during the first week of November 2004.)

Grievant began full-time employment at a private sector hospital in March 2005.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of misapplication of policy, discrimination, or retaliation, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.[26]

Misapplication of Policy

Grievant alleges that the agency violated a facility policy known as 280ss. However, grievant failed even to proffer a copy of this policy as evidence. If grievant intends to show misapplication of policy, she must, at a minimum, provide a copy of the policy and, evidence to show what the purported misapplication was. Nonetheless, the human resource manager testified about relevant portions of the policy; grievant did not rebut the agency representations about the policy. Based on these representations and the evidence in the hearing, grievant has not shown any misapplication of the policy – except that the

[26] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

agency treated her more *leniently* than the policy requires by allowing her three 45-day accommodation periods in one year.

Retaliation

Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.[27] To prove a claim of retaliation, grievant must prove that: (i) she engaged in a protected activity;[28] (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. In this case, grievant satisfies the first prong of the test because she had previously filed grievances. However, grievant has not suffered an adverse employment action. An adverse employment action typically involves a significant change in one's employment status such as: loss in pay or benefits, demotion, change in responsibilities, formal discipline, or other tangible detriment to the terms and conditions of employment.[29] Here, the agency did not take any action to reduce grievant's pay or benefits, demote her, change responsibilities, discipline her, or any other tangible detriment. Grievant's loss of pay was occasioned solely by her own decision not to report to work after October 31, 2004.

Even if one could somehow conclude that the agency's work schedule constituted an adverse employment action, grievant has offered no evidence of a nexus between the work schedule and the protected activity of filing a previous grievance. In order to shoulder the burden of proof, grievant must do more than merely make an allegation of a connection between the two events. The evidence presented in this hearing amounts to no more than speculation that there was a nexus. Grievant suggests that the DON harbored a grudge against her because grievant had specifically mentioned her in the prior grievance. However, grievant offered no testimony or evidence to show that the DON said anything or took any action that would connect the two events. Moreover, the controversy over grievant's work schedule went well beyond the DON. At various points, it has involved the Human Resource Manager, the Medical Director, the Hospital Director, and the Central Office Human Resources Consultant. There is no evidence that any or all of these people were motivated by retaliation.

In fact, to the contrary, the evidence demonstrates that the agency has made extensive efforts to accommodate grievant. It allowed her two more 45-day accommodation periods than policy provides for; it offered her multiple schedule options; it has continued to hold her job open for her; and, it has stated

[27] EDR *Grievance Procedure Manual*, p.24

[28] §4.1(b) EDR Grievance Procedure Manual defines protected activity as: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incident of fraud, abuse, or gross mismanagement, or exercising any right protected by law.

[29] *Reinhold v. Commonwealth*, 135 F.3d 920 (4th Cir. 1998).

its willingness to have grievant return to work even at this late date. These are not the actions of someone bent on retaliation. The agency could have removed her from employment because she sought a second accommodation under Policy 280ss. Moreover, pursuant to Section V.B.3.a of DHRM Policy 1.60, the agency could have removed grievant from employment for abandoning her job after October 31, 2004. Thus, if the agency had wanted to end the employment relationship, it has had ample opportunity to do so. However, the unambiguous actions of the agency after grievant stopped working clearly demonstrate that the agency wants grievant to return to work. Accordingly, grievant has not met the test to show that the agency retaliated against her.

Discrimination

Grievant alleges that the agency discriminated against her on the basis of a mental disability. Grievant has not shown that her insomnia and anxiety constitute disabilities for the reasons discussed above. However, even if these conditions could be categorized as a mental disability, grievant failed to offer any evidence that the agency took any action against her as a result of these conditions.

Throughout 2004 and particularly during November 2004, grievant made repeated demands of the agency which the agency made every effort to accommodate. Grievant was accommodated under the agency's temporary medical restrictions policy on *three* occasions during the year even though the policy allows only one such accommodation per year. In November, the agency offered her three possible scheduling options but grievant rejected all three. At the same time, the agency expressed a willingness to consider even more accommodation if grievant would cooperate by providing medical documentation to support her claim that she had a disability. Grievant did not provide the medical documentation despite repeated requests. Eventually, when the TPA was able to obtain medical information, it became apparent that grievant does not have a disability as that term is used in the VSDP.

Grievant asserts that she is an "individual with a disability" and therefore should be accommodated pursuant to the Americans with Disabilities Act (ADA). However, in order to meet the ADA definition of an individual with a disability, it must be determined that grievant has a physical or mental impairment, and that the impairment substantially limits one or more major life activities. Grievant's physicians have provided only diagnoses of insomnia and anxiety. Grievant has not shown that these conditions constitute a *physical or mental impairment* as that term is used in the ADA. However, even if grievant's conditions were considered to be such an impairment, grievant has not shown that her *major life activities*[30] are affected by the conditions. Further, grievant has not shown that her conditions *substantially limit* any major life activity either by preventing her from performing the activity, or by significantly restricting the manner in which

[30] The ADA defines "major life activities" as: walking, speaking, breathing, performing manual tasks, seeing, hearing, learning, caring for one's self, sitting, standing, lifting, reading, or working.

she can perform the activity. Accordingly, for the above reasons, grievant does not meet the ADA definition of an individual with a disability.

Summary

Grievant alleges that the agency "suspended" her from work at the time she rejected the work schedule to which she had been assigned. A "suspension" is an unpaid absence from work imposed by an agency as part of a disciplinary action pursuant to the *Standards of Conduct*.[31] The agency did not issue a disciplinary action to grievant and, therefore, she was not suspended. Grievant ceased working when she rejected her assigned work schedule. Since grievant could have continued to work, her decision not to work the hours assigned was a decision over which grievant had sole control.

Because the agency has not acceded to grievant's request to work a specific schedule of hours, grievant suggests that the agency is motivated by retaliation and discrimination. For the reasons stated above, grievant has not borne the burden of proof. A good employment relationship requires that both employer and employee work together and compromise when necessary. Because the agency needs nurses, it has provided more accommodation to grievant than it might have done with other non-medical employees. Grievant, on the other hand, expects the agency to accede to her demands for working hours that suit her personal desires. While the agency has accommodated grievant to a point, it is not required to do so without regard to the agency's operational needs. It is clear from the abrupt change in the physician's recommendations between October 28 and November 1, and from the medical evidence, that he made the change not for bona fide medical reasons, but as acquiescence to the hours grievant wanted. Without a legitimate medical reason to support the restrictions, the agency is not obligated to accommodate grievant.

Because grievant is still an employee of the agency, her request to be returned to employment is not a form of relief that the hearing officer can award. Grievant has not been working of her own volition but she could return to work if she chooses to do so. The agency affirmed that nurses are still in short supply and that grievant's skills are needed at the hospital. However, the question of grievant returning to work is moot because grievant stated that she is now employed full-time as a hospital nurse in the private sector and does not want to return to work for the agency.

DECISION

[31] DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.

Grievant has not borne the burden of proof to show that agency misapplied policy, discriminated, or retaliated against her. Grievant's request for relief is DENIED.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[32] You must file a notice of appeal with the clerk of the circuit court in the

[32] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[33]

[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]

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David J. Latham, Esq.
Hearing Officer

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that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[33] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.