

Issues: Misapplication of policy and discrimination; Hearing Date: 08/30/06; Decision Issued: 09/15/06; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8404/8405; Outcome: Agency upheld in full; **Administrative Review: HO Reconsideration Request received 09/29/06; Reconsideration Decision issued 02/05/07; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 09/29/06; EDR Ruling #2007-1567 issued 04/06/07; Outcome: HO's decision affirmed; Administrative Review: DHRM Ruling Request received 09/29/06; DHRM Ruling issued 03/29/07; Outcome: HO's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8404 / 8405

Hearing Date: August 30, 2006
Decision Issued: September 15, 2006

PROCEDURAL HISTORY

On August 10, 2005, Grievant timely filed a grievance to challenge the Agency's action. On September 12, 2005, Grievant filed a second grievance to challenge the Agency's actions. The outcome of the Third Resolution Steps was not satisfactory to the Grievant and she requested a hearing. On July 13, 2006, the EDR Director issued Ruling 2006-1220, 1239. On August 1, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 30, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether the Agency misapplied State Policy?

2. Whether Grievant is entitled to relief under the Americans with Disabilities Act?
3. Whether the Agency discriminated against Grievant?

BURDEN OF PROOF

In disciplinary actions and dismissals for unsatisfactory performance, the agency must show by a preponderance of the evidence that the action was warranted and appropriate under the circumstances. In all other actions, the employee must prove her claim by a preponderance of the evidence.

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 Department of Corrections employed Grievant as a Counselor II at one of its Facilities. The purpose of her position was:

Provides a range of casework management services, programming, and guidance for inmates in a correctional facility to enhance the security of the facility, public safety, and promote inmate's long term pro-social behaviors and re-integration into society.¹

Essential Functions of a counselor include:

1. Maintain contact with inmates assigned to caseload.
2. Accurately complete all required documentation.
3. Facilitate mandated treatment programs.
4. Be constantly alert to observe inmate behavior.
5. Communicate with inmates and staff.
6. Maintain contact with public.
7. Exercise good judgment when dealing with inmates. Be able to analyze situations and reach a logical conclusion.
8. Must work shift as directed by management.²

One of the Physical Requirements for working in a correctional institution as a counselor is: "Stress: Must be able to deal with stress associated with work environment."³ Working in a correctional institution is a high stress environment because a counselor must work with convicted felons living under intense security.

¹ Agency Exhibit 6.

² Agency Exhibit 2.

³ Agency Exhibit 2.

Beginning in November 2004, Grievant was absent from work due to a mental health condition. She was hospitalized due to this condition. She was released to return to work effective March 1, 2005 for half days for a period of six months. Prior to enabling Grievant to return to work, the Agency required Grievant to have her medical providers assess her ability to perform several important functions of her position as a counselor. On March 7, 2005, the Warden advised Grievant that the maximum accommodation that the Agency could provide at that Facility would be for 90 days.

On March 24, 2005, Medical Provider MFP completed a form describing Grievant's ability to perform her Essential Functions and Physical Requirement. When asked which Essential Functions and Physical Requirements was Grievant not able to perform, the MFP responded, "PR – stress management. EF – analyze situations, shift work, maintain public contact."⁴

On April 7, 2005, Grievant met with the Warden and human resource staff regarding her return to work. Grievant was offered a temporary accommodation for ninety days based on the restrictions detailed in her medical documentation.⁵ She was assigned to work in the mailroom from 8 a.m. until 4:30 p.m. Grievant accepted the temporary accommodation and began working. Grievant continued to work in the mailroom for 90 days which ended July 11, 2005. The Agency could not find any additional positions for which Grievant could fill. Grievant disliked working in the mailroom because the duties were significantly different from her counseling duties.

On July 8, 2005, Medical Provider MFP completed a form describing Grievant's ability to perform her Essential Functions and Physical Requirement. When asked which Essential Functions and Physical Requirements was Grievant not able to perform, the MFP responded, "need note of release to work from [Dr. S] regarding page 2 of essential functions (stress, judgment, public contact)."⁶

On August 11, 2005, Grievant's psychiatric medical provider wrote:

This is to notify that [Grievant] is under my care at this office. She can return to work part time in a low stress setting.⁷

⁴ Agency Exhibit 2.

⁵ The Facility Human Resource Officer sent Grievant a letter dated April 20, 2005 informing her that if she could not perform the essential functions and physical requirements of the Counselor position at the end of the 90 days she had the several options including seeking accommodation through the Department's ADA Review Committee.

⁶ Agency Exhibit 3.

⁷ Agency Exhibit 4.

On August 12, 2005, Grievant was advised by the Agency that she had exhausted all of her leave balances as of July 29, 2005 and was placed on Leave Without Pay status.

On August 17, 2005, Grievant was advised she had been released from employment effective August 12, 2005. She was removed from employment because her physician had not authorized her to return to work without restriction, several documents had not been completed and the Agency did not have any estimate of the length of her disability.

CONCLUSIONS OF POLICY

The Governor's Executive Order on Equal Opportunity prohibits employment discrimination against otherwise qualified persons with disabilities. Employees may not be discriminated against regarding many aspects of employment including, for example, hiring, transfer, demotion, layoff, termination, rehiring, and any other term, condition, or privilege of employment.⁸

Grievant asserts that she has been terminated from employment in violation of the ADA and state policy. To establish a *prima facie* claim of wrongful discharge under the ADA, the grievant must show that: (1) she is within the ADA's protected class (i.e., a "qualified individual with a disability"); (2) she was discharged; (3) "her job performance met her employer's expectation when she was discharged"; and (4) "her discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination."⁹

Qualified Individual with a Disability

Disability. An individual is considered to have a disability if that individual either (1) has a physical or mental impairment which substantially limits one or more of his or her major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment. Under the first option, "[m]erely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity."¹⁰ "Major life activities"¹¹ mean functions

⁸ In addition, DHRM Policy 2.05 "[p]rovides that all aspects of human resource management be conducted without regard to race, color, religion, gender, age, national origin, *disability*, or political affiliation"

⁹ *Rohan v. Networks Presentations, LLC*, 2003 U.S. Dist. LEXIS 26687, at n.5 (D. Md. Apr. 17, 2003), *aff'd*, 375 F.3d 266 (4th Cir. 2004). Once an employee establishes a *prima facie* case, an agency may nevertheless prevail if it can establish one of the defenses enumerated in 29 C.F.R. § 1630.15. See generally Peter A. Susser, *Disability Discrimination and the Workplace* 1014-26 (BNA Books 2005).

¹⁰ *Toyota Motor Manufacturing, Kentucky, Inc., v. Williams*, 534 U.S. 184, 122 S.Ct. 681 (2002).

¹¹ Other major life activities include, but are not limited to, sitting, standing, lifting, and reaching. 29 CFR § 1630.2(h)(Appendix).

such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."¹² An individual must also show that the limitation on a major life activity is substantial.¹³ "[T]o be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term." The existence of a disability must be determined on a case-by-case basis.¹⁴

Grievant stopped working in November 2004 because of a mental impairment. She was able to return to work on a part time basis in a low stress environment but not able to work as a Counselor. As of the date of the hearing, the Hearing Officer finds that Grievant's mental impairment has not improved beyond her condition as of March 2005.¹⁵ This is based on the credible testimony of Grievant that she cannot work despite her genuine desire to return to work in her former capacity. In addition, Grievant's need to take certain medications¹⁶ to help improve her mental impairment demonstrated the existence of her mental impairment.

Grievant's mental impairment substantially limits a major life activity of working. Based on the evidence presented, it is unclear whether Grievant can work in any job involving stress. The Hearing Officer finds that Grievant has a mental impairment preventing her from working without restriction.

Qualified Individual. A qualified individual with a disability is one who "satisfies the requisite skill, experience, education and other job-related requirement of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position."¹⁷

An agency must make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability, unless the Agency can demonstrate that the accommodation would impose an undue hardship on the operation of its business.¹⁸

¹² 45 CFR § 84.3(j)(2)(ii). Congress drafted the Americans with Disabilities Act definition of disability almost verbatim from Section 706(8)(B) of the Rehabilitation Act. Thus, referencing relevant sections of Title 45 of the Code of Federal Regulation is appropriate.

¹³ 42 U.S.C. § 12102(2)(A).

¹⁴ Toyota Motor Manufacturing, Kentucky, Inc., v. Williams, 534 U.S. 184, 122 S.Ct. 681 (2002).

¹⁵ Grievant's mental impairment is not temporary.

¹⁶ Grievant testified she began spending approximately \$400 per month for her medications.

¹⁷ 29 CFR § 1630.2(m).

¹⁸ 42 U.S.C. § 12112(b)(5)(A); 29 CFR § 1630.9(b).

Reasonable accommodation includes modification or adjustments to the work environment, or to the manner or circumstances under which the position is customarily performed that enables Grievant to perform the essential functions of her position.¹⁹ Essential functions are the fundamental job duties of Grievant's position.²⁰

Reasonable accommodation, however, "does not have to be the 'best' accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated."²¹ The Agency is not obligated to create a position for Grievant as a form of accommodation.

With respect to the Counselor position, Grievant is not a qualified individual.²² An essential function of the Counselor position is high stress due to interacting with inmates. It is not possible for Grievant to be a Counselor without interacting with inmates. It is not possible to make interacting with inmates a low stress duty. Thus, there is no accommodation possible for the Agency to grant that would enable Grievant to remain as a Counselor but in a low stress environment.

With respect to positions within the Agency other than a Counselor position, Grievant is also not a qualified individual because she has refused accommodation. Grievant was able to work in the mailroom for 90 days. Grievant was advised that at the end of the 90 days she could:

1. Seek an accommodation through the Department ADA Review Committee
2. Apply for disability retirement
3. Seek other positions, either within or outside the Department
4. Separation

Grievant did not wish to work in the mailroom and she did not wish to seek an accommodation through the Department ADA Review Committee.²³ Had Grievant

¹⁹ 29 CFR § 1630.2(o).

²⁰ 29 CFR § 1630.2(n).

²¹ 29 CFR § 1630.9 Appendix.

²² The Agency argued Grievant was a direct threat to the Agency because of some of her comments made in response to her removal from employment. There is no credible evidence to suggest Grievant was a direct threat to the Agency. None of her comments sufficiently establish a threat to the Agency or its employees.

²³ DOC Procedures Number 5-54.6 defines the ADA Review Committee as "a Department technical advisory group composed of Employee Relations (ERU) managers. The group may also include, upon request of the ERU managers, advisors from DOC operating divisions; staff from other agencies with knowledge or expertise in assessing disabilities or providing accommodation for qualified individuals with disabilities; representatives of the Attorney General's Office; or other legal professionals knowledgeable regarding ADA regulations."

sought accommodation through the Department's ADA Review Committee, the Agency would have been able to determine whether she could be placed in a permanent position as an accommodation to her disability. Grievant did not apply to the ADA Review Committee. She has offered no explanation as to why she did not apply. She knew she could apply to the Committee and understood the Committee could be the source of another position that would accommodate her disability. By insisting that she be returned to her Counselor position and refusing to seek accommodation through the ADA Review Committee, Grievant has rejected any Agency accommodation.²⁴

"A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability."²⁵ Because Grievant cannot perform the duties of the Counselor position and has refused any further accommodation, Grievant is not to be considered a qualified person with a disability. Grievant was not discriminated against based on her disability. Accordingly, there is no basis to grant Grievant's request for reinstatement.²⁶

Other Issues

Grievant contends the Agency improperly calculated her leave balances. Grievant has not established what errors the Agency may have made. Based on a review of the testimony and documents presented, there is no reason to believe the Agency denied Grievant any leave due to her. When Grievant was absent from work due to illness, she was paid by reducing her leave balances until those balances reached zero.²⁷

Grievant contends she was not given a fair opportunity to keep her health insurance. The Agency is not obligated to pay for Grievant's health insurance once she

²⁴ DOC Procedure Number 5-54.8(C) states that the, "employee must participate and cooperate in the Agency's identification, assessment, and implementation of an accommodation(s) which would enable the employee to perform the essential job functions." Grievant did not comply with this provision.

²⁵ See 29 C.F.R. § 1630.9(d).

²⁶ Grievant's removal from employment was authorized by DHRM Policy 1.60(IV)(A) providing that employees unable to meet the working conditions of their employment may be removed from employment. Although the section lists four examples, those examples are not all inclusive. The text of the section refers to "circumstances such as those listed below." The language does not suggest that only one of the four examples permits removal. Grievant was given due process as part of her removal.

²⁷ When Grievant returned to work on March 1, 2005, she returned with zero leave balances. Because she did not work eight hours per day, she remained in a "docked leave" status meaning she did not begin accruing leave.

is removed from employment. Although it was unfortunate that Grievant lost her health insurance, Grievant has not identified any policy misapplied by the Agency when it stopped paying for her health insurance.

DECISION

For the reasons stated herein, 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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that 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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 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 all of your appeals to the other party and to the EDR Director. 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. 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.²⁸

[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

²⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8404 / 8505-R

Reconsideration Decision Issued: February 5, 2007

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.²⁹

Grievant argues the Agency failed to meet the grievance deadline for exchanging exhibits. Any failure by the Agency to exchange its documents and list of witness within the expected time frame is not a basis to grant relief to Grievant. Grievant initiated her grievance and knew the Agency’s defenses prior to the hearing date.

Grievant argues the Agency failed to show any unsatisfactory performance on her part to support its actions. The Agency showed that Grievant was unable to perform an essential function of her position³⁰ because she was unable to deal with the high stress environment of working with convicted felons living under intense security. It was not necessary for the Agency to show unsatisfactory performance because the Agency

²⁹ Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.

³⁰ The Agency met its burden of proof to show that tolerance of stress was an essential job function. This conclusion is based on the Agency’s judgment as well as other factors such as (1) the amount of time spent on the job performing the function, (2) the consequences of not requiring the incumbent to perform the function, (3) the terms of any collective bargaining agreement, (4) the work experience of past incumbents in the job, and (5) the current work experience of incumbents in similar jobs. The Agency referred to stress management as a physical requirement. The physical requirement of stress tolerance is significant with respect to “[m]aintain contact with inmates assigned to caseload”, “[b]e constantly alert to observe inmate behavior”, and “[c]ommunicate with inmates and staff.” See, Agency Exhibit 2.

was able to show an inability to perform an essential function of her Counselor II position.

Grievant argues the Agency failed to show she was a potential threat if she returned to work. The Hearing Officer agrees, but even though she was not a potential threat, Grievant did not establish at the hearing that she was a qualified individual. Thus, she did not establish a basis to require the Agency to accommodate her. Grievant has also not provided evidence of what accommodation would be appropriate.

Grievant states that when she worked at the Facility, a Corrections Officer said some man was going to pour hot grease on her. It is unclear how Grievant's assertion relates to this grievance.

Grievant argues she was required to bring in a Counselor function sheet which was conflicting and did not include all of the basic essential functions of a counselor job function. Grievant's argument is untenable. The Agency presented sufficient evidence to show stress was an essential function of her position. Grievant did not present sufficient evidence to show she could work in a high stress environment counseling inmates.

Grievant argues the Warden "did acknowledge on August 30, 2006 at the hearing that he called himself discipline me by not allowing me to return to my office and work as a counselor." It is unclear what evidence Grievant is relying upon or the point she is making.

Grievant contends a document dated August 17, 2005 was not authentic. The Hearing Officer finds that there is no reason to believe the Agency altered any documents to support its position in this grievance.

Grievant argues that the Warden indicated she had to take her "own time" after the Warden decided Grievant could no longer work. She argues she should not be punished for the Warden's decision. No evidence was presented to show the Agency failed to follow State leave policies. No evidence was presented to establish the days for which Grievant contends she should have received compensation.

Grievant argues the Agency inappropriately handled her insurance following her removal. No evidence was presented to show that the Agency failed to comply with State policy. No evidence was presented to show what amount of money Grievant claimed as owing to her.

Grievant contends she was under the ADA protected class since 1980 yet she was permitted to work as a Counselor. She questions why the prior standard would not apply in this situation. The Agency is permitted to make decisions based on the evidence before it. Based on the information the Agency had regarding Grievant's ability to work, the Agency's decision to remove Grievant from employment was appropriate.

Grievant argues the Agency's referral of her to the ADA Review Committee was contrary to policy which required the Agency to "first explain what it is and why it is needed."³¹ DOC Policy 5-54.9(B), *Employee Relations and Training*, addresses when a supervisor should refer an employee's request for assistance to the organizational unit head. The matter was properly brought to the attention of the Warden who was the organizational unit head. Grievant has not established a violation of policy that would justify granting the relief she seeks.

Grievant contends she did not participate in the ADA Review Committee evaluation because the Agency failed to determine what specific paperwork was needed. No evidence was presented to establish Grievant's claim or to show that the Agency failed to comply with State policy regarding its ADA Review Committee.

Grievant questions how she could be placed on leave without pay at the same time she was being terminated from employment. Grievant was on leave without pay for the period as of July 29, 2005. She was released from employment as of August 12, 2005. Insufficient evidence was presented to support Grievant's assertion that she was on leave without pay while she was also terminated.

Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, Grievant's request for reconsideration is **denied**.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

³¹ Grievant cites policy 5-53 but is most likely referring to DOC Policy 5-54, *Employee Relations and Training*. Grievant cites page 3 of 13 as containing the section upon which she relies. Policy 5-53 addresses Customer Service.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Virginia Department of Corrections

March 29, 2007

The grievant has requested an administrative review of the hearing officer's decision in Case No. 8404/8405. The grievant is challenging the decision because she feels that the decision is inconsistent with various state and agency policies. The agency head of the Department of Human Resource Management has requested that I respond to this appeal.

FACTS

Until she was terminated, the Virginia Department of Corrections (DOC) employed the grievant as a Counselor II at one of its adult correctional institutions. By letter dated August 17, 2007, the DOC notified the grievant that her employment with DOC was terminated. The grievant has a mental disability and decision to terminate her employment was based on her inability to perform the essential job functions of her position. The purpose of her position was listed as:

Provides a range of casework management services, programming, and guidance for inmates in a correctional facility to enhance the security of the facility, public safety, and promote inmates' long-term pro-social behaviors and re-integration into society.

The essential job functions include:

1. Maintain contact with inmates assigned to caseload
2. Complete accurately all required documentation
3. Facilitate mandated treatment programs
4. Observe inmates' behavior and be alert
5. Communicate with inmates and staff
6. Maintain contact with public
7. Exercise good judgment when dealing with inmates. Be able to analyze situations and reach logical conclusion
8. Work shift work as directed by management

In addition, the employee must be able to deal with stress associated with the work environment.

In November 2004, the grievant was absent from work due to a mental condition. She was released to return to work on March 1 for half days for six months. The Warden advised the grievant on March 7, 2005, that the facility could give her an accommodation for a maximum of 90 days. The medical provider completed a form on March 34, 2005 that stated that the grievant was not able to handle stress management, analyze situations, do shift work or maintain public contact. On April 7, 2005, the grievant was offered an accommodation for 90 days working in the mailroom from 8am until 4:30pm. She worked in that position until the 90 days expired, July 11, 2005. There were no additional positions that the grievant could fill. She continued under medical care and was put on Leave Without Pay as of July 29, 2006. She was removed from employment, effective August 12, 2005, because her physician had not authorized her to return to work without restrictions, several documents had not been completed and the agency had no estimate of the length of time as to when she would return to work.

Among others, the grievant raised the following issues in her challenge to the hearing decision:

1. The agency failed to meet the deadline for exchanging information during the grievance procedure.
2. The agency failed to show any unsatisfactory performance as evidence to support the actions that were taken.
3. The agency alleged that she was removed from employment because her physician had not authorized her to return to work without restrictions, several documents had not been completed and the agency did not have an estimate of the length of her disability.
4. Agency released her from state service by letter dated August 17, 2005, effective August 12, 2005, even though she brought in a medical report releasing her to return to work part time.
5. The agency required her to use her leave time while the warden made a decision regarding her return to work.
6. The agency cancelled her insurance coverage in July 2005 and terminated her in August 2005 without giving her an opportunity to keep the insurance.
7. She has been protected under ADA since 1980 and the agency was aware of her condition.
8. The agency failed to determine what specific paperwork was needed to in order to support her need for accommodations.
9. The agency indicated that she was placed on leave without pay when she actually received a pay check.

The relevant laws and policies related to how employers handle disability issues in the workplace include the American with Disabilities Act. That act defines the responsibilities of the employer and the employee in requesting assistance and providing that assistance when needed in the workplace to accommodate a disability. An individual with a disability is one who (1) has a physical or mental impairment which substantially limits one or more of his or her major life activities; (2) has a record of such impairment, or (3) is regarded as having such an impairment.

This ruling will not attempt to determine if the grievant's condition rose to the level of an impairment that substantially limited any of her life activities. Rather, the medical documentation serves to support the grievant's status.

In the instant case, the fact that the grievant had been treated for a mental condition for several years is supported by disputable evidence. Also, the evidence supports that the grievant could not perform the essential functions of the job. Finally, because she could not perform the essential job functions, she was offered another position that she could perform but did not like. Thus, she was no longer deemed to be a qualified individual with a disability. Because there were no other positions available that she could perform, she was dismissed from state service. Based on that evidence, the hearing officer upheld all parts of the disciplinary action.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. Any challenge to the hearing decision must cite a particular mandate or provision in policy. The Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

Our review of the issues raised by the grievant reveals that the majority of the issues deal with how the hearing officer assessed the evidence. This agency cannot be a "super human resource officer" and substitute its judgment for that of the hearing officer. The relevant issue here is that the grievant had a disability that prevented her from performing the essential functions of her job. In addition, the agency placed her in a job on a temporary basis that she did not like. She was offered an opportunity to appear before the agency's ADA Review Committee to have her employment status reviewed but she refused to appear. Finally, because there were no other employment options, she was dismissed from state service.

Regarding the other concerns, such as no insurance coverage and not being paid for leave time, our review of the hearing decision reveals that the agency gave a proper accounting of the steps it took to ensure that those issues were addressed properly.

In summary, this Agency has determined that the hearing decision is consistent with state and agency policy. Therefore, we have no basis to interfere with the execution of this decision.

Ernest G. Spratley