Issues: Misapplication of Policy, Discrimination (disability), and Retaliation (other protected right); Hearing Date: 10/01/09; Decision Issued: 10/14/09; Agency: VEC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9181; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9181

Hearing Date: October 1, 2009
Decision Issued: October 14, 2009

PROCEDURAL HISTORY

On January 5, 2009, Grievant timely filed a grievance seeking reasonable accommodation, alleging violation of State policy and alleging discrimination and retaliation. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On August 17, 2009, the EDR Director issued Ruling 2009-2261 qualifying this matter for hearing. On September 9, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 1, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

1. Whether Grievant is a qualified individual with a disability entitled to reasonable accommodation?

2. Whether the Agency complied with policy by moving Grievant from the position of Workforce Services Counselor to Workforce Services Representative?

3. Whether the Agency retaliated against Grievant?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief he seeks should be granted. 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:

Grievant began working for the Agency in September 2003 as a Workforce Services Counselor (hereinafter "Counselor") at Location F. The purpose of his position as a Counselor was:

> Perform responsible, professional work in support of agency customers with workforce development/economic, social and personal and health related needs; provide career counseling services; determine eligibility, assess training needs, evaluate test results, and refer individuals applying for participation in federal funded programs, provide assistance with day to day operations, and perform other related work as required.[1]

On May 15, 2008, Location F was closed by the Agency in order to reduce the Agency's operating costs. All of the employees in Location F were reassigned to other offices based on the needs of those offices. Agency managers did not ask the employees in Location F to which offices they wished to be reassigned.

Grievant was assigned to Location W as a Workforce Services Representative. There were no Consultant positions at Location W and no need to add a Consultant position at Location W.[2] Agency managers concluded the position of Representative was needed in Location W and that Grievant should fill that position based on his skills. Consequently, the Agency assigned Grievant the duties of a Representative at Location W. Grievant reported to work at Location W on May 19, 2008.

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[1] Agency Exhibit 1.

[2] The Agency considered whether Counselor positions were needed in other offices in the Region and concluded none were needed.

As a Counselor at Location F, Grievant had his own office and was sometimes left in charge when managers were absent from the office. As a Representative at Location W, Grievant was assigned a cubical[3] and not left in charge when managers were absent from the office. Grievant's position number and pay band did not change as his duties changed from a Counselor to a Representative.

When Grievant was first moved from Location F to Location W, his Employee Work Profile remained unchanged. In other words, he was working under the EWP of a Counselor even though he was to work as a Representative.[4] Agency managers spoke with Agency Human Resource Staff regarding whether to change Grievant's EWP immediately upon his arrival at Location W or to wait until the subsequent performance cycle beginning October 2008. The Classification and Compensation Manager said that it would make sense to wait until the beginning of the next performance cycle in October 2008 to change the EWP even though Grievant's duties had changed effective May 19, 2008.

While Grievant was working at Location F, he was involved in an automobile collision resulting in injuries to his back.[5] He experienced pain and discomfort along with having difficulty walking. He required a cane to assist with his walking. When Grievant was moved from Location F to Location W, his commute became longer[6] and resulted in additional strain on his back. On June 13, 2008, Grievant went to see his doctor and the doctor said Grievant required a shorter commute in order to reduce the impact on his back. On June 18, 2008, Grievant told his Supervisor what the doctor said. On July 9, 2008, Grievant obtained a Verification of Treatment from his doctor stating, "MUST LIMIT DRIVING TO 30 MINUTES AT A TIME."[7] He presented the document to the Agency.

In July 2008, Grievant was out of work on short-term disability. He returned to work in October 2008.

Grievant was given an Employee Work Profile effective October 1, 2008 for the position of Representative. The purpose of his position was:

> To provide extensive services to the public related to workforce services, employer relations, and unemployment insurance.[8]

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[3] Other Representatives working at Location W worked in cubicles, not offices.

[4] Grievant was given a new business card indicating his position at Location W was as a Counselor.

[5] Grievant suffered a herniation of an intervertebral disc.

[6] Grievant's commute became more than 45 minutes.

[7] Agency Exhibit 1.

[8] Agency Exhibit 1.

Forty-five percent of Grievant's time as a Representative was to "[i]nterview and evaluate clients to correctly determine their needs and provide quality workforce services."[9]

In April 2009, the Agency opened an office in Location C. Grievant was moved to Location C. Location C is within a 30 minute commute of Grievant's home.

CONCLUSIONS OF POLICY

Grievant seeks remedies under the Americans with Disabilities Act, for violation of State policy, and in response to alleged retaliation by the Agency.

American's with Disabilities Act

DHRM Policy 2.05 "[p]rovides that all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or *disability* . . . ."[10] Under Policy 2.05, "'disability' is defined in accordance with the 'Americans with Disabilities Act,'" the relevant law governing disability accommodations.[11] Like Policy 2.05, the Americans with Disabilities Act (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 with a disability, who, with or without "reasonable accommodation," can perform the essential functions of the job.[12] An individual is "disabled" if he "(A) [has] a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) [has] a record of such an impairment; or (C) [has been] regarded as having such an impairment."[13] The "essential functions" are the "fundamental job duties of the employment position the individual with a disability holds or desires."[14]

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[9] Agency Exhibit 1.

[10] DHRM Policy 2.05 (emphasis added).

[11] 42 U.S.C. §§12101 *et seq.* In 2008, Congress passed the Americans with Disabilities Act Amendments Act of 2009 (ADAAA). This Act, which became effective on January 1, 2009, was intended to expand the number of individuals covered by the ADA. In particular, the ADAAA expressly states that the current EEOC ADA regulations "express [ ] too high a standard" by defining "substantially limits" as "significantly restricted."

[12] 42 U.S.C. § 12111(8).

[13] 42 U.S.C. § 12102(1).

[14] Courts have considered a number of factors in determining what functions are essential. These factors include, but are not limited to, the employer's judgment regarding which functions are essential, the number of employees available among whom the performance of the functions can be distributed, the amount of time spent performing the functions, the consequences of not performing the function, and the actual work experience of past or current incumbents in the same or similar jobs. *See* 42 U.S.C. 12111(8); 29 C.F.R. 1630.2(n); Hill v. Harper, 6 F. Supp.2d 540, 543 (E.D. Va. 1998).

The Hearing Officer will assume for the sake of argument that Grievant is a qualified individual with a disability because making such assumption will not affect the outcome of this case.

If an employee is disabled under the ADA, an employer must make "reasonable accommodations" unless the employer can demonstrate that the accommodation "would impose an undue hardship on the operation of the business [or government]."[15] Under the ADA, job restructuring, part-time or modified work schedules, reassignment and "other similar accommodations for individuals with disabilities" are considered reasonable accommodations.[16] However, courts have recognized that an accommodation is unreasonable if it requires the elimination of an "essential function."[17] In determining what functions of the job are essential, due consideration shall be given to the employer's judgment.[18]

Grievant seeks reasonable accommodation for his disability. One of his requests is to be moved to an office location closer to his home so that his drive to work is no longer than 30 minutes. Grievant presented a note from his doctor indicating that he could not drive for periods longer than 30 minutes. After receiving this doctor's note, the Agency moved Grievant from Location W to Location C. Location C would permit Grievant to travel from his home to his office without having to drive directly for longer than 30 minutes. Because the Agency has complied with Grievant's request, it is not necessary for the Hearing Officer to address whether the Agency is obligated to grant Grievant's request as a reasonable accommodation. There is no longer a basis for the Hearing Officer to grant relief to Grievant by ordering the Agency to move Grievant to a location closer to his home.

Some evidence was presented during the hearing to suggest that the Agency may close Location C in the future. The Hearing Officer will not grant prospective relief regarding a contingency that may or may not occur and for which the Agency has not yet decided how it handle Grievant's concern about the length of his commute.

Grievant seeks accommodation by being permitted to telecommute. Grievant's presence at the workplace is an essential function of his position as Representative. The Agency places its offices throughout the Commonwealth in order to make its employees accessible to customers residing in particular localities. Many of Agency's

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[15] 42 U.S.C. § 12112(b)(5)(A).

[16] 42 U.S.C. § 12111(9)(B).

[17] Hill v. Harper, 6 F. Supp.2d 540, 544 (E.D.Va. 1998)(citing Hall v. U.S. Postal Service, 857 F.2d 1073, 1078 (6th Cir. 1988)).

[18] 42 U.S.C. § 12111(8).

customers arrive at the Agency's offices in order to receive services from Agency staff.[19] In order to determine what services are needed by each customer, the Representative must obtain information from customers and be available to answer questions posed by customers. The opportunity to work with customers on a face to face basis is an important function of the Representative position.[20] Grievant would not be able to perform all of his duties as a Representative if he were to telecommute. If Grievant were to telecommute it would require elimination of an essential function of his position as a Representative.[21] The Agency is not obligated to permit Grievant to telecommute as a reasonable accommodation.

Compliance with State Policy

Grievant contends he was hired as a Counselor and wishes to continue as a Counselor at his new location. He contends the Agency improperly changed his position to that of a Representative. He contends he was demoted by being assigned responsibility as a Representative.

DHRM Policy 3.05 defines demotion as:

> Voluntary: Employee initiated movement to a different position in a lower Pay Band. This move may result from a competitive (recruitment) or non-competitive (employee request) process.
>
> Performance or disciplinary: Management initiated assignment of an employee to the same or a different position in the same or lower Pay Band with less job responsibilities that results in a minimum of a 5% reduction in base salary

DHRM Policy 1.40 defines performance demotion as:

> Action taken to an employee who received an overall performance evaluation of "Below Contributor" and whose performance during the re-evaluation period has not improved. Employees who are demoted for performance reasons must have their salaries decreased by a minimum of 5%. With this performance-related salary action, an employee may be:
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> 1. retained in his position with a reduction in duties commensurate with the salary reduction or;

[19] Some customers may also communicate with Agency staff by telephone or email.

[20] Prior to Grievant's request to telecommute, the Agency evaluated all of its positions to determine which positions were appropriate for telecommuting. Agency managers concluded that neither the Counselor nor the Representative positions were appropriate for telecommuting because of the importance of face to face customer service for these positions.

[21] Had Grievant remained a Counselor, the Hearing Officer would have reached the same conclusion.

2. placed in a lower level position within the same pay band or;

3. placed in a position in a lower pay band.

Grievant did not receive a voluntary demotion. He remained in the same pay band when his role changed from Counselor to Representative. Grievant did not receive a performance demotion. Grievant's salary was not lowered and he did not receive a lower performance evaluation. Grievant was not demoted.

DHRM policy permits the Agency to change Grievant's position from Counselor to Representative based on its business needs. DHRM Policy 3.05 defines reassignment within the pay band as:

> Action of agency management to move an employee from one position to a different position in the same Role or Pay Band.

The Agency reassigned Grievant from the position of Counselor to the position of Representative within the same pay band. The reassignment was based on a change in the Agency's business needs. The Agency's action was authorized by DHRM policy. The Agency did not fail to comply with State policy when it changed Grievant from a Counselor to a Representative and, thus, there is no basis for the Hearing Officer to order the Agency to restore Grievant to the title of Counselor.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[22] (2) suffered a materially adverse action[23]; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.[24]

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[22] *See* Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: 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 the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[23] On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

[24] This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

Grievant engaged in protected activities. Grievant was on short term disability and was absent from work. Grievant sought benefits for an injury on February 23, 2009, he claimed to be compensable under workers' compensation. He also sought workers' compensation benefits in 2008.

Grievant suffered a materially adverse action because his duties were changed and his position was changed from a Counselor to a Representative. He was no longer given supervisory responsibilities when office managers were absent.[25]

Grievant has not established a connection between his protected activities and the materially adverse actions he suffered. The Agency's actions were consistent with policy and not as a pretext for discrimination or retaliation.

DECISION

For the reasons stated herein, the Grievant's requests for relief are **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

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[25] Grievant also alleged an Agency manager complained to him about his car being parked in two spaces instead of one space. The evidence showed that the basis of the complain arose from a customer who complained about not being able to park and the manager was concerned that someone might harm Grievant's car. Grievant considered the manager's comments to be a complaint about his disability because he required two spaces to properly exit his vehicle. The manager later apologized to Grievant and explained his basis for speaking with Grievant. There is no reason for the Hearing Office to disbelieve the manager's account of the incident.

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
    600 East Main St. STE 301
    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.[26]

[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

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Carl Wilson Schmidt, Esq.
Hearing Officer

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