



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11513

Hearing Date: June 16, 2020

Decision Issued: July 6, 2020

PROCEDURAL HISTORY

On March 10, 2020, Grievant was removed from employment for failing to receive an annual flu shot.

On March 17, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 31, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 6, 2020, a hearing was held audio conference due to the COVID19 pandemic.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

1. Whether the University removed Grievant from employment in accordance with policy and law?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the University misapplied policy. 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 University of Virginia Medical Center employed Grievant as an Administrative Assistant. Although she was not involved in direct care of patients, she sometimes came into contact with patients as part of her work duties. She had been employed by the University for approximately ten years.

When Grievant was three years old, she was vaccinated for Dtap. She had an extreme reaction to the vaccine which placed her life at risk. She was traumatized by the incident and has refused to receive any vaccinations since then. Grievant feared that if she receives a flu vaccine, she may suffer another extreme reaction thereby jeopardizing her health and life.

Medical College Human Resource Policy 104 provides:

Employees shall also complete a mandatory annual flu vaccination by the deadline determined by the Medical Center Hospital Epidemiologist each year.

Occupational Health Screening and Maintenance Policy (OCH-002) provides:

All Tier I Team Members,¹ regardless of date of hire, must have received one Tetanus, Diphtheria, Pertussis (Tdap) vaccine as an adult.

A Tier I Team Member shall be exempt from the required vaccination if he/she can provide to Employee Health/WorkMed medical documentation of one of the contraindications for Tetanus, Diphtheria or Tdap as defined by the CDC (cdc.gov). Tier I Team Members are also responsible for informing Employee Health/WorkMed of other claimed grounds for exemption.

All Tier I Team Members must be vaccinated annually (for the flu).

¹ Grievant was a Tier I Team Member.

A Tier I Team Member shall be exempt from the required vaccination if he/she can provide to Employee Health/WorkMed medical documentation of one of the contraindications for influenza vaccine as defined by the CDC (cdc.gov). Tier I Team Members are also responsible for informing Employee Health/WorkMed of other claimed grounds for exemption.

The University instructed Grievant to be vaccinated for the flu by December 1, 2019.

Grievant submitted an Exemption Request Based on Medical Condition dated November 19, 2019 from a Nurse Practitioner stating:

Does the employee have a history of a CDC/ACIP contraindication to the specific vaccine? If so, please briefly describe the contraindication or pertinent medical condition.

No, however, [patient] had severe reaction to Tdap [and] was hospitalized at time [and] has opted not to receive further vaccines due to concern of further severe reaction.²

On December 6, 2019, the Nurse Practitioner revised updated her statement as follow:

Flu vaccine contraindicated due to severe immunization reaction.³

On December 9, 2019, Grievant was notified that, “[your] request for exemption from the flu vaccine has been reviewed by the Immunize UVA Committee and has not been approved. In order to be compliant with Health System Policy CCH-002, please receive your vaccination.”⁴

Grievant provided the Agency with a document dated January 14, 2020 drafted by the Nurse Practitioner:

To Whom It May Concern,
[Grievant] is a patient of mine that I have last seen on 11/19/19. [Patient] had severe immunization reaction to DTP as a child which resulted in a coma at age three, and because of this she has opted not to receive flu vaccines as she is concerned of future possible vaccine reactions. While this was not a reaction to the flu vaccine, the reaction of patient was great

² Agency Exhibit 6-1.

³ Agency Exhibit 8-1.

⁴ Agency Exhibit 9-3.

enough that I believe [patient's] request not to have future immunizations is reasonable.⁵

On January 15, 2020, the Nurse Practitioner revised her statement in the Exemption Request Based on a Medical Condition to provide:

Yes, [patient] had severe reaction and was hospitalized due to coma.

On February 5, 2020, Grievant was notified that the Immunize UVA Committee had approved her exemption request for Tdap. She was reminded that was the only vaccine from which she had been exempted.

Grievant provided the Agency with a document dated March 7, 2020 drafted by the Nurse Practitioner:

To Whom It May Concern,

I am writing on behalf of my patient [Grievant]. [Patient's] first time she received Dtap she did have rash and had received a third of dose of Dtap for second dose. She had a sever reaction to the second dose of childhood vaccine Dtap. She had severe seizures that resulted in weeklong coma and [patient] had to have physical therapy to learn how to walk again. [Patient] should not have any component of Dtap again. As [patient] has had severe reaction and has never had any immunizations since then, it is my recommendation that [patient] should not be required to take Dtap as this is contraindicated as well as other immunizations as her reaction to Dtap was quite severe.⁶

On March 10, 2020, Grievant was removed from employment for failing to satisfy a condition of employment.

CONCLUSIONS OF POLICY

Executive Order 1 prohibits discrimination against State employees who are otherwise qualified persons with disabilities. DHRM Policy 2.05 requires human resource management decisions to be made without regard to disability. This policy defines disability as:

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.

⁵ Agency Exhibit 12-1.

⁶ Agency Exhibit 16-1.

The Americans with Disabilities Act (ADA) defines disability as "a physical or mental impairment that substantially limits one or more major life activities" or a "record of such impairment."⁷ Major life activities are defined by the ADA to include, but not limited to, seeing, eating, walking, speaking, thinking, reading, concentrating, thinking, communicating, and working.⁸ The ADA Amendments Act of 2008 (the ADAAA) reestablished expansive protection under the ADA.⁹ Pursuant to the ADAAA, to be classified as a disability, the level of limitation resulting from the impairment must render the individual "substantially limited in performing a major life activity as compared to most people in the general population."¹⁰ Further, impairments that are episodic or in remission qualify as disabilities if they substantially limit a major life activity when active.¹¹ Notably, the ADA protects individuals that may not currently be experiencing a disability but have a recorded history of that disability.¹² Protection under the ADA also extends to individuals who are perceived to have a disability they do not have and experience an adverse employment action as a result of that perception.¹³

Grievant has the mental impairment of Post-Traumatic Stress Disorder because of her extreme fear of vaccines.

Post-Traumatic Stress Disorder is:

a psychological reaction occurring after experiencing a highly stressing event (such as wartime combat, physical violence, or a natural disaster) that is usually characterized by depression, anxiety, flashbacks, recurrent nightmares, and avoidance of reminders of the event — abbreviation *PTSD*.¹⁴

⁷ 42 U.S.C.S. § 12102 (1)(A), (B) (LEXIS through Pub. L. No. 116-145) (definition of disability within the ADA).

⁸ See *id.* (2)(A) (Nonexclusive list of activities considered to be "major life activities").

⁹ See ADA Amendments Act of 2008, 110 P.L. No. 325 § 2 (b) (1), 122 Stat. 3553 (2008) (stating the purpose of the ADA Amendments Act of 2008).

¹⁰ See U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2011-1, QUESTIONS AND ANSWERS ON THE FINAL RULE IMPLEMENTING THE ADA AMENDMENTS ACT OF 2008 (2011) <https://www.eeoc.gov/laws/guidance/questions-and-answers-final-rule-implementing-ada-amendments-act-2008> (summarizing the changes made to the definition of "individual with a disability" as a result of the ADA Amendments Act of 2008).

¹¹ See *id.*

¹² See 42 U.S.C.S. § 12101 (1) (B) (LEXIS through Pub. L. No. 116-145).

¹³ See *id.* at (3) (A).

¹⁴ <https://www.merriam-webster.com/dictionary/post-traumatic%20stress%20disorder>.

Grievant suffered a highly stressing event. She suffered seizures and a coma and had to have physical therapy to learn how to walk again. This highly stressing event caused Grievant to suffer a psychological reaction of extreme fear of all vaccinations. Grievant has PTSD relating to her extreme fear of suffering illness or death if she receives the flu vaccine.

In this case, Grievant did not seek to avoid the flu shot due to minor discomfort or annoyance. She did not fear having the flu shot because it might cause pain or inconvenience. She feared the flu shot because she believed it would kill her. Grievant's fear of death from a flu vaccine was profound. Whether Grievant's fear was rational is not significant.

Grievant was unable to perform a major life activity of working because her PTSD prevented her from satisfying the University's condition of employment. Grievant suffered an adverse employment action (removal) because she did not comply with the University's vaccination requirement.

The University likely could have accommodated Grievant by permitting her to wear a mask when working. The University did not take the steps necessary to determine that she had a disability and then engage in an interactive process to identify any reasonable accommodations.

It is not necessary for an employee to specifically mention a request for accommodation under the ADA in order to create an agency's obligation to investigate whether it can provide a reasonable accommodation to a disability. The Nurse Practitioner's notes provide adequate notice to the University that Grievant's severe reaction to a vaccination may have resulted in a disability of PTSD. This created the University's obligation to engage in an "interactive process" to determine whether it could accommodate Grievant's disability. The evidence showed that when the University exempted employees from vaccinations, it required them to wear masks to ensure they did not infect any patients if the employees became ill.

The University's position in this case is understandable. It has a paramount obligation to ensure patient safety and its policies are designed to achieve that objective. It provided Grievant with numerous opportunities to convince its Immunize UVA Committee that she should not be vaccinated. The University denied Grievant's request for exemption because she had not demonstrated a contraindication to getting the flu shot. If the Hearing Officer disregards the applicability of the ADA and only focuses on the University's policies, then the University's decision is consistent with its policies. The Hearing Officer cannot assign fault to the University or conclude it abused its authority. The University simply overlooked another remedy available to Grievant that was outside of its policies governing vaccinations. As a result, the University failed to comply with the requirements of the ADA to include engaging in an interactive process to determine whether the University can accommodate Grievant's disability. This matter must be remanded to the University so the University may evaluate the extent of

Grievant's disability and whether a reasonable accommodation exists such as wearing a mask.¹⁵

DECISION

For the reasons stated herein, the University's removal of Grievant is **rescinded**. The University is ordered to **reinstate** Grievant to Grievant's former position or, if the position is filled, to an equivalent position. The University is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal. The University is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

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.

¹⁵ One University Witness testified that wearing a mask was not a feasible alternative. On the other hand, the University Representative indicated:

If a team member has an approved exemption from the flu vaccine he/she must wear a mask when 6 feet from patients for 1 or more minutes during flu season, as determined by the Hospital Epidemiologist.

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.



COMMONWEALTH of VIRGINIA
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 11513-R

Reconsideration Decision Issued: October 26, 2020

RECONSIDERATION DECISION

EDR Ruling 2021-5140 remanded this matter to the Hearing Officer to address:

[T]he record does support the hearing officer's broader conclusion that the grievant put the University on notice that she had a physical or mental impairment and/or record of such impairment. ***

As a general rule, an employer must 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." In order to determine the appropriate reasonable accommodation, it may be necessary for [the employer] "to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." Thus, when an employee seeks a reasonable accommodation, ADA regulatory guidance provides that "the employer, using a problem solving approach, should:

(1) Analyze the particular job involved and determine its purpose and essential functions;

- (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
- (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
- (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer."

As it relates specifically to epidemics and vaccines, ADA regulatory guidance states that, during a pandemic, "[a]n employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents [him or her] from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship" (citations omitted). ***

In the interests of providing efficiency and finality to the parties, EDR remands this matter to the hearing officer to make findings as to whether the University failed to grant a reasonable accommodation to the grievant that would allow her to perform the essential functions of her job. On remand, the hearing officer may, if he deems the record incomplete, reopen the record to take further evidence as to what accommodations may or may not exist and whether they are reasonable and/or impose an undue burden on the organization. After receiving any such additional evidence, the hearing officer shall determine whether, as the grievant argues, her removal misapplied or unfairly applied state disability protections such that her separation must be rescinded.

The Hearing Officer received additional evidence from the parties on October 13, 2020. The Hearing Officer finds:

Grievant worked as an Administrative Assistant with some possible contact with patients. There is no reason to believe Grievant could not perform the essential functions of her position while wearing a mask.

The University's interactive process to assess whether an employee's disability may be accommodated was similar to the process the University followed when it denied Grievant's request. The University, however, failed to apply its interactive process within the framework of the Americans with Disabilities Act.

The University provides exceptions to the flu vaccine if an employee can show a CDC contraindication for the influenza vaccine. The University accommodates these employees by permitting them to work while wearing masks without requiring them to take the flu shot.

Grievant is eligible to be rehired but only if she takes a flu shot or shows an exemption under the Agency's policy.

Based on these findings and the findings from the Original Hearing, the Hearing Officer concludes that wearing a mask and being exempt from taking the flu vaccine is a reasonable accommodation for Grievant. The University can provide this accommodation to Grievant because it is able to provide such accommodations to other employees. It is able to provide accommodations to employees who have demonstrated CDC contraindication to the flu vaccine.

Grievant's reaction to the DTAP was unusual and extraordinary. This reaction generated extreme fear in Grievant of receiving all vaccinations. The University's application of its testing policy puts Grievant in the position of having to possibly place her life at risk in order to establish a CDC contraindication. The University's application of its policy is unfair and unreasonable. The University's application of its policy disregards an employer's obligation under the Americans with Disabilities Act.

When an individual decides to request accommodation, the individual or his or her representative must let the employer know that he or she needs an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation."¹

Grievant notified the University she was requesting an accommodation under the ADA by asking to be exempt from the flu vaccine shot. The University did not provide Grievant an interactive process under the ADA because Grievant did not specifically mention the ADA. It was not necessary for Grievant to specifically request accommodation under the ADA. The University should have examined Grievant's request within the context of the ADA and not just under its vaccination policies.

The only statutory limitation on an employer's obligation to provide "reasonable accommodation" is that no such change or modification is required if it would cause "undue hardship" to the employer. "Undue hardship" means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.²

Allowing Grievant to wear a mask while working does not create an undue hardship on the University. This conclusion follows because the University allows other employees

¹ See, <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>

² See, <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>

to wear masks rather than comply with its vaccination expectations. The impact on the University of allowing Grievant to wear a mask is the same as when the University accommodates other employees by permitting them to wear masks.

The University argued that it could not accommodate Grievant because she would pose a risk of transmitting the flu to patients and other employees. This argument would be persuasive if the University had a policy with no exceptions. In other words, if the University required every employee without exception to have a flu shot, then it may have established that allowing an employee without a flu shot to work at the Medical Center created a risk that could not be accommodated. Once the University created exceptions, it established that an employee could work for the University without receiving a flu vaccine and that the University could tolerate that level of risk.

The University argued that with each additional employee exempt from the flu shot, the risk to patient health increases. The University's assertion is logical, but the University presented no evidence showing the risk created by the addition of another employee who has not had the flu shot but is wearing a mask. It is unclear how many employees are granted exemptions under its policy and how the number of employees and risk of infection is affected by attrition.

The University argued that disability is a medical determination and the Hearing Officer and EDR are not qualified to determine disability. This argument fails because whether an employee is disabled under the ADA is a legal determination, not a medical determination. The Hearing Officer may be aided by the submission of medical evidence and opinion but the absence of such evidence or the medical conclusions drawn by medical professionals are not binding on the Hearing Officer's determination.³

The University argued that if Grievant were reinstated, it should not be required to pay full back pay. The University's position in this matter is understandable because its actions at all times have been focused on minimizing the health risks to its patients. The University's oversight is neither obvious, nor egregious. Grievant's position is also understandable. She experienced an unusual and exceptional event generating fear of death from what others may consider as a routine inconvenience. The Hearing Officer will award full back pay which is consistent with the discretion afforded under the Rules for Conducting Grievance Hearings.

For this reason, the Original Hearing Decision is **affirmed**.

³ For example, if an employee testified credibly that he had no vision whatsoever, it would not be necessary for that employee to present medical evidence establishing the inability to see in order for the Hearing Officer to find that the employee had the disability of blindness. Moreover, evidence from a medical professional that an employee was or was not disabled would not be binding on the Hearing Officer if the Hearing Officer found such evidence unpersuasive. In the other hand, if an employee asserted partial blindness, a medical examination may assist the Hearing Officer in determining the degree of blindness.

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 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.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer