COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11649

Hearing Date: August 31, 2021
Decision Issued: October 14, 2021

PROCEDURAL HISTORY

On July 14, 2020, Grievant was removed from employment because the Agency alleged she had abandoned her job.

On August 14, 2020, Grievant timely filed a grievance to challenge the Agency's action. On January 19, 2021, the Office of Employment Dispute Resolution issued Ruling 2021-5178 qualifying the matter for hearing. On February 1, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing was initially scheduled for May 11, 2021 but continued at the request of a party based on just cause. On August 31, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
Witnesses

ISSUES

1. Whether Grievant's removal was consistent with State and Agency policy?

2. Whether Grievant's removal was unlawful discrimination or retaliation?

BURDEN OF PROOF

The EDR Ruling places the burden of proof on Grievant to show by a preponderance of the evidence that her removal was improper and that the Agency discriminated and retaliated against her. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia State Police employed Grievant as a Public Relations Specialist.[1] The purpose of her position was:

> This position is responsible for providing information on the accomplishments of the [Unit] to the insurance industry, the general public and the media by compiling the annual report, program newsletter, press releases, and web site.[2]

The Knowledge, Skills and Abilities and competencies of the position included, "to establish and maintain effective working relationships with others." Grievant's performance factors included, "Interpersonal relationships – The extent to which the employee establishes working relationships when dealing with supervisors, co-workers, public officials, and the general public." [3]

Grievant received an overall rating of Extraordinary Contributor on her August 2019 annual performance evaluation. She received an overall rating of Major Contributor on her January 2020 evaluation.

Grievant had mental health concerns including anxiety and depression that were diagnosed before she came to the Agency. She had been able to manage them with exercise and other methods. Grievant described herself as having a disability. The Agency did not contest Grievant's assertion.

---

[1] Grievant's position was Exempt under the Fair Labor Standards Act.

[2] Agency Exhibit p. 179.

[3] Agency Exhibit p. 179.

Grievant began working for the Agency in May 2018. She reported to First Sergeant H but began reporting to First Sergeant M[4] in June 2019. Grievant's Unit also had two Special Agents who served as Field Representatives for the Agency.

Captain G wanted Grievant's Unit to work as a "team effort." Instead of having Grievant make social media posts by herself, he wanted Grievant to collaborate with the supervisor and field agents who were sworn law enforcement officers. Captain G believed the law enforcement officers would know what terminology needed to be included in social media posts. Many of the social media posts or memoranda were written under the Agency Head's name and needed to be reviewed by other employees.

In June 2019, Grievant spoke with First Sergeant M and requested to telecommute due to childcare needs. Her request was denied because her position was not authorized for telecommuting. The Agency adjusted Grievant's schedule to allow her to work half-days on Fridays until the end of August 2019.

On July 16, 2019, Grievant went to the Agency's Human Resource division to complain about First Sergeant M and two other employees. Grievant stated First Sergeant M was scrutinizing her work too closely. She said she did not feel comfortable with First Sergeant M because he became agitated too quickly. Grievant said she felt like she was being bullied at work. On July 19, 2019, Grievant returned to the Human Resource division and asked if she could have a different supervisor than First Sergeant M.

On July 19, 2019, Grievant filed a grievance seeking corrections to and modification of her salary. She was denied relief by the Third Step Respondent. Her request for hearing was denied by the Office of Employment Dispute Resolution on October 31, 2019.

On July 29, 2019, Grievant filed an internal EEO complaint.

On September 19, 2019, Grievant filed a complaint with the Department of Human Resource Management.

On August 1, 2019, Grievant left work on medical leave. On October 24, 2019, Grievant went on Short-term Disability. Grievant asked for a reasonable accommodation of teleworking. Grievant wanted "to work remotely on days when there are no staff meetings requiring her presence."[5] Her request was denied by the Agency on October 25, 2019 because, "[t]his is a true work restriction as her division does not telecommute."[6] In November 2019, Grievant made a request for accommodation to work remotely. Her request was denied.

---

[4] First Sergeant M was promoted to Lieutenant on March 25, 2020.

[5] Agency Exhibit p. 39.

[6] Agency Exhibit p. 104.

Grievant returned to work on December 2, 2019 without any restrictions from her medical provider. She was informed that she had been moved to another building and would be reporting to a new supervisor. This decision resulted from Grievant having an active complaint against First Sergeant M. Grievant began reporting to First Sergeant W but would receive assignments from First Sergeant M. She was not demoted. Grievant was given a new office with updated equipment and an ergonomically designed chair. Captain G's office was close to Grievant's new office. He invited Grievant to lunch and attempted to make her feel welcomed and valued.

On December 16, 2019, Grievant received an annual performance evaluation with an overall rating of "Contributor" and her 2020 Employee Work Profile. Grievant appealed the evaluation. On January 22, 2020, Lieutenant B changed the rating for one Core Responsibility from Contributor to Major Contributor and changed her overall rating from Contributor to Major Contributor.

Grievant filed a complaint with the Federal Equal Employment Opportunity Commission on December 16, 2019.

On January 24, 2020, Grievant filed a complaint of discrimination with the EEOC for discrimination that she claimed occurred from July 26, 2019 to December 2, 2019.

On January 28, 2020, Captain G sent Captain K a memorandum explaining the reason he was denying Grievant's request to telecommute:

> [Grievant's] position is crucial to the [Unit's] operations and her absence at the office created a void in time sensitive events. Many projects and events are known suddenly and their responses are crucial to the success and failure of the section. [Grievant's] position does not allow the flexibility to work from home. No employee [who] held the position prior to [Grievant] teleworked. [Grievant] never formally requested from me, in writing or verbally to telework. Therefore, the Grievant, [Grievant's] request to telework is denied.[7]

Grievant submitted medical information to the Third Party Administrator as part of her request for Short-term Disability. She did not submit medical information directly to the Agency's Human Resource Office.[8] As of February 5, 2020, the Agency did not have information about Grievant's disability.

The Agency planned to have a display at the Convention Center during an auto show on February 15, 2020. Grievant was supposed to report to the Convention Center at 9:45 a.m. but reported at 12:53 p.m. The Agency initiated an investigation to determine

[7] Grievant Exhibit E2.

[8] Grievant was not expected to submit medical documentation of her disability to the Human Resource Division. She correctly submitted such information to the Third Party Administrator.

if disciplinary action was appropriate. Grievant met with the Investigator on February 26, 2020 and was given a letter of allegation dated February 25, 2020. The Interview began at 9:39 a.m. but was interrupted at 9:49 a.m. when Grievant said she had to go to the restroom because of stomach issues. Grievant explained to the investigators that she "mixed up the time."[9]

On March 23, 2020, the Governor issued Executive Order 53 limiting interactions and requiring social distancing due to concern for public health.

On March 30, 2020, Grievant sent Captain G an email asking to telework because "my kids are home out of school."[10]

On April 1, 2020, Captain G met with Grievant in the office regarding assignments. Grievant requested to telework due to child care needs. Captain G said Grievant could telecommute but would need to work in the office at least two days per week and social distance.

On April 10, 2020, Grievant was telecommuting and instructed to participate in a status call with her Unit on April 13, 2020. She could have participated in the call by video or telephone. Grievant failed to participate in the call. Grievant later claimed she had connectivity issues.

Grievant worked full time from home in April 2020. She was asked to sign an "emergency telework agreement" on April 13, 2020.

Captain G wanted to meet in-person with Grievant on April 29, 2020. The Agency intended to issue Grievant a Group I Written Notice and wanted to do so in-person. Grievant could not do so because her children were not able to attend school because of COVID19. Grievant sent an email on April 29, 2020 to First Sergeant W explaining:

> I am unable to meet with [Captain G] today as requested … for the same reasons stated in previous communications regarding in-person meetings. I do not have anyone that can watch my kids as they are out of school for COVID19 related reasons. *** In 12 emails I have explained that I have child care issues that make coming into the office consistently and on short notice challenging. *** The situation has become extremely stressful for me which has a negative impact on my health. I have an anxiety disorder that I have made you aware of before. Constantly asking me the same thing repeatedly with no seeming resolution, creating a schedule that increases the time that I need to come into the office to work and threatening disciplinary action only exacerbates my disorder.[11]

[9] Grievant Exhibit D1.

[10] Grievant Exhibit C1.

[11] Grievant Exhibit E27.

Grievant used ten weeks of Public Health Emergency Leave. She received leave under the Families First Coronavirus Response Act. Grievant exhausted all of her family medical leave on June 19, 2020. Grievant was instructed to return to work on June 22, 2020.

On June 18, 2020, Grievant filed a claim under the American's with Disabilities Act and requested to permanently telecommute.

On June 22, 2020, Grievant sent an email to Ms. M, a human resource employee referring to her "diagnosed disability."[12] Ms. M asked Grievant for a doctor's note indicating that Grievant had a disability. On June 26, 2020, Grievant sent Ms. M an email with medical documentation as part of Grievant's request to telecommute five days per week. Ms. M responded to Grievant by saying the March 20, 2020 doctor's note did not say Grievant had a disability but asked that Grievant be "permitted to take up to 3 ten minute breaks during [the] workday to manage anxiety."[13] Ms. M said the Agency could accommodate this request. She added that Grievant's medical provider did not refer to telecommuting five days per week.

On June 18, 2020, Grievant submitted timesheets with errors to Lieutenant S. Lieutenant S returned the timesheets to Grievant with an explanation of the errors. Grievant submitted timesheets again on June 22, 2020.

Grievant returned to work on June 29, 2020. She worked the full day.

Grievant began reporting to First Sergeant H on June 29, 2020. Grievant met with First Sergeant S and First Sergeant H who told her she would be reprimanded for making an error on a time slip. Lieutenant S had drafted a Counseling dated June 29, 2020 regarding making errors in her timesheets that were submitted on June 18, 2020 and June 22, 2020. Grievant was told that Captain G might have additional disciplinary action for her. This affected Grievant's mental health. She was "freaking out" about having to meet with Captain G.

On June 29, 2020, Grievant's Doctor faxed a note to the Agency stating that he had been Grievant's physician since 2018 and he concluded she had a disability requiring accommodation. He added, "I strongly recommend she be allowed to work from home/telecommute."[14]

On June 29, 2020, the Human Resource Manager sent Grievant an email informing Grievant that her request to telecommute was denied because:

---

[12] Grievant Exhibit C3.

[13] Agency Exhibit p. 123.

[14] Agency Exhibit p. 161.

> Your position and job duties require a teamwork environment, with face-to-face interaction. Many projects and events are known suddenly, and their responses are crucial to the success of the section. Further the [Unit] has undergone several changes to include new supervision, a new advertising agency, and a new fiscal budget cycle. However, I have attached a list of possible, reasonable accommodations that can be discussed with you.[15]

The Human Resource Manager offered Grievant 31 options to accommodation and reduce Grievant's anxiety. These options included, rest area, private space, modified break schedule, extra time, reminders, communicate another way, periodic rest breaks, and uninterrupted work time.

On June 30, 2020, Grievant reported to work but left between 10 a.m. and noon. She told First Sergeant H, "I'm about to have a really bad panic attack."[16] Grievant said she was experiencing pressure and anxiety about the meeting on the prior day and the upcoming disciplinary action. First Sergeant H gave Grievant permission to leave.

Grievant did not report to work on July 1, 2020 because "I am not feeling well and need to stay home."[17] Grievant exhausted all of her available leave. On July 1, 2020, Grievant asked to use leave without pay from June 30, 2020 to July 6, 2020.

Grievant did not report to work on July 2, 2020 and did not telecommute.

Grievant was not obligated to work on July 3, 2020, a holiday.

The Agency placed Grievant on leave without pay status from June 30, 2020 to July 6, 2020.

Grievant returned to work on July 7, 2020. She worked at least until lunchtime.

Grievant reported to work on time on July 8, 2020. She said "Good morning" to First Sergeant H and Lieutenant S. Lieutenant S provided Grievant with keys to her office and the front entrance. At approximately 9:30 a.m., Grievant got into her vehicle and left the Facility. She did not speak with her supervisor before leaving. She sent a text to First Sergeant H stating "I went to get coffee and then to SPHQ to grab my monitor but I'm having a really bad panic attack. I am in my car."[18] First Sergeant H sent Grievant a text message asking if there was anything she could do. Grievant replied, "No, I need to go home. I don't feel safe."[19] First Sergeant H called Grievant to ask what caused her to feel

[15] Agency Exhibit p. 119.

[16] Grievant Exhibit C7.

[17] Grievant Exhibit C7.

[18] Grievant Exhibit p. 44.

[19] Agency Exhibit p. 90.

unsafe. Grievant said she was uncomfortable being in the building by herself and started to feel unsafe. Grievant said she still had her laptop in her office and would be returning to retrieve it. Grievant returned to the office at approximately 10 a.m. and then left.

Grievant sent an email to the HR Deputy Director stating that all of her leave and family medical leave were exhausted but she needed to leave work due to "symptom flare ups." Grievant asked, "Are you able to help me explore any other options I may have?"[20] The HR Deputy Director replied, "At this point, I don't see any options for you. It is my understanding you are out of leave and you are no longer covered by FMLA."[21]

Captain G drafted a memorandum to Grievant dated July 8, 2020 notifying Grievant of pending charges against her. The first charge was because Grievant was expected to report to work at a Convention Center on February 15, 2020 at 9:45 a.m. to represent the Department. Grievant reported to the Convention Center at 12:53 p.m. The second charge arose because on February 13, 2020, First Sergeant W and First Sergeant M gave Grievant instructions of when to report to a Department function. Grievant disregarded those instructions. Grievant was informed she was subject to disciplinary action and was told to report to the Agency's headquarters on Monday, July 13, 2020 at 10:30 a.m. to present her response to the allegations.

Grievant did not report to work on July 9, 2020 or July 10, 2020.

On July 9, 2020, Grievant asked to be granted leave without pay from July 8, 2020 to July 17, 2020. Captain G denied Grievant's request on July 10, 2020 and advised Grievant:

> You are to adhere to your routine work schedule, Monday-Friday 8:00 – 4:30, at your assigned work location beginning July 13, 2020.[22]

Grievant did not report to work on July 13, 2020. Grievant sent an email to First Sergeant H saying, "I am not feeling well this morning and I'm unable to make it to work today."[23]

Grievant did not report to work on July 14, 2020.

On July 14, 2020, the Superintendent issued Grievant a letter notifying her of her removal from the Agency because:

---

[20] Agency Exhibit p. 108.

[21] Grievant Exhibit C8.

[22] Agency Exhibit p. 112.

[23] Grievant Exhibit C12.

> The Department presumes you have abandoned your employment with the agency. As referenced in the July 10, 2020 memorandum issued to you by [Captain G] your July 8, 2020 request for Leave Without Pay was denied. Additionally, you were instructed to report to your assigned work location at 0800 hours on July 13, 2020 and you failed to do so. Your leave balances and your Family Medical Leave Act protections have been exhausted.[24]

On July 14, 2020 at 4:14 p.m., First Sergeant H called Grievant and read to her the Superintendent's letter.

Grievant filed a request for Short-term Disability on July 15, 2020. Her request was denied because she was no longer employed by the Agency.

On November 18, 2020, the US Equal Employment Opportunity Commission ruled, "Based on its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes."[25]

On January 19, 2021, the Department of Human Resources informed Grievant:

> Based on the forgoing, your complaint fails to establish that you were discriminated against because of a protected class. Accordingly, the investigation of this complaint is closed, effective the date of this letter.[26]

CONCLUSIONS OF POLICY

Grievant was removed from employment pursuant to General Order 12.02 which governs Disciplinary Measures. Section 14 provides:

> Terminations Due to Circumstances Which Prevent an Employee from Performing the Job.
>
> > a. Employees unable to meet the working conditions of their employment due to circumstances such as those listed below may be removed under this section: ***
> >
> > Inability to perform the essential functions of the job after reasonable accommodation (if required) has been considered.

[24] Agency Exhibit p. 19.

[25] Agency Exhibit p. 28.

[26] Agency Exhibit p. 33.

The phrases, “essential functions of the job” and “reasonable accommodation” are terms of art in disability law. The Hearing Officer construes these terms as used in the Agency’s policy to be defined by the Americans with Disabilities Act.

Essential Job Functions

Essential functions of a job are described by 29 CFR 1630.3 as follows:

> (n) *Essential functions* –
>
> (1) *In general.* The term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires. The term “essential functions” does not include the marginal functions of the position.
>
> (2) A job function may be considered essential for any of several reasons, including but not limited to the following:
> (i) The function may be essential because the reason the position exists is to perform that function;
> (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
> (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.
>
> (3) Evidence of whether a particular function is essential includes, but is not limited to:
> (i) The employer’s judgment as to which functions are essential;
> (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
> (iii) The amount of time spent on the job performing the function;
> (iv) The consequences of not requiring the incumbent to perform the function;
> (v) The terms of a collective bargaining agreement;
> (vi) The work experience of past incumbents in the job; and/or
> (vii) The current work experience of incumbents in similar jobs.

Whether in-person attendance is an essential job function of Grievant’s position is primarily a factual determination but within the framework of federal law. In *Hanna P v. Coats*[27], 916 F.3d 327 (2019), the United States Court of Appeals, Fourth Circuit held:

> As we have stated:

[27] *Hanna P v. Coats* involved an employee who was unable to report to work consistently. Grievant wants to “report to work” via telecommuting.

> In addition to possessing the skills necessary to perform the job in question, an employee must be willing and able to demonstrate these skills by coming to work on a regular basis. Except in the unusual case where an employee can effectively perform all work-related duties at home, an employee who does not come to work cannot perform any of his job functions, essential or otherwise. Therefore, a regular and reliable level of attendance is a necessary element of most jobs.
> *Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal.,* 31 F.3d 209, 213 (4th Cir. 1994) (quoting *Wimbley v. Bolger,* 642 F.Supp. 481, 485 (W.D. Tenn. 1986), *aff'd,* 831 F.2d 298 (6th Cir. 1987)) (emphasis in original); *see also Denman v. Davey Tree Expert Co.,* 266 F. App'x 377, 380 (6th Cir. 2007) ("Job performance is separate from the ability to show up for work, an essential function of [Hannah's] position.").

The Hearing Officer finds that in-person attendance is an essential function of Grievant's job for several reasons. First, the Agency has at all times (except when required by Executive Order) considered Grievant's job to require in-person attendance. The employee in Grievant's position prior to Grievant was not allowed to telework. Second, the Agency denied Grievant's request to telework to ease her child care concerns. This suggests the Agency's practice was consistent regardless of Grievant's reason to telework. Third, Grievant's performance was evaluated based on whether she "establish[ed] and maintain[ed] effective working relationships with others." Fourth, part of Grievant's work arose suddenly and involved teamwork and face-to-face meetings.

Competing Reasonable Accommodations

> 29 CFR 1630.3 provides:
>
> **(1)** The term *reasonable accommodation* means:
> ***
> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential of that position; or
> (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.
>
> (2) *Reasonable accommodation* may include but is not limited to:
> (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
> (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials,

> or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.
> (3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity 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.
> (4) A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the "actual disability" prong (paragraph (g)(1)(i) of this section), or "record of" prong (paragraph (g)(1)(ii) of this section), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong (paragraph (g)(1)(iii) of this section).

Teleworking can be a reasonable accommodation.[28] If the parties agreed that Grievant could telework to accommodate her disability, nothing would prohibit the Agency from doing so. In this case, however, the parties do not agree on which method to accommodate Grievant's disability. The question becomes who decides which accommodation is to be implemented when there are numerous potential reasonable accommodations.

Where there are more than one reasonable accommodations available to address an employee's disability, the employer chooses the most effective accommodation for the employee and the employer.

29 CFR § 1630.9 provides:

> (d) An 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

[28] EEOC Guidance provides:

> May permitting an employee to work at home be a reasonable accommodation, even if the employer has no telework program?
> Yes. Changing the location where work is performed may fall under the ADA's reasonable accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to telework. However, an employer is not obligated to adopt an employee's preferred or requested accommodation and may instead offer alternate accommodations as long as they would be effective. (See Question 6.) https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation#:~:text=Yes

the essential functions of the position, the individual will not be considered qualified.

EEOC Guidance provides:

1. May an employer make accommodations that enable an employee to work full-time in the workplace rather than granting a request to work at home?

Yes, the employer may select any effective accommodation, even if it is not the one preferred by the employee. Reasonable accommodations include adjustments or changes to the workplace, such as: providing devices or modifying equipment, making workplaces accessible (e.g., installing a ramp), restructuring jobs, modifying work schedules and policies, and providing qualified readers or sign language interpreters. An employer can provide any of these types of reasonable accommodations, or a combination of them, to permit an employee to remain in the workplace. For example, an employee with a disability who needs to use paratransit asks to work at home because the paratransit schedule does not permit the employee to arrive before 10:00 a.m., two hours after the normal starting time. An employer may allow the employee to begin his or her eight-hour shift at 10:00 a.m., rather than granting the request to work at home, if this would work with the paratransit schedule.[29]

As part of its interactive process, the Agency offered 31 potential accommodations for Grievant to consider. These options included, rest area, private space, modified break schedule, extra time, reminders, communicate another way, periodic rest breaks, and uninterrupted work time. The Agency's options appear reasonably designed to reduce an employee's anxiety. In other words, the Agency appears to have offered several reasonable accommodations. Grievant did not establish that the Agency's proposed accommodations could not work. She expressed insistence on permanent teleworking but reporting to the office for scheduled meetings. It is not clear that Grievant's proposed accommodation was the only reasonable accommodation or that her proposed accommodation would remedy her anxiety.

Grievant's anxiety often appeared to be triggered based on the behavior of her co-workers. She felt anxiety when she was "micro-managed" by her supervisors. She did not like it when the two Special Agents altered her work or disregarded her input. She felt anxiety because she was sometimes in a room with men carrying weapons with doors shut.[30] Grievant felt anxiety because the Agency was investigating her for possible disciplinary action because she did not report to the Convention Center on time. The

[29] https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation

[30] When Grievant complained to Agency managers, the Agency acted appropriately by removing Grievant from First Sergeant M's direct supervision and moving Grievant to a new office that was well-equipped and afforded her an opportunity to focus on her work.

Agency did not violate any policies by overseeing Grievant's work product or investigating Grievant about possible disciplinary action. Carrying weapons would be an expectation of State Troopers. If Grievant were to telework full time, she would remain subject to employees who could micro-manage her work and investigate her for possible disciplinary action. Teleworking would not significantly alleviate her anxiety because she would continue to experience co-worker related anxiety regardless of her location. The Hearing Officer cannot conclude that Grievant's proposed accommodation of teleworking was so vastly superior as to make the Agency's proposed accommodations unworthy of consideration or unrealistic. The Hearing Officer believes that if Grievant were granted permanent teleworking status, she would continue to experience significant anxiety because of the nature of the Agency and the personalities and working styles of her co-workers.

Grievant alleged the Agency discriminated against her by failing to accommodate her disability.[31] The evidence showed that the Agency did not deny her request to telework in order to discriminate against her based on her disability. Grievant did not establish that the Agency's supervision of her created an impermissible hostile work environment. Agency managers supervised Grievant's work product within the scope of their authority. The Agency is a quasi-military organization with extensive detailed policies. It handles potential disciplinary actions differently from other State agencies in that it routinely conducts extensive investigations and multiple internal management reviews to ensure the Agency achieves what it considers as the correct outcome. Even routine investigations can be stressful for employees but this practice is within the scope of the Agency's authority to manage the affairs of State government.

Conclusion

Grievant failed to meet the essential functions of her job to have in-person attendance. The Agency offered her reasonable accommodation, but she refused those accommodations while insisting on permanent telework. The Agency was authorized to remove Grievant from employment.[32]

Retaliation

[31] DHRM Policy 2.05, Equal Employment Opportunity, provides:

> It is the policy of the Commonwealth that all aspects of human resource management be conducted without regard to race (or traits historically associated with race including hair texture, hair type, and protective hairstyles such as braids, locks, and twists); sex; color; national origin; religion; sexual orientation; gender identity or expression; age; veteran status; political affiliation; disability; genetic information; and pregnancy, childbirth, or related medical conditions. There shall be no retaliatory action against any person making allegations of violations of this policy.

[32] The Agency referred to this as job "abandonment" even though such terminology does not appear in the Standards of Conduct.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[33] (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment 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. Ultimately, to support a finding of retaliation, the Hearing Officer must find that the protected activity was a "but-for"[34] cause of the alleged adverse action by the employer.[35]

Grievant engaged in protected activities because she filed several complaints against the Agency and Agency employees. Grievant suffered an adverse employment action because she was removed from employment. Grievant has not established a nexus between her protected activity and the adverse employment action.

Grievant alleged that shortly after informing the Agency on July 14, 2020 of her request for Short-term disability the Agency removed her from employment thereby denying her Short-term disability benefits. The evidence showed Grievant was removed because the Agency did not believe she could perform the essential functions of her job.

Grievant alleged the Agency retaliated against her by placing her in a cubical away from her co-workers, removing job duties, required to use FMLA FFCRA leave when everyone else was teleworking, denied professional development training, given lower then deserved performance evaluations, receiving disciplinary action, and terminated without notice or just cause.

The evidence showed that Grievant was placed in a cubical because she complained about her supervisor and the Agency wanted to remove her from close proximity with that supervisor and minimized the supervisor's authority over her. Grievant's assertion that "everyone else was teleworking" was not correct. Many Agency staff were reporting to the office at the same time she was expected to report to work. Grievant's job duties were not reduced.[36] It is unclear what professional development Grievant was entitled to but denied. The Agency revised Grievant's performance

[33] 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.

[34] This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

[35] *See,* Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013).

[36] See, Grievant Exhibit E21.

evaluation when appropriate. Grievant was sometime late to work. She was over three hours late to an Agency event at the Convention Center. The Agency's concerns about her work performance were supported by the evidence. Grievant has not established that the Agency retaliated against her for engaged in protected activity.

Discrimination Based on Race and Gender

Grievant alleged the Agency discriminated against her based on her race and gender. No credible evidence was presented to support this allegation. The Agency did not take any actions against Grievant because of her race or gender. In addition, Grievant's allegations of discrimination were investigated by other decision-makers and none of the completed investigations confirmed discrimination based on race or gender.

DECISION

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

APPEAL RIGHTS

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

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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