Issue: Administrative Review of Hearing Officer's Decision in Case No. 11147; Ruling Date: August 21, 2018; Ruling No. 2019-4762; Agency: Department of Corrections; Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2019-4762
August 21, 2018

The Department of Corrections (the "agency") has requested that the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11147. For the reasons set forth below, EEDR remands the case to the hearing officer.

FACTS

On October 17, 2017, the grievant was issued a Group I Written Notice for

> [a] violation of DOP 150.3, *Reasonable Accommodations*; DOP 145.3, *Equal Employment Opportunity*, DHRM Policy 2.05, *Equal Employment Opportunity*, DHRM Policy 2.30, *Workplace Harassment*, and the Americans with Disabilities Act (ADA) for retaliation and interference as defined by the EEOC and DOP 145.3, resulting in a hostile work environment for [Ms. M,] a subordinate employee[,] due to her placement at [the Institution] as an accommodation under the ADA.[1]

The grievant timely grieved the disciplinary action and a hearing was held on March 20, 2018.[2] In a decision dated June 29, 2018, the hearing officer found that the agency had not presented sufficient evidence to show that the grievant engaged in the misconduct charged on the Written Notice and rescinded the disciplinary action.[3] The agency now appeals the hearing decision to EEDR.

DISCUSSION

[1] Agency Exhibit 1 at 1; *see* Decision of Hearing Officer, Case No. 11147 ("Hearing Decision"), June 29, 2018, at 1. The Written Notice specifically alleges that the grievant improperly issued a Notice of Improvement Needed ("NOI") to Ms. M and instructed Ms. M's supervisor to issue a second NOI; attempted to transfer Ms. M to another position at the Institution; told two employees that she wanted to terminate Ms. M; increased scrutiny over Ms. M by initiating a review of her internet use; and increased Ms. M's workload before she was adequately trained to perform the duties of the position in which she was placed. Agency Exhibit 1 at 2. The Written Notice also charges the grievant with failing to follow policy, unsatisfactory performance, and disruptive behavior in connection with the above-charged behavior. *Id.*
[2] Hearing Decision at 1.
[3] *Id.* at 10-16.

By statute, EEDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure."[4] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EEDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[5] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[6] The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.

In the hearing decision, the hearing officer found that "[t]he Agency did not agree with Grievant's decisions affecting Ms. M and presumed Grievant was acting in part because of Ms. M's ethnicity and pregnancy despite Grievant's explanations that Grievant's actions related to Ms. M's work performance."[7] In particular, the hearing officer determined that there was "no merit to the Agency's allegation that Grievant's actions towards Ms. M were based in part on Ms. M's pregnancy or ethnicity,"[8] and that the "Grievant's treatment of Ms. M was based on Grievant's perception of Ms. M's work performance and not in any way on Ms. M's ethnicity or pregnancy."[9] The hearing officer further stated that the grievant's conduct was not a violation of the ADA, or state and/or agency policy, because she was correcting Ms. M's poor work performance.[10]

In its request for administrative review, the agency essentially contends that the hearing officer erred in rescinding the Written Notice because he did not consider whether the grievant engaged in the misconduct actually charged on the Written Notice—retaliation and interference against Ms. M due to her placement at the Institution—but rather based his decision on a conclusion that the grievant did not discriminate against Ms. M based on her pregnancy and/or ethnicity. The agency further argues that the hearing officer erred by determining that that grievant's actions were an attempt to address perceived issues with Ms. M's work performance, and asserts that the evidence in the record instead shows the grievant's conduct was because of Ms. M's placement at the Institution as a reasonable accommodation.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[11] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[12] Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[13] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a

[4] Va. Code §§ 2.2-1202.1(2), (3), (5).
[5] *See Grievance Procedure Manual* § 6.4(3).
[6] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[7] Hearing Decision at 11.
[8] *Id.*
[9] *Id.* at 14.
[10] *Id.* at 11-13.
[11] Va. Code § 2.2-3005.1(C).
[12] *Grievance Procedure Manual* § 5.9.
[13] *Rules for Conducting Grievance Hearings* § VI(B).

preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[14] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Hearing Officer's Findings Regarding Retaliation and Interference

EEDR has thoroughly reviewed the hearing record and is unable to determine whether there is a factual basis for the hearing officer's conclusion that the disciplinary action was not warranted under the circumstances in this case. The hearing officer appears to have assessed the alleged misconduct for which the grievant was disciplined primarily as a question of whether she engaged in discrimination against Ms. M based on her pregnancy and/or ethnicity.[15] The hearing officer only explicitly addresses the allegations of retaliation and interference once in the decision, stating the "Grievant did not interfere with the Agency's placement of Ms. M at the Institution."[16] The Written Notice, however, charged the grievant with retaliation and interference because Ms. M was assigned to the Institution as a reasonable accommodation under the Americans with Disabilities Act ("ADA"), not discrimination based on Ms. M's pregnancy and/or ethnicity.[17] As such, the hearing officer has not adequately addressed the conduct charged in the Written Notice and, as described below, there is no indication that he has utilized the correct standard.

DHRM Policy 2.05, *Equal Employment Opportunity*, and the ADA both prohibit discrimination and retaliation against a qualified individual with a disability on the basis of the individual's disability.[18] An individual is "disabled" if he/she "(A) [has] a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) [has] a record of such an impairment; or (C) [has been] regarded as having such an impairment . . . ."[19] Although pregnancy is not, by itself, a disability under the ADA, "a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition."[20] In the hearing decision, the hearing officer noted that the agency appears to have "regarded Ms. M as being disabled."[21]

Although an employee who meets the definition of disability solely under the "regarded as" prong is not entitled to reasonable accommodation,[22] such an employee is nonetheless protected from discrimination and retaliation based on his or her perceived disability or protected

[14] *Grievance Procedure Manual* § 5.8.
[15] *See id.* at 10-16.
[16] *Id.* at 12.
[17] Agency Exhibit 1.
[18] DHRM Policy 2.05, *Equal Employment Opportunity*; 42 U.S.C. §§ 12112, 12203. Under DHRM Policy 2.05, *Equal Employment Opportunity*, "'disability' is defined in accordance with the 'Americans with Disabilities Amendments Act,'" the relevant law governing disability accommodations.
[19] 42 U.S.C. § 12102(1).
[20] 29 C.F.R. pt. 1630 app. § 1630.2(h).
[21] Hearing Decision at 3 n.2; *see* Grievant's Exhibit 25. An employee is regarded as disabled when he or she "has been subjected to an action prohibited by the ADA . . . because of an actual or perceived impairment that is not both 'transitory and minor.'" 29 C.F.R. § 1630.2(g)(iii).
[22] 29 C.F.R. § 1630.9(e).

activity relating to the perceived disability.[23] A request for reasonable accommodation constitutes protected activity under the ADA.[24] It is, therefore, unlawful and a violation of state policy to retaliate against employee who has requested reasonable accommodation.

Furthermore, regulatory guidance provides that "[i]t is unlawful to coerce, intimidate, threaten, harass or interfere with any individual in the exercise or enjoyment of . . . any right granted or protected by" the ADA.[25] The Equal Employment Opportunity Commission ("EEOC") has also published guidance stating that "[t]he scope of the [ADA's] interference provision is broader than the anti-retaliation provision" and "protects any individual who is subject to coercion, threats, intimidation, or interference with respect to ADA rights."[26] When interpreting and applying the statutory language prohibiting ADA interference, some courts have adopted tests that require a discriminatory motive.[27] At least one other court seems to have determined that an impermissible motive is not necessary for an actionable claim of ADA interference.[28] There appear to be no cases from the Court of Appeals for the Fourth Circuit addressing the elements of a claim of ADA interference. Here, the agency has essentially adopted the EEOC's guidance that "conduct that is reasonably likely to interfere with the exercise or enjoyment of ADA rights" is prohibited.[29] EEDR finds that this is the standard to be applied by the hearing officer in evaluating whether the grievant engaged in ADA interference with regard to Ms. M.[30]

In this case, the agency investigated the grievant's conduct and determined that she had retaliated against Ms. M due to her request for reasonable accommodation and interfered with Ms. M's exercise or enjoyment of ADA rights.[31] Based on the discussion above, the hearing officer does not appear to have considered whether the evidence supports a conclusion that the grievant's conduct constituted retaliation and/or interference because of Ms. M's request for

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[23] *See* 42 U.S.C. § 12203; 29 C.F.R. § 1630.12.
[24] *E.g.*, Haulbrook v. Michelin N. Am., Inc., 252 F.3d 696, 706 (4th Cir. 2001); *see also* Solomon v. Vilsack, 763 F.3d 1, 15 n.6 (D.C. Cir. 2014) (collecting cases from the federal judicial circuit courts holding that a request for reasonable accommodation under the ADA is protected activity).
[25] 29 C.F.R. § 1630.12(b); *see* 42 U.S.C. § 12203(b).
[26] EEOC Enforcement Guidance on Retaliation and Related Issues, § III (citation omitted), https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm; *see* Brown v. City of Tucson, 336 F.3d 1181, 1192 (9th Cir. 2003) (holding that in comparison to the retaliation provision, the interference provision of the ADA "protects a broader class of persons against less clearly defined wrongs").
[27] Frakes v. Peoria Sch. Dist. No. 150, 872 F.3d 545, 550-51 (7th Cir. 2017) (applying guidance from the anti-interference provision of the Fair Housing Act and holding that "a plaintiff alleging an ADA interference claim must demonstrate that: (1) she engaged in activity statutorily protected by the ADA; (2) she was engaged in, or aided or encouraged others in, the exercise or enjoyment of ADA protected rights; (3) the defendants coerced, threatened, intimidated, or interfered on account of her protected activity; and (4) the defendants were motivated by an intent to discriminate" (citation omitted)).
[28] EEOC v. Day & Zimmerman NPS, Inc., 265 F. Supp. 3d 179, 205-06 (D. Conn. 2017).
[29] EEOC Enforcement Guidance on Retaliation and Related Issues, § III (citation omitted), https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm.
[30] Notably, the EEOC Enforcement Guidance provides that, "[b]ecause the interference provision is broader . . ., it will reach even those instances when conduct does not meet the 'materially adverse' standard required for retaliation." *Id.*
[31] *See* Agency Exhibit 15. The EEO Manager testified at the hearing that she had not considered whether the grievant's behavior could be considered pregnancy discrimination in violation of policy and/or law. Hearing Recording at 2:57:27-2:57:36 (testimony of EEO Manager). Because the grievant was not charged with discriminating or retaliating against Ms. M based on her pregnancy status, that issue will not be addressed in this ruling.

reasonable accommodation and subsequent placement at the Institution. Accordingly, the decision must be remanded to the hearing officer for further consideration of the evidence in the record on this issue under the standard provided above.

Evidence about Ms. M's Internet Use

The agency further argues that the hearing officer's factual findings with regard to Ms. M's internet use are inconsistent with the evidence in the record. The hearing officer stated that the evidence showed "Ms. M did not access Facebook using the Agency's computer because the Agency's 'firewall' prohibited employees from accessing Facebook," but that Ms. M "repeatedly tried to access Facebook."[32] The hearing officer then lists several occasions on which Ms. M attempted to access Facebook, and appears to note that Ms. M successfully accessed Facebook at least once, on May 23, 2017.[33] The agency contends that Ms. M was unable to access Facebook from her user account, and thus the grievant's contention that she saw the Facebook logo on Ms. M's computer was "a complete fabrication." As a result, the agency asserts that the grievant's stated reason for requesting a review of Ms. M's computer usage—her apparent attempt to access Facebook—was a pretext for retaliation and/or interference because of Ms. M's placement at the Institution.

The basis for the hearing officer's conclusion that Ms. M attempted to access (and, on at least one occasion, successfully accessed) Facebook is not clear. There is some evidence in a report of Ms. M's internet use to support a conclusion that she attempted to access Facebook.[34] The agency's Information Security Officer, however, unequivocally testified that Ms. M did not have access to Facebook, and clarified that an attempt to access Facebook captured in an employee's internet use report does not necessarily mean she successfully logged into Facebook, or that she actually even attempted to access Facebook.[35] Although the grievant testified that she saw the Facebook logo on Ms. M's computer on one occasion,[36] EEDR has not reviewed evidence to suggest what would have been visible on Ms. M's computer screen when she attempted to access Facebook, and the Information Security Officer did not testify about that issue.

As the hearing decision must be remanded for additional discussion of whether the evidence supports the agency's charge that the grievant engaged in retaliation and interference as discussed above, the hearing officer must also discuss the evidence in the record relating to Ms. M's computer use more fully, particularly as its relates to the misconduct charged on the Written Notice. The hearing officer should clarify his factual findings with regard to whether Ms. M attempted to access Facebook (whether successfully or not), and discuss the credibility of the

[32] Hearing Decision at 15.
[33] *Id.* at 15-16.
[34] *See* Grievant's Exhibit 43B.
[35] Hearing Recording at 3:44:19-3:45:11, 3:47:20-3:47:56. (testimony of Information Security Officer). The internet use report apparently relied upon by the hearing officer for this finding reflects, for example, that Ms. M also allegedly attempted to access as many as nineteen different websites at the precise date and time she is alleged to have attempted to access Facebook on each occasion. As such, it is unclear what factual assumptions the hearing officer is drawing from the confusing nature of the internet use report when considered against the unrebutted testimony of the Information Security Officer that the information contained in the report does not necessarily mean that Ms. M attempted to access Facebook.
[36] *Id.* at 6:11:32-6:12:18 (testimony of grievant).

grievant's explanation of events in light of the Information Security Officer's testimony and the report of Ms. M's internet use. If the grievant's investigation of Ms. M's internet use was not reasonably based on suspected misconduct, then her action could be considered retaliation and/or interference based on Ms. M's placement at the Institution.

Evidence about Ms. M's Handling of Personnel Records and Assignment of Duties

In addition, the agency asserts that the grievant effectively reassigned, or attempted to reassign, Ms. M to another position at the Institution, which constituted interference with Ms. M's ADA placement in the Office Service Specialist position, and misleadingly used the term "cross-training" to describe this action. The hearing officer found that the "Grievant had discretion regarding whether to cross-train employees at the Institution," that "Ms. M demonstrated she did not appreciate the importance of properly maintaining confidential employee records," and that the grievant's decision to cross-train Ms. M and Ms. F on the responsibilities of their respective positions "was appropriate under the circumstances . . . ."[37]

At the hearing, the grievant testified that she decided to change Ms. M's job duties after Ms. M moved boxes of employee records containing confidential information from her office to a vacant office without checking the contents of the boxes.[38] The EEO manager testified that Ms. M moved the records to a vacant office that was typically locked.[39] According to the grievant, other employees at the Institution could have accessed the records after Ms. M moved them into the vacant office, which was not consistent with the agency's requirements for maintaining confidentiality of employee records.[40] The grievant stated that she chose to cross-train Ms. M and Ms. F so that Ms. M would receive additional training about properly handling employee records.[41]

On the issue of cross-training, the EEO Manager testified that the grievant had effectively transferred Ms. M to another position because she assigned Ms. M to perform different functions, and stated the same conclusion in her report.[42] There is further evidence in the record to suggest that the grievant planned to assign Ms. F to perform the tasks previously assigned to Ms. M, and vice versa. For example, the grievant sent an email to all employees at the Institution stating that Ms. F would be "the facility contact to assist employee with Human Resources," and that Ms. M would "assist [Ms. F] with the Records Management . . . ."[43] There is also evidence in the record showing that the grievant intended to physically relocate Ms. M to a different office in another building, and have Ms. F move into the building where Ms. M worked at the time.[44] The EEO Manager stated that the timing of the change meant that Ms. M was not fully trained in the Office Service Specialist position into which she had been placed as an ADA accommodation.[45]

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[37] Hearing Decision at 15.
[38] Hearing Recording at 6:35:39-6:37:05 (testimony of grievant).
[39] *Id.* at 2:12:01-2:13:51 (testimony of EEO Manager).
[40] *Id.* at 5:57:55-5:5:58:39, 6:37:17-6:37:37 (testimony of grievant).
[41] *Id.* at 6:43:11-6:44:09 (testimony of grievant).
[42] *Id.* at 2:58:23-3:01:10 (testimony of EEO Manager); Agency Exhibit 15 at 7.
[43] Agency Exhibit 12 at 2.
[44] *Id.* at 4.
[45] Hearing Recording at 3:01:28-3:01:56 (testimony of EEO Manager).

EEDR finds that the hearing officer has not fully discussed or considered the evidence about the agency's concerns with how the grievant responded to Ms. M's handling of the personnel records and the planned reassignment. On remand, the hearing officer must consider and address the facts in the record regarding these issues. The hearing officer must also address the nature of the reassignment of tasks between Ms. M and Ms. F, i.e., whether the "cross-training" was a de facto transfer of Ms. M.

If the hearing officer finds that the grievant transferred Ms. M to a different position at the Institution—whether formally or informally—he must also consider whether the agency properly considered such action to be ADA interference warranting the issuance of the Written Notice. For example, the agency placed Ms. M in the Office Service Specialist at the Institution as a reasonable accommodation under the ADA. If the hearing officer finds that the grievant reassigned Ms. M to a different position without consulting agency management about whether the reassignment complied with the ADA, these facts could support a conclusion that the grievant interfered with Ms. M's exercise or enjoyment of ADA rights.

Additional Charges on the Written Notice

In addition to the agency's contention that the grievant retaliated against Ms. M based on her request for reasonable accommodation and interfered with her exercise or enjoyment of ADA rights, the offense codes listed on the Written Notice also charge the grievant with unsatisfactory performance and disruptive behavior.[46] The hearing officer does not appear to have considered whether the behavior charged on the Written Notice constituted misconduct falling into either of those two categories. As the hearing decision must be remanded for further consideration of the evidence in the record relating to the agency's allegation that the grievant engaged in retaliation and interference against Ms. M, the hearing officer should also address whether any aspect of the grievant's conduct as set forth on the Written Notice constituted unsatisfactory performance and/or disruptive behavior, either one of which would be a Group I offense under DHRM Policy 1.60, *Standards of Conduct*.[47]

CONCLUSION AND APPEAL RIGHTS

This case is remanded to the hearing officer for further consideration of the evidence in the record to the extent described above. As directed above, the hearing officer must:

1) Consider and address the agency's allegations of retaliation and interference charged on the Written Notice specifically, and whether the evidence in the record supports a conclusion that the grievant engaged in the charged misconduct;
2) Reconsider and address his factual findings and analysis relating to the evidence about Ms. M's internet use;
3) Consider and address the facts regarding the agency's concerns about how the grievant addressed Ms. M's handling of personnel records and the "cross-training" and/or reassignment of Ms. M to another position; and

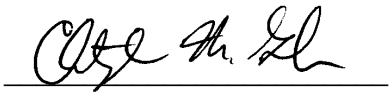
[46] Agency Exhibit 1 at 1-2.
[47] *See* DHRM Policy 1.60, *Standards of Conduct*, Attachment A.

4) Consider and address the charges of unsatisfactory performance and disruptive behavior on the Written Notice, and whether there is evidence that might justify the issuance of the disciplinary action on either or both of those bases.

The hearing officer is directed to issue a remand decision **within 15 calendar days** of the date of this ruling.

Once the hearing officer issues his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the remand decision (i.e., any matters not previously part of the original decision).[48] Any such requests must be **received** by EEDR **within 15 calendar days** of the date of the issuance of the remand decision.[49]

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[50] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[51] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[52]



Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

[48] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[49] *See Grievance Procedure Manual* § 7.2.
[50] *Id.* § 7.2(d).
[51] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[52] *Id.; see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).