EMILY S. ELLIOTT
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of the Department of State Police
Ruling Number 2022-5319
December 1, 2021

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11649. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 11649, as found by the hearing officer, are as follows:[1]

> The Virginia State Police ["the agency"] employed Grievant as a Public Relations Specialist. 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.
>
> 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."
>
> 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

[1] Decision of Hearing Officer, Case No. 11649 ("Hearing Decision"), October 14, 2021, at 2-9 (internal citations omitted).

with exercise and other methods. Grievant described herself as having a disability. The Agency did not contest Grievant's assertion.

Grievant began working for the Agency in May 2018. She reported to First Sergeant H but began reporting to First Sergeant M 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 halfdays 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." 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." In November 2019, Grievant made a request for accommodation to work remotely. Her request was denied.

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.

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. 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 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."

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."

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.

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 Americans 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." 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." 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."

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

> 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.

The Human Resource Manager offered Grievant 31 options to accommodat[e] 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." 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." 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." 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." First Sergeant H called Grievant to ask what caused her to feel 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?" 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."

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.

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."

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:

> 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.

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."
>
> 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.

The grievant timely grieved her separation, and a hearing was held on August 31, 2021.[2] In a decision dated October 14, 2021, the hearing officer upheld the grievant's separation as consistent with law and policy.[3] Specifically, the hearing officer determined that:

> 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 Greivant from employment.[4]

In addition, the hearing officer concluded that the agency established non-discriminatory, non-retaliatory reasons for the grievant's separation.[5] The grievant now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR has 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."[6] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.[7] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant maintains that the agency's treatment of her, up to and including her separation from employment, was not consistent with applicable

---

[2] Hearing Decision at 1.
[3] *Id.* at 14, 16.
[4] *Id.* at 14.
[5] *Id.* at 15-16.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

laws and policies. In particular, she contends that, contrary to the hearing officer's findings, she was entitled to telework as a reasonable accommodation that would have allowed her to continue working for the agency. Essentially, the grievant argues, the reason why she was unable to work in person was "because I was being constantly harassed by my supervisors" and, therefore, other accommodations offered by the agency "did not take my actual disability into account."[9] The grievant also claims that the agency denied the reasonable accommodation of telework for improper reasons, causing her to exhaust her available leave, and otherwise mishandled her leave balances.[10] She further asserts that the agency denied her due process rights and that its witnesses "told lies under oath" and "fabricated evidence" that misled the hearing officer.[11]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[12] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[13] 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 on evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Reasonable Accommodation

The grievant contends that, during her employment with the agency, she should have been entitled to telework as a reasonable accommodation for a disability, and that the hearing officer "failed to acknowledge" how her disability worsened as a result of interactions with her management at the agency.[14]

DHRM Policy 2.05, *Equal Employment Opportunity*, "[p]rovides that all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or *disability*."[15] Under this policy, "'disability' is defined in accordance with the Americans with

[9] Request for Administrative Review at 2, 4.
[10] *Id.* at 3. The grievant also asserts generally that the agency "penalized" her for using short-term disability and family medical leave benefits. *Id.* To the extent this was a matter at issue in this grievance, the grievant's submission on administrative review does not identify record evidence to support her claims. Accordingly, there is no basis for EDR to provide further consideration to this assertion.
[11] *Id.* at 1. The grievant has also indicated that she wishes to introduce newly discovered evidence for consideration by the hearing officer. *Id.* at 4. However, as of the date of this ruling, EDR has not received a proffer of any such evidence as an independent basis for remand. *See Rules for Conducting Grievance Hearings* § IV(G) (defining "newly discovered evidence"); *see also Grievance Procedure Manual* § 7.2(a) ("Requests for administrative review must be in writing and ***received by*** EDR within 15 calendar days of the date of the original hearing decision."). To the extent that the grievant's request raises additional grounds for administrative review, EDR has thoroughly reviewed the record in this matter and finds no grounds for remand.
[12] Va. Code § 2.2-3005.1(C).
[13] *Grievance Procedure Manual* § 5.9.
[14] Request for Administrative Review at 1-2.
[15] DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).

Disabilities Act [ADA]", the relevant federal law governing disability accommodations.[16] Like Policy 2.05, the ADA prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability.[17] A qualified individual is defined as a person who, "with or without reasonable accommodation," can perform the essential functions of the job.[18] As a general rule, the ADA also requires employers to 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]."[19]

In this case, the hearing officer determined that "in-person attendance is an essential function" of the grievant's position at the agency, based on the agency's consistent historical practice, the grievant's documented need to "establish and maintain effective working relationships with others" as part of her job, and the potential for the grievant's responsibilities to arise suddenly and require team-based response.[20] Evidence in the record supports the hearing officer's conclusions. The agency denied the grievant's request to telework full-time based on management's position that the job required "a teamwork environment, with face-to-face interaction, [where] projects and events are known suddenly, and their responses are crucial to the success of the section."[21] In addition, management noted that the grievant's section had recently "undergone several changes" that could be better navigated in person.[22] At the hearing, an agency witness testified that, as part of her public relations duties, the grievant would regularly coordinate with other agency staff seeking to disseminate information, with third-party entities involved with television and advertising, with the agency's budget and program support staff, and with the agency's special agents who served as field representatives.[23] The witness also testified that the agency had historically not approved telework for the grievant's position in the past, in part because success in the the job required the grievant to be "out in the public" and/or working closely with her small team.[24] Finally, the witness described an occasion when the grievant failed to sign

---

[16] *Id.*; *see* 42 U.S.C. §§ 12101 through 12213. Because the record presents no dispute on this issue, EDR presumes for purposes of this ruling that the grievant satisfies the definition of an individual with a disability.
[17] 42 U.S.C. § 12112(a).
[18] *Id.* § 12111(8); 29 C.F.R. § 1630.2(m).
[19] 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a) ("It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.").
[20] Hearing Decision at 10-11 (citing 29 C.F.R. § 1630.3). In his analysis, the hearing officer cited a recent Fourth Circuit decision reiterating the principle that it will be an "unusual case" where an employee "can effectively perform all work-related duties at home." Hannah P. v. Coats, 916 F.3d 327, 339 (4th Cir. 2019) (quoting Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal., 31 F.3d 209, 213 (4th Cir. 1994). We observe that the feasibility and prevalence of remote work may have changed dramatically since 1994 and even 2019, due to the ongoing COVID-19 pandemic. Accordingly, we emphasize the broader ADA principle that an employee's essential job functions are ultimately a fact-specific determination, as the hearing officer properly analyzed the issue here.
[21] Grievant's Ex. C6 at 19; *see* Grievant's Ex. E2.
[22] *Id.*
[23] Hearing Recording at 13:58-16:10 (Division Commander's testimony).
[24] *Id.* at 1:00:20-1:01:25; *see also* Agency Ex. 16.

on to a virtual meeting where she was to be a key participant, which perpetuated management concerns about her timeliness and accountability while working remotely.[25]

The grievant disagrees with the agency's position on telework, maintaining that "all of [her] work could have been conducted remotely."[26] Although the grievant testified at the hearing in support of her position, she had the ultimate burden to prove that she was entitled to telework as a reasonable accommodation that would allow her to perform the essential functions of her job.[27] On this point, it appears that the hearing officer found the agency's evidence regarding its need for in-person attendance more persuasive, and we cannot say that his analysis in this regard suggests non-compliance with the grievance procedure or any other error that would support remand. Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.[28]

Moreoever, the hearing officer found that, even if telework could have been a reasonable accommodation, the agency offered the grievant a list of 31 alternative accommodations that appeared "reasonably designed to reduce an employee's anxiety."[29] Under the ADA, "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."[30] In order to determine the appropriate reasonable accommodation, it may be necessary for an 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."[31] However, an employer is not required to approve the exact accommodation requested by an employee if some other accommodation is available that will allow her to perform the essential functions of her position.[32] Thus, when an employee seeks a

---

[25] *See* Hearing Recording at 1:21:35-1:24:05, 1:28:45-1:31:10.
[26] Request for Administrative Review at 3.
[27] The grievant had the burden to prove her entitlement to telework regardless of whether her separation from employment was effectively disciplinary or non-disciplinary. *See Rules for Conducting Grievance Hearings* § VI(B)(1) (stating that the employee bears the burden to prove affirmative defenses); *id* § VI(C) (stating that the employee bears the burden to prove grievance issues for non-disciplinary grievances).
[28] *See*, *e.g.*, EDR Ruling No. 2021-5188; EDR Ruling No. 2020-4976.
[29] Hearing Decision at 13.
[30] 29 C.F.R. § 1630.2(o)(1)(iii); *see* 42 U.S.C. § 12111(9)(B). A reasonable accommodation encompasses "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." 29 C.F.R. pt. 1630 app. § 1630.2(o).
[31] 29 C.F.R. § 1630.2(o)(3).
[32] *See id.* pt. 1630 app. § 1630.9 (stating that an employer should conduct an individualized assessment of the employee's limitations and the job, then "select and implement the accommodation that is most appropriate for both the employee and the employer").

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."[33]

In his decision, the hearing officer determined that the grievant "did not establish that the Agency's proposed accommodations could not work. . . . It is not clear that Grievant's proposed accommodation [of full-time telework] was the only reasonable accommodation or that her proposed accommodation would remedy her anxiety."[34] The grievant objects to these conclusions on grounds that "constant harassment" by her supervisors was the cause of her difficulty with working in person. However, the hearing officer did not find that the grievant experienced harassment. Instead, he found that the grievant

> 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. Grievant felt anxiety because the Agency was investigating her for possible disciplinary action because she did not report to the Convention Center on time.[35]

Upon reviewing the grievant's testimony and the record as a whole, we cannot say that the hearing officer's description of the grievant's experiences lacks a basis in the record or disregards relevant evidence. Essentially, the grievant argues that, because she felt intimidated by the behavior of multiple managers, no accommodation other than telework would have been

---

[33] *Id.* Even if the employee does not specifically seek an accommodation, "an employer should initiate the reasonable accommodation interactive process without being asked if the employer: (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation." U.S. Equal Emp't Opportunity Comm'n, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, #40, Oct. 17, 2002.

[34] Hearing Decision at 13. The hearing officer further concluded that "[t]eleworking would not significantly alleviate [the grievant's] anxiety because she would continue to experience co-worker related anxiety regardless of her location." *Id.* at 14. Upon a thorough review of the record, we do not find evidentiary support for the hearing officer's affirmative conclusion as to how the grievant's medical condition would or would not manifest and/or respond to mitigations. However, we will not disturb the hearing decision on these grounds because its broader conclusions are supported by the record, as described herein.

[35] Hearing Decision at 13.

reasonable and there were "no valid reasons as to why [she] was denied this benefit."[36] Ultimately, however, the record does not reflect that any substantive discussion of the agency's proposed alternatives occurred, and we identify no evidence that would have required the hearing officer to conclude that none of those alternatives were reasonable. Even assuming that the grievant experienced harassment and bullying not acknowledged in the hearing officer's findings of fact,[37] such circumstances do not necessarily dictate the accommodations to which an employee may be entitled under the ADA. Here, the agency proposed accommodations such as "private space," "identify and reduce triggers," flexible and/or "modified break schedule," "supervisory methods," "communicate another way," and "positive feedback."[38] The grievant does not appear to have offered specific information to the agency or to the hearing officer as to why none of the alternative proposals were adequate. Because the grievant bore the evidentiary burden to prove that she was entitled to telework as the only reasonable accommodation under the circumstances, we find no basis to disturb the hearing officer's conclusion that the grievant did not carry that burden.

Retaliation

In her request for administrative review, the grievant maintains that the agency retaliated against her for filing complaints about harassment and other alleged misconduct. To prove retaliation, an employee must demonstrate by a preponderance of the evidence that (1) they engaged in a protected activity;[39] (2) they experienced an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity – in other words, whether management took an adverse action because the employee had engaged in the protected activity.[40] If the agency presents a non-retaliatory business reason for the adverse employment action, the employee must prove that the adverse action would not have occurred but for their protected activity.[41] Here, the hearing officer determined that the grievant engaged in a protected activity and experienced an adverse employment action (separation), but the agency's reasons for terminating the grievant's employment were business-related and non-retaliatory.[42]

Specifically, the hearing officer determined that the agency terminated the grievant's employment because management "did not believe she could perform the essential functions of

[36] Request for Administrative Review at 3.
[37] The hearing officer determined that the agency "did not violate any policies by overseeing Grievant's work product or investigating Grievant about possible disciplinary action." Hearing Decision at 14. Nothing in this ruling should be read to condone behavior that is harassing, bullying, intimidating, or otherwise prohibited by DHRM Policy 2.35, *Civility in the Workplace*.
[38] Agency Ex. 14, at 119.
[39] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the agency's 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 Congress or the General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b)(4).
[40] *See* Netter v. Barnes, 908 F.3d 932, 938 (4th Cir. 2018) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013)); Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 900-901 (4th Cir. 2017).
[41] *Id.*
[42] Hearing Decision at 15-16.

her job."[43] As to the grievant's allegations regarding how she was treated following her complaints, the hearing officer found that the agency moved the grievant's work location

> because she complained about her supervisor and the Agency wanted to remove her from close proximity with that supervisor . . . . 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. . . . The Agency revised Grievant's performance evaluation when appropriate. Grievant was sometime[s] late to work. . . . The Agency's concerns about her work performance were supported by the evidence.[44]

These conclusions find support in the record.[45] Although the grievant asserts that she received unwarranted performance criticism and disciplinary actions following complaints she made, and that agency witnesses "lied under oath" and "fabricated evidence," her request for administrative review does not reference evidence that the hearing officer should have credited in support of her claims.[46] The agency presented testimony to the effect that management attempted to help the grievant feel comfortable and welcome at work but initiated disciplinary investigations when the grievant failed to report for multiple work events. While the grievant clearly does not believe the agency's concerns about her performance were valid, we find no basis to conclude that the hearing officer's consideration of the evidence presented on the issue of retaliation was in erroneous or not in compliance with the grievance procedure. Accordingly, we will not disturb the hearing decision on these grounds.

Due Process

Finally, the grievant argues that "[n]othing in the finding of facts by the hearing officer justifies why [the agency was] allowed to skip due process protocol" in terminating her employment.[47] Although the grievant does not elaborate as to procedural rights that she may have been entitled to but did not receive,[48] we interpret her argument broadly to assert that she was not given adequate notice and opportunity to be heard with respect to her separation from employment.

---

[43] *Id.* at 15.
[44] *Id.* at 15-16.
[45] *See*, *e.g.*, Hearing Recording at 1:02:50-1:08:20, 1:21:35-1:24:05, 1:28:45-1:31:10.
[46] In claiming that the agency "lied under oath" and "fabricated evidence," the grievant does not identify any specific false testimony or fabricated evidence. Upon a thorough review of the record, we can identify nothing that should have led the hearing officer to dismiss testimony from the agency's witnesses or other material evidence as false.
[47] Request for Administrative Review at 4.
[48] Prior to certain disciplinary actions, the United States Constitution generally provides, for individuals with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property."). Constitutional due process is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review. *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a); *e.g.*, Davis v. Pak, 856 F.2d 648, 651 (4th Cir.

In the public employment context, due process rights are generally most robust following disciplinary action. Specifically, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine the accuser in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.[49] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[50] The grievant's separation ultimately qualified for the same process.[51]

Here, we cannot conclude that the grievant lacked notice of the agency's reasons for terminating her employment, *i.e.* that the grievant was not reporting to work as scheduled and had indicated that she was unable to do so. Moreover, the grievant ultimately received a full hearing before an impartial decision-maker; an opportunity to present evidence; an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker; and the opportunity to have counsel present. We believe, as do many courts, that based upon the full process provided to the grievant, any alleged lack of pre-separation due process was cured by the extensive post-separation due process.[52] Accordingly, EDR finds no basis to disturb the hearing decision on due process grounds.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[53] 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.[54] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[55]

1988); *see also* Huntley v. N.C. State Bd. of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974). Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue.

[49] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1284 (4th Cir. 1995) ("'The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting Carter v. W. Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985))).

[50] See Virginia Code Section 2.2-3004(E), which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. *See* Va. Code §§ 2.2-3005, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

[51] *See* EDR Ruling No. 2021-5178.

[52] *E.g.*, Va. Dep't of Alcoholic Bev. Control v. Tyson, 63 Va. App. 417, 423-28, 758 S.E.2d 89, 91-94 (2014); *see also* EDR Ruling No. 2013-3572, at 5 (and authorities cited therein).

[53] *Grievance Procedure Manual* § 7.2(d).

[54] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

[55] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).

Christopher M. Grab
Director
Office of Employment Dispute Resolution