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ADMINISTRATIVE REVIEW

In the matter of the University of Virginia Medical Center
Ruling Number 2021-5140
August 24, 2020

The University of Virginia Medical Center ("the University" or "the agency") has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11513. For the reasons set forth below, EDR remands the case to the hearing officer for further consideration.

FACTS

The relevant facts in Case Number 11513, as found by the hearing officer, are as follows:[1]

> The University of Virginia Medical Center employed Grievant as an Administrative Assistant. Although she was not involved in direct care of patients, she sometimes came into contact with patients as part of her work duties. She had been employed by the University for approximately ten years.
>
> When Grievant was three years old, she was vaccinated for Dtap. She had an extreme reaction to the vaccine which placed her life at risk. She was traumatized by the incident and has refused to receive any vaccinations since then. Grievant feared that if she receives a flu vaccine, she may suffer another extreme reaction thereby jeopardizing her health and life.
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> Medical College Human Resource Policy 104 provides:
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> Employees shall also complete a mandatory annual flu vaccination by the deadline determined by the Medical Center Hospital Epidemiologist each year.

[1] Decision of Hearing Officer, Case No. 11513 ("Hearing Decision"), July 6, 2020, at 2-4 (internal citations omitted).

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

> All Tier I Team Members, regardless of date of hire, must have received one Tetanus, Diphtheria, Pertussis (Tdap) vaccine as an adult.
>
> A Tier I Team Member shall be exempt from the required vaccination if he/she can provide to Employee Health/WorkMed medical documentation of one of the contraindications for Tetanus, Diphtheria or Tdap as defined by the CDC (cdc.gov). Tier I Team Members are also responsible for informing Employee Health/WorkMed of other claimed grounds for exemption.
>
> All Tier I Team Members must be vaccinated annually (for the flu).
>
> A Tier I Team Member shall be exempt from the required vaccination if he/she can provide to Employee Health/WorkMed medical documentation of one of the contraindications for influenza vaccine as defined by the CDC (cdc.gov). Tier I Team Members are also responsible for informing Employee Health/WorkMed of other claimed grounds for exemption.

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

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

> Does the employee have a history of a CDC/ACIP contraindication to the specific vaccine? If so, please briefly describe the contraindication or pertinent medical condition.
>
> No, however, [patient] had severe reaction to Tdap [and] was hospitalized at time [and] has opted not to receive further vaccines due to concern of further severe reaction.

On December 6, 2019, the Nurse Practitioner revised[/]updated her statement as follow[s]:

> Flu vaccine contraindicated due to severe immunization reaction.

On December 9, 2019, Grievant was notified that, "[your] request for exemption from the flu vaccine has been reviewed by the Immunize UVA

Committee and has not been approved. In order to be compliant with Health System Policy CCH-002, please receive your vaccination."

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

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

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

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

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

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

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

On March 10, 2020, the University administratively terminated the grievant's employment for noncompliance/inability to meet a work condition.[2] The grievant timely grieved

[2] *See id.* at 1; Agency Ex. 17; Hearing Recording at 1:20-2:05.

her separation, and a hearing was held on June 16, 2020.[3] In a decision dated July 6, 2020, the hearing officer concluded that, while the University's action was "consistent with its policies," the grievant's separation must be rescinded as inconsistent with the Americans with Disabilities Act ("ADA") and related state protections.[4] The hearing officer determined that the grievant "has the mental impairment of Post-Traumatic Stress Disorder because of her extreme fear of vaccines"[5] and, thus, she "was unable to perform a major life activity of working because her PTSD prevented her from satisfying the University's condition of employment."[6] The hearing officer further found that the University was on adequate notice of the need to "engage in an interactive process to identify any reasonable accommodations," and the "University likely could have accommodated Grievant by permitting her to wear a mask when working."[7] The University 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."[8] 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.[9] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[10] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

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] 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.

The University's request for administrative review raises multiple arguments that collectively challenge the hearing officer's conclusions with respect to the application of the ADA in this case.[13] The University contends that the hearing officer exceeded his authority by diagnosing the grievant with a medical condition with no support in the record, and then using

[3] Hearing Decision at 1.
[4] *Id.* at 6.
[5] *Id.* at 5.
[6] *Id.* at 6.
[7] *Id.*
[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[11] Va. Code § 2.2-3005.1(C).
[12] *Grievance Procedure Manual* § 5.9.
[13] *See generally* Request for Administrative Review.

this condition to invoke the legal framework for disability protections. The University claims it did not have the "opportunity to contest the relevance of the ADA to the facts in this case,"[14] and it now disputes the hearing officer's findings regarding the existence of reasonable accommodations and the significance of the opinion of the grievant's medical provider. More generally, the University argues that the hearing officer "improperly ordered" it to recognize a policy exemption "for employees who have a subjective fear of vaccinations,"[15] which would undermine the University's need to "maintain[] a safe environment for its fragile patients and community."[16]

For the reasons that follow, EDR concludes that, while the hearing officer exceeded his authority with respect to his findings about post-traumatic stress disorder, the record otherwise supports his conclusion that the University was on adequate notice that the grievant may be entitled to an accommodation under the ADA and related state policy and, thus, it failed to engage in an interactive process to determine whether she could perform the essential functions of her job with a reasonable accommodation.

Individual with a Disability

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*. . ."[17] Under this policy, "'disability' is defined in accordance with the [ADA]", the relevant law governing disability accommodations.[18] Under this framework, the term "disability" may refer to "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . . ."[19] 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.[20] In this context, a qualified individual is defined as a person who, "with or without reasonable accommodation," can perform the essential functions of their job.[21]

For ADA purposes, a "physical or mental impairment" includes "[a]ny physiological disorder or condition . . . affecting one or more body systems . . . ."[22] The statute clarifies that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[23] Thus, "learned behavioral or adaptive neurological

[14] *Id.* at 8.
[15] *Id.* at 5.
[16] *Id.* at 6.
[17] DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).
[18] *Id.*; *see* 42 U.S.C. §§ 12101 through 12213.
[19] 42 U.S.C. § 12102(1).
[20] *Id.* § 12112(a).
[21] *Id.* § 12111(8); 29 C.F.R. § 1630.2(m).
[22] 29 C.F.R. § 1630.2(h)(1).
[23] 42 U.S.C. § 12102(4)(D).

modifications" that make a condition inactive are excluded from the analysis of whether an impairment substantially limits a major life activity.[24]

As to whether the grievant was a qualified individual with a disability, EDR finds no record support for the hearing officer's determination that the grievant was entitled to ADA protections on the basis of "the mental impairment of Post-Traumatic Stress Disorder."[25] While a hearing officer is authorized to make "findings of fact as to the material issues in the case,"[26] such findings must be based upon claims and evidence in the record. Here, neither the grievant nor her testifying medical provider nor any documentary exhibits gave any suggestion that the grievant had been medically evaluated for possible post-traumatic stress disorder. As a result, the hearing officer's finding that the grievant has this condition was entirely premised on a general dictionary definition of the term.[27] Independent reference to a dictionary for general definitions would not ordinarily raise an issue of compliance with the grievance procedure, but in this case the linguistic resource was erroneously used to support a medical finding. To the extent the hearing officer made independent findings regarding the grievant's personal medical condition without supporting medical evidence, he abused his discretion.

Notwithstanding the error in this specific finding, the record *does* support the hearing officer's broader conclusion that the grievant put the University on notice that she had a physical or mental impairment and/or record of such impairment. On November 19, 2019, the grievant submitted a vaccine exemption request form in which her medical provider described the following as a "pertinent medical condition": "[patient] had severe reaction to dtap & was hospitalized at time & has opted not to receive further vaccines due to concern of further severe reaction."[28] On December 9, 2019, the grievant advised the University that "I had seizures and a severe reaction to immunization"; she provided a statement of the same from her medical provider. On January 14, 2020, the grievant's medical provider advised the University that the grievant "had severe immunization reaction to DTP as a child which resulted in a coma at age three . . . ."[29] On March 7, 2020, the grievant's medical provider wrote another letter on the grievant's behalf advising the University that:

> [The grievant]'s first time she received Dtap she did have rash and had received a third of dose of dtap for second dose. She had a severe reaction to the second dose of childhood vaccine Dtap. She had severe seizures that resulted in weeklong coma and [she] had to have physical therapy to learn how to walk again. . . . As [the grievant] has had severe reaction and has never had any immunizations since then, it is my recommendation that [she] should not be required to take Dtap as

[24] *See id.* § 12102(4)(E)(i)(IV); J.D. v. Colonial Williamsburg Found., 925 F.3d 663, 670-71 (4th Cir. 2019) (plaintiff's claimed disability of gluten sensitivity must be analyzed as it affects him in the absence of his "learned behavioral modification" of avoiding gluten).
[25] *See* Hearing Decision at 5-6.
[26] Va. Code § 2.2-3005.1(C).
[27] *See* Hearing Decision at 5.
[28] Agency Ex. 6.
[29] Agency Ex. 12.

> this is contraindicated as well as other immunizations as her reaction to Dtap was quite severe.[30]

This evidence supports the hearing officer's findings of fact that when the grievant was young, "[s]he had an extreme reaction to the [Dtap] vaccine which placed her life at risk."[31] Further, the evidence on this point does not appear to have been disputed at the hearing, and indeed it appears that the University had previously exempted the grievant from its Dtap vaccination requirement on these same grounds.[32] In light of these supported findings of fact, EDR cannot conclude that the University lacked notice to consider the grievant a qualified individual with a disability who may require reasonable accommodation. While the record is silent as to the particular mechanism that caused the grievant's reaction to her childhood vaccine, the history she provided sufficiently implies that she may have a "physiological disorder or condition . . . affecting one or more body systems" that, when active, can substantially limit major life activites by inducing seizures and coma. That the grievant may have avoided recurrence of these reactions through the learned behavioral modification of avoiding all vaccines does not exclude her from ADA protection.

Thus, although the hearing officer's findings were in error with respect to the precise impairment supported by the grievant's evidence, this ruling does not disturb the hearing decision to the extent that it concluded the grievant was entitled to the protections of the ADA and related state law and policy.

Reasonable Accommodation

As a general rule, an employer must make reasonable accommodations to the known physical or mental limitations of a qualified employee with a disability, unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business [or government]."[33] "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."[34] In order to determine the appropriate reasonable accommodation, it may be necessary for [the employer] "to initiate an informal, interactive process with the individual with a disability in

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[30] Agency Ex. 16.
[31] Hearing Decision at 2.
[32] *See id.* at 4; Agency Ex. 14.
[33] 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.").
[34] 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). 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. *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").

need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[35] Thus, when an employee seeks a reasonable accommodation, ADA regulatory guidance provides that "the employer, using a problem solving approach, should:

(1) Analyze the particular job involved and determine its purpose and essential functions;
(2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
(3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
(4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer."[36]

As it relates specifically to epidemics and vaccines, ADA regulatory guidance states that, during a pandemic, "[a]n employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents [him or her] from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship . . . ."[37] Similar considerations must be made as to employees' sincerely-held religious beliefs.[38] Consistent with this guidance, it appears that the University's vaccination policies provide for medical and religious exemptions to their general vaccination requirements.[39] Indeed, the grievant attempted to utilize this process to seek an accommodation – *i.e.* exemption from the flu vaccine requirement – based on her physiological condition or disorder and/or record thereof.

The University declined to grant the requested accommodation, on grounds that the grievant did not meet its general criteria for exemption. The hearing officer identified no further exploration by the agency of other potential accommodations in light of the grievant's circumstances. Therefore, the hearing officer determined that the University "did not . . . engage in an interactive process to identify any reasonable accommodations,"[40] as the ADA requires.

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[35] 29 C.F.R. § 1630.2(o)(3).
[36] 29 C.F.R. Pt. 1630 App'x § 1630.9. 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.
[37] U.S. Equal Emp't Opportunity Comm'n, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, #13, Oct. 9, 2009 (updated Mar. 21, 2020) ("Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it.").
[38] *Id.*
[39] *See* Agency Ex. 3, at 2.
[40] Hearing Decision at 6.

The record suggests no error in the decision on this point.[41] While the hearing officer declined to affirmatively find that any particular accommodation was reasonable under the circumstances, he noted that the "evidence showed that when the University exempted [other] employees from vaccinations, it required them to wear masks."[42] Accordingly, he concluded that the grievant's separation must be rescinded "so the University may evaluate . . . whether a reasonable accommodation [exists] such as wearing a mask."[43]

In its request for administrative review, the University suggests that holding the grievant exempt from its vaccine requirement would not be reasonable in light of the medical environment it operates. It explains that the "stringency of [its vaccination] policy reduces the number of unvaccinated employees, and provides an objective way for the [University] to evaluate the validity of each exemption request."[44] The University asserts that its approach is necessary to avoid "outbreaks of multiple contagious diseases, including measles, chicken pox, pertussis, etc."[45] because, "[i]n order for the vaccination policy to be effective, a maximum number of the [University's medical] community must be inoculated."[46]

EDR appreciates the University's vital mission to promote and protect public health and its expertise in doing so. However, we note that its policies must nevertheless comply with the ADA and related state policies.[47] Further, for purposes of the state employee grievance process, the hearing officer has authority to consider whether an agency's action was consistent with law and policy or whether state policy was misapplied or unfairly applied, as asserted here;[48] this authority extends to consideration of federal and state legal protections for individuals with disabilities. The University suggests that its vaccination policies include an "objective" standard for exemptions, but ADA considerations are necessarily individualized and case-specific. In addition, to the extent that the University asserts that granting the exemption to the grievant under the circumstances would impose an undue hardship on its organization, it carries the burden to prove as much to the factfinder.[49]

Thus, EDR finds no basis to disturb the hearing officer's determination that the University failed to engage in an interactive process to explore potential accommodations to which the grievant may be entitled under the ADA. However, the hearing decision also left open

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[41] Indeed, the University has maintained throughout the grievance process that the grievant never put disability protections at issue, and it appears that, following denial of her exemption request, the University informed her that she could be subject to disciplinary action if she did not receive the required vaccination. Agency Ex. 9, at 1.
[42] Hearing Decision at 6.
[43] *Id.* at 6-7. It appears that, following the hearing, the hearing officer posed the following inquiry to the parties to solicit their positions: "If the [University] determines an employee does not have to take a flu vaccine, . . . [h]ow does the [University] treat those employees? Are those employees required to wear masks or have job duty changes?" The University responded that: "If a team member has an approved exemption from the flu vaccine he/she must wear a mask when 6 feet from patients for 1 or more minutes during flu season, as determined by the Hospital Epidemiologist."
[44] Request for Administrative Review at 5.
[45] *Id.* at 6.
[46] *Id.* at 8.
[47] *See* DHRM Policy 2.05, *Equal Employment Opportunity*.
[48] *See* Va. Code § 2.2-3004(A); *Rules for Conducting Grievance Hearings* §§ V(C), VI(C)(1).
[49] 42 U.S.C. § 12112(b)(5)(A); *see* Reyazuddin v. Montgomery County, 789 F.3d 407, 414 (4th Cir. 2015).

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

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR remands this case to the hearing officer for further consideration of the evidence currently in the record and any further evidence subsequently received. The hearing officer is directed to issue a remand decision considering whether the grievant was denied a reasonable accommodation such that her separation from employment must be rescinded.

Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any new matter addressed in the remand decision (*i.e.* any matters not resolved by the original decision). Any such requests must be **received** by EDR **within 15 calendar days** of the date of the issuance of the remand decision.[50] 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.[51] 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.[52] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[53]

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