

Issues: Administrative Review of Case No. 8404/8405/Hearing Decision Appeal;  
Discrimination/Disability; Ruling Date: April 6, 2007; Ruling #2007-1567; Agency:  
Department of Corrections; Outcome: Hearing decision in compliance.



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of Department of Corrections  
Ruling Number 2007-1567  
April 6, 2007

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8404/8405. For the reasons set forth below, the grievant has presented no grounds warranting remand to the hearing officer.

**FACTS**

This case concerns a grievance hearing involving the grievant's removal from state employment for inability to meet working conditions. Following a prolonged absence due to a medical condition, the grievant returned to work in March 2005.<sup>1</sup> Her original position was a counselor at a Department of Corrections (the agency) facility.<sup>2</sup> In March 2005, however, a medical provider stated that, due to a mental impairment, the grievant was not able to perform certain job functions, including stress management, analyzing situations, shift work, and maintaining public contact.<sup>3</sup> In April 2005, the grievant was offered temporary accommodation and assigned to work in the mailroom for 90 days.<sup>4</sup> Following that 90 days, the agency could not find additional positions in which to place the grievant.<sup>5</sup> The grievant refused to work in the mailroom and refused other disability accommodation.<sup>6</sup> After the grievant had exhausted her leave balances, she was placed on leave without pay as of July 29, 2005.<sup>7</sup> An August 11, 2005 letter from one of the grievant's medical care providers stated that the grievant could "return to work part time in a low stress setting."<sup>8</sup> As the grievant's condition was still restricted, the agency removed the grievant from employment effective August 12, 2005.<sup>9</sup> The hearing

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<sup>1</sup> Decision of Hearing Officer, Case No. 8404/8405, Sept. 15, 2006 ("Hearing Decision"), at 2.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 3.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 6-7.

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 4.

officer's decision afforded the grievant no relief.<sup>10</sup> She now appeals to this Department for administrative review.

## DISCUSSION

By statute, this Department 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.”<sup>11</sup> If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.<sup>12</sup>

### *Disability Discrimination*

DHRM Policy 2.05 “[p]rovides that all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability.”<sup>13</sup> Under Policy 2.05, “‘disability’ is defined in accordance with the Americans With Disabilities Act,” the relevant law governing disability accommodations.<sup>14</sup> Like Policy 2.05, the Americans with Disabilities Act (ADA) prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability.<sup>15</sup> A qualified individual is defined as a person with a disability, who, with or without “reasonable accommodation,” can perform the essential functions of the job.<sup>16</sup>

The grievant raises a number of issues concerning the hearing officer's denial of her ADA claim. First, the grievant disputes the findings regarding her ability to handle the stress of the counselor position, that she “couldn't work around inmates,” and her ability to satisfy the job's other requirements. Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>17</sup> and to determine the grievance based “on the material issues and the grounds in the record for those findings.”<sup>18</sup> 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, this Department cannot substitute its judgment

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<sup>10</sup> *Id.* at 8.

<sup>11</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>12</sup> *Grievance Procedure Manual* § 6.4(3).

<sup>13</sup> DHRM Policy 2.05, p. 1 of 4 .

<sup>14</sup> 42 U.S.C. §§ 12101 *et seq.*

<sup>15</sup> 42 U.S.C. § 12112, (B), (5), (A).

<sup>16</sup> 42 U.S.C. § 12111(8).

<sup>17</sup> Va. Code § 2.2-3005.1(C)(ii).

<sup>18</sup> *Grievance Procedure Manual* § 5.9.

for that of the hearing officer with respect to those findings. In the decision, the hearing officer referred to evidence from medical care professionals who had opined as to the grievant's job limitations.<sup>19</sup> Thus, this Department cannot conclude that the hearing officer's findings challenged by the grievant were unsupported by the hearing record.

The grievant also addresses the agency's lack of consideration of her past job performance and the lack of evidence of unsatisfactory performance. As the hearing officer found, past job performance was not relevant to the termination at issue in this case.<sup>20</sup> The grievant was removed for inability to meet working conditions of employment, not poor performance.<sup>21</sup> The hearing officer determined that the grievant's former position was not a low stress position.<sup>22</sup> Because the grievant's physician had limited the grievant to low stress jobs, the grievant was unable to perform the duties of her position and was removed from employment.<sup>23</sup> As stated above, there is evidence in the record supporting the hearing officer's findings as to the grievant's limitations. There is no basis to disturb the hearing officer's decision in this regard.

The grievant additionally claims that the agency "failed to make any accommodation for me." Under the ADA, employers must only make reasonable accommodations for qualified individuals with disabilities.<sup>24</sup> The hearing officer found that the grievant was not a "qualified individual with a disability."<sup>25</sup> Although the hearing officer determined that the grievant does have a mental impairment, the grievant did not meet her burden to establish that she was "otherwise qualified."<sup>26</sup> Indeed, the hearing officer found that the grievant had refused accommodation for her disability.<sup>27</sup>

An employee is free to refuse an accommodation.<sup>28</sup> In such a case, however, the employer may require the employee to perform the essential functions of her job without accommodation and take disciplinary or corrective measures if the employee is unable to meet the employer's expectations.<sup>29</sup> The employee will not be considered a qualified

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<sup>19</sup> Hearing Decision at 3, 5-6.

<sup>20</sup> Reconsideration Decision, Case No. 8404/8505-R, Feb. 5, 2007 ("Reconsideration Decision"), at 1-2.

<sup>21</sup> Hearing Decision at 7.

<sup>22</sup> Hearing Decision at 6; Reconsideration Decision at 2.

<sup>23</sup> Reconsideration Decision at 1-2.

<sup>24</sup> 42 U.S.C. § 12112 (6) (5) (A).

<sup>25</sup> Hearing Decision at 7.

<sup>26</sup> *Id.* at 5-7.

<sup>27</sup> *Id.* at 6-7. The grievant has also suggested that the agency failed to explain certain issues to the grievant regarding the requirements of requests for accommodation and the agency's ADA Review Committee. However, as the hearing officer found, the grievant did not present sufficient evidence at hearing to support her claims. A review of the hearing record confirms the hearing officer's determination.

<sup>28</sup> See 29 C.F.R. § 1630.9(d) ("A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability.")

<sup>29</sup> See *Hankins v. Gap, Inc.*, 84 F.3d 797, 801-02 (6<sup>th</sup> Cir. 1996); see also 29 C.F.R. § 1630.9(d).

individual with a disability if she refuses an accommodation that is necessary for the employee to perform the essential functions of her job.<sup>30</sup>

The medical evidence presented supported the finding that the grievant could only perform low stress, part-time jobs. Moreover, because the hearing officer determined that the grievant's previous job as a counselor was not a low stress job, the grievant could not be considered a qualified individual with respect to that position. The hearing officer found that the grievant's limitations, as specified by her physician, made it impossible for her to satisfy the requirements of the counselor position without accommodation, which the grievant refused.<sup>31</sup> Therefore, the grievant was not a qualified individual with respect to the counselor position. In addition, the hearing officer found that the grievant refused any other accommodation.<sup>32</sup> As such, the agency was not required to offer reasonable accommodation in the face of the grievant's refusal. Consequently, there is no basis to disturb the hearing officer's decision as to the denial of the grievant's ADA claim.

#### *Compensation Claims*

The grievant also suggests that there were errors in her past salary. Although this claim was not a subject of the hearing officer's decision, after reviewing the hearing tapes, there was no evidence presented at hearing to support the grievant's claim. As such, remand to the hearing officer for further consideration is not required.

The grievant has also requested an investigation into her "pension pay, loss of wages and paid correction." First, the hearing officer correctly determined that there was no evidence presented at hearing to establish what, if any, errors existed with the grievant's leave balances.<sup>33</sup> As such, there is no basis to remand the case to the hearing officer on these grounds. In addition, a request for administrative review is not the proper forum to raise a request for an investigation into these issues. Indeed, this Department does not even have authority to conduct an independent investigation into the matters raised.

To the extent the grievant raises further claims regarding her leave, pay, and benefits, those state policy matters are within the purview of the Department of Human Resource Management (DHRM) on administrative review. The grievant has not presented any evidence that there was noncompliance with the grievance procedure with respect to those claims.

#### *Additional Claims*

The grievant has raised several other issues. First, the grievant claims that the agency failed to meet its deadline for exchanging exhibits prior to the hearing. However,

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<sup>30</sup> 29 C.F.R. § 1630.9(d).

<sup>31</sup> Hearing Decision at 6-7.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 7.

there is no evidence that the agency was untimely in providing its proposed exhibits. The hearing officer required that the parties exchange exhibits by August 24, 2006. The agency sent its exhibits by mail on August 21, 2006. While this package may have arrived at the grievant's address after August 24<sup>th</sup>, the grievant has not presented evidence to substantiate her claim. Moreover, there is no evidence that the grievant was prejudiced by the agency's alleged lack of timeliness. Consequently, the grievant's mere allegation of noncompliance is insufficient to warrant remand.

The grievant has also raised a number of disputes concerning the facts as determined by the hearing officer. As stated above, hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>34</sup> and to determine the grievance based "on the material issues and the grounds in the record for those findings."<sup>35</sup> As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings. Based on the evidence in the hearing record, this Department cannot conclude that the hearing officer's findings or conclusions are unsupported by the hearing record or were inappropriately decided upon material inaccurate facts

#### CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the hearing officer's decision will not be disturbed. 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.<sup>36</sup> 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.<sup>37</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>38</sup>

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Claudia T. Farr  
Director

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<sup>34</sup> Va. Code § 2.2-3005.1(C)(ii).

<sup>35</sup> *Grievance Procedure Manual* § 5.9.

<sup>36</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>37</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>38</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).