

Issue: Administrative Review Ruling/discrimination/disability; discipline/unsatisfactory performance; Ruling Date: September 22, 2006; Ruling #2007-1413; Agency: Virginia Information Technologies Agency; Outcome: Hearing Decision in compliance

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COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Virginia Information Technologies Agency

Ruling Number 2007-1413

September 22, 2006

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8361. For the reasons discussed below, this Department will not disturb the decisions of the hearing officer.

FACTS

The grievant received two Group I Written Notices for "unsatisfactory work performance" (March 24, 2006 and April 7, 2006) in connection with a project that was neither completed adequately nor in the required timeframe. In instituting this grievance, the grievant noted on the Form A the agency's alleged "failure to comply with ADA." According to letters from medical personnel received by the agency, the grievant was under treatment for hypertension, depression, and anxiety. These letters indicated that the grievant's job and conflict with a supervisor were contributing to the conditions noted.

The agency received the first of these letters on January 9, 2006, in which one of the grievant's medical care providers suggested that the conflict between the grievant and a supervisor necessitated a transfer to another supervisor. On January 24, 2006, the agency created a Work Performance Plan by which the grievant was to report directly to a new supervisor rather than the one with whom there was apparently conflict. In February 2006, the agency received two additional letters from other medical care providers who suggested that the agency consider transferring the grievant within the organization. In April 2006, following a staff exchange, the agency revised the job description of an existing open position and offered to transfer the grievant to this new position on a different team and with a new supervisor. The grievant refused to sign the new job description and, therefore, remained in her original position.

In his decision, the hearing officer upheld the two Group I Written Notices for unsatisfactory work performance. The initial decision did not reference the issue the grievant had identified under the Americans with Disabilities Act (ADA). However, on reconsideration, the hearing officer addressed the ADA claim even though the agency had only qualified the grievance as to the written notices and not as to the ADA. The hearing officer noted that, following the partial qualification of the grievance by the agency, the Form A was not signed by the grievant. Therefore, it was possible that the agency sent the Form A directly to EDR without sending it back to the grievant for further comment. The hearing officer, however, concluded that the grievant had not alleged a viable ADA claim because of the steps the agency had taken to offer accommodations. The grievant raises two challenges to the hearing officer's decision: 1) that inaccurate information was relied upon by the hearing officer, and 2) that her grievance was based on the ADA.

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.”¹ 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.²

Inaccuracies in Decision of Hearing Officer

Hearing officers are authorized to make “findings of fact as to the material issues in the case”³ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁴ 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 for that of the hearing officer with respect to those findings.

The grievant asserts that the hearing officer relied upon and included inaccurate information in the hearing decision. However, the grievant has not identified any specific examples of inaccurate information in the hearing decision. A review by this Department has found a few factual errors in the document, but none of these represented any material error.⁵ Based on the evidence in the hearing record, this Department cannot

¹ Va. Code § 2.2-1001(2), (3), and (5).

² See *Grievance Procedure Manual* § 6.4(3).

³ Va. Code § 2.2-3005.1(C)(ii).

⁴ *Grievance Procedure Manual* § 5.9.

⁵ Both of these errors appear on page 3. The first error notes that the grievant's supervisors believed the project at issue could have been completed in four hours, whereas the actual time given appears to have

conclude that the hearing officer's findings or conclusions are unsupported by the hearing record or were inappropriately decided upon material inaccurate facts.

ADA Claim

In her request for review, the grievant also stated that she originally initiated her grievance under the ADA, which was not mentioned by the hearing officer in his original decision. The hearing officer subsequently issued a reconsideration decision, which addressed the grievant's ADA claims. The Form A may not have been returned to the grievant for review following this partial qualification, thus, the hearing officer appropriately considered the ADA claims on reconsideration, even though the agency had not qualified the ADA issue for hearing.

DHRM Policy 2.05 "[p]rovides that all aspects of human resource management be conducted without regard to race, color, religion, gender, age, national origin, *disability*, or political affiliation"⁶ Under Policy 2.05, "'disability' is defined in accordance with the Americans with Disabilities Act," the relevant law governing disability accommodations.⁷ 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.

Even assuming the grievant is a "qualified individual with a disability," as the hearing officer did, there is no basis to overturn the hearing officer's decision that the agency made reasonable accommodations to the grievant. If an employee is disabled under the ADA, an employer must make "reasonable accommodations" unless the employer can demonstrate that the accommodation "would impose an undue hardship on the operation of the business [or government]."⁸ Under the ADA "reassignment to a vacant position" is considered a reasonable accommodation.⁹ However, "the ADA does not require an employer to provide the specific accommodation requested by the disabled employee, or even to provide the best accommodation, so long as the accommodation provided to the disabled employee is reasonable."¹⁰

After the initial letter from the grievant's medical provider, the agency altered the grievant's work flow so that she would not have to report to the supervisor with whom

been twelve hours, which is also identified in footnote 5. The second error states that the grievant signed the first Written Notice, which she did not.

⁶ DHRM Policy 2.05, page 1 of 4 (emphasis added)(effective date 9/25/00). Policy 2.05 was revised 5/16/06 to also include sexual orientation and veteran status.

⁷ 42 U.S.C. §§ 12101 *et seq.*

⁸ 42 U.S.C. § 12112(b)(5)(A).

⁹ 42 U.S.C. § 12111(9)(B). However, employers are not required to create new jobs or reassign disabled employees if no positions are vacant.

¹⁰ *Walter v. United Airlines, Inc.*, No. 99-2622, 2000 U.S. App. LEXIS 26875, at *13 (4th Cir. 2000); *see also* 29 C.F.R. § 1630.9 app. (2000) ("The accommodation, however, does not have to be the 'best' accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated.").

there was conflict. Additionally, at the grievant's further urging and subsequent letters from her medical providers, the agency rewrote the job description for an open position so that the grievant could work in a new department with a different supervisor. The grievant refused to accept the accommodation, however. There is no basis to overturn the hearing officer's decision that the agency's offer was reasonable. The hearing officer properly found that the agency had complied with state policy and federal law as to the grievant's disability claims under the ADA.

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, this Department will not disturb the decisions of the hearing officer.

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.¹¹ 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.¹² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹³

Claudia T. Farr
Director

¹¹ *Grievance Procedure Manual* § 7.2(d).

¹² Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹³ *Id.*; see also *Virginia Dep't of State Police vs. Barton*, 39 Va. App. 439, 445, 573 S.E. 2d 319 (2002).