



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case Number: 12120

Hearing Date: May 30, 2024
Decision Issued: July 8, 2024

PROCEDURAL HISTORY

On March 15, 2024, Grievant was removed from employment pursuant to a fitness for duty evaluation.

On March 20, 2024, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On April 10, 2024, the Agency qualified the grievance for hearing. On April 22, 2024, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 30, 2024, a hearing was held at the City of Norfolk court complex in Norfolk, Virginia.

APPEARANCES

Grievant
Agency Advocate
Agency Party Designee
Witnesses

ISSUES

Whether the Agency misapplied or unfairly applied policy?

An Equal Opportunity Employer

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief the Grievant seeks should be granted. Grievance Procedure Manual (GPM) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Juvenile Justice employed Grievant as a Probation Officer I. Grievant had been employed by the Agency for more than 18 years. Grievant received a Contributor rating for her 2023 annual performance evaluation which she signed on October 10, 2023. She received a Major Contributor rating for her 2020 annual performance evaluation and a Contributor rating for her 2021 annual performance rating.¹

The Employee Work Profile for Grievant's position sets forth "Essential Duties" as follows:

- Public-facing position that requires in-person, face to face work with the public involving the screening and processing of domestic and delinquent intake complaints.
- Requires in-person work with juveniles and their families, both in the office and within the community, to include interviewing for social history court reports; application of screening and assessment tools; evaluative decision making, court report writing, case plan development, community probation and parole supervision, counseling, use of cognitive-behavioral interventions, crisis intervention; court coverage and presentations; service referrals, and case management.
- Requires in-person home visits, facility visits, school visits, worksite visits, and administration of on-site drug testing; and participation in collaborative/multidisciplinary staff meeting.
- Requires periodic 24-hour on-call intake work, including after-hours (5:00 p.m. to 8:00 a.m.) and weekend duties. After-hour intake work may require office visits to assist law enforcement with intake processes.²

The Employee Work Profile identified the Core Responsibilities for Grievant's position as: Screening, Assessment, and Report Writing (45%); Pre-Court and Post

¹ Grievant Ex. 1-5. A copy of Grievant's annual performance evaluation for 2022 was not included in the hearing exhibits.

² Agency Ex. at 7-14.

Disposition Case Management (15%); Probation Supervision (15%); Parole Supervision (5%); and Agency Values (20%).³

The Employee Work Profile identified the following Physical Cognitive Requirements as Essential:

Mental/Sensory Demands: Hearing, Memory, Analyzing, Reading Reasoning, Written communication, Oral communication.

Emotional Demands: Fast pace, Multiple priorities, Intense customer interaction, Frequent change, Multiple stimuli.

Grievant was diagnosed with depression when she was 22 years old and has experienced intermittent episodes of depression since that time.⁴ Grievant also is diabetic. Grievant testified that her diabetes had been “out of control” and challenging to manage over the past year, causing her to periodically experience blood sugar levels over 300 mg/dL and to be hospitalized on at least two occasions.⁵

Grievant testified that she was on short-term disability leave related to her depression from June 19, 2023, to July 10, 2023, and from September 5, 2023, to September 17, 2023.⁶

On the morning of October 16, 2023, Grievant texted her supervisor to report that she would arrive to work at 10:30 am that morning. Grievant’s supervisor texted Grievant to advise her that one of Grievant’s clients now would appear in court that morning and the supervisor requested that Grievant be present for the hearing. Grievant replied that she would not be able to attend that hearing. Grievant then called her supervisor to inquire as to whether he had received her message. Grievant also re-confirmed during that call that she would be reporting to work at 10:30 am that day. At approximately 9:04 am, Grievant sent a text to her supervisor advising him that she had left a note for him taped to the side of a file cabinet.⁷

The note included statements that caused Grievant’s supervisor to be sufficiently concerned about Grievant’s well-being that he contacted the local police department to request that officers perform a wellness check at Grievant’s residence.⁸

Grievant’s medical provider is a board-certified family nurse practitioner. Grievant’s medical provider gave Grievant a note dated October 18, 2023, that stated:

³ Agency Ex. at 7-14.

⁴ Hearing Recording at 40:11-41:00.

⁵ Hearing Recording at 2:04:00-2:04:31.

⁶ Hearing Recording at 1:32:22-1:32:58.

⁷ Agency Ex. at 15-16, Hearing Recording at 1:32:58-1:38:50.

⁸ Agency Ex. at 15-17.

Due to illness, [Grievant] will be out of work from 10/16/23 through 10/30/23. May return 10/30/23 full-time and full duty.⁹

On the day that Grievant's medical provider had indicated Grievant could return to work, October 30, 2023, Grievant had what she described as a "breakdown" on her way to work that culminated in Grievant being charged with two misdemeanors: a Class 1 misdemeanor charge of obstructing an officer in the performance of his duties and a Class 4 misdemeanor charge of public intoxication. On the "Checklist for Bail Determinations" form, the "nature and circumstances of the offense" was described as:

Call for service, 10 am this morning def was a passenger in a vehicle and grabbed the steering wheel, jerking it into oncoming traffic, Officer arrived, def had strong odor of alcohol, slurred speech, glassy watery eyes, def over curb almost falling down, def told Off that she had drank rubbing alcohol, while being placed under[] arrest for DIP def began fighting with Off to not be handcuffed, [] def stated that she needed help, Off took her to hospital where def then stated that she just wanted to go home and attempted to walk away, Off took def to his vehicle [] where she refused to get into vehicle, using her hands and feet to brace herself to not go into the vehicle.¹⁰

Grievant called Unit Director from jail on October 30, 2023, and advised him that she had been arrested for resisting arrest earlier that day.¹¹

In early November 2023, Benefits Manager advised Grievant that she would not face any disciplinary action associated with the events of October 30, 2023, if Grievant began a period of short-term disability and "followed program guidelines, including returning to work appropriately."¹²

Grievant testified that she had contacted the Employee Assistance Program in September 2023 to try to get some assistance with managing her depression. Additionally, as part of the conditions of her bond following her October 30, 2023, arrest, Grievant participated in outpatient therapy with a counseling center to which she was referred by the Employee Assistance Program. From November 30, 2023, to March 13, 2024, Grievant participated in nine sessions with a licensed professional counselor.¹³

While Grievant was on short-term disability, she requested permission from the Agency to retrieve some personal items from her office. When Grievant entered her office on December 1, 2023, she observed that the office had been cleaned and appeared to have been "packed up." This was upsetting to Grievant because she believed it showed that the Agency had decided not to allow her to return to work. Grievant later learned that the office had been cleaned and items packed to ensure that files containing personal

⁹ Agency Ex. at 18.

¹⁰ Agency Ex. 19-21.

¹¹ Agency Ex. at 22.

¹² Grievant Ex. 11.

¹³ Grievant Ex. 31.

information of juveniles were secured and to allow the office to be used by other Agency employees due to Agency needs at the time.¹⁴

On February 6, 2024, the heat in Grievant's home was not working. Grievant contacted a co-worker so that Grievant could coordinate with that co-worker to find a time for Grievant to pick-up a personal heater that Grievant had left at her workplace for her co-worker's use.¹⁵ Grievant arrived at the workplace that morning and, at Unit Director's instruction, waited downstairs for a co-worker to bring the heater to her.

On February 7, 2024, Unit Director advised Grievant by email that when she had communication needs with her work unit, she should send those requests to him by email and that she should limit her communications with other Unit staff.¹⁶ By separate email, also dated February 7, 2024, Unit Director advised Grievant that she was not "currently allowed at any of the [Unit] work sites until further notice."¹⁷ This was the first time the Agency instructed Grievant that she was not allowed at Agency facilities while she was on leave.¹⁸ Unit Director also sent the following message to staff working at Grievant's office location:

Please halt all communication with [Grievant] when you are in the performance of your duties as [an Agency] employee. All communications from [Grievant] should be directed to me. This directive will remain in place until further notice.

Additionally, [Grievant] is not allowed at any of our work sites until further notice. If this situation occurs contact me immediately.¹⁹

In light of the incident that occurred on October 30, 2023, that culminated in Grievant's arrest, Benefits Manager had reservations about allowing Grievant to return to work based on a note from Grievant's medical provider because Grievant's medical provider had previously released Grievant to return to work full-time, full duty on October 30, 2023. Benefits Manager testified that she also had concerns about Grievant's readiness to return to work based on her opinion that Grievant was having trouble processing information that Benefits Manager was sharing with her; although, when questioned how that compared to other employees' difficulty understanding the benefits information Benefits Manager shared, Benefits Manager testified that what made Grievant different, in Benefits Manager's opinion, was that Grievant had a previous return to work note from a medical provider that appeared to have allowed Grievant to return to work too early. Benefits Manager shared her concern about Grievant returning to work with the Agency's Human Resources Director and suggested the idea of requiring a fitness for duty examination to ensure that Grievant was ready to return to work.²⁰ Benefits Manager

¹⁴ Hearing Recording at 1:46:33-1:51:29 and Agency Ex. at 23-24.

¹⁵ Grievant Exs. 12-14.

¹⁶ Grievant Ex. 15.

¹⁷ Grievant Ex. 16.

¹⁸ Hearing Recording at 2:56:28-2:56:33.

¹⁹ Grievant Ex. 17.

²⁰ Hearing Recording at 3:41:12-3:46:32.

recalled sharing the idea of requiring a fitness for duty examination with the Agency Human Resources Director in early January.

Grievant's medical provider provided Grievant with a letter and a "Return to Work Form" dated February 15, 2024, that indicated that her medical provider had reviewed the employee work profile for Grievant's position and that Grievant would be able to return to work on February 19, 2024, and be able to perform the duties enumerated in Grievant's EWP with no restrictions.²¹

Benefits Manager worked through the Agency's procurement process to identify a service provider to perform a psychological fitness for duty evaluation of Grievant. On February 15, 2024, Benefits Manager completed the Fitness for Duty Referral Form that was required for the psychologist to schedule an evaluation of Grievant.²²

The referral form that Benefits Manager completed requested "Case Specific Information," described as details about: What behaviors have been observed/reported that prompted concern about the employee's ability to perform their job?". In response to this question on the form, the Agency stated the following:

She has been released to return to work fulltime, full duty today [2/15/2024] after a period of continuous short-term disability that began in Oct 2023. She was on STD intermittently starting 6/12/23. When released to work full time/full duty in Oct, she was arrested after being found wandering the street. Our concern is that she has convinced her current treating provider, a family practice provider, that she can return to work now.²³

The Referral Form also made clear that "A completed referral must include: . . . [a]ll documents to be reviewed by the evaluator (attendance records, internal notes, medical records, performance reviews, social media posts, etc.)."²⁴ During the hearing, Benefits Manager testified that she completed the referral form and that she believed she had provided the psychologist with the Employee Work Profile for Grievant's position, but she did not recall providing any other information to the psychologist.²⁵

The Referral Form also asked whether the Agency wanted the psychologist to "speak to anyone as a part of this evaluation such as supervisors, treating providers or family members." The Agency indicated that Unit Director should be contacted. The Agency did not identify any other individuals to be contacted by the psychologist.²⁶

The Agency notified Grievant by memorandum dated February 22, 2024, that she was being placed on paid administrative leave effective February 20, 2024. The memorandum also advised Grievant that, while on administrative leave, she would have

²¹ Agency Ex. at 25-26.

²² Agency Ex. at 27-29.

²³ Agency Ex. at 27.

²⁴ Agency Ex. at 27.

²⁵ Hearing Recording at 3:46:44-3:48:38, 4:19:00-4:20:55.

²⁶ Agency Ex. at 28.

limited access to Agency facilities and that she would be authorized to visit Agency facilities only by appointment through the Agency's human resources office.²⁷

The psychologist the Agency hired conducted his evaluation of Grievant on February 26, 2024. Grievant testified that when she met with the psychologist, he began their discussion by telling her that he understood that she had been arrested after she had been found wandering in the street based on the referral information he received, and the information provided by Unit Director. Grievant testified that she told the psychologist that information was untrue. Grievant testified that they had a "back-and-forth" about the fact in question that she said heightened her anxiety about the evaluation and set a bad tone for the assessment.²⁸

The psychologist provided the Agency with a four-page summary report entitled "Confidential – Fitness For Duty Evaluation Employer Report" dated March 5, 2024.²⁹ The Report set forth the psychologist's conclusion that, "[b]ased on all the data available as summarized and analyzed below, it is this evaluator's opinion within a reasonable degree of clinical probability that the employee is unfit for duty."³⁰

The data analyzed by the psychologist included the following "Referral Information:"

[Date of Birth]

[Gender]

Job Title: Probation Officer

Reason for referral: According to the referral, "She had been released to work full time, full duty after a period of continuous short-term disability that began in Oct 2023. She had been out on short-term disability intermittently starting 6/12/23. When released to work full time in Oct, she was found wondering [sic] in the street. Our concern is that she has convinced her current treating provider, a family practice provider, that she can return to work now."

The Report also noted that the psychologist "informed the employee of having reviewed all information that had been sent to [his] office from the referring party, and as relevant to the purpose of this evaluation. . . . explained that [the psychologist] would take a detailed history, perform a detailed evaluation, and then [the psychologist] would send a report to the requesting third party."

The Report provided the following "Analysis:"

Based on the information available for review, the employee is not fit for duty at this time. She has a long history of a psychological condition with

²⁷ Grievant Ex. 18.

²⁸ Hearing Recording at 1:27:56-1:31:33.

²⁹ Agency Ex. at 30-33.

³⁰ Agency Ex. at 30.

partial compliance to recommended treatment. She has left work many times to decrease stimulation and seek help. Over time, her work quality and personal appearance have deteriorated. In the collateral call, her supervisor [Unit Director] said her co-workers are wary of her and have drifted apart from her as her overall condition has deteriorated. He said she has deteriorated over time and she has never gotten back to her full level of prior functioning. At one time she was a very good employee.

In the evaluation situation she is pleasant and well-meaning. Her premorbid intelligence is well above average. Her current performance on cognitive tests shows inconsistent abstract thinking, difficulty thinking clearly and organizing her thoughts, and poor concentration. Results of the MCMI-IV show minimization of symptoms. She shows limited insight into her condition, as she sees her psychiatric illness as due to life stressors and chemical imbalance. Her judgment is poor, exhibited by going to work with poor hygiene even though she had been told many times she should come to work clean and appropriately groomed. She also exhibited poor judgment by calling and going to work offices after being told to stay away while on leave. She has been inconsistent with treatment for her chronic mental health condition. She shows symptoms of a psychological condition in partial remission, as the vegetative symptoms are improving according to her report of improved sleep, appetite, energy, and mood. She is currently taking psychotropic medications, prescribed by her PCP, by her report.

She is unfit for duty at this time. While her depression symptoms are improving, per her report, she has not achieved full remission. Reports from her employer indicate her interaction with the job has been odd and inappropriate. She would be unable to perform under deadlines, work cooperatively with coworkers, juveniles and their families, maintain a professional appearance, tolerate conflict and emotionally stressful situations, and regulate her emotions.³¹

The Report then set forth Psychologist's opinions in response to seven questions regarding Grievant's ability to perform her job functions as follows:

1. If allowed to perform HIS/HER job, would the employee pose a foreseeable risk to himself/herself, others or the employer's interests?

The employee would pose a foreseeable risk to the employer's interest, as she is not able to perform adequately on the job. She is not a foreseeable risk to herself or others.

2. Based on employee's job requirements, as provided in the referral information, does the employee have a psychological condition that would prevent him/her from performing the essential functions of the job?

³¹ Agency Ex. at 31.

Her psychological condition prevents her from performing the essential functions of her job.

3. If applicable, describe any clinically supported functional limitations.

Functional limitations include problems with concentration and organizing thoughts. She would be unable to perform under deadlines, work cooperatively with coworkers, juveniles and their families, maintain a professional appearance, tolerate conflict and emotionally stressful situations, and regulate her emotions.

4. If applicable, describe any clinically supported activity restrictions.

None observed.

5. If the employee cannot perform the essential job functions, are there suggested modifications that might be made which would allow the employee to perform these functions? Please explain.

There are no modifications available to her job that would allow her to complete the essential functions of her job at this time.

6. If your opinion is that the employee cannot perform the essential job requirements, provide your opinion regarding the probable duration of the employee's leave and provide rationale that supports your opinion.

The employee's probable duration of leave would be approximately 12 to 16 weeks. It is recommended that the employee engage in treatment through an IOP. The minimal standard of care for an impairing condition would be the combination of therapy and medication management. Medication changes typically take 6-8 weeks to take effect per the research and when methods of psychotherapy are trialed in the research, they are typically utilized for a minimum of 8-12 weeks before they are evaluated for effectiveness. An additional 4 weeks is estimated for her to establish follow-up care with a psychiatric provider for medication management and a therapist for weekly individual therapy.

7. If applicable, what treatment recommendations do you have for the employee to complete prior to and/or during returning to work?

It is recommended that the employee engage in treatment through an IOP. It is recommended that once discharged from the IOP, the employee should engage in follow-up care with a psychiatric provider for medication management. The frequency of appointments is deferred to the psychiatric provider. She should also engage in follow-up care with a therapist for weekly individual therapy. All treatment providers should be provided with a

copy of this report. Once released to return to work by her treating providers, she should be re-evaluated with a FFD evaluation.³²

In response to the Agency's expressed concerns that Grievant had influenced her assessment, Grievant's medical provider, provided Grievant with a letter dated May 17, 2024. Grievant's medical provider made clear her assessment of Grievant:

Patient last seen in office on March 20, 2024 and showed that she has the mental capacity to interact with her clients and perform her job duties/responsibilities. In my medical opinion, patient may return to work with supportive mental health counseling.

Patient had no influence on my decision to allow her to return to work.³³

Although Unit Director testified during the hearing that he had never read the psychologist's report, it appeared that, based on the psychologist's assessment, on or about March 12, 2024, the Agency advised Grievant that she had been determined to be unfit for duty, she could not return to work, and encouraged Grievant to pursue long term disability benefits. Grievant's last day of employment with the Agency was March 15, 2024.

CONCLUSIONS OF POLICY

The Agency does not have any policies setting forth the Agency's requirements or parameters for requiring or conducting fitness for duty examinations of its employees.

Federal and state laws and policies establish various protections for employees who may be unable to fully perform their job duties for medical or health reasons. These protections – such as the Americans with Disabilities Act, the Family and Medical Leave Act, Virginia's Workers' Compensation Act, and DHRM Policy 4.57, Virginia Sickness and Disability Program ("VSDP") – may limit how fitness-for-duty examinations are appropriately used. For example, state policy permits an agency to remove an employee due to her "inability to perform the essential functions of the job after reasonable accommodation (if required) has been considered."³⁴ In addition, DHRM Policy 4.57 provides for short-term disability benefits during employment and long-term disability benefits for eligible employees who are unable to return to work on a full-duty basis.³⁵

³² Agency Ex. at 32-33.

³³ Grievant Ex. 29.

³⁴ See DHRM Policy 1.60, Standards of Conduct, Removal Due to Circumstances which Prevent Employees from Performing Their Jobs. In addition, state policy requires 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*. . ." DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added). Like DHRM Policy 2.05, the federal Americans with Disabilities Act prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability. 42 U.S.C. § 12112(a); see 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).

³⁵ See generally DHRM Policy 4.57, *Virginia Sickness and Disability Program*.

The Equal Employment Opportunity Commission's regulations for implementing the employment provisions of the Americans with Disabilities Act provide that an employer may require a medical examination of an employee only to the extent such examination is job-related and consistent with business necessity.³⁶ A medical examination is job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.

In this case, Grievant had been on short-term disability leave related to her depression intermittently from June 2023 until February 2024. Most recently, Grievant had been on short-term disability leave due to her depression for almost four months, from October 2023 to February 2024. Prior to commencing that period of short-term disability, Grievant had left a note for her supervisor that included statements that gave her supervisor reasonable cause to be concerned about Grievant's welfare on October 16, 2024. On October 30, 2023, the date Grievant's medical provider had released her to return to work, Grievant had what she described as a "breakdown" which culminated in Grievant being arrested and charged with two misdemeanors.

In February 2024, the Agency had a reasonable, non-discriminatory basis to believe that Grievant's ability to perform her job functions may be impaired by her medical condition. Based on the testimony of Benefits Manager, the Agency was skeptical of the ability of Grievant's medical provider, a family nurse practitioner, to determine whether Grievant was mentally able to return to work and perform the essential functions of her job. This concern appeared to have been primarily based on the events that occurred on October 30, 2023, when the same medical provider had released Grievant to return to work and Grievant experienced a "breakdown" on the very day she was approved to return to work. Based on the information provided, the Agency's skepticism of Grievant's medical provider's assessment of Grievant's mental ability to perform the essential functions of her job was not unreasonable.

Because of its skepticism of Grievant's medical provider's ability to assess Grievant's mental health, after Grievant provided a release to return to work from that medical provider, the Agency advised Grievant that it was requiring her to undertake a psychological fitness for duty examination by a third-party provider chosen by the Agency. This requirement appeared to this Hearing Officer to be reasonable and consistent with law and policy.

Once the Agency decided to engage a third-party provider to conduct the fitness for duty examination, however, it had a responsibility to do so in a manner that would ensure the assessment was, in fact, independent and unbiased, and, in providing information to that third-party provider regarding Grievant, the Agency had a responsibility to ensure that any information it provided was accurate and unbiased.

³⁶ 29 C.F.R. 1630.13(b) and 1630.14(c).

In this case, the Agency identified Grievant's arrest in October as one of the details that prompted its concern about Grievant's ability to perform her job but then provided the psychologist with incorrect information about the details of that arrest. Once the Agency determined to provide details related to those events, it had a responsibility to ensure that the details it was providing were accurate. The preponderance of the evidence provided at the hearing showed that Benefits Manager relied on information provided to her by Unit Director, but Unit Director was relaying information he received some time before from Grievant's supervisor, who was relaying information he had received from a probation officer, who purportedly had spoken with police on the day of the incident.³⁷ There was no indication from Benefits Manager or Unit Director that they ever attempted to verify or confirm the accuracy of that information before sharing it with the psychologist.

Based on the evidence presented by the Agency at the hearing, the information Benefits Manager and Unit Director shared with the psychologist regarding the nature of Grievant's arrest was incorrect and not consistent with the description of the events provided on the "Checklist for Bail Determinations" form in the arrest documentation included in the Agency's exhibits. Although the Agency argued the information provided was "just a summary" of the events and what they understood to be true at the time, the nature of the inaccuracy of the information provided by the Agency is not insignificant in this case. The Agency stated that Grievant was arrested "after being found wandering in the street," which is significantly different from the actual facts leading up to Grievant's arrest and which would appear to be significant when set forth as case specific information of the behaviors that "prompted concern about the employee's ability to perform their job." This Hearing Officer is persuaded by Grievant's testimony that a "back-and-forth" ensued when she tried to correct such misinformation with the psychologist during the evaluation that then set a bad tone for the assessment. Grievant's point is particularly persuasive because a disagreement over a basic and important fact, such as the details of her arrest and whether she was wandering the streets, likely called into question Grievant's credibility with the psychologist as well as his credibility with her.

It also is of note that the psychologist, again relying on information provided by the Agency, determined that Grievant "exhibited poor judgement by calling and going to work offices after being told to stay away while on leave." The preponderance of the evidence presented during the hearing, however, showed that Grievant did not fail to follow any instructions regarding calling or visiting Agency offices. The evidence presented during the hearing was that Grievant was first instructed to stay away from Agency offices on February 7, 2024, and there was no information or testimony to suggest that she failed to follow that instruction.³⁸ Indeed, during the hearing, the testimony was that Grievant visited the office only twice during her short-term disability leave and, on both occasions, she had a reasonable purpose for the visit.

The Agency identified Unit Director as the only individual, other than Grievant, for the psychologist to speak to as part of the psychologist's evaluation of Grievant's fitness for duty. Unit Director was not, and had never been, Grievant's direct supervisor and Unit

³⁷ Hearing Recording at 2:35:44-2:36:48, 3:46:44-3:48:38.

³⁸ Hearing Recording at 2:56:28-2:56:33.

Director did not work at the same work site as Grievant. Unit Director testified that during the one telephone conversation he had with the psychologist, Unit Director advised the psychologist that he was not Grievant's direct supervisor and may not be the "best person" to answer all of the psychologist's questions. However, the Agency identified Unit Director as the sole individual for the psychologist to contact regarding Grievant. And the psychologist clearly relied on information provided by Unit Director, including Unit Director's apparent assessment that Grievant "had deteriorated over time and she has never gotten back to her full level of prior functioning" and that "[a]t one time she was a very good employee." The psychologist's description of Unit Director's assessment, however, is contradicted by the Agency's evaluation of Grievant's performance issued on October 10, 2023 (as well as her prior performance evaluations).³⁹ At the hearing, Unit Director could not recall whether or what he may have discussed with the psychologist regarding Grievant's performance.⁴⁰

Unit Director recalled that in his one telephone conversation with the psychologist he may have relayed information about his observation of Grievant's appearance. Unit Director testified that he observed that her appearance had declined over time based on his observations that there sometimes was odor and an appearance of looking disheveled. But Grievant argued that it was the physical impacts of her diabetes that had been impacting her physical appearance, including significant weight loss and dental issues. Grievant also testified that the psychologist did not contact Grievant's medical provider and, as indicated, the Agency did not identify Grievant's medical provider among its list of individuals to be contacted as part of the evaluation.

The psychologist also attributed to Unit Director the assessment that Grievant's "co-workers are wary of her and have drifted apart from her as her overall condition has deteriorated." Unit Director testified that during his conversation with the psychologist he may have described "uneasiness" around the office related to Grievant. Based on the testimony during the hearing, Unit Director's basis for describing this uneasiness appeared to have come from a single email describing "uneasiness" and requesting that office locks be changed. Unit Director also testified that the email described the uneasiness as arising from Grievant's "incessant" calling. During the hearing, however, Unit Director provided very little information or details about these concerns or the facts surrounding them, including whether the concerns were those of a single employee or multiple employees. Unit Director could not clarify why there was a feeling of uneasiness or what was being referred to or considered incessant or excessive calling that prompted the concern. This Hearing Officer does not minimize the concerns or observations of other employees, but rather, questions the Agency's decision to share a concern (or concerns) with an "independent" evaluating psychologist when, at least at the hearing, there appeared to be very little information about the alleged concern or any verified facts relating to that concern (or concerns) or any effort to ensure that such concern was not based on a misunderstanding or bias related to Grievant's medical condition.

³⁹ Grievant's Exs. 1-5.

⁴⁰ Hearing Recording at 3:15:22-3:16:39.

The Agency argued that the psychologist interviewed Grievant and conducted cognitive tests to assess Grievant's fitness and did not solely rely on information from the Agency to reach his determination that Grievant was unfit for duty. Specifically, the Agency pointed to the psychologist's assessment that Grievant's "current performance on cognitive tests shows inconsistent abstract thinking, difficulty thinking clearly and organizing her thoughts, and poor concentration."⁴¹ Grievant argued that the cognitive tests that the psychologist utilized were culturally biased, but Grievant provided no evidence of such bias beyond her own testimony.

The psychologist that performed the fitness for duty evaluation did not testify and his report does not provide any detail as to how much weight he attributed to the cognitive tests he performed during his one meeting with Grievant versus the information he received from the Agency in reaching his determination that Grievant was "unfit for duty."

In this case, the Agency's decision to require that Grievant undergo a psychological fitness for duty examination before allowing her to return to work appeared to be reasonable and consistent with law and policy. Once the Agency decided to apply this condition on the Grievant's return to work, however, it had a responsibility to do so in a manner that would ensure the assessment was reasonably fair and accurate. Although DHRM Policy 1.60 provides for separation when an employee is unable to perform the essential functions of their job, in this case, the Agency misapplied policy by separating the grievant based on the report of a third-party provider to whom the Agency had provided inaccurate, incomplete, and/or unverified information that may have foreseeably biased his analysis.

Grievant argued that her medical provider authorized her to return to work when she was medically able to do so. But no other psychological evaluation of Grievant's fitness for duty has been provided. Although the Hearing Officer is reinstating Grievant, it is not clear, based on the information provided, whether Grievant is able to perform her work duties. The Hearing Officer recommends that the Agency re-evaluate whether Grievant is able to perform the essential functions of her job. If the Agency chooses to engage a third-party provider again to assist with such an evaluation, the Agency's reliance on any resulting report should be in accordance with the analysis herein.

DECISION

For the reasons stated herein, Grievant's request for relief is **granted in part**. The Agency is ordered to reinstate Grievant to Grievant's same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

⁴¹ Agency Ex. at 31.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar-day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁴²

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

⁴² See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant.