



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case Number: 12209

Hearing Date: March 4, 2025

Decision Issued: April 18, 2025

PROCEDURAL HISTORY

On or about July 3, 2024, Grievant initiated a grievance challenging the Agency's decision to separate her from employment due to inability to meet working conditions. The grievance proceeded through the expedited process and Grievant was not satisfied with the outcome of the process. On November 21, 2024, the Office of Employment Dispute Resolution issued Ruling 2025-5760 qualifying this grievance for hearing. On December 9, 2024, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 4, 2025, a hearing was held at the Facility.

The Grievant offered a large volume of unmarked exhibits for the hearing. At the hearing, the Agency's Legal Advocate offered to provide the Hearing Officer and Grievant with copies of the Grievant's exhibits that the Agency's Legal Advocate had numbered based on the exhibits that the Grievant had shared prior to the hearing. The Agency's Legal Advocate indicated she had done so for ease of reference and to save time during the hearing. The Grievant reviewed those copies and indicated they were reflective of what she had shared and those exhibits as numbered were used during the hearing and may be referenced herein.

APPEARANCES

Grievant
Grievant's Advocate
Agency Legal Advocate

An Equal Opportunity Employer

Agency Party Designee

ISSUES

Whether the Agency's separation of Grievant from employment was a misapplication of the Americans with Disabilities Act and related state policies?

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 Facility is a secure juvenile correctional facility that serves juvenile residents ranging from 14 to 20 years of age.

The Facility has a medical department that employs registered nurses and licensed practical nurses (LPNs) to provide medical services to the juvenile residents of the Facility. Based on the descriptions provided at the hearing, the Facility has an older section referred to as the "Existing Section" which includes housing units (or residential pods), cottages that also serve as residential pods, and a medical unit. The Facility also has a newer section referred to as the "Expansion Section" which includes eight residential pods and a medical unit. Although any nurse working at the Facility may be assigned to work in either the Existing Section or the Expansion Section on a particular day, some nurses may be assigned to one Section or the other on a regular basis. Based on the testimony during the hearing, the Expansion Section is accessible without climbing any stairs, but certain areas of the Existing Section may require the use of stairs to gain entry. It was unclear whether ramps also may be available to access those parts of the Existing Section.

Prior to her dismissal, Grievant worked at the Facility as an LPN. Grievant testified that during her employment at the Facility, she was primarily assigned to work in the medical unit in the Expansion Section. Grievant's Employee Work Profile (EWP) identified the core responsibilities of Grievant's job as follows: direct patient care (25 percent), support of a safe and efficient clinical environment (25 percent), medication administration (20 percent), ensuring continuity of medical care (15 percent), and responds to medical emergencies and security events (5 percent).¹ Among the specific duties involved in these categories were:

- Health screening (under supervision)

¹ Agency Ex. at 1-6.

- Triaging health complaints and requests
- Assessing residents prior to placement in holding rooms, risk of self-injury, etc.
- Communicating patient needs with health care providers
- Direct patient care (under supervision)
- Chart/records maintenance
- Equipment checks and maintenance
- Keeping workspaces clean
- Medication administration and documentation
- Providing emergency care as required, including performing CPR, using AED, applying oxygen, and using first aid techniques.

Grievant was approved for a period of short-term disability from August 18, 2023 through February 4, 2024.² Grievant returned to work on February 8, 2024, with the following medical restrictions: no pushing carts for 4 weeks, no standing for long periods of time, no heavy lifting, and requires frequent breaks to elevate her leg.³ Upon her return, the agency considered Grievant to be in long-term disability-working status (LTD-W) as of February 9, 2024.⁴ Nurse Manager testified that when Grievant was returning to work, Nurse Manager was asked by an Agency benefits consultant if she could accommodate Grievant's restrictions for four weeks and Nurse Manager confirmed that she could.⁵ Nurse Manager also identified specific duties that Grievant could perform within her restrictions to be included as part of a "Transitional Employment Plan."⁶ Those specific duties included:

- No medication plans
- Can complete chart audits
- Checking MAR's and completing supervisory audits of MAR's
- Restocking/organization of treatment rooms
- Reordering meds and refills
- Other task within her limits

Grievant testified that when she returned to work in the Expansion Section medical unit, it was like she had "not missed a beat." According to Grievant, she worked approximately 40 hours each week.⁷ Although she could not push the medicine carts due to her restrictions, Grievant testified that she continued to perform other LPN duties consistent with work she had performed prior to her short-term disability leave when she was the "third nurse" on a particular shift. According to Grievant and Nurse Manager, when there were three nurses working a shift in the Expansion Section, only two of the nurses could be assigned to push the medicine carts, so the "third nurse" would perform the other duties of an LPN, including temperature checks, paperwork, reports, checking equipment, inventory and counting materials, and other duties.⁸

² Agency Ex. at 7-8.

³ Agency Ex. at 15-17.

⁴ See DHRM Policy 4.57, *Virginia Sickness and Disability Plan*, at 4, 21-24.

⁵ Agency Ex. at 15-17 and see Hearing Recording at 3:28:22-3:30:33, 3:31:18-3:32:15.

⁶ Agency Ex. at 13-19.

⁷ Hearing Recording at 2:43:23-2:47:47, and see Agency Ex. at 10, 13.

⁸ Hearing Recording at 2:39:26-2:43:10, 2:55:16-3:01:32, 3:31:18-3:32:15, 3:41:59-3:49:03.

On or about February 23, 2024, Grievant submitted the Agency's required forms to request disability accommodations. By memorandum dated March 19, 2024, the Agency's ADA Coordinator issued a memorandum to Grievant which granted the following accommodations on a temporary basis until May 9, 2024:⁹

- Not to be pushing medication carts.¹⁰
- Cannot stand for long periods and will require frequent breaks.
- No heavy lifting.
- 3 x 15-minute breaks per shift.
- No standing more than 45 minutes within every 1.5 hours of time

The ADA Coordinator noted that Grievant's position "requires a high degree of standing, movement, and pushing of medication carts." The memorandum noted that

[d]ue to this organizational need and expectation, it is my assessment that the [Agency] will not be able to grant your preferred accommodation request for an extended period. However, that does not mean there are no alternative accommodation options available to you. We will reassess this accommodation on 5/9/2024.¹¹

The Employee Work Profile for Grievant's position and the accommodations that Grievant had requested and been granted by the Agency did not include any restrictions or prohibitions associated with climbing stairs/ramps or working in housing units (or residential pods) where juvenile residents resided.

On March 26, 2024, Nurse Manager requested that Grievant check AEDs and first aid kits in the Facility and that she complete those checks during the first two weeks of April.¹²

After Nurse Manager requested that Grievant perform the AED checks across the Facility, Grievant asked Nurse Manager questions regarding the process for conducting such checks. Grievant also expressed concern that going to certain areas of the Facility was outside the scope of what she understood her work restrictions to be. Based on her testimony, Grievant believed at that time that because she was on "restricted" duties, she was not allowed or required to walk outside of her "normal" work area, the Expansion Section, and into housing units except during medical emergencies. Grievant testified that her understanding was that security personnel were not allowed to go into areas with the juvenile residents while they were on "restricted duties" due to safety and liability concerns and she had been advised by an employee relations consultant that the Facility would have the same safety and liability concerns for a nurse with restricted duties.¹³ Grievant further testified that she was concerned that her medical conditions made her unsteady

⁹ Agency Ex. at 25.

¹⁰ On or about March 1, 2024, Grievant provided a note from one of her medical providers stating that "[Grievant] is not to push any carts until July 31, 2024." Grievant Ex. unmarked, entitled Certificate to Return to Work or School, dated 3/1/24.

¹¹ Agency Ex. at 25.

¹² Agency Ex. at 29.

¹³ Hearing Recording at 1:49:35-1:50:31, 2:34:00-2:39:26, and Agency Ex. at 40-41.

while walking and she believed that her risk of falling increased if she walked into the areas outside of the Expansion Section and in areas where juvenile residents resided.¹⁴

Grievant testified that based on her concerns, she was advised by an employee relations consultant to obtain a note from her medical provider stating that Grievant could not be around residents while she had medical restrictions.¹⁵

On or about April 4, 2024, Grievant obtained a note from one of her health care providers stating:

Due to current health condition, patient is not ideal candidate to work in juvenile departments due to unsteady gait. Please allow for patient to reduce frequent standing heavy lifting/pulling, walking long distances or climbing of stairs.¹⁶

On or about April 8, 2024, Grievant obtained a note from the same health care provider that provided the April 4th note. The note stated:

Due to current health condition, patient is not ideal candidate to work in juvenile departments due to unsteady gait. Please allow for patient to reduce frequent standing, heavy lifting/pulling, walking long distances or climbing of stairs until 7/31/24. Patient should not be pushing medication carts, standing longer than 45 minutes within every 1.5 hours period of time Do not carry > 20 lbs. Will require 3 15-minute breaks per shift.¹⁷

On April 10, 2024, an Agency employee relations consultant sent an email to Grievant notifying her that "HR" had received her "ADA Packet" and asking Grievant if she was "able to send us a resume; this will help us reviewing your ADA packet for a possible job placement."¹⁸ Grievant testified that she never provided the Agency with the requested resume because on April 19, 2024, the Agency advised Grievant that she was being assigned to a post where she would monitor juvenile residents' computer and internet use.¹⁹

It appears that on or about April 17, 2024, the Agency's human resources director became aware of the April 4, 2024, note from Grievant's health care provider indicating that Grievant "was not an ideal candidate to work in juvenile departments due to unsteady gait." The Agency's human resources director advised her staff to remove Grievant from the worksite immediately and contact the third-party administrator to advise them that the Agency could no longer accommodate Grievant's medical restrictions.²⁰ Consistent with the human resources director's instructions, it appears that the Agency's human resources and employee relations staff interpreted the note from Grievant's health care

¹⁴ Hearing Recording at 1:49:35-1:50:31, 2:34:00-2:39:26.

¹⁵ Agency Ex. at 37, 40.

¹⁶ Agency Ex. at 30.

¹⁷ Grievant Ex. at 79.

¹⁸ Grievant Ex. at 57.

¹⁹ Hearing Recording at 1:49:35-1:50:31, 3:12:43-3:16:48.

²⁰ Agency Ex. at 31.

provider as “a note provided by her doctor that she cannot work in a juvenile detention center, so she could not come back on site as a result.”²¹

On April 18, 2024, Grievant provided the Agency with another note from her health care provider stating:

Due to current health condition, patient is not ideal candidate to work directly with juveniles in juvenile departments due to unsteady gait. Please allow for patient to reduce frequent standing, heavy lifting/pulling, walking long distances or climbing stairs until [July 31, 2024]. Patient should not be pushing medication carts, standing longer than 45 minutes within every 1.5 hours period of time[.] Do not carry > 20 lbs. Will require 3 15-minute breaks per shift. She is appropriate, however, to work in medical office setting. ²²

Based on the evidence and testimony presented during the hearing, on and after April 17, 2024, Nurse Manager was not included in any discussions or determinations as to whether Grievant could perform the essential functions of her job with or without reasonable accommodation.²³ Indeed, based on the evidence presented, it appeared that there was limited consultation with Nurse Manager regarding the extent to which Grievant’s limitations could be accommodated aside from the initial inquiry as to whether Nurse Manager could, for four weeks, accommodate the specific restrictions identified by Grievant’s health care providers when Grievant returned from short-term disability leave in February 2024.

On April 19, 2024, an Agency benefits consultant advised Grievant that on April 22, 2024, she would begin a “modified duty post” where she would monitor juvenile residents’ computer and internet use.²⁴ Later that same day, the benefits consultant also advised Grievant that “I also heard about your ADA approval, and it is through 05/09/24. I would have your doctor complete new ADA paperwork to continue this ADA Accommodation. I have attached the paperwork for you.”²⁵ The Agency appears to have initially expected Grievant to remain in the modified duty post until May 9, 2024.²⁶

Grievant updated a request for reasonable accommodation on or about April 24, 2024. Grievant requested that the accommodations previously requested continue, including “not pushing medication carts/cannot stand for long period of time, frequent breaks, [no] heavy lifting, 3x15 min breaks per shift, no standing more than 45 min within every 1.5 hrs. of time.” Grievant provided the Agency with a certification form from her health care provider to support her request on or about May 6, 2024. That certification was subsequently updated and resubmitted to the Agency on or about May 10, 2024. The May 6 form, as completed by Grievant’s provider, indicated that Grievant was experiencing leg swelling and pain after pushing a medication cart for prolonged periods. In response to the form’s prompt about how the employee’s limitations would affect her ability to perform the essential functions of her job, the medical provider noted Grievant’s

²¹ Agency Ex. at 31, 39-43.

²² Agency Ex. at 38.

²³ Hearing Recording at 3:50:28-3:51:43 and Agency Ex. at 57-60.

²⁴ Agency Ex. at 34.

²⁵ Agency Ex. at 34.

²⁶ Agency Ex. at 42-50.

need for three 15-minute breaks throughout the day, such that the grievant would not be standing for more than 90 minutes at a time. This restriction was identified as chronic but potentially controlled with medication. The updated certification Grievant provided from her health care provider indicated that the accommodations should continue until July 31, 2024.²⁷ This request for accommodations did not request any accommodations with respect to walking long distances, climbing stairs, working with juveniles, or performing work in juvenile resident housing units.

The evidence showed that by May 15, 2024, the Agency had approved the continuation of the modified duty post for Grievant through July 31, 2024.²⁸ Based on the evidence presented, it also appeared that by that time the Agency had stopped engaging in any discussions as to whether there were potential reasonable accommodations that would allow Grievant to continue to perform her duties as an LPN at the Facility.²⁹

According to Grievant, she used her annual leave for an approved, planned vacation from May 22, 2024, through June 4, 2024.³⁰

While Grievant was on vacation, the Agency restricted juvenile residents' access to computers, such that the Agency no longer had a need, or positions, for Grievant and other employees to monitor juvenile residents' computer and internet use.³¹

On June 7, 2024, the Facility's human resources manager sent an email to Grievant advising her that:

Per our conversation on Tuesday June 4, 2024, you were informed that we are unable to accommodate your work restrictions beyond 6/4/24. [The third-party administrator] has been notified of this date. Please contact them in regard to your LTD benefits. A revised long term disability letter and forms will be sent to you. If you have any questions, please feel free to call me at the below cell number.³²

There was no evidence that after the Agency determined that it no longer had a modified duty post for Grievant the Facility's human resources manager or anyone else from the Agency discussed with Grievant or Nurse Manager the status and extent of Grievant's medical limitations or Grievant's ability to perform the essential functions of an LPN at the Facility with or without reasonable accommodations.

CONCLUSIONS OF POLICY

The Americans with Disabilities Act (ADA) prohibits discrimination against a qualified individual on the basis of disability in regard to job application procedures, the

²⁷ Agency Ex. at 61-64.

²⁸ Agency Ex. at 57-59.

²⁹ Agency Ex. at 57-60.

³⁰ Hearing Recording at 1:56:15-1:59:45, 2:33:45-2:37:10.

³¹ Agency Ex. at 74-78.

³² Agency Ex. at 83.

hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.³³

To that end, the ADA requires that employers make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business.³⁴ Reasonable accommodation includes “[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position” or that enable the employee “to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.”³⁵

In order to identify an appropriate reasonable accommodation, it may be necessary for the employer “to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”³⁶

The preponderance of the evidence showed that the Agency’s separation of Grievant from employment was a misapplication of policy. The evidence showed that Grievant was a person with a disability who was qualified for her position as an LPN. The evidence showed that Grievant performed the essential functions of her job with reasonable accommodations after she returned from a period of short-term disability leave, on or about February 8, 2024, and until the Agency chose to move Grievant out of that role and into a modified duty post. Grievant testified that when she returned from short-term disability leave in February 2024, she regularly worked 40-hour work weeks.³⁷ Grievant described the work that she was performing prior to being moved into the modified duty post as the regular work of the “third” nurse in the Expansion Section’s medical unit. According to Grievant, aside from being unable to push the heavy medicine carts, Grievant was performing the duties that she regularly had performed prior to going out on short-term disability leave in August 2023. Testimony from both Grievant and Nurse Manager described the “third nurse” as a reference to the third nurse on duty who did not push the medicine carts in the Expansion Section because there were only two medicine carts for the nurses on duty to push in that area. The third nurse would perform other duties, including temperature checks, paperwork, reports, equipment checks, material and inventory counts, and the other duties of an LPN.³⁸

³³ 42 USC § 12112(a); and see DHRM ADA Policy Guide Series #1, Responsibilities Associated with the Americans With Disabilities Act.

³⁴ 42 U.S.C. § 12112(b)(5)(A); and see DHRM ADA Policy Guide Series # 5, Undue Hardship and Direct Threats.

³⁵ 29 C.F.R. § 1630.2(o)(1)(ii) and (iii).

³⁶ 29 C.F.R. § 1630.2(o)(3); and see DHRM ADA Policy Guide Series #3, Interactive Process for Reasonable Accommodation.

³⁷ Hearing Recording at 2:43:23-2:47:47, and see Agency Ex. at 10, 13.

³⁸ Hearing Recording at 2:39:26-2:43:10, 2:55:16-3:01:32, 3:31:18-3:32:15, 3:41:59-3:49:03.

On or about April 17, 2024, the Agency determined that information included in a note from one of Grievant's health care providers prevented Grievant from continuing to work with juveniles. Based on that determination, the Agency chose to no longer allow Grievant to perform the duties of an LPN with accommodations, and to instead place Grievant in a modified duty post outside of the Facility's medical department. The Agency appeared to make the determination to move Grievant out of her role as an LPN and into a modified duty post without first engaging in a process to determine what, if any implications, the information and limitations set forth in the health care provider's note had on Grievant's ability to perform the essential functions of her job. The Agency did not discuss or seek clarification from Grievant or her health care provider regarding the information in that note or Grievant's specific limitations. The Agency also did not engage Grievant or Nurse Manager in any discussions regarding Grievant's continued ability to perform the essential functions of an LPN, with or without reasonable accommodation. The evidence showed that both the Agency and Grievant expected the modified duty post to continue until July 31, 2024.³⁹ When the availability of the modified duty post unexpectedly ended in June 2024, the evidence showed that the Agency misapplied policy when it separated Grievant from employment rather than engaging Grievant in a process to review her specific physical limitations and the essential functions of her job to determine whether there were accommodations, such as assistive devices or procedures, that may have enabled Grievant to continue to perform the essential functions of an LPN without imposing undue hardship on the Agency's operations.

The Agency argued that its separation of Grievant from employment was consistent with policy because, according to the Agency, Grievant was no longer qualified for the position of an LPN as, according to the Agency, she could no longer perform the essential functions of the position, including having direct contact with juvenile residents, responding to medical emergencies, and pushing medicine carts.

The Agency argued that its separation of Grievant from employment was consistent with policy because, according to the Agency, Grievant could no longer have direct contact with juvenile residents. The Agency appeared to argue that Grievant was no longer qualified for her position as an LPN and could no longer be reasonably accommodated from the moment her health care provider issued a note stating that: "[d]ue to current health condition, [Grievant] is not ideal candidate to work directly with juveniles in juvenile departments due to unsteady gait. . . ." Although Nurse Manager testified that the duties of an LPN at the Facility required direct contact with juvenile residents, this Hearing Officer is not persuaded by the Agency's argument that the health care provider's note(s) alone supported the Agency's determination on or about April 17, 2024, that Grievant's physical limitations prevented her from having any direct contact with juvenile residents. There was no evidence that the Agency contacted Grievant or Grievant's health care provider for clarification about the note or the health care provider's assessment of the specific limitations as to Grievant's ability to perform her job duties. Based on both the language of the health care provider's note(s) and Grievant's testimony, Grievant's limitations related to her "unsteady gait" and the associated restrictions appeared to be walking long distances and climbing stairs (in addition to previous restrictions related to breaks and pushing heavy carts).⁴⁰ An "unsteady gait" and

³⁹ Agency Ex. at 57-60.

⁴⁰ Agency Ex. at 30 and 38, and Grievant Ex. at 79.

restrictions related to walking and climbing stairs do not necessarily prohibit or prevent direct contact with juvenile residents. Although such limitations may impact the method by which Grievant would be able to perform the essential functions of her job, the preponderance of the evidence did not show that such limitations rendered Grievant unqualified for her position or that the Agency was relieved of its responsibility to reasonably accommodate Grievant's known limitations unless doing so would impose an undue hardship on the Agency's operations.

The Agency argued that its separation of Grievant from employment was consistent with policy because, according to the Agency, Grievant was unable to timely respond to medical emergencies. The Employee Work Profile for Grievant's position does not set forth a specific time within which Grievant was expected to respond to residents' medical emergencies, however, both Grievant and Nurse Manager testified that the Facility expected nurses to respond to the juvenile residents' medical emergencies within approximately four or five minutes, regardless of where the nurse was working at the time.⁴¹ Prior to the time when the Agency decided to place Grievant in a modified duty post, Grievant had not requested or received approval for an accommodation that would excuse her from responding to medical emergencies. Grievant testified that although she may, at times, have been slower than other responding nurses, she was able to get to a medical emergency within five minutes. There was no evidence to suggest that Grievant was not able to perform CPR, first aid, or use an AED on juvenile residents. The note from Grievant's health care provider described Grievant's unsteady gait and limitations with respect to walking long distances and climbing stairs. Such limitations may present challenges and ultimately *could* be determined to prevent Grievant from quickly responding to an emergency. In this case, however, there was no evidence that the Agency conducted any review of Grievant's limitations and the essential function of responding to a medical emergency that included Grievant and Nurse Manager to determine whether Grievant could continue to perform the function with or without reasonable accommodation. Further, even if an unsteady gait, walking long distances, and climbing stairs would have presented challenges for Grievant to timely respond to a medical emergency, the Agency does not appear to have engaged in any discussion with Grievant or Nurse Manager to determine whether there may have been assistive devices or procedures that would have enabled Grievant to respond to emergencies at the Facility when she could not walk a long distance or climb stairs. To the extent that responding to medical emergencies within a specified period of time was an essential function of Grievant's job, the evidence did not show that Grievant was unable to perform this job function, with or without reasonable accommodation, at the time the Agency separated Grievant from employment.

The Agency argued that its separation of Grievant from employment was consistent with policy because Grievant was unable to push a heavy medicine cart. Based on Grievant's Employee Work Profile and the hearing testimony, an essential function of Grievant's job included "Medication Administration." Nurse Manager testified that the juvenile residents would report to the medical units to receive many of the services provided by the nursing staff, including sick calls, doctors' calls, and treatments.⁴² Based

⁴¹ Hearing Recording at 1:32:28-1:33:38, 1:54:19-1:55:22, 3:35:34-3:36:51, 3:54:30-3:55:35, 3:58:57-4:02:43, 4:06:11-4:10:51.

⁴² Hearing Recording at 3:51:43-3:54:30.

on the information provided during the hearing, at the time of Grievant's separation, the mechanism for distributing medication to residents was for LPNs to push heavy carts through the housing units of the Facility. The Agency initially chose to accommodate Grievant's limitations with respect to pushing the heavy carts by temporarily eliminating the requirement that she engage in this activity. There was no evidence, however, that the Agency ever explored whether there were other means, including available assistive devices or alternate procedures, that would have allowed Grievant to perform the function of administering medication and that did not require her to push a heavy cart or whether, if such means were available, they would impose undue hardship on the Agency. Indeed, during the hearing, Grievant testified that prior to the COVID-19 pandemic, LPNs were not required to push heavy medicine carts because residents would report to the medical unit to receive their medications from a central location.⁴³ Although the Agency may change its procedures for how medicine is distributed to residents, the fact that other means for distributing medicine have been utilized in the past suggests that there may be alternatives that would have allowed Grievant to continue to perform this function. The preponderance of the evidence did not show Grievant was unable to perform the essential function of medication administration with or without reasonable accommodation at the time the Agency separated her from employment.

Additionally, there was no evidence that showed that Grievant's other requested accommodations, such as breaks, prevented her from performing the essential functions of an LPN at the Facility.

To the extent that the Agency appeared to argue that Grievant refused to engage in the interactive process to identify reasonable accommodations because she did not provide a resume to the Agency, this Hearing Officer is not persuaded. The evidence showed that on April 10, 2024, an Agency employee relations consultant sent an email to Grievant notifying her that "HR" had received Grievant's "ADA Packet" and requesting that Grievant "[if she was able to send] us a resume; this will help us reviewing your ADA packet for a possible job placement."⁴⁴ Grievant testified that she never provided the Agency with the requested resume because on April 19, 2024, the Agency advised Grievant that she was being assigned to a post where she would monitor juvenile residents' computer and internet use. Thus, from Grievant's perspective the Agency did not have any further need for a resume.⁴⁵ There does not appear to have been any further inquiry from the Agency for a resume from Grievant or attempt by the Agency to further engage in an interactive dialogue with Grievant about her limitations and potential accommodations or options. Indeed, the evidence showed that the Agency had advised Grievant that they intended for Grievant to work in the modified duty post until July 31, 2024. The preponderance of the evidence does not support a finding that Grievant refused to engage in an interactive process with the Agency.

To the extent the Agency argued that Grievant did not meet her burden of proving that the Agency misapplied policy because Grievant did not prove that there were reasonable accommodations available that would have allowed her to perform the essential functions of her job, this Hearing Officer is not persuaded that Grievant was

⁴³ Hearing Recording at 2:55:16-3:01:32.

⁴⁴ Grievant Ex. at 57.

⁴⁵ Hearing Recording at 1:49:35-1:50:31, 3:12:43-3:3:16:48.

required to make such a demonstration in this proceeding. The Agency was required to reasonably accommodate Grievant's physical limitations unless doing so would impose an undue hardship on the Agency's operations. To the extent the Agency could not provide Grievant with the specific accommodations she requested or questioned whether any accommodations would allow Grievant to continue to perform the essential functions of her job, the Agency was required to engage in an interactive process with Grievant to understand her limitations and consider whether or how the Agency may be able to reasonably accommodate those limitations. Such a requirement was on-going as both Grievant's limitations and the Agency's needs changed. In this case, the preponderance of the evidence showed that, although the Agency initially temporarily provided Grievant with the accommodations she requested, the Agency failed to continue to engage in the process needed to adjust to Grievant's changing limitations and then the Agency's changing needs.

The preponderance of the evidence showed that the Agency's separation of Grievant from employment was a misapplication of policy. The evidence showed that Grievant was a person with a disability who was qualified for her position as an LPN. The Agency misapplied policy when it separated Grievant from employment rather than first engaging Grievant in a process to review her specific physical limitations and the essential functions of her job to determine whether there were accommodations that may have enabled Grievant to continue to perform the essential functions of an LPN without imposing undue hardship on the Agency's operations. Based on the evidence presented, it is reasonable to infer that, if the Agency had not misapplied policy, Grievant could have continued to perform the job duties of an LPN with reasonable accommodations until at least July 31, 2024, consistent with the Agency and Grievant's expectations as to when Grievant's health care providers would again review her medical condition and limitations.⁴⁶

Grievant argued that the Agency also engaged in disability discrimination and retaliation and violated her rights under the Family and Medical Leave Act (FMLA) with respect to her requests and inquiries related to time away from work to address mental health issues and to undergo surgery during April and May of 2024. Grievant testified that she believed that each time she inquired about her need for time off from work related to medical and mental health issues she was inappropriately told that she would be placed on long-term disability and separated from the Agency.⁴⁷ There was insufficient evidence for this Hearing Officer to understand the context of the information Grievant may have been provided by the Agency as it related to her employment benefits, particularly since the few emails provided indicate that Grievant was having multiple telephone conversations with various Agency staff who were not called upon to provide evidence during the hearing. Although it appears that at least the written communications were not very clear as to Grievant's options to utilize approved and available leave consistent with her status on LTD-W status and the Family and Medical Leave Act, this Hearing Officer cannot determine that the evidence presented shows discrimination, retaliation, or a violation of Grievant's rights under the Family and Medical Leave Act. Further, the preponderance of the evidence does not show a causal connection between the Agency's

⁴⁶ Agency Ex. 57-64

⁴⁷ Hearing Recording at 1:51:40-1:52:55, 1:56:15-1:59:45, 2:33:45-2:37:10, 2:48:45-2:55:16, and see Agency Ex. at 36, 56, 65-70.

responses to Grievant's inquiries about time off for mental health and a surgery and the Agency's decision to separate Grievant from employment when the modified duty position was no longer available.

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 Grievant with **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

Based on the evidence presented, it is reasonable to infer that Grievant could have continued to perform the job duties of an LPN with reasonable accommodations until at least July 31, 2024. Therefore, the Agency is directed to provide Grievant with **back pay through July 31, 2024**, less any interim earnings accrued during that period.

Although the Hearing Officer is reinstating Grievant, it is not clear, based on the information provided during the hearing, whether Grievant currently is able to perform her work duties with or without reasonable accommodations. Consistent with this decision, the Agency is directed to engage in an interactive process to determine the extent of Grievant's current limitations and whether there are reasonable accommodations that would allow Grievant to perform the essential functions of her job without imposing an undue hardship on the Agency's operations.

To the extent Grievant appeared to request relief in the form of damages for "pain and suffering," such relief is not within this Hearing Officer's authority to grant.

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.⁴⁸

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

⁴⁸ 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.