



JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA
Department Of Human Resource Management
Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219
Tel: (804) 225-2131
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of the Department of General Services
Ruling Number 2024-5728, 2024-5730
August 2, 2024

The grievant and the agency have both requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review the hearing officer's decision in Case Number 12092. For the reasons set forth below, EDR remands the decision for further consideration by the hearing officer consistent with this ruling.

FACTS

The relevant facts in Case Number 12092, as found by the hearing officer, are as follows:¹

Approximately eight years ago, Medical Provider-1 diagnosed Grievant with Attention-Deficit Hyperactivity Disorder (ADHD). Grievant testified that one of the limitations that he experiences as a result of ADHD is memory loss impacting working memory. As Grievant described it, he has trouble moving information from his short-term memory into his long-term memory.

Prior to his dismissal, Grievant was a Financial Services Specialist I with the Agency. Grievant started in that position with the Agency on December 10, 2021.

[. . .]

Manager, Assistant Controller and Controller testified that the Agency considered Grievant's position to be a professional level position that would require little training. The expectation was that someone hired into the position would have sufficient base knowledge and experience to perform the work with limited training to help familiarize the employee with issues and processes that may be unique or specific to the Agency. When Grievant began his job with the Agency, Manager first trained Grievant on the responsibilities of his job related to General Ledger Accounting, Grant Reporting and some of the responsibilities related to Financial

¹ Decision of Hearing Officer, Case No. 12092 ("Hearing Decision"), June 12, 2024, at 2, 4-12, 14, 16, 17, 19-20, 25-26 (footnotes omitted).

Reporting, including training on the computer systems the Agency utilized. Manager testified that he trained Grievant on those core responsibilities of Grievant's job for approximately two months.

Grievant testified that this job was difficult, but that he believed he could learn the job if he was given enough time to do so. Grievant testified that when he took the job, he believed that he was bringing a lot of base knowledge to the position; however, he found that the functions of other accounting positions he had held had not been as detail-oriented and computer-driven as this job.

Although Grievant asserted that he had advised Manager in February 2022 of his ADHD diagnosis, Manager testified that Grievant made Manager aware of Grievant's memory issues around May 2, 2022 when Manager advised Grievant that he was nearing his six-month review and Manager hoped to see improvement in Grievant's performance. Manager testified that after Grievant told Manager about his issues with memory loss, Manager spoke with staff in the Agency's Human Resources office. Based on their advice, Manager then advised Grievant that if Grievant needed accommodations due to his memory issues, he should contact the Agency's Human Resources Office.

On August 17, 2022, Manager met with Grievant and provided Grievant with a copy of Grievant's Employee Work Profile, which apparently had not been provided prior to that time. Manager also discussed the importance of meeting deadlines, anticipated training with Grievant, and reminded Grievant that he should "initiate when help is needed." Manager also advised Grievant that he was rescinding one of Grievant's telework days because Manager believed that would provide better opportunity for Manager to train Grievant and for Grievant to ask questions of Manager and get assistance when he needed it.

Grievant advised Manager at that time that:

. . . What I would like to request from you is a little more specificity

In other words, beside each of the lines of responsibilities, I need for you to share with me specifically what each line references and how you will objectively evaluate my success/failure of success in fulfilling that responsibility.

I do not do well with generalities and anything else can lend itself to subjectivity.

I like working at [Agency-Office] as the [Accounting Analyst]. I am totally capable of working this job. Nothing we do is difficult.

For my performance to be anything less than successful is not because “I” do not make a successful effort or cannot do the job successfully.

On or about August 25, 2022, Grievant received a Notice of Improvement Needed/Substandard Performance form documenting specific performance deficiencies and areas for improvement. The Notice of Improvement/Substandard Performance identified the following areas for improvement:

- Grant Reimbursements
- Applying thorough knowledge to identify, research and resolve reconciling discrepancies. Correct application to understand and identify when correcting journal entries are needed.
- SPCC Allocations
- Length of time required to perform job duties should be consistent as outlined in the EWP.
- Initiating requests for assistance when it is required.
- Responding to emails promptly
- Unprofessional email communications and professional office communications

On February 9, 2023, Grievant received a performance evaluation¹⁴ indicating that Grievant had earned an overall rating of Contributor. With respect to the General Ledger core responsibility, Manager rated Grievant a Contributor but noted that there were areas where Grievant’s performance needed to improve.

On June 22, 2023, Grievant received a Group I Written Notice of disciplinary action for unsatisfactory performance. The Written Notice described Grievant’s unsatisfactory performance as follows:

You were hired on 12/10/21, and have made slow progress. In particular, you can explain instructions but your work product does not demonstrate that you know how to apply the required financial knowledge. In response to my questions, you have told me at different times that 1. You know how, 2. Then that you weren’t able to because it wasn’t what you thought it was, 3. You have never done it all, etc. You have indicated having a CPA but your work product does not reflect that required knowledge and application of that knowledge. You have cited information systems issues; however, you have been in your position for a sufficient amount of time to use your accounting knowledge and system knowledge to ensure error-free work. On 2/15/23, I reminded you to monitor cash and appropriations. On 2/23/23, I discovered that [Fund] was lacking in cash. On 2/24/23, you stated that you saw where the fund could be coming up short the following week but it happened

quicker than you expected. You had not taken steps to avoid this from occurring. Cash and appropriations must be frequently monitored to avoid these situations. You additionally have still submitted incorrect journal entries despite training in January 2023, an overview of the journal entry process in February 2023 and additional training on journal entries on 2/6/23. While you have shown some improvement while being on a Notice of Improvement Needed plan, your performance has not demonstrated the necessary decision-making skills for a professional accounting staff member.

In the Circumstances Considered for the Written Notice, Manager noted that Grievant additionally “noted a disability yet despite my communication with [Grievant] to contact Human Resources regarding any needed accommodations, [Grievant] failed to do so. [Grievant] indicated [Grievant was] reluctant to go to HR but offered no plausible rationale for not following through.” There was no evidence to suggest that Grievant grieved the Group I Written Notice.

It does not appear that Grievant requested an accommodation for a disability until June 30, 2023. Grievant completed an Employee Request for Accommodation Form identifying his disability as: “Diabetic & Attention-Deficit/Hyperactivity Disorder (ADHD) in Adults.” Grievant identified the accommodations for ADHD that might enable him to perform the essential functions of his job as:

Time & freedom to ask questions without fear of reprisal as has been expressed on occasions. If I know something, I know that thing. I may not need to ask questions and I won’t. However, since I may not be fully comfortable with my own knowledge base, sometimes I need either reassurance that I understand what has been previously taught[] OR I may only need to sharpen up on a small additional point without fear. Sometimes, a process is so infrequent, I may not remember all the details of a process. Again, I shouldn’t fear having to ask for reminders, which is often, the only guidance I may need. With all this said, once my brain has moved information to my long term memory, I have rarely, in the past needed extra accommodation.

On the portion of the Employee Request for Accommodation Form that asked whether the request for accommodation was time-sensitive, Grievant stated:

In recent months, I have already endured informal notices, a Notice of Due Process (NDP), and even, a Level One employment punishment (Level 1). The NDP was issued in April, 2 days before leaving on medical short-term disability (STD). . . .

So yes, this is time sensitive as now I'm under the "gun" to correct issues that were included in both the NDP and Level 1. Since I have mentioned on more than at least 1/2 dozen occasions about my ADHD disability, it doesn't seem to have mattered? Even in the Level 1, it was acknowledged that I had mentioned this fact. So yes, I am fearful and afraid to have come back to work as a direct result of such techniques, even when management was aware, and by default, DHRM/DGS, they still deemed it fit and necessary to issue such DHRM documents. Makes me angry & sad because it didn't have to be this way.

Grievant also completed a Medical Release for Information form dated June 30, 2023. Grievant completed the form to allow the Agency to contact Primary Care Physician to obtain information relating to his "Diabetic & Attention-Deficit/Hyperactivity Disorder in Adults" and its functional limitations for the purpose of evaluating Grievant's request for accommodation.

On July 17, 2023, HR Generalist sent Grievant an email advising him that she was "still waiting on the signed form allowing [the Agency] to contact [Medical Provider-1]." HR Generalist also advised Grievant that:

I also wanted to follow up on the unsolicited email that you sent to me that contained confidential medical information attached. We did not request, nor would we ever request such information as it is inappropriate. The entire email and related attachment have been deleted and will not be retained by the Human Resource Office. In the future, we ask that you not send such information or related information unless requested. Thank you for understanding.

Grievant replied to HR Generalist on July 18, 2023. In his emailed reply, Grievant indicated that, when he returned to the office on July 19, 2023, he would send her a copy of the form authorizing the Agency to contact Medical Provider-1. Grievant also acknowledged that he may not totally understand the process and further stated "[a]t least, I have a copy of the report, which is a document I've wanted for personal reference. Also, I have at least contacted him; know that he had my record; & has such a document to reference."

On July 19, 2023, Grievant met with HR Generalist to discuss concerns related to alleged bullying and abusive actions by Manager. Based on the emailed summary of the meeting prepared by HR Generalist, Grievant stated that he "felt that [Manager] shouldn't be such a bully when providing instructions or instruction to find other resources for questions and that sometimes [Manager] can talk in a short and aggressive tone that [Grievant] felt was abusive." But, according to HR Generalist's emailed summary, Grievant was unable to provide more detailed information of the specific instances he referenced.

Grievant also mentioned to HR Generalist at that time that he was “told that maybe [Grievant] should find another job and that [Grievant] was sometimes scared to go to [Manager] because he could be short with [Grievant].” But, again, Grievant was unable to provide more detailed information of specific examples to HR Generalist at that time.

The Agency granted Grievant’s request for accommodations related to his diabetes on September 18, 2023. The Agency also advised Grievant at that time that it had not received information it had requested from his medical provider regarding Grievant’s request for accommodation related to the ADHD diagnosis. HR Generalist advised Grievant that: “we have not received the information that I requested from the doctor to be submitted to me. You may want to follow up with him to check on the status and let the office know we are awaiting correspondence from their office.” On September 18, 2023, Grievant completed a signed Medical Release for Information to allow Agency to contact Medical Provider-1 to obtain information relating to Grievant’s ADHD and its functional limitations in order to evaluate Grievant’s request for reasonable accommodations.

On October 11, 2023, the Agency notified Grievant that it was provisionally approving Grievant’s request for accommodation related to ADHD. The accommodation that the Agency provisionally approved was: “Detailed training and one-on-one training for new and sometimes older task that aren’t done frequently and an allotted amount of time to learn the task.” The Agency noted that:

[Medical Provider-1] did confirm your diagnosis of AttentionDeficit/Hyperactivity Disorder (AD/HD) from an evaluation that was diagnosed more than eight years ago and did feel that his ‘best guess’ would be that they would continue to be present. He also stated that the requested accommodations of detailed training and one-on-one training for new and sometimes older task that aren’t done frequently and an allotted amount of time to learn the task appear to be reasonable. These accommodations are currently being provided to you by your supervisor as needed.

In order for your request to be an ongoing accommodation, we will need updated form from your physician that provide a current diagnosis and complete the physician form that we provide for them to answer questions regarding your physical or mental impairment and reasonable accommodations.

When the Agency provisionally approved Grievant's request for accommodation, the Agency noted that “[t]hese accommodations are currently being provided to you by your supervisor as needed.”

On November 2, 2023, Grievant received his Annual Performance Evaluation for the 2022-2023 performance year. Grievant received an overall rating of Below Contributor. Grievant did not grieve the Annual Performance Evaluation.

90-Day Re-Evaluation Plan

The Agency created a 90-Day Re-Evaluation Plan for Grievant for the period November 15, 2023, through February 13, 2024. The Re-Evaluation Plan was provided as a memo from Manager to Grievant dated November 15, 2023. The Re-Evaluation Plan set forth the following instructions and expectations for Grievant:

The purpose of this document is to establish a 90-day re-evaluation plan, including timeline and performance expectations following receipt of your below contributor rating for the 2022/2023 performance cycle. You are expected to meet all expectations outlined below:

- Reconciliations are to be accurately processed by the 25th of each month.
- Any reconciliation variance should be thoroughly analyzed, properly identified, and accurately recorded.
- All correcting journals are to be based on sound decision making and should be accurately recorded by the 25th of each month.
- All GL data should be adequately analyzed bi-weekly and provided to Manager by noon on Wednesdays.
- Monthly depreciation entry is to be properly completed by noon, the day after Cardinal's final close.
- Monthly P&L statements are to be correctly prepared and reviewed by the 20th of each month.
- Accrual cash reconciliation should be properly planned and analyzed to make a sound decision as to what steps are required to accurately correct each month prior to completing the P&L statement.
- SPCC allocations are to be completed each month with marginal errors by the 15th of each month.
- Grant Reimbursements are to be accurately prepared, reviewed, and submitted by the 20th of each month.
- MELP packages are to be accurately prepared and submitted within 3 workdays of receipt.
- MELP master file is to be updated no later than 3 workdays after receipt of payment schedule.
- Must maintain a high level of customer service by responding promptly to email and telephone messages.

- Must be able to adapt to changes without a delay in workflow or performance.

During the re-evaluation period, you must take steps to improve your performance. We will meet every two weeks with a final review approximately two weeks prior to the end of your re-evaluation period (February 13, 2024). If you are unable to perform at a contributor level during the re-evaluation period, the agency will consider options available under the Department of Human Resources Management (DHRM) Policy 1.40, Performance Planning and Evaluation for non-contributors, including termination of employment or demotion/transfer if there are any available positions at that time for which you are qualified. Under demotion/transfer, this includes a reduction in pay. I have attached a copy of the DHRM Policy 1.40, Performance Planning and Evaluation for your review.

To ensure you remain on track and meeting criteria, we will continue to meet and will provide you a review of your progress. Please feel free to see me to discuss further if you have any questions.

Grievant signed the 90-Day Re-Evaluation Plan on November 15, 2023. Manager signed the 90-Day Re-Evaluation Plan on November 14, 2023, and Assistant Controller, the Reviewer, signed the Re-Evaluation Plan on November 13, 2023.

Throughout the re-evaluation period, Manager met approximately bi-weekly with Grievant to discuss Grievant's work performance, including reviewing Employee Review Reports that Manager completed. In these meetings, Manager noted, with explanatory comments and recommendations, whether Grievant had met expectations for each of the review areas set forth in the Re-Evaluation Plan. Based on the Employee Review Reports, Grievant's performance appeared to be inconsistent during the re-evaluation period. Additionally, with respect to Grievant's performance in certain review areas, Manager's comments or observations were repeated multiple times during the review period.

Employee Review Report – November 15 - 29, 2023

The Employee Review Report for the review period November 15-29, 2023, noted that Grievant met expectations in one review area, and did not meet expectations with respect to the following review areas: "Analysis of General Ledger Data" and "Accrual Cash Recon." The report noted that there was no basis for review of six of the nine review areas during the review period.

[. . .]

Employee Review Report – November 30 – December 13, 2023

The Employee Review Report for the review period November 30-December 13, 2023, noted that Grievant met expectations in one review area (“SPCC Allocations”), that there was no basis for review of two review areas, and that Grievant failed to meet expectations in the remaining six of the nine listed review areas, including “Reconciliations and Variances,” “Correcting Journal Entries,” “Analysis of General Ledger Data,” “Depreciation Entry,” “P&L Statements,” and “Accrual Cash Recon.”

[. . .]

Employee Review Report – December 14, 2023 – January 3, 2024

The Employee Review Report for the review period December 14, 2023 – January 3, 2024, noted that Grievant was meeting expectations during that review period in five of the nine review areas, but continued to have trouble meeting expectations in the areas of “Analysis of General Ledger Data” and “P&L Statements.”

[. . .]

Employee Review Report – January 4 – 10, 2024

The Employee Review Report for the review period January 4 – 10, 2024, noted that Grievant was meeting expectations during that review period in four of the nine areas of review, but continued to have trouble meeting expectations in the areas of “Analysis of General Ledger Data” and “P&L Statements.”

[. . .]

Employee Review Report – January 11 – 24, 2024

The Employee Review Report for the review period January 11-24, 2024, noted that Grievant met expectations in four areas of review, but did not meet expectations in four of the nine listed review areas during that period, including the following: “Reconciliations and Variances,” “Analysis of General Ledger Data,” “P&L Statements,” and “Accrual Cash Recon.”

[. . .]

Assessment by Medical Provider-2

On January 22, 2024, Medical Provider-2 provided Grievant with a letter that stated:

[Grievant] recently completed psychological testing with the undersigned. Previous psychological testing concluded that he was diagnosed with F.90 Attention Deficit Hyperactive Disorder. Results of the most recent assessment did not show the same impairment. However, he appears to have difficulty with working memory and processing speed that likely impact his work process. It is suggested that he be given 1.5 the amount of time to complete tasks and be allowed to have short breaks between tasks. He also would benefit from having 1:1 meetings with his supervisor to review problems and details.

On January 23, 2024, Grievant emailed HR Generalist to provide her with the letter from Medical Provider-2. In his email, Grievant stated:

Regarding the letter you sent to me, 10.11.2023, you requested an up-to-date psychological evaluation. It took a while to get the appointment; go through the testing; and having the report meeting on the testing. Please see the attached from [Medical Provider-2]. If you choose to obtain additional information directly, I'd encourage you to contact [Medical Provider-2] at [Medical Practice-2]. . . .

I believe the results are consistent with the prior report of qualities that impair my memory's ability to function at a preferred level.

Accommodation is still requested.

I am learning my job and have gone through the most difficult parts of learning the job and attention to the detail the manager desires. Yes, it's been a challenge but I believe that I am slowly but surely working through the 90-Day Evaluation the Manager has established.

HR Generalist replied to Grievant the next morning, first to confirm that the date on the letter from Medical Provider-2 was incorrect and should have been dated January 22, 2024, rather than January 22, 2023. HR Generalist replied to Grievant a second time on January 24, 2024, to clarify her understanding of Grievant's request for accommodation. She wrote:

Per the attached letter, dated October 10, 2023, your request for an accommodation was provisionally approved for detailed trainings,

one-on-one training for new and sometimes older task that aren't done frequently and an allotted amount of time to learn the task. From my understanding your supervisor has been providing you the training as needed and provided you time to learn the necessary task as needed.

I am not aware of any additional accommodation request. If I have missed something, please let me know.

Re-Evaluation Performance Evaluation

On January 31, 2024, Manager re-evaluated Grievant and provided Grievant the Re-evaluation Performance Evaluation with an overall rating of Below Contributor [. . .]

[. . .]

Manager provided Grievant with a Notice of Contemplated Termination from Employment dated January 31, 2024. In the Notice of Contemplated Termination memorandum, Manager advised Grievant that: "Following careful[] consideration of your performance during the re-evaluation period, I have determined that you have not made significant progress to achieve an overall contributor rating, where your performance remains at the below contributor level of performance as detailed on the re-evaluation provided to you today." Manager also advised Grievant that:

By policy, an employee whose performance is not improving and remains at the overall below contributor level may be demoted or reassigned, may have duties reduced, or terminated if no alternatives are identified. I have worked with and discussed these possible options with the Human Resources Office and with Division Management, and no alternatives to termination were identified. As a result, I am contemplating terminating you from employment unless you provide a satisfactory or sufficient reason to mitigate this action.

Because the consequences of your overall below contributor re-evaluation could result in the termination of your employment, you are being afforded an opportunity to respond before a final decision is made. I ask that you provide me with a written statement responding to this notice no later than 3:00 PM on February 2, 2024 providing mitigating circumstances, and any and all other factors you would like to be considered, and a discussion of how you could become successful in your position before a final determination is made. If you elect not to provide me with a written statement, I will

make my decision based on the information available to me at that time.

You are being granted and are being placed on Administrative Leave with pay to allow you time to focus on and prepare your response to this notice. You should return to the office on Monday, February 5, 2024.

Grievant provided his written response to the Notice of Contemplated Termination from Employment by the February 3, 2024, deadline. Grievant asserted in his response that:

I am only requesting, by definition in the law and policies, reasonable accommodation, which is not an unreasonable request given my mental condition. I was conditionally approved for accommodation upon receiving [Medical Provider-1's] report and subsequently, permanently accepted upon receiving [Medical Provider-2's] report.

Nothing has changed except the pressure put upon me by management during this period after I had made you aware of my condition.

...

I'd like to continue the once/twice a month one-on-one meeting with the manager. It has been specifically very helpful. I showed gradual if not continual improvement during this time of the 90-day Evaluations. It's what I needed and as [Medical Provider-2] suggested, need to do.

As time has passed, I may not meet 100% of the manager's expectations, but I've made good progress and am becoming more comfortable in performing my job responsibilities.

Pursuant to the re-evaluation and the grievant's response, the agency terminated the grievant's employment, effective February 5, 2024.² The grievant timely grieved the termination and a hearing was held on May 3, 2024.³ In a decision dated June 12, 2024, the hearing officer determined that the agency's re-evaluation was neither arbitrary nor capricious, nor did they find that the re-evaluation or termination violated the Americans with Disabilities Act ("ADA"). Therefore, the hearing officer upheld the termination.⁴ However, the hearing officer also found

² Agency Ex. 2 at 1-2; Hearing Decision at 1, 26.

³ See Hearing Decision at 1. After the grievant filed his grievance on February 7, the agency requested a compliance ruling from EDR regarding the grievant's articulation of the issues grieved. On February 23, EDR determined that the grievance was in compliance. EDR Ruling No. 2024-5673; see Hearing Decision at 1.

⁴ Hearing Decision at 26-27, 30-33.

that the agency terminated the grievant's employment earlier than was permitted by DHRM Policy 1.40 and ordered back pay and benefits "to the extent the Agency prematurely removed him from employment."⁵

The agency and the grievant now appeal the hearing decision to EDR.

DISCUSSION

By statute, EDR 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."⁶ If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.⁷ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁸ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Agency's Request for Administrative Review

In its request for administrative review, the agency disputes the hearing officer's decision to award "back pay and benefits to the extent the Agency prematurely terminated [the grievant's] employment,"⁹ arguing that the agency properly interpreted DHRM Policy 1.40, *Performance Planning and Evaluation*, in its decision to terminate the grievant prior to the end of the 90-day re-evaluation period. The relevant portions of the policy are as follows:

If Performance Does Not Improve: If the employee receives a re-evaluation rating of "Below Contributor," the supervisor shall demote, reassign, or terminate the employee by the end of the three (3)-month re-evaluation period.

...

Terminate: If the agency determines that there are no alternatives to demote, reassign, or reduce the employee's of duties, termination based on the unsatisfactory re-evaluation is the proper action. The employee who receives an unsatisfactory re-evaluation will be terminated at the end of the three (3)-month re-evaluation period.¹⁰

The agency asserts that while the language of the highlighted portions of Policy 1.40 are ambiguous, it is their interpretation that an employee who receives an unsatisfactory re-evaluation

⁵ *Id.* at 27-29.

⁶ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁷ See *Grievance Procedure Manual* § 6.4(3).

⁸ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁹ Hearing Decision at 29, 33.

¹⁰ DHRM Policy 1.40, *Performance Planning and Evaluation*.

shall be demoted, reassigned, or terminated *by the end* of the three-month re-evaluation period. The agency also noted in its request for administrative review, as well as in witness testimony, that they consulted with DHRM Policy Administration staff and were told that the policy allows for termination prior to the end of the re-evaluation period.¹¹

Here, the agency initiated a three-month re-evaluation plan scheduled to run from November 15, 2023, through February 13, 2024, with the grievant's supervisor meeting with the grievant to discuss progress every two weeks.¹² On January 31, 2024, approximately two weeks before the plan was set to conclude, the supervisor provided a final re-evaluation rating of "Below Contributor."¹³ That same day, the supervisor provided the grievant a notice of contemplated termination, and after allowing the grievant to respond, the termination was effective February 5.¹⁴ In their decision, the hearing officer applied DHRM Policy 1.40 to these facts as follows:

The policy clearly states that "The employee who receives an unsatisfactory re-evaluation will be terminated at the end of the three (3) month re-evaluation period." In this case, the Agency advised Grievant that the re-evaluation period would end on February 13, 2024, and neither the Agency nor any policy provision put Grievant on notice that the Agency may terminate his employment based on his performance during the re-evaluation period at some time before that date. Grievant is entitled to back pay and benefits to the extent the Agency prematurely removed him from employment.¹⁵

Upon review of Policy 1.40, EDR agrees with the agency's contention that the policy is at least ambiguous. While the hearing officer cites a portion that uses the phrase, "*at the end of the three (3) month re-evaluation period,*" the same policy also uses the phrase "*by the end of the three (3) month re-evaluation period.*"¹⁶ EDR has also been informed by DHRM's Policy Administration staff that it interprets DHRM Policy 1.40 to permit the termination of the grievant at the time chosen by the agency in this case. In essence, "*at the end*" of the three-month re-evaluation period is interpreted to include the approximate two-week period "*prior to the end*" of the three-month re-evaluation period when the re-evaluation occurs. Accordingly, EDR remands the matter for reconsideration of the hearing officer's conclusions of policy, in light of the policy interpretation herein, as to the timing of separation under DHRM Policy 1.40 and award of back pay and benefits for the time between the grievant's termination and the end of the re-evaluation period.

Grievant's Request for Administrative Review

In his request for administrative review, the grievant challenges the hearing officer's finding that the agency properly provided the requested reasonable accommodations to the grievant, arguing that reasonable accommodations were in fact never provided to him. The grievant

¹¹ Hearing Recording at 5:04:45-5:05:45 (Agency Human Resources Testimony).

¹² Hearing Decision at 9-10.

¹³ *Id.* at 20.

¹⁴ *Id.* at 25-26.

¹⁵ *Id.* at 29.

¹⁶ See DHRM Policy 1.40, *Performance Planning and Evaluation*.

also contests the hearing officer's finding that there was insufficient evidence to suggest bullying, harassment, or intimidation by the grievant's supervisor. Finally, he asserts that the re-evaluation and all other modes of disciplinary action since he first notified his supervisor of his mental impairment, as well as after he first reported alleged bullying by his supervisor, were retaliatory actions. As amended relief, the grievant no longer wishes to be reinstated with the agency, but requests that (1) EDR affirms that the agency violated the ADA and other applicable laws, (2) his state employment status reflects good standing with no break in service, (3) all disciplinary actions since January of 2022 be removed from his record, (4) he is provided compensation for his grievance, stress, and mental anguish (including punitive damages), (5) he will face no additional abusive, retaliatory, or negative consequences from his grievance, and (6) DHRM/EDR conducts training and explicitly enforces policies relating to ADA protections.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"¹⁷ and to determine the grievance based "on the material issues and the grounds in the record for those findings."¹⁸ Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.¹⁹ Thus, in disciplinary actions, the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.²⁰ Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based on evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Disability and Reasonable Accommodations

The grievant is primarily contending that despite the agency's testimony and the hearing officer's findings, the agency did not properly follow the administrative procedures required by the Americans with Disabilities Act ("ADA") to document a disability and provide requested reasonable accommodations.

As a general rule, the ADA requires an employer to make reasonable accommodations to the known physical or mental limitations of a qualified employee with a disability, unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business [or government]."²¹ A "disability," as defined in accordance with the

¹⁷ Va. Code § 2.2-3005.1(C).

¹⁸ *Grievance Procedure Manual* § 5.9.

¹⁹ *Rules for Conducting Grievance Hearings* § VI(B).

²⁰ *Grievance Procedure Manual* § 5.8.

²¹ 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a) ("It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.").

ADA, may refer to “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment”²² “Reasonable accommodations” include “[m]odifications or adjustments that enable [an employee] with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.”²³

As a preliminary matter, the grievant, in his appeal, asserts that the agency has questioned the legitimacy of the grievant’s disability or mental impairment as its basis for arguing a reasonable accommodation was not required. Based on EDR’s review of the hearing recording, while not a primary contention in their argument, the agency at multiple times during the hearing questioned whether the grievant had any mental impairment at all.²⁴ For instance, the agency would draw the conclusion that because the grievant’s most recent medical documentation states that he “does not have the same impairment” (referring to when he was last diagnosed with ADHD eight years ago), he must have no mental impairment at all.²⁵ The agency also went as far as to suggest the grievant believes or wishes he has an impairment.²⁶

While the agency asserts that they are not attempting to diagnose an impairment themselves and are merely interpreting what is said in the recent medical documentation, it is still clear prior to the hearing decision that whether the grievant has an impairment is a factual dispute. The medical documentation, while it confirms the grievant no longer has ADHD, indicates that the grievant still “appears to have difficulty with working memory and processing speed that likely impact his work process.”²⁷ The language of ADA’s “disability” definition clearly does not require an official diagnosis to be considered a qualified individual, so long as there is a mental impairment that substantially limits one or more major life activities. The medical documentation seems to state that the grievant still has some form of mental impairment that affects his ability to work, and the hearing officer’s findings of fact include multiple citations to the grievant’s testimony about his limitations. Therefore, while there does not appear to be an explicit finding in the hearing decision as to whether the grievant was an individual with a disability for ADA purposes, the fact that the hearing officer analyzed the ADA at all suggests the hearing officer determined that the grievant’s condition fell within the ADA’s definition of “disability” and we have no legitimate basis to dispute that determination.

Regardless, this issue has little bearing on this review because the ultimate issue comes down to whether the grievant properly requested reasonable accommodations and whether the agency granted those accommodations. The hearing officer found that the grievant “[did] not [meet] his burden of proving that the Agency failed to provide him with a reasonable accommodation or that his dismissal was due to the Agency’s failure to reasonably accommodate

²² See 42 U.S.C. §§ 12101 through 12213, 12102(1).

²³ 29 C.F.R. § 1630.2(o)(1)(iii); see 42 U.S.C. § 12111(9)(B).

²⁴ See, e.g., Hearing Recording at 47:15-47:45 (Agency Human Resources Testimony), 6:46:30-6:46:55, 6:48:30-6:48:50 (Grievant Testimony), 7:24:00-7:24:30, 7:29:40-7:30:20 (Agency Closing).

²⁵ See *id.* at 6:48:30-6:48:50 (Grievant Testimony); Grievant Exs. at 163.

²⁶ See *id.* at 7:24:00-7:24:30 (Agency Closing).

²⁷ Grievant Exs. at 163.

his disability.”²⁸ EDR finds there is sufficient evidence in the record to support this determination. After a thorough review of the evidence and the hearing recording, it appears that the only accommodations the grievant requested were more frequent, more personal training sessions from his supervisor, more time to complete tasks with opportunities to ask questions, specificity in instructions, and repetition to develop the skills necessary to complete his assigned tasks.²⁹ The grievant asserts in his testimony that the training provided by his supervisor to meet these requests was insufficient.³⁰ However, the agency presented substantial evidence and testimony to affirm that the grievant’s supervisor has sufficiently provided these requested accommodations, allowing for more one-on-one training, often extending deadlines, and allowing for the grievant to ask any questions he had in how to carry out his tasks.³¹ The supervisor added that he was doing everything in his ability to assist the grievant, stating that he was essentially working two jobs in doing so.³² Thorough documentation of this extensive training is reflected in the supervisor’s notes throughout the 90-day re-evaluation plan.³³

Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Weighing the evidence and rendering factual findings is squarely within the hearing officer’s authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.³⁴ The hearing officer properly weighed conflicting evidence and testimony and made a determination in their findings as to this issue, and EDR finds no abuse of discretion in doing so.

Finally, the record shows that the agency appeared to properly follow the required ADA processes for documenting a disability/impairment and providing requested accommodations. To select 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.”³⁵ Under the ADA, an employer is not required to approve the exact accommodation requested by an employee if some other accommodation is available that will allow them to perform the essential functions of their position.³⁶

²⁸ Hearing Decision at 33.

²⁹ Hearing Recording at 6:27:20-6:33:45 (Grievant Testimony); Agency Ex. 20 at 2-3.

³⁰ Hearing Recording at 6:32:40-6:33:00, 7:10:50-7:11:20 (Grievant Testimony).

³¹ *See, e.g., id.* at 2:03:30-2:04:30 (Agency Supervisor Testimony) 5:23:30-5:23:50 (Agency Human Resources Testimony).

³² *Id.* at 1:51:25-1:51:40 (Agency Supervisor Testimony).

³³ *See generally* Agency Ex. 8.

³⁴ *See, e.g.,* EDR Ruling No. 2020-4976.

³⁵ 29 C.F.R. § 1630.2(o)(3).

³⁶ *See id.* pt. 1630 app. § 1630.9 (stating that an employer should conduct an individualized assessment of the employee’s limitations and the job, then “select and implement the accommodation that is most appropriate for both the employee and the employer.”).

The grievant contends in his appeal that he notified the agency of his impairment as early as February of 2022, he requested accommodations as early as August of 2022, and the agency had a responsibility thereafter to provide whichever accommodations were requested. However, the record shows that upon the grievant's supervisor first being told about the grievant's mental impairments (as early as May of 2022, according to the grievant's supervisor's testimony), the supervisor consulted about necessary steps with Human Resources, who told the supervisor that the grievant would have to formally request accommodations from Human Resources; the supervisor then conveyed this information to the grievant.³⁷ The hearing officer found that the grievant did not formally request accommodations until at least June 30, 2023, despite the grievant contending that he did so as early as August of 2022. The August 2022 request the grievant is referring to, in response to a Notice of Improvement Needed Form, shows the grievant suggesting ways in which his supervisor could better assist him in carrying out his duties, mentioning modes of additional support that were later formally requested, such as one-on-one training and specificity in instructions.³⁸ The grievant also mentioned his mental impairment and its effects in his due process notice response on April 14, 2023.³⁹ There do not appear to have been any further discussions of impairments that might have required accommodations until the grievant formally submitted an Employee Request Form for accommodations on June 30, 2023, as noted by the hearing officer.⁴⁰

Consistent with the ADA, DHRM policy encourages an informal process to determine which accommodations are needed once the agency is notified of an impairment. While the incidents the grievant mentions in August of 2022 and April of 2023 can perhaps be interpreted as informal requests for accommodations, even if we assume that the agency did not properly respond to these requests, the analysis of this case does not change. The question before the hearing officer was whether the grievant's re-evaluation and eventual termination occurred because the agency failed to provide reasonable disability accommodations.⁴¹ The record supports the notion that the grievant's supervisor often spoke to and worked with the grievant in determining how to best assist him in light of his impairments. In particular, the grievant's supervisor testified that he frequently talked with the grievant about his training needs and would even ask the grievant which accommodations he felt he needed once he was notified,⁴² in addition to referring him to Human Resources for a formal request.⁴³ The grievant's supervisor further testified that as early as 2022 he conducted thorough, personal training with the grievant to help him gradually learn how to carry out his required duties.⁴⁴

The remainder of the timeline regarding the accommodations request process does not seem to be in much dispute. Once the grievant submitted the request form, the agency did what

³⁷ Hearing Recording at 2:07:00-2:10:50 (Agency Supervisor Testimony), 5:07:50-5:09:00, 5:21:20-22:15 (Agency Human Resources Testimony).

³⁸ See Grievant Exs. at 93-95.

³⁹ *Id.* at 103-106.

⁴⁰ *Id.* at 111-112.

⁴¹ Hearing Decision at 8-9; see, e.g., Agency Ex. 8 at 1; Agency Ex. 20 at 8-9.

⁴² Hearing Recording at 2:16:40-2:18:10 (Agency Supervisor Testimony).

⁴³ *Id.* at 2:07:00-2:10:50.

⁴⁴ *Id.* at 43:15-49:30.

was required by notifying the grievant of the need for medical documentation before they could grant certain accommodations.⁴⁵ The grievant provided such documentation, but because it was several years old and agency precedent requires up-to-date medical documentation,⁴⁶ the agency provisionally granted the request so long as the grievant provided updated documentation as soon as possible.⁴⁷ After the grievant was able to find a doctor to carry out the required medical tests, he updated the agency with the new medical documentation.⁴⁸ In this communication, the grievant continued to contend that his requested accommodations were not being provided.⁴⁹ The grievant reasserted this contention in his testimony, arguing that the training provided by his supervisor was insufficient.⁵⁰

After a thorough review of this information, EDR cannot find a basis to suggest that the hearing officer abused their discretion to find that the agency properly followed the process for reviewing accommodation requests. The record supports the conclusion that the grievant's supervisor attempted to ask the grievant how he could accommodate him, as well as his more intensive, repetitive one-on-one training given for several months throughout the performance cycle. The hearing officer has the sole authority to weigh evidence and make findings of fact, and EDR holds that these findings are based on evidence in the record in this case. Therefore, we find no grounds to disturb the hearing decision's conclusions with respect to the grievant's ADA claims.

Bullying, Harassment, and Intimidation

The grievant claims that the hearing officer did not consider any evidence pertaining to alleged bullying, harassment, or intimidation by his supervisor. DHRM Policy 2.35 and its associated guidance make clear that agencies must not tolerate workplace conduct that is disrespectful, demeaning, disparaging, denigrating, humiliating, dishonest, insensitive, rude, unprofessional, or unwelcome. Thus, while these terms must be read together with agencies' broader authority to manage the means, methods, and personnel by which agency work is performed, management's discretion is not without limit. Policy 2.35 also places affirmative obligations on agency management to respond to credible complaints of prohibited conduct and take steps to ensure that such conduct does not continue.⁵¹ Accordingly, where an employee reports that work interactions have taken a harassing or bullying tone, Policy 2.35 requires agencies to determine in the first instance whether such perceptions are supported by the facts. Where an agency fails to meet these obligations, such failure may constitute a misapplication or unfair application of Policy 2.35 such that the harassing or bullying behavior is imputable to the agency.

⁴⁵ Hearing Decision at 7.

⁴⁶ Hearing Recording at 5:37:00-5:37:30 (Agency Human Resources Testimony).

⁴⁷ Hearing Decision at 8.

⁴⁸ *Id.* at 19.

⁴⁹ *Id.* at 19-20.

⁵⁰ *Id.* at 6:32:40-6:33:00 (Grievant Testimony); *see also* Hearing Decision at 31

⁵¹ Under Policy 2.35(D)(4), "[a]gency managers and supervisors are required to: Stop any prohibited conduct of which they are aware, whether or not a complaint has been made; Express strong disapproval of all forms of prohibited conduct; Intervene when they observe any acts that may be considered prohibited conduct; Take immediate action to prevent retaliation towards the reporting party or any participant in an investigation; [and t]ake immediate action to eliminate any hostile work environment when there has been a complaint of workplace harassment"

After a review of the record, EDR cannot find that the hearing officer's findings on this issue were inconsistent with the proffered evidence and testimony. In his testimony and appeal, the grievant specifically mentions a meeting he had with his supervisor on August 18, 2022, in which his supervisor apparently raised his voice, used a short, aggressive tone, suggested that the grievant may need to find another job, told him to leave his office, and created an intimidating environment to the point where the grievant felt discouraged to approach him in his office again.⁵² The supervisor testified that he may have raised his voice, but admitted that doing so was unprofessional, and asserted that he did not tell him to get out of his office or use a short, aggressive tone.⁵³ The supervisor added that after the grievant made him aware of the perceived intimidation, they had a "40-minute" discussion about it, as they have done in the past, and stated that he felt the conversation helped ease the concern.⁵⁴ Finally, the Human Resources representative testified that they were aware of the complaint the grievant filed regarding the alleged bullying, finding the complaint to be unfounded and that the supervisor's behavior was only an attentive mode of supervision.⁵⁵

Given all of this, EDR adheres to the findings of the hearing officer in relation to this issue posed by the grievant. First, while the supervisor admits he raised his voice, this alone would be insufficient to support a claim of bullying, especially considering that the supervisor met with the grievant extensively to discuss these concerns. As to the other claims that the supervisor denies, weighing contradicting testimony is a task reserved solely for the hearing officer, and nothing in evidence suggests an abuse of discretion in the hearing officer's findings on this issue. While the hearing officer could have perhaps mentioned that the grievant perceived bullying by his supervisor and that he reported the perceived bullying to Human Resources in their findings of fact, acknowledging these allegations would have no effect on the ultimate conclusions of policy. As will be discussed more in the following section, there is insufficient evidence to suggest that the agency's performance management actions were a part of a continuing pattern of bullying by the grievant's supervisor, as they were instead rooted in legitimate, performance-based reasons. As such, EDR declines to disturb the hearing decision as to the issue of perceived bullying, harassment, and intimidation.

Retaliation

Building on the claims of bullying, the grievant also challenges the hearing officer's determination that the agency's disciplinary actions were motivated by legitimate, non-retaliatory reasons. He argues that "management has constantly retaliated against [his] constant need to mention having a mental health disability and/or request for reasonable accommodation by responding with a disciplinary action." He specifically adds that the Notice of Improvement Needed Form received on or about August 25, 2022, was "retaliatory" based upon [a] complaint filed with HR on 8/18."

⁵² Hearing Recording at 36:30-38:30 (Grievant Testimony).

⁵³ *Id.* at 3:39:25-41:00 (Agency Supervisor Testimony)

⁵⁴ *Id.* at 3:41:00-3:42:00.

⁵⁵ *Id.* at 5:25:20-5:27:00 (Agency Human Resources Testimony).

The hearing officer did not find these retaliation claims to be supported by the evidence, finding that:

Grievant offered no evidence, however, to support any assertion that the Agency's dismissal was intended to punish him for having a disability or was otherwise discriminatory or retaliatory in nature. The Agency should be able to expect an employee to meet performance expectations for the position for which he was hired. The Agency had business reasons for its evaluation and dismissal of Grievant based on performance and Grievant offered no evidence that would suggest that those reasons were mere pretext for discrimination or retaliation.⁵⁶

In his appeal, the grievant presents no basis to disturb the hearing officer's key finding: that the 90-day re-evaluation was not arbitrary or capricious and that the agency's findings were rooted in well-documented analysis of the grievant's performance, regardless of any impairment that may have been affecting his performance.⁵⁷ For each two-week meeting throughout the 90-day re-evaluation, the supervisor provided extensive notes as to the grievant's progress in consideration of each outlined portion of the plan.⁵⁸ While the grievant contends that he was never given sufficient accommodations necessary to improve his performance, he nonetheless conceded in most of his responses to the two-week evaluation notes that the performance-based findings were valid.⁵⁹ The record therefore reflects the notion that the agency's performance management actions were rooted in legitimate, non-retaliatory reasons. In light of this finding, the grievant could prove retaliation only by showing that managing employee substandard performance was *not* the agency's true motive in issuing its dismissal. While the grievant contends that all disciplinary actions since he first notified his supervisor of his mental impairment were either in response to his impairment or his complaint made to Human Resources, the hearing officer's determination to the contrary is supported by evidence in the record. Conversely, regardless of the merit of the grievant's retaliation claims, the grievant has not shown that managing substandard performance was not the agency's true motive. As such, he has not presented a basis for EDR to disturb the hearing officer's determinations regarding his retaliation claim.

CONCLUSION AND APPEAL RIGHTS

We find no error in the hearing officer's assessment of the evidence in the record or their conclusion that the agency's evidence was sufficient to support the grievant's termination. Accordingly, the grievant's arguments do not present a basis to disturb the hearing officer's findings as to the agency's motive for re-evaluation and subsequent termination.

However, this matter is remanded for reconsideration of DHRM Policy 1.40, *Performance Planning and Evaluation*, and its interpretation as discussed herein. Both parties will have the

⁵⁶ Hearing Decision at 30.

⁵⁷ See *id.* at 9-19, 26-27. This finding is supported by evidence in the record. See, e.g., Agency Ex. 6-8, 16-17; Hearing Recording at 1:18:00-1:55:45 (Agency Supervisor Testimony that explains the entire 90-day re-evaluation process that was conducted).

⁵⁸ Hearing Decision at 11-19.

⁵⁹ *Id.*

opportunity to request administrative review of the hearing officer's reconsidered decision on any new matter addressed in the remand decision (*i.e.* any matters not resolved by the original decision). Any such requests must be **received** by EDR **within 15 calendar days** of the date of the issuance of the remand decision.⁶⁰

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.⁶¹ 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.⁶² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁶³

Christopher M. Grab

Director

Office of Employment Dispute Resolution

⁶⁰ See *Grievance Procedure Manual* § 7.2.

⁶¹ *Grievance Procedure Manual* § 7.2(d).

⁶² Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁶³ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).