



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 Juvenile Justice
Ruling Number 2025-5741
August 8, 2024

The Department of Juvenile Justice (the “agency”) has 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 12120. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

The relevant facts in Case Number 12120, as found by the hearing officer, are as follows:

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

The Employee Work Profile for Grievant’s position sets forth “Essential Duties” as follows:

- Public-facing position that requires in-person, face to face work with the public involving the screening and processing of domestic and delinquent intake complaints.
- Requires in-person work with juveniles and their families, both in the office and within the community, to include interviewing for social history court reports; application of screening and assessment tools; evaluative decision making, court report writing, case plan development, community probation and parole supervision, counseling, use of cognitive-behavioral interventions, crisis intervention; court coverage and presentations; service referrals, and case management.

An Equal Opportunity Employer

- Requires in-person home visits, facility visits, school visits, worksite visits, and administration of on-site drug testing; and participation in collaborative/multidisciplinary staff meeting.
- Requires periodic 24-hour on-call intake work, including after-hours (5:00 p.m. to 8:00 a.m.) and weekend duties. After-hour intake work may require office visits to assist law enforcement with intake processes.

The Employee Work Profile identified the Core Responsibilities for Grievant's position as: Screening, Assessment, and Report Writing (45%); Pre-Court and Post Disposition Case Management (15%); Probation Supervision (15%); Parole Supervision (5%); and Agency Values (20%).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Grievant's medical provider provided Grievant with a letter and a "Return to Work Form" dated February 15, 2024, that indicated that her medical provider had reviewed the employee work profile for Grievant's position and that Grievant

would be able to return to work on February 19, 2024, and be able to perform the duties enumerated in Grievant's EWP with no restrictions.

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

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

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

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

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

The Agency notified Grievant by memorandum dated February 22, 2024, that she was being placed on paid administrative leave effective February 20, 2024. The memorandum also advised Grievant that, while on administrative leave, she would have limited access to Agency facilities and that she would be authorized to visit Agency facilities only by appointment through the Agency's human resources office.

The psychologist the Agency hired conducted his evaluation of Grievant on February 26, 2024. Grievant testified that when she met with the psychologist, he began their discussion by telling her that he understood that she had been arrested after she had been found wandering in the street based on the referral information

he received, and the information provided by Unit Director. Grievant testified that she told the psychologist that information was untrue. Grievant testified that they had a “back-and-forth” about the fact in question that she said heightened her anxiety about the evaluation and set a bad tone for the assessment.

The psychologist provided the Agency with a four-page summary report entitled “Confidential – Fitness For Duty Evaluation Employer Report” dated March 5, 2024. The Report set forth the psychologist’s conclusion that, “[b]ased on all the data available as summarized and analyzed below, it is this evaluator’s opinion within a reasonable degree of clinical probability that the employee is unfit for duty.”

The data analyzed by the psychologist included the following “Referral Information:”

[Date of Birth]

[Gender]

Job Title: Probation Officer

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

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

The Report provided the following “Analysis:”

Based on the information available for review, the employee is not fit for duty at this time. She has a long history of a psychological condition with partial compliance to recommended treatment. She has left work many times to decrease stimulation and seek help. Over time, her work quality and personal appearance have deteriorated. In the collateral call, her supervisor [Unit Director] said her co-workers are wary of her and have drifted apart from her as her overall condition has deteriorated. He said she has deteriorated over time and she has never gotten back to her full level of prior functioning. At one time she was a very good employee.

In the evaluation situation she is pleasant and well-meaning. Her premorbid intelligence is well above average. Her current performance on cognitive tests shows inconsistent abstract thinking,

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

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

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

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

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

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

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

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

Functional limitations include problems with concentration and organizing thoughts. She would be unable to perform under deadlines, work cooperatively with coworkers, juveniles and their

families, maintain a professional appearance, tolerate conflict and emotionally stressful situations, and regulate her emotions.

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

None observed.

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

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

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

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

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

It is recommended that the employee engage in treatment through an IOP. It is recommended that once discharged from the IOP, the employee should engage in follow-up care with a psychiatric provider for medication management. The frequency of appointments is deferred to the psychiatric provider. She should also engage in follow-up care with a therapist for weekly individual therapy. All treatment providers should be provided with a copy of this report. Once released to return to work by her treating providers, she should be re-evaluated with a FFD evaluation.

In response to the Agency's expressed concerns that Grievant had influenced her assessment, Grievant's medical provider, provided Grievant with a

letter dated May 17, 2024. Grievant's medical provider made clear her assessment of Grievant:

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

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

Although Unit Director testified during the hearing that he had never read the psychologist's report, it appeared that, based on the psychologist's assessment, on or about March 12, 2024, the Agency advised Grievant that she had been determined to be unfit for duty, she could not return to work, and encouraged Grievant to pursue long term disability benefits. Grievant's last day of employment with the Agency was March 15, 2024.¹

On March 15, 2024, the grievant was removed from employment pursuant to a fitness for duty evaluation.² The grievant timely grieved her separation, and the agency head qualified the grievance for a hearing.³ Following a hearing on May 30, 2024, the hearing officer concluded that the agency's action was not consistent with applicable policy.⁴ As a result, the hearing officer ordered the agency "to reinstate Grievant to Grievant's same position prior to removal, or if the position is filled, to an equivalent position," and also to "provide back benefits including health insurance and credit for leave and seniority that the employee did not otherwise accrue."⁵ The agency now appeals 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 either 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.

¹ Decision of Hearing Officer, Case No. 12120 ("Hearing Decision"), July 8, 2024, at 2-10 (citations and footnotes omitted).

² *Id.* at 1.

³ *Id.*

⁴ *Id.* at 14.

⁵ *Id.*

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

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

⁸ Va. Code §§ 2.2-1201(13), 2.2-3006(A); see *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

In its request for administrative review, the agency argues that, because the hearing officer “found that the taint [in policy application] occurred in the manner in which the Fitness for Duty evaluation was carried out and not the decision to require the evaluation, that is the point where relief should have been granted.” The agency further contends that “reinstating the Grievant was premature as the Hearing Officer could not conclude, based on the evidence submitted, that the Grievant was able to perform her work duties.” Finally, the agency asserts that reinstatement is not possible because the grievant “has been on an approved Long-Term Disability since March 16, 2024.”

In finding that the agency misapplied policy in separating the grievant, the hearing officer reasoned as follows:

Although DHRM Policy 1.60 provides for separation when an employee is unable to perform the essential functions of their job, in this case, the Agency misapplied policy by separating the grievant based on the report of a third-party provider to whom the Agency had provided inaccurate, incomplete, and/or unverified information that may have foreseeably biased his analysis. . . .

Although the Hearing Officer is reinstating Grievant, it is not clear, based on the information provided, whether Grievant is able to perform her work duties. The Hearing Officer recommends that the Agency re-evaluate whether Grievant is able to perform the essential functions of her job.⁹

This conclusion appears to be consistent with the remedies contemplated in the *Rules for Conducting Grievance Hearings*, which provides that where a hearing officer finds that a policy has been misapplied, they “may order the agency to reapply the policy from the point at which it became tainted.”¹⁰ As to the agency’s view that policy should be reapplied at the point at which the fitness for duty evaluation was carried out, EDR perceives no discrepancy between this conclusion and what the hearing officer directed. That is, the hearing officer identified the agency’s separation of the grievant, in reliance on a flawed fitness-for-duty report, as the point at which the policy application was tainted. Therefore, the hearing officer ordered the agency to return the grievant to her employment status at the time that policy was misapplied, and then appropriately reapply any policies as necessary from that point – to include a re-evaluation of the grievant’s fitness for duty, as the agency deems necessary.

To the extent that the agency challenges reinstatement on grounds that the grievant is unable to perform her work duties, we cannot find that the hearing officer’s ordered relief is improper or otherwise unreasonable under the principles above. The hearing officer’s reinstatement order relates to the grievant’s employment *status*. It is not an order for the grievant to return to her job duties, as the hearing officer specifically stated that the evidence was inconclusive as to “whether Grievant is able to perform her work duties.”¹¹ Essentially, we interpret the hearing decision to order the grievant to be made whole in terms of her employment

⁹ Hearing Decision at 14.

¹⁰ *Rules for Conducting Grievance Hearings* § VI(C)(1).

¹¹ The omission of back pay from the relief ordered is also consistent with the hearing officer’s finding in this regard. *See* Hearing Decision at 14. Back pay would typically be awarded along with reinstatement on the presumption that the employee would have either been working or on *paid* leave, but for the misapplication of policy. Here, it appears the evidence may have called that presumption into question such that the hearing officer could not conclude that back pay was supported.

status and any benefits that the grievant would have accrued had she not been improperly separated. To the extent that the agency seeks to re-evaluate the grievant's fitness for duty pursuant to the hearing officer's recommendation before returning her to work, the hearing decision indicates that the grievant should be considered an employee during that process unless and until she is found not fit for duty, or unless her separation is supported by other circumstances that were not at issue before the hearing officer.¹²

Finally, it is not clear how the remedy ordered in this case would be frustrated by the grievant's prior approval for long-term disability benefits, as asserted by the agency. State employees subject to DHRM Policy 4.57, *Virginia Sickness and Disability Program*, may be eligible for such benefits as determined by the state's third-party disability administrator. The third-party administrator's benefits determination is distinct from the employer's decision regarding employment status, and only the latter decision was before the hearing officer in this matter.¹³ Indeed, the hearing officer did not make findings regarding the grievant's disability status or entitlement to benefits, and our review of the record does not indicate that either party presented the issue for substantial consideration. Accordingly, we cannot find that any disability claim by the grievant, or the third-party administrator's determination of that claim, presents a basis to disturb the hearing decision.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. 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.¹⁴ 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.¹⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁶

Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹² During the period of continued employment while any fitness re-evaluation is pending, the grievant would remain subject to all DHRM and agency policies. For example, the grievant would remain subject to DHRM Policy 1.60, *Standards of Conduct*.

¹³ EDR is not aware of any authority for our office to review benefits determinations rendered by the third-party administrator, and we perceive nothing in the hearing officer's decision that purports to make findings regarding the grievant's eligibility for disability benefits. Should the parties seek guidance on how the hearing officer's decision implicates any prior benefits determination, we recommend contacting the third-party administrator.

¹⁴ *Grievance Procedure Manual* § 7.2(d).

¹⁵ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁶ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).