

Issues: Group II Written Notice (failure to follow instructions/policy), Termination (due to accumulation), and misapplication of FMLA policy; Hearing Date: 03/04/09; Decision Issued: 04/09/09; Agency: Department of Corrections; AHO: Thomas J. McCarthy, Jr.; Case No. 8953; Outcome: No Relief – Agency Upheld in Full; **Administrative Review**: EDR Ruling Request received 04/23/09; EDR Ruling #2009-2399 issued 07/20/09; Outcome: Remanded to AHO; Remanded Decision pending; **Administrative Review**: DHRM Ruling Request received 04/23/09; Outcome pending.

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 8953

Hearing Date: March 4, 2009

Decision Issued: April 9, 2009

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
4 Witnesses for Agency
0 Witnesses for Grievant

On March 4, 2009, a formal grievance hearing was held on this matter at the Agency's facility. The onset of the hearing had been delayed due to Grievant's attorney's medical condition (broken leg). The decision was delayed for the Grievant and Agency to submit briefs regarding the matter.

ISSUES

"Was Group written notice resulting in termination proper for Grievant's actions regarding failure to follow instructions regarding attendance violations of Policy Number 5-12?";

"Was Grievant's termination the result of disparate treatment?"; and

"Were Grievant's constitutional rights violated?"

FINDINGS OF FACTS

On June 13, 2008, grievant was terminated by Written Notice for "Failure to follow supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy." The Written Notice did not specify the Group Category.

From the evidence presented, the Department gave Grievant every opportunity to improve his attendance problems. Through meetings and counseling, he was granted every due process right to address his absences.

Careful review of Grievant's rights under FMLA from the evidence shows that where FMLA was appropriate, on an incident by incident basis, he was granted his full rights under the statute, to-wit:

- In 2005, no FMLA qualified absences, no three day absences and no request for FMLA protected leave.
- In 2006, absences due to his wife's health issues, pregnancy, child birth and absences due to stress were his allowable hours and he was allowed "leave without pay " after the FMLA approved time was exhausted.
- In 2007, Grievant had 14 days of qualifying absences and an additional 138 hours of leave with no absence over two days and no information that twenty of the 138 hours qualified for FMLA protected leave.
- In 2008, Grievant had several absences, none indicating a protected health problem and FMLA was not requested.

There was no evidence of disparate treatment of the Grievant.

The Department properly posted posters explaining FMLA and policy requirements.

Grievant had an active Group II Written Notice at the time of termination.

Grievant was given the choice of leave with or without pay and always chose FMLA time with leave.

From the evidence presented, Grievant admitted he was not a dependable employee, that he was not "a morning person". He often felt better later in the day after calling in sick in the morning. He admitted that his Supervisors tried to accommodate him by moving him to positions which would keep his interest up.

APPLICABLE LAW AND OPINION

For state employees subject to the Virginia Personnel act, appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the polices and procedures promulgated by DHRM, including Policy Number 4.20 "Family and Medical Leave".

The grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government. [See Virginia Code Section 2.2-3004(B)].

Department of Corrections Operating Procedure, 135.1, Standards of Conduct shall be and are consistent with Department of Human Resources Managements (DHRM) policy which sets the standards for professional conduct and behavior, and corrective actions for unacceptable behavior.

Sick Leave Verification Policy and Procedure was clarified by Department of Corrections Memorandum dated September 29, 2000, and applied in Required Sick Leave Policy dated December 18, 2002.

The Grievant's rights under the FMLA after careful review do not appear to have been violated. The Department's records indicate Grievant was given FMLA protection where he qualified. His constitutional rights of due process, from the evidence were carefully and admittedly observed. Grievant admitted that he was not a "dependable employee". Grievant had been told in 2005 on his Annual Performance Evaluation that he needed to work on his leave usage. This admonition was repeated by his supervisors many times since then. In August of 2006, he called in sick and was seen coaching a Little League All-Star Game, later that day.

The Department proved that the Grievant failed to follow his supervisors instructions not to violate leave/attendance written policy performance requirements outlined in Policy Number 5-12, such failure constituted misconduct and the discipline was consistent with the law and the policy, and the discipline did not exceed the limits of reasonableness. From the face of the Written Notice, even though the "Group II" box was not checked, the Written Notice clearly states that Grievant is terminated as of June 13, 2008, for policy violations under Policy Number 5-12, resulting in "his no longer being a viable employee for retention." He has had ample opportunity to respond as required in Operating Procedure 135.1 and the Grievance Procedure.

Grievant had an active Group II Written Notice at the time of termination.

From the evidence, the Department's action did not violate Grievant's due process rights, complied with FMLA requirements and was in the bounds of specific policy. Termination was not disparate for the actions of Grievant.

DECISION

For the reasons stated herein, I uphold the Group Written Notice and termination.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review

This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia, 23219 or faxed to (804) 371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, Virginia, 23219 or faxes to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and **received** by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Thomas J. McCarthy, Jr.
Hearing Officer