Issue: Termination due to Below Contributor rating on Re-Evaluation; Hearing Date: 06/09/10; Decision Issued: 06/21/10; Agency: VSDB; AHO: Loren A. Costanzo, Esq.; Case No. 9334; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
VIRGINIA SCHOOL FOR THE DEAF AND BLIND

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 9334

Hearing Date: June 9, 2010
Decision Issued: June 21, 2010

PROCEDURAL HISTORY

On January 7, 2010 Grievant received an overall rating of Below Contributor on her 2009 annual performance evaluation. On her March 26, 2009 re-evaluation Grievant received an overall performance re-evaluation of Below Contributor and Agency terminated her employment. On April 23, 2010 Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to Grievant and she requested a hearing. On April 26, 2010 Agency Head qualified matters for a hearing. On May 17, 2010 undersigned was appointed hearing officer and a hearing was held on June 9, 2010.

APPEARANCES

Agency Presenter
Agency Party Representative, who was also a witness
Program Manager
Superintendent
Grievant (who also was a witness)
Cook

ISSUES:

Whether Grievant's removal from employment was warranted and appropriate under the circumstances?

BURDEN OF PROOF:

In dismissals for unsatisfactory performance, the Agency must show by a preponderance of the evidence that the action was warranted and appropriate under the circumstances. In all other actions, the employee must prove his/her claim by a preponderance of the evidence. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.[1]

FINDINGS OF FACT:

[1] Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Sections 5.8 and 9.

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

Agency has employed Grievant as a Food Service Technician 1 from 2004 until her termination. Grievant is part of a staff of six employees plus one supervisor charged with providing three daily meals to day students, residential students, and staff.[2]

Grievant's 2009 Performance Cycle was from October 25, 2008 to October 24, 2009. During this performance period Grievant had 13 unscheduled absences *(1 day in October, 2 days in December, 1 day in January, 2 days in February, 1 day in March, 2 days in June, 1 day in August, 1 day in September, and 2 days in October).* Grievant was on Short Term Disability ("STD") 56 days also during this Performance Cycle *(4 days in March, 17 days in April, 21 days in May, and 14 days in October).*

On June 17, 2009 Grievant received a Notice of Improvement Needed due to excessive unscheduled absences. An improvement plan was established which required her to make immediate and significant improvement in attendance and provide a doctor's note for unscheduled absences. Grievant was counseled that continued unscheduled absences could result in an overall Below Contribution evaluation. As of June 17, 2009 she had 11 days of unscheduled absences (8/10/08, 8/11/08, 10/26/08, 12/18/08, 12/19/08, 1/11/09, 2/25/09, 2/26/09, 3/16/09, 6/9/06, and 6/10/09).[3]

On September 3, 2009 Grievant received a Notice of Improvement Needed addressing unscheduled absenteeism. An improvement plan was established requiring her to make immediate and significant improvement in attendance and provide a doctor's note for any unscheduled absence. After receiving the 6/17/09 Notice of Improvement Needed Grievant had two days of unscheduled absentees (8/3/09 and 9/2/09). Grievant was advised in the 9/3/09 Notice that excessive unscheduled absenteeism could result in an overall evaluation of Below Contributor on her annual performance evaluation and that this could lead to the termination of her employment. She was advised her continued employment was in jeopardy. [4]

Grievant was on Short-Term Disability ("STD") from October 6, 2009 through January 5, 2010. Grievant's 2009 evaluation was delayed due her being on "STD". On January 7, 2010 Grievant received an overall rating of Below Contributor on her 2009 Annual Performance Evaluation. Pursuant to DHRM Policy 1.40 a re-evaluation plan was established requiring a re-evaluation of her performance at the end of three months.[5] Grievant was informed that she needed to show significant improvement in unscheduled absenteeism. She was informed any absenteeism will require a doctor's note before returning to work with the doctor's statement covering entire period absent and indicating she was unable to work due to a medical condition. She was required to contact her supervisor personally at least 2 hours prior to the beginning of her shift for any absence.[6]

Grievant's 2010 Performance Cycle was from October 25, 2009 to October 24, 2010. Grievant was on Short Term Disability for 37 days (5 days in October, 16 days in November, 14 days in December, and 2 days in January). After her return from "STD" in January of 2010,

[2] Tab 5 and Testimony.
[3] Tab 9.
[4] Tab 9.
[5] Tab 2 and Tab 8.
[6] Tab 3.

Grievant, until her termination in March, had a total of 9 days of unscheduled absences (4 days in January, 2 days in February, and 3 days in March).[7]

On January 28, 2010, Grievant received a Group II Written Notice and a 10 days suspension without pay for "failure to follow a supervisor's instructions or comply with written policy". Grievant was given the Written Notice and suspension for failing to contact her supervisor prior to her absence from work on 1/14/10 as was required in her re-evaluation plan of January 7, 2010.[8]

On February 19, 2010, Grievant received a Notice of Improvement Needed for excessive unscheduled absenteeism since returning to work from "STD" on January 5, 2010. As of 2/19/10 Grievant had 6 unscheduled days of absenteeism from work *(1/14/10, 1/15/10, 1/20/10, 1/21/10, 2/15/10, and 2/16/10)* and an improvement plan was set forth that called for Grievant showing significant improvement during the remainder of the re-evaluation period and in the future. Additionally, Grievant was notified that excessive unscheduled absenteeism may result in a overall evaluation of Below Contributor on her performance re-evaluation and may lead to termination of employment.[9]

After receiving the 2/19/10 Notice of Improvement Needed, Grievant, during the month of March of 2010, had three more days of unscheduled absenteeism *(March 11, 12, & 13 of 2010)*. As of March 26, 2010 Grievant missed 9 work days in 2010 due to unscheduled absences.

On March 26, 2010 Grievant met with management for her re-evaluation. Grievant received an overall rating of Below Contributor on her re-evaluation plan because of excessive unscheduled absenteeism and failing to show improvement in her unscheduled absences during her re-evaluation period. Grievant's employment was terminated effective March 26, 2010.[10]

Grievant indicated to Agency her unscheduled absences from work on January 14 & 15 of 2010 were due to her flu like symptoms and her unscheduled absences on March 11, 12, & 13 of 2010 were due to a cold/viruses. Grievant acknowledged she did not properly notify her supervisor of her absence on January 14, 2010 as she was required.[11]

Grievant provided a doctor's excuse on January 18, 2010 for her 1/14/10-1/15/10 absences. She provided a doctor's excuse for the absence of 1/20/10 and 1/21/10 on January 20, 2010. Grievant also provided a doctor's excuse for absences on 3/10/10-3/12/10.

In her 2008 annual performance evaluation Grievant received a Below Contributor evaluation in the area of School Policies. It was determined she required improvement in her attendance; excessive unscheduled absentee was noted. On September 15, 2008 Grievant received a Notice of Improvement Needed for excessive unscheduled absences and an improvement plan was established calling for Grievant to make significant improvement in unscheduled absenteeism.[12]

APPLICABLE LAW AND OPINION:

[7] Tab14.
[8] Tab 3 and 6.
[9] Tab 4 and 5.
[10] Tab 4.
[11] G1 and Tab 1.
[12] Tab 12 &13.

The General Assembly enacted the Virginia Personnel Act, Va. Code §2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in part:

> "It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints .... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes which may arise between state agencies and those employees who have access to the procedure under §2.2-3001."

DHRM Policy 1.40 governs Performance Planning and Evaluation and provides for the establishment and communication of employees' performance plans and procedures for evaluating employees' performance**.** Under this policy, an employee who receives an overall rating of Below Contributor on an annual evaluation must be re-evaluated within approximately two weeks prior to the end of a three month period. When so re-evaluated the employee may be removed from employment if the employee's overall performance rating remains as Below Contributor.

A state agency may not conduct arbitrary or capricious performance evaluations of employees. Arbitrary or capricious is defined as "In disregard of the facts or without a reasonable basis."[13]

Policy 1.40 provides that the following types of leave taken must not be used to negatively impact the employee's overall performance rating: overtime, compensatory, on-call, workers' compensation, military, Family and Medical Leave, Short-term Disability, and Long-term Disability-Working status under the VSDP program.

DHRM Policy 1.40 further indicates, in pertinent part, as follows*:*

> "Supervisors should immediately identify poor, substandard or unacceptable performance …"
>
> "An employee may receive a Notice of Improvement Needed/Substandard Performance form at any time during the performance cycle if the employee exhibits substandard performance on any core responsibility, special assignment, agency or unit objective, or core value or core competency."
>
> "Within 10 workdays of the evaluation during which the employee received the annual rating, the employee's supervisor must develop a performance re-evaluation plan that sets forth the performance measure for the following (3) months…"
>
> "The Employee must be re-evaluated within approximately two weeks prior to the end of the three (3)-month period."
>
> "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."

[13] Grievance Procedure Manual Section 9.

> "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 reevaluation period."

DHRM Policy 1.40 defines "Below Contributor Rating" as Results or work that fails to meet performance measures. To receive this rating, an employee must have received at least one documented Notice of Improvement Needed/Substandard Performance form within the performance cycle. Effective July 10, 2007A Written Notice (Standards of Conduct Policy 1.60) that is issued to an employee for any reason in the current performance cycle may be used in place of the Notice of Improvement Needed/Substandard Performance to support an overall rating of "Below Contributor".[14]

Agency's Employee Handbook indicates, in pertinent part:

> Before taking a leave of absence from work, whether with or without pay, employees must request and receiver their supervisor's or appropriate official's approval of the desired leave. … Employees should request leave of absence as far in advance of the desired leave as practicable. If an employee could not have anticipated the need for a leave of absence (unscheduled leave), the employee should request approval for the leave as soon as possible after the leave begins …
>
> Unscheduled leaves impact the operation of the agency, the education of students, and the supervision of students. Due to various departmental needs, duties vacated by staff on unscheduled leave are often left unfilled. Unscheduled leave may be subjected to leave without pay. At the discretion of the direct supervisor, employees with excessive unscheduled leave (3 or more) may be required to provide verification and/or may be subject to disciplinary action.
>
> If an employee is sick and not able to work the regular schedule, the direct supervisor must be notified prior to the normally scheduled work day unless otherwise specified. Each department supervisor will designate a "call in" time … Your direct supervisor reserves the right to request a doctor's excuse to verify any sick leave.[15]

Grievant worked in Agency's food service program which was staffed with six employees and a supervisor. Generally a cook and two employees were present on a given shift (with two shifts a day which could overlap). Agency provides meals to students in residence, day students, and to staff. Certain students have special requirements as to the preparation, content, or other matters related to meals which Agency was responsible for meeting. Agency prepared meals for up to approximately 90-95 individuals in the morning, 120-125 individuals at lunch, and 120-125 individuals at dinner. The actual number of students and staff at any given meal could vary significantly due school schedules and other factors. Additionally, the food service program staff provided cleaning and pick up duties in the dining facility.[16]

Grievant's position is one which requires a physical and timely presence at the job site. The Core Responsibilities for her position included:

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[14] Department of Human Resource Management Policies and Procedures Manual, Policy No. 1.40 - Performance Planning and Evaluation, Efft. Date: 4/01/01 Rev. Date: 8/01/01; Tab 22.
[15] Tab 19.
[16] Testimony.

Cleanliness and Sanitation	50%
Food Preparation	25%
Serving Food	15%
Restocking Food	05%
Other Duties	05% [17]

Agency was concerned that Grievant's unscheduled absences were very disruptive for her department, caused a loss of productivity, and was a hardship on other employees, both within and outside the department. Testimony indicated that an individual outside the food services department would often have to be removed from his/her duties to assist in the dining facility.

Grievant has an extensive history of excessive unscheduled absenteeism (3 or more as defined in Agency Policy). Testimony indicated in 2006 she had 5 unscheduled absences, in 2007 she had 18 unscheduled absences and in 2008 she had 14 unscheduled absences from work. Agency provided extensive counseling and a number of Notices of Improvement Needed.

Employees receive annual evaluations for the performance cycle usually beginning on October 25 of each year. Grievant received a Below Contributor rating on her 2009 annual performance evaluation. From October 25, 2008 to October 24, 2009, the 2009 performance cycle, she had 13 unscheduled absences. From October 25, 2009 to March 26, 2010, the date of her termination, she had 9 unscheduled absences (all of which occurred in 2010).[18] The number of unscheduled absences met Agency Policy determinations for "excessive".

The Agency's Employee Handbook provides that employees are required to:

- Obtain approval before taking a leave of absence from work.
- Request a leave of absence as far in advance as practicable or, if this is not possible, as soon as possible after the leave begins.
- Notify supervisor prior to the scheduled work day if sick and unable to work.

The Agency's Employee Handbook also provides that:

- Employees with excessive (defined as 3 or more) unscheduled leaves may be required to provide verification and/or may be subject to disciplinary action.
- Supervisors will designate a "call in" time.
- Supervisors can request a doctor's excuse to verify any sick leave.[19]

Grievant does not contest the number of her unscheduled absences or the fact that she failed on January 14, 2010 to contact her supervisor prior to her absence from work on 1/14/10 as she was directed. Grievant has not raised issues concerning the Family Medical Leave Act ("FMLA") or the Americans with Disability Act ("ADA").

Agency has addressed concerns over Grievant's excessive unscheduled absenteeism in counseling. Additionally, Agency has issued Grievant one Group II Written Notice and four Notices of Improvement Needed on the following dates:

1/28/10 Group II Written Notice

[17] Tab 3.
[18] Tab 14.
[19] Tab 19.

2/19/10	Notice of Improvement Needed
9/03/09	Notice of Improvement Needed
6/17/09	Notice of Improvement Needed
9/15/08	Notice of Improvement Needed

In the 2009 annual evaluation Grievant received an overall rating of Below Contributor. Per DHRM Policy 1.40 a re-evaluation plan was established for Grievant requiring she be re-evaluated at the end of three months. At this re-evaluation which occurred on March 26, 2010 it was determined that Grievant had failed to show improvement in her unscheduled absences and was again evaluated as having overall performance as Below Contributor.

During the re-evaluation period:

- On January 28, 2010, Grievant received a Group II Written Notice and a 10 days suspension without pay for not contacting her supervisor prior to her absence from work on 1/14/10 as was required in her re-evaluation plan of January 7, 2010.[20]

- On February 19, 2010 Grievant received a Notice of Improvement Needed for excessive unscheduled. As of 2/19/10 Grievant had 6 unscheduled days of absenteeism from work since her January 2010 return to work:

  1/14/10, and 1/15/10
  1/20/10, and 1/21/10
  2/15/10, and 2/16/10 [21]

- In March of 2010 Grievant had 3 more unscheduled days of absenteeism since her return to work in January of 2010:

  March 11, 12, & 13 of 2010

FMLA: While magic words are not necessary, an employee must do something to invoke protection under FMLA. While neither party specifically referred to the applicable policy, I have reviewed DHRM Policy 4.20, the state's policy on FMLA. The policy provides:

> An employee should submit a written request for family and medical leave at least 30 calendar days prior to the anticipated leave beginning date or as soon as practicable in unforeseen circumstances. If an employee is not able to provide notice because of an illness or injury, notice may be given by a family member or a spokesperson as soon as practicable.

As held by the Fourth Circuit in *Dotson v. Pfizer*, 558 F.3d 284 (4th Cir. 2009), case law and federal regulations make it clear that employees do not need to invoke the FMLA in order to benefit from its protections. The regulations do not require the employee expressly to assert rights under the FMLA or even mention the FMLA; instead, the employee may only state that leave in needed for a potentially qualifying reason. After the employee makes such a statement, the responsibility falls on the employer to inquire further about whether the employee is seeking FMLA leave. *Id.* at 295.

[20] Tab 6.
[21] Tab 4 and 5.

Grievant indicated she was not able to show up at work on March 11, 12, and 13 of 2010 due to a viral cold. She also indicated that the January 14 and 15, 2010 unscheduled absences were due to a virus. Here, however, the Grievant used no words to put Agency on notice that FMLA was being sought or being requested for a potentially qualifying reason.

An employee may take family or medical leave on an intermittent leave basis or work on a reduced schedule. However, an employee must comply with agency's leave request procedures and submit a written request at least 30 days prior or as soon as practicable.

The FMLA does not prohibit employers from terminating employees who fail to comply with an internal company policy that requires employees to call-in when they will be absent. The fact that the absence may be covered by the FMLA does not abrogate the right of employers to know whether their employees will be coming to work on a particular day.

The FMLA requires employees whose need for leave is not foreseeable to notify their employer that they need leave "as soon as practicable." An employer's policy that requires an employee to call in to work and provide advance notice of the need for leave is consistent with the FMLA where advance notice is reasonable under the circumstances. As such, an employee could terminate an employee for violation of that policy and such termination would not violate the FMLA.

The issue was addressed in *Knox v. Cessna Aircraft Co*., 2007 U.S. Dist. LEXIS 71528 (M.D. Ga., Sept. 26, 2007). In rejecting the employee's argument that enforcement of the "no call, no show" policy violated the FMLA, the court opined:

> If this Court accepted Plaintiff's position, employers would be severely disadvantaged because they would be prohibited from requiring employees to give advance notice of their absences, even when they are capable of giving advance notice. Without advance notice that an employee will be absent, employers are unable to make arrangements to have somebody else fill in for the absent employee. See *Spraggins*, 401 F. Supp. 2d at 1239. Because FMLA allows employers to require that their employees call-in their absences, this Court finds that Defendant is entitled to rely on its "no call, no show" policy as a basis for Plaintiff's termination.

29 C.F.R. § 825.302(d) provides:

> An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. An employee also may be required by an employer's policy to contact a specific individual. Unusual circumstances would include situations such as when an employee is unable to comply with the employer's policy that requests for leave should be made by contacting a specific number because on the day the employee needs to provide notice of his or her need for FMLA leave there is no one to answer the call-in number and the voice mail box is full. Where an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied. However, FMLA-protected leave may not be delayed or denied where the employer's policy requires notice to be given sooner than set forth in paragraph (a) of this section and the employee provides timely notice as set forth in paragraph (a) of this section.

FLMA does not prohibit the Agency from enforcing its policies and procedures governing leave or notification of absence from work. No evidence was presented that Grievant's medical condition rendered her incapable of complying with the Agency's policies and expectations of notification.

Grievant did not request Intermittent Leave or a reduced leave schedule upon her return to work in January of 2010. Grievant did not invoke the protections under FMLA or state that leave was needed for a potentially qualifying reason which would give rise to an Agency duty of further inquiry.

ADA: Under the ADA an employer cannot discriminate against an employee because of a disability and an employer has a duty to accommodate an employee's disability. However, the duty of accommodation does not excuse an employee from meeting the same performance and conduct standards as other similarly situated employees without disabilities. An employer is obligated to make an accommodation only to the known limitations of an otherwise qualified individual with a disability. In general, it is the responsibility of the employee with a disability to inform the employer that an accommodation is needed to perform essential job functions. An employer is not required to provide an accommodation if unaware of the need. *EEOC Technical Assistance Manual § 3.6 and §7.7.*

A qualified individual with a disability may be able to receive relief under the Americans with Disability Act. An individual is considered to have a disability if that individual either (1) has a physical or mental impairment which substantially limits one or more of his or her major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment. A qualified individual with a disability is one who "satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who with or without reasonable accommodation, can perform the essential functions of such position." 29 CFR § 1630.2(m).

To establish a prima facie claim of wrongful discharge under the ADA, the grievant must show that: 1.) He is within the ADA's protected class (i.e., a "qualified individual with a disability"); 2.) He was discharged; 3.) His job performance met his employer's expectation when he was discharged; and 4.) His discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination.[22]

Grievant was on Short Term Disability from October 6, 2009 through January 5, 2010. Agency received a physician's note dated 1/4/10 indicating,

> *"Return to work light duty. No standing for 30-45 min. at a time.*
> *No lifting >20 lbs. Ok to return full duty in three months."*

Agency received the physician's note dated 1/4/10 and Grievant returned to work. It could be argued this document could be viewed as an accommodation request for light duty, no standing for 30-45 minutes at a time, and no lifting over 20 pounds. However, no evidence was admitted indicating Grievant requested accommodation as to matters related to attendance.

Grievant has the responsibility to inform Agency that an accommodation is needed to perform essential job functions. Then Agency is charged with making reasonable accommodation to the <u>known</u> physical or mental limitation of an otherwise qualified employee with a disability,

[22] *Rohan v. Networks Presentations*, LLC, 2003 U.S. Dist. LEXIS 266879d. Md. Apr. 17, 2003), aff'd, 375 F.3d 266 (4th Cir. 2004),

unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its business.[23] Agency would not be required to provide an accommodation if unaware of the need for that accommodation.

The ADA generally requires employees with disabilities to request reasonable accommodations rather than employers to have to ask questions about the nature of an employee's impairment. Although the ADA does not require employees to ask for an accommodation at a specific time, the timing of a request for reasonable accommodation is important because an employer does not have to rescind discipline. *Hill v. Kansas City Area Transp. Auth*., 181 F.3d 819 (8th Cir. 1999).

The ADA only protects a "qualified individual with a disability" who can perform the essential functions of the job either with or without a reasonable accommodation. An employee who is excessively absent may not be a qualified individual with a disability because regular attendance is an essential function of her job. Grievant's job duties involved matters related to the timely preparation and service of meals at Agency's dining facility.

There is no credible evidence that the issuance of the termination was affected by Grievant's rights under the ADA. The Americans with Disability Act does not provide a basis to grant relief to Grievant in this cause.

Conclusion:

The Agency presented substantial credible evidence to establish that its annual evaluation and 90 day re-evaluation of Grievant were not arbitrary or capricious and were consistent with law and policy. The Agency conducted a 90 day re-evaluation after its 2009 annual evaluation. In the re-evaluation Agency concluded Grievant continued having excessive unscheduled absences during the re-evaluation period and failed in meeting the requirements of her improvement plan. Her attendance/excessive unscheduled absences and actions during the 90 day re-evaluation period were such as to justify the issuance of an overall rating of Below Contributor. Testimony indicated that Agency considered and determined that there was no transfer opportunity available and no position to demote Grievant to. With the issuance of an overall rating of Below Contributor for the 90 day re-evaluation, Agency concluded Grievant should be removed from employment.

For the reasons stated above, it is found that the Agency has met its burden of proof that removal was warranted and appropriate under the circumstances and conformed to law and policy.

DECISION

For the reasons stated above, the action of the Agency in terminating Grievant based upon a re-evaluation rating of Below Contributor is **UPHELD.**

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.

[23] 42 U.S.C. § 12112(b)(5)(A); 29 CFR § 1630.9(b).

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 are the basis for such a request.

2. A challenge that the hearing decision is inconsistent with state policy 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:

Director, Department of Human Resources Management
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

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:

Director, Department of Employment Dispute Resolution
600 East Main St., Suite 301
Richmond, VA 23219.

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 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. You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Lorin A. Costanzo, Hearing Officer