

Issue: Group III Written Notice with Termination (failure to follow instructions and unsatisfactory attendance); Hearing Date: 07/22/10; Decision Issued: 08/03/10; Agency: DOC; AHO: Thomas J. McCarthy, Jr., Esq.; Case No. 9331; Outcome: No Relief – Agency Upheld.

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 9331

Hearing Date: July 22, 2010
Decision Issued: August 3, 2010

APPEARANCES

Grievant
Agency Representative
3 Witnesses for Agency
Grievant was only witness

ISSUE

“Was the Group III Written Notice with termination issued to Grievant for failure to follow Supervisor’s instructions and unsatisfactory attendance proper?”

FINDINGS OF FACTS

1. Grievant and his wife had received word that the baby she was pregnant with had severe problems.
2. The unborn child’s conditions necessitated trips to specialists at East Tennessee Hospital.
3. Grievant had several failures to follow call in policy.
4. Grievant was accommodated by being moved to a day shift and admitted he over slept and was tardy.
5. Grievant was counseled by the Warden that he was not to take further leave without pay absences on December 4, 2009. On January 8, 2010, he called in sick.
6. Grievant had to work without a radio because he could not get batteries, due to his charger being destroyed by a power surge.

7. The job area had severe snow storms on December 21, 2009. Power and telephone lines were out or down for a large part of the County and Grievant couldn't get to work.

8. After the birth of his child the baby had medical problems.

9. Grievant was offered a similar job within the Department at another facility which would have alleviated his leave violations. Grievant declined the department's offer.

10. Grievant signed Department Conditions of Employment on October 25, 2004, accepting the conditions and his agreement to abide by them, including call-in requirements.

11. Due to the seriousness of his daughter's conditions and the amount of leave Grievant had taken before her birth and as a baby, the Human Resources Officer suggested Grievant take long term leave. He did not.

12. Grievant was allowed to change two days leave to holiday leave.

13. FMLA was not violated.

14. Grievant repeatedly violated call-in requirements.

APPLICABLE LAW OR POLICY AND OPINION

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. [Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001) (citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997))].

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)].

Grievant admitted and signed off on "Conditions of Employment" for the Department facility where he worked. He was counseled by the Warden not to take leave without pay and not to be tardy. He violated the terms of his counseling. Ultimately his failure to call in as required were dealt with under Department Operating Procedure 135.1 and a Group III Written Notice was issued with termination.

DECISION

No discrimination or harassment was proven. The Warden gave him every break he could and stretched in a few more. The Regional Director offered him a position at a nearby facility. Grievant was stressed due to the difficult pregnancy and subsequent health challenges for the newborn.

This is a sad case, but Grievant did not use the breaks he was given. I can find no alternative but to uphold the Group III Written Notice with termination, as proper.

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, Main Street Centre, 600 East Main, Suite 301, 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