

Issue: Non-disciplinary transfer; Hearing Date: 08/26/11; Decision Issued: 09/29/11; Agency: DOC; AHO: Thomas J. McCarthy, Jr., Esq.; Case No. 9649; Outcome: No Relief – Agency Upheld; **Administrative Review: DHRM Ruling Request received 10/13/11; DHRM Ruling issued 12/14/11; Outcome: AHO's decision affirmed.**

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 9649

Hearing Date: August 26, 2011

Decision Issued: September 29, 2011

APPEARANCES

Grievant
Agency Representative
5 Witnesses for Agency
3 Witness for Grievant

ISSUE

“Was the termination issued to Grievant due to a medical condition which requires him to have immediate access to a bathroom appropriate?”

FINDINGS OF FACTS

1. Grievant worked as a CO (guard) at a facility where convicted felons were incarcerated.
2. After 14 years with the department, Grievant developed prostate problems causing him to have to urinate frequently.
3. Grievant was granted a 90 day accommodation and applied for continuation of his accommodation.
4. Under Operating Procedure 101.5, G.7., Grievant’s matter was properly referred to the Department’s ADA Committee.
5. Grievant did not submit all forms required by the Department’s ADA Committee. He refused to consider the four options available to him and presented to him by the Department’s ADA Committee, to-wit:

(i) Work with his HRO to apply and be granted leave under the FMLA and apply for disability retirement while on FMLA leave.

(ii) Apply for a non-security position at [facility] or another Agency institution or office, if available and for which he meets the minimum qualifications and is physically capable of performing.

(iii) Seek a position external to the Agency.

(iv) Consider using one or more of the personal individualized options that would allow him to continue to work all posts.

6. Grievant testified that any of the other CO's on A Block could substitute for him. Normally A Block had 45 officers. At the time in question, it had 35.

7. Grievant was told when he was hired that CO services were required to work all positions and be able to fill in for CO's during emergencies, illness, or any other reasons for their absence from their posts. Grievant signed a statement acknowledging this essential requirement in August of 1996.

8. Due to his urinary problems, Grievant refused to fill a post on the yard to replace another CO who had been there for hours in inclement weather.

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 Director of the Department of Employment Dispute Resolution has ruled that the Grievant has the burden of proof in this matter under Operating Procedure 101.5, dated October 1, 2007.

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)], and Department of Corrections Procedure 101.5, dated October 1, 2010, as amended.

DECISION

Grievant knew since he was hired as a CO that he would be required to fill CO posts as ordered. He refused to work at a CO position on the yard. He was granted a 90 day accommodation, but his condition did not improve. The Department, through its ADA Committee offered him options, three of which would have permitted him to continue employment in the facility where he was working. He did not take their suggestions and listed options.

Far from being unsympathetic to the problem of a long-term employee, the Department through its ADA Committee offered suggestions of ways he could maintain employment with the Department. Testimony was heard that he denied being disabled, did not cooperate by filing necessary information for the ADA Committee, and did not follow suggestions for employment within the Department.

Grievant was uncooperative and was offered accommodations and refused them.

The ability of a CO to fill all positions of CO's in the Department's facility is essential, is essential to the safety of the citizens of the Commonwealth, and the other inmates. Grievant did not meet the burden of proof. Grievant was properly terminated.

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 DEDR. 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 DEDR 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 DEDR 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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Corrections
December 14, 2011

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9649. For the reason stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

In his FINDINGS OF FACTS, the hearing officer listed the following relevant facts:

1. Grievant worked as a CO (guard) at a facility where convicted felons were incarcerated.
2. After 14 years with the department, Grievant developed prostate problems causing him to have to urinate frequently.
3. Grievant was granted a 90 day accommodation and applied for continuation of his accommodation.
4. Under Operating Procedure 101.5, G.7., Grievant's matter was properly referred to the Department's ADA Committee.
5. Grievant did not submit all forms required by the Department's ADA Committee. He refused to consider the four options available to him and presented to him by the Department's ADA Committee, to-wit:
 - (i) Work with his HRO to apply and be granted leave under the FMLA and apply for disability retirement while on FMLA leave.
 - (ii) Apply for a non-security position at Bland Correctional Center or another Agency institution or office, if available and for which he meets the minimum qualifications and is physically capable of performing.
 - (iii) Seek a position external to the Agency.
 - (iv) Consider using one or more of the personal individualized options that would allow him to continue to work all posts.
6. Grievant testified that any of the other CO's on A Block could substitute for him. Normally A Block had 45 officers. At the time in question, it had 35.

7. Grievant was told when he was hired that CO services were required to work all positions and be able to fill in for CO's during emergencies, illness, or any other reasons for their absence from their posts. Grievant signed a statement acknowledging this essential requirement in August of 1996.

8. Due to his urinary problems, Grievant refused to fill a post on the yard to replace another CO who had been there for hours in inclement weather.

In his DECISION, the hearing officer stated the following:

Grievant knew since he was hired as a CO that he would be required to fill CO posts as ordered. He refused to work at a CO position on the yard. He was granted a 90 day accommodation, but his condition did not improve. The Department, through its ADA Committee offered him options, three of which would have permitted him to continue employment in the facility where he was working. He did not take their suggestions and listed options.

Far from being unsympathetic to the problem of a long-term employee, the Department through its ADA Committee offered suggestions of ways he could maintain employment with the Department. Testimony was heard that he denied being disabled, did not cooperate by filing necessary information for the ADA Committee, and did not follow suggestions for employment within the Department.

Grievant was uncooperative and was offered accommodations and refused them. The ability of a CO to fill all positions of CO's in the Department's facility is essential, is essential to the safety of the citizens of the Commonwealth, and the other inmates. Grievant did not meet the burden of proof. Grievant was properly terminated.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In his request to this Department for an administrative review, the grievant appealed on the basis of misapplication of disability policy by Bland Correctional Center which resulted in the termination of his 14-year employment with DOC.

CONCLUSION

Summarily, the hearing officer concluded that the agency's ADA Committee offered four options to the grievant as accommodations, all rejected by the grievant. In addition, the hearing officer accepted management's position that manning all posts was an essential job function for all corrections officers, and to eliminate that essential job function was not a requirement under the provisions of the ADA. Furthermore, the hearing officer accepted the agency's position that to continue the temporary accommodation would cause an undue hardship on the agency.

This Department's review of the hearing decision does not reveal that the decision is in violation of any human resource management policy. Rather, it appears that the grievant is contesting the assessment of evidence by the hearing officer and the conclusions the he drew. Therefore, we have no authority to interfere with the application of this decision.

Ernest G. Spratley, Assistant Director
Office of Equal Employment Services