



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11587

Hearing Date: November 17, 2020

Decision Issued: February 23, 2021

PROCEDURAL HISTORY

On May 13, 2020, the Agency removed Grievant from employment following a fitness for duty examination. On May 27, 2020, Grievant timely filed a grievance to challenge the Agency's action. On July 31, 2020, the Office of Employment Dispute Resolution issued Ruling 2020-5117 qualifying the grievance for hearing.

On August 24, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 17, 2020, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant Counsel
Agency Representative
Witnesses

ISSUES

1. Whether Grievant's removal was consistent with State Policy?

2. Whether the Agency violated a mandatory policy provision or whether the challenged action in its totality was so unfair as to amount to a disregard of the applicable policy's intent?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief he seeks should be granted. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

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

The Virginia State Police employed Grievant as a Senior Trooper at one of its divisions. He began working for the Agency on October 13, 2002.

The Agency's Human Resource Division was responsible for administering the Fitness for Duty Program. This Division was also responsible for administering and coordinating personnel benefits including short and long-term disability.

On January 2, 2018, Grievant was working with a Search and Recovery Team as part of his job duties. He applied lift bags to a submerged vehicle and injured both of his shoulders during the task.

Grievant received treatment from Dr. D who recommended surgery on both of Grievant's shoulders. Dr. D was also Grievant's workers' compensation doctor.

On October 11, 2019, Grievant had surgery on his left shoulder.

On December 16, 2019, the Workers' Compensation Commission awarded Grievant temporary total disability beginning October 11, 2019 due to injuries to his shoulders occurring on the job.

On January 10, 2020, Captain K sent Grievant a Notice of Eligibility under the Family Medical Leave Act indicating that on January 9, 2020, Grievant notified the Agency he would need leave beginning January 10, 2020 for his own serious health condition. Grievant was notified he was eligible for FMLA leave. The pre-printed form advised Grievant:

You will be required to present a fitness-for-duty certificate to be restored to employment. If such certificate is not timely received, your return to work may be delayed until certification is provided. A list of essential functions for your position [is not] attached. If attached, the fitness-for-duty certification must address your ability to perform these functions.¹

On February 4, 2020, Grievant met with Dr. D. Grievant told Dr. D, Grievant wanted to return to work. Dr. D said Grievant only had 40 percent capacity but that if Grievant wanted to return to work, Dr. D would not stop him. Dr. D wrote a note authorizing Grievant to return to work on February 5, 2020 “full duty.”² The Agency allowed Grievant to resume his work duties.

When Grievant returned to work, he had problems with his left shoulder. Opening doors and reaching with his left arm were difficult. He experienced pain when he put on his ballistics vest.

Grievant had to be certified to use firearms. On March 9, 2020, he went to the firing range and was unable to hold properly a shotgun. Because he was unable to hold the shotgun, he believed he would be unable to qualify during the Spring Firearms Training in April 2020.

On March 9, 2020, Grievant spoke with the First Sergeant about his inability to hold a shotgun. Grievant told the First Sergeant that if Grievant was in a fight he would not win it because of his shoulder. The First Sergeant saw no other option than to send Grievant to a fitness for duty examination. He did not see the option of having Grievant seek short-term disability because Grievant was not claiming an injury.

The First Sergeant told Grievant that “we can’t let you work until you see the doctor.” The First Sergeant asked Grievant to send him an email addressing Grievant’s concerns. Grievant sent the First Sergeant an email stating, “I am concerned about my physical readiness with the department.” Grievant explained that on the day of his return to work, “[Dr. D] stated that I was only 40% recovered.” Grievant added, “I was ready mentally to get back to work and help out the Area, but in actuality I was not physically ready.” Grievant wrote, “I believe it would be in the best interest of myself and the Department to have a physical performed by the Department physician to establish my fitness for duty.”

Grievant asked for a fitness for duty examination because he believed the firearms instructor and the First Sergeant had told him to make such a request.

The First Sergeant sent Grievant’s email to the Lieutenant and asked, “[p]lease advise what steps need to be taken to address [Grievant’s] concerns.”

¹ Grievant Exhibit 1.

² Agency Exhibit 14.

On March 10, 2020, Grievant drafted a memorandum to Captain explaining his concern about his “readiness with the Department.”

On March 11, 2020, the Agency retrieved Grievant’s vehicle. Grievant kept his manuals inside the vehicle. On March 31, 2020, the Agency retrieved Grievant’s work laptop. He no longer had access to the Agency’s policies once his laptop was removed.

While Grievant was not working, he was told to use his annual leave. He called the First Sergeant and asked when would he no longer have to use his “own leave,” meaning his annual leave. Grievant and the First Sergeant spoke approximately five times between March 10, 2020 and May 13, 2020. During several of those conversations, Grievant would ask why he was still having to use “my leave.” Grievant asked, “Why am I not already back on short-term disability or worker’s comp?” Grievant asked why he had to use personal leave since he was “off with an injury.” The First Sergeant did not discuss light duty or any other accommodation with Grievant. Grievant did not request light duty or any other accommodation. The First Sergeant did not discuss with Grievant the option of requesting short-term disability because he believed after his appointment with the Agency’s physician, “they would tell him what to do.”

The Agency scheduled a fitness for duty examination with Dr. V on March 31, 2020. Grievant met with Dr. V and Dr. V indicated they should meet for a second time to see if Grievant’s condition improved.

Grievant met with Dr. V a second time on April 28, 2020. Grievant’s physical condition had not improved. Dr. V conducted a fitness for duty follow up examination. Dr. V wrote:

[Grievant] continues to have ongoing weakness to the left shoulder girdle status post surgery. I feel that he has an ongoing weakness that will take a prolonged period of time before it is back to its normal strength, if ever. He has agreed he has made no real progress in 90 days and therefore at this time, given the review of the notes from [Dr. D], I recommend that [Grievant] be offered medical disability, as he is not fit to return to duty.³

Grievant was separated from employment based on Dr. V’s conclusion that Grievant was unfit for duty.

Captain K sent Grievant a letter dated May 13, 2020 advising Grievant that the Agency had been advised by Dr. V on May 8, 2020 that Grievant was not fit for duty. Captain K informed Grievant that his employment was terminated effective May 13, 2020.

³ Agency Exhibit 1.

On May 13, 2020, Grievant had an appointment with his worker's compensation doctor, Dr. D. On May 14, 2020, Dr. D wrote a note excusing Grievant from work from May 13, 2020 until his next appointment on July 14, 2020 due to ongoing weakness and inability to safely perform his job duties.

On May 15, 2020, Captain K completed an Employer Information for Line of Duty Act form. Captain K wrote, "[Grievant] suffered a work injury to his shoulders on January 2, 2018. As a result of this injury his physician and our department physician have not released him to return to full duty." Captain K added, "He is unable to work in any capacity due to his injury."⁴

On May 22, 2020, Grievant applied to the Third Party Administrator for Short-term Disability benefits beginning May 14, 2020.

On May 27, 2020, the Third Party Administrator denied Grievant's request for disability because the Agency has terminated Grievant's employment on May 13, 2020 and Grievant was no longer covered by the VSDP.

Grievant was not offered light duty or any accommodation prior to his removal.

The HR Manager Senior testified that she did not advise Grievant he could file a claim for disability because she did not know why he was out of work and she did not get involved in the fitness for duty program.

CONCLUSIONS OF POLICY

Grievant had two available paths under policy. He could follow the path set forth under DHRM Policy 4.57 governing the Virginia Sickness and Disability Program (VSDP) or the path set forth under General Order ADM 14.10 governing Fitness for Duty. Under the VSDP, Grievant would receive money benefits relating to his disability. Under the Fitness for Duty Policy, Grievant would receive termination of employment without further benefits relating to his disability.

DHRM Policy 4.57

DHRM Policy 4.57 sets forth the Virginia Sickness and Disability Program. The purpose of this policy is to provide "eligible employees supplemental replacement income during periods of partial or total disability for both non-occupational and occupational disabilities." This policy provides short-term disability benefits during employment and long-term disability benefits to employees who cannot return to work due to a disability.

This policy defines disability as:

⁴ Agency Exhibit 2.

An illness or injury or other medical condition, including pregnancy, that prevents an employee from performing the duties of his or her job. A disability can be total or partial.

DHRM Policy 4.57 requires the Agency to:

Ensure employee receives appropriate communication regarding VDSP and FMLA.

An agency's obligation under DHRM Policy 4.57 is not merely to notify an employee of the existence of the policy during orientation but also to advise the employee regarding its applicability when the agency learns the employee is unable to perform his or her job duties due to a disability.

General Order ADM 14.10

General Order ADM 14.10 governs Fitness for Duty. Under this policy:

The Superintendent may require mental or physical examinations of an employee by a designated psychiatrist, psychologist, or physician when, in the Superintendent's estimation, it is to the best interest of the employee or the Department. The purpose of these examinations is to assist the Department in making decisions to determine an employee's mental and physical fitness to perform his/her job. Beyond this assessment, however, it is the employee's responsibility to maintain fitness for duty.

Unfair Choice of Policy

Grievant had a disability that made him unable to perform his job duties. He was entitled to short-term disability under DHRM Policy 4.57. The Agency unfairly denied him benefits under VSDP because it allowed his removal pursuant to its Fitness for Duty Policy which did not provide him benefits relating to his disability.

Grievant placed the Agency on notice that he had a disability and was unable to perform his job duties. He notified the First Sergeant and asked what steps should follow. He relied on the First Sergeant who understood the best practice was to pursue a Fitness for Duty evaluation. The First Sergeant asked the Lieutenant for guidance but the Lieutenant did not indicate Grievant should seek disability benefits.

Grievant repeatedly asked the First Sergeant why was he having to use his own leave while being out of work. Grievant's message was that he wanted to receive leave paid for by the Agency without using the annual leave he had already earned. If Grievant were receiving short-term disability, he would not be using all of his annual leave. The Agency should have investigated Grievant's request to avoid using his own

leave and that investigation should have resulted in the Agency advising Grievant of his option to apply for short-term disability benefits.

The physician selected by the Agency to evaluate Grievant recommended Grievant “be offered medical disability.” This recommendation placed the Agency on notice that it should advise Grievant of the availability of disability benefits.

Grievant was entitled to disability benefits under DHRM Policy 4.57. The Agency’s application of its Fitness for Duty policy deprived Grievant of his disability benefits. In other words, the Agency denied Grievant replacement income during his period of disability. This application of policy was unfair.

To meet its duty of “appropriate communication”, the Agency was obligated to explain to Grievant that he had the option to apply for short-term disability under the VSDP. Grievant must be restored to the position he was in prior to his removal so that he can exercise the options available to him under the VSDP. Grievant must be reinstated to his position prior to removal. Grievant must be provided back benefits but not back pay. Back pay is not necessary in this case because Grievant will likely seek VSDP benefits during the period of his removal.

The Agency argued that it gave Grievant a fitness for duty examination because he requested one. Although Grievant wrote that he wanted a fitness for duty examination, it is clear he was not requesting to be removed from the Department without benefits. Grievant knew he could not perform his job duties. He could have resigned his position without a fitness for duty examination and achieved the same result that followed from the fitness for duty examination. Grievant was seeking to be placed in a disability status and wanted the Agency to complete an examination that would accomplish that goal. He was relying on his supervisors and Agency staff for guidance.

Attorney’s Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, “In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys’ fees, unless special circumstances would make an award unjust.” Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney’s fees unjust. Accordingly, Grievant’s attorney is advised to submit an attorneys’ fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director’s *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, the Agency is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 11587-A

Addendum Issued: April 28, 2021

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.¹ For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.²

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's Counsel devoted 58 hours to representing Grievant. At the hourly rate allowed by DHRM of \$131, Grievant is entitled to reimbursement for \$7,598.

AWARD

Grievant is awarded attorneys' fees in the amount of \$7,598.

¹ Va. Code § 2.2-3005.1(A).

² § 7.2(e) Department of Human Resource Management, *Grievance Procedure Manual*. § VI(E) OEDR *Rules for Conducting Grievance Hearings*.

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer