

Issue: Administration Review of Case No. 8526 - Hearing Decision Appeal; Ruling Date: April 12, 2007; Ruling #2007-1611; Agency: Department of Medical Assistance Services; Outcome: Remanded to Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Medical Assistance Services
Ruling Number 2007-1611
April 12, 2007

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8526. For the reasons set forth below, the grievance is remanded to the hearing officer for further proceedings in accordance with this ruling.

FACTS

In Case Number 8526, the hearing officer upheld the grievant's termination based on an accumulation of disciplinary actions.¹ Although the hearing officer rescinded one of the Group II Written Notices at issue,² he upheld another based on the grievant's "continued refusal to comply with supervisory and management instructions."³ The grievant now requests administrative review from this Department based on the argument that the hearing officer failed to consider the grievant's medical condition. The grievant cites evidence presented at hearing as to the grievant's migraine headaches and doctor's approval to remain at work up to an additional 90 minutes after her normal work hours to allow her medication to take effect.⁴ The grievant asserts that the hearing officer failed to consider this evidence and determine whether the agency's actions violated either the Family and Medical Leave Act (FMLA) or the Americans with Disabilities Act (ADA). The grievant further argues that the hearing officer did not consider the grievant's medical condition in his mitigation determination.

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions ... on all matters related to procedural compliance with the grievance procedure."⁵ If the hearing

¹ Decision of Hearing Officer, Case No. 8526, Mar. 8, 2007 ("Hearing Decision"), at 7. The grievant had one prior active Group II Written Notice dated July 7, 2006. *Id.* at 2.

² *Id.* at 7.

³ *Id.* at 6.

⁴ *E.g.*, Hearing Tape 2, Side B, at Counter Nos. 390-422; Hearing Tape 3, Side A, at Counter Nos. 380-90; Grievant Ex. 10.

⁵ Va. Code § 2.2-1001(2), (3), and (5).

officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁶

Family and Medical Leave Act

The FMLA permits eligible employees to take unpaid leave for certain family and medical related reasons including the employee's own "serious health condition."⁷ A serious health condition is defined as an "illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider."⁸ The grievant's medical condition, based upon the grievant's continued treatment with her doctor, would appear to qualify as a serious health condition under this definition. Indeed, because of this health condition, the grievant requested and was previously granted FMLA leave by the agency.⁹ The grievant argues that the agency may have improperly denied additional leave protected by the FMLA and disciplined her in violation of the FMLA. The grievant was terminated twenty days after filing a request for FMLA leave.¹⁰ "It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the FMLA]."¹¹

A hearing officer's decision "must contain ... findings of fact on material issues and the grounds in the record for those findings; any related conclusions of law or policy; [and] any aggravating or mitigating circumstances that are pertinent to the decision."¹² The grievant presented sufficient evidence that her FMLA claims were material to the grievance. Moreover, the grievant's attorney specifically raised these issues during closing argument.¹³ As such, it was error when the hearing officer failed to consider the grievant's allegations that the agency disciplined the grievant because of her requests for leave or improperly denied any leaves of absence for qualifying events. Consequently, remand is required for further consideration of the grievant's arguments.

Americans with Disabilities Act

DHRM Policy 2.05 "[p]rovides that all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability."¹⁴ Under Policy 2.05, "'disability' is defined in accordance with the Americans with Disabilities Act," the relevant law governing disability accommodations.¹⁵ Like Policy 2.05, the Americans with Disabilities Act (ADA) prohibit

⁶ See *Grievance Procedure Manual* § 6.4(3).

⁷ 29 U.S.C. § 2612(a)(1)(D).

⁸ 29 U.S.C. § 2611(11).

⁹ Hearing Decision at 4.

¹⁰ Hearing Decision at 1, 4.

¹¹ 29 U.S.C. § 2615(a)(1).

¹² Rules for Conducting Grievance Hearings § V(C).

¹³ Hearing Tape 3, Side B, at Counter Nos. 449-56.

¹⁴ DHRM Policy 2.05, page 1 of 4.

¹⁵ 42 U.S.C. §§ 12101 *et seq.*

employers from discriminating against a qualified individual with a disability on the basis of the individual's disability.¹⁶

Under the ADA, the term "disability" means, "with respect to an individual-- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."¹⁷ To be "substantially limited" in a major life activity, the grievant must be significantly restricted in performing the activity.¹⁸ Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."¹⁹ Refusing to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" is a prohibited form of discrimination under the ADA.²⁰ However, the employer will not be required to offer the accommodation if it would "impose an undue hardship on the operation of the business" of the employer.²¹

The grievant argues that she has been subject to such a form of discrimination through the alleged failure of the agency to provide a reasonable accommodation for her under the ADA. The grievant had requested accommodation, approved by her doctor, to be permitted to remain at work on occasion for up to 90 minutes after her assigned departure time.²² This accommodation was refused by the agency based on security concerns.²³ It is unclear whether the grievant has presented sufficient evidence to establish that she is a "qualified individual with a disability" under the Act. However, because the hearing officer has yet to make a factual finding as to these issues, such a determination will not be made in this ruling. Similar to her FMLA claims, the grievant has presented sufficient evidence that her ADA claims were material to the grievance. Consequently, the grievance must be remanded to the hearing officer for consideration of the grievant's ADA argument and the agency's proffered defense.

Mitigation

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."²⁴ The grievant presented evidence regarding her medical condition and how it affected her tardiness and leave.²⁵ The grievant's attorney also specifically argued during closing statements that this

¹⁶ 42 U.S.C. § 12112.

¹⁷ 42 U.S.C. § 12102(2).

¹⁸ *Toyota Motor Mfg., Ky., Inc., v. Williams*, 534 U.S. 184, 196-97 (2002).

¹⁹ 29 C.F.R. § 1630.2 (i).

²⁰ 42 U.S.C. § 12112(b)(5)(A).

²¹ *Id.*

²² Grievant Ex. 10. The grievant also asserts that this request is an issue under the FMLA and should be considered by the hearing officer on remand as such.

²³ Hearing Tape 2, Side A, at Counter Nos. 185-215.

²⁴ Va. Code § 2.2-3005(C)(6).

²⁵ *E.g.*, Hearing Tape 2, Side B, at Counter Nos. 390-422; Hearing Tape 3, Side A, at Counter Nos. 380-390; Grievant Ex. 10.

evidence was relevant to mitigation.²⁶ The hearing officer, however, limited his assessment of mitigating circumstances to the grievant's length of service and past performance.²⁷

While the hearing officer must "give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances," the hearing officer is permitted to mitigate a disciplinary action if it exceeds the limits of reasonableness.²⁸ The Rules for Conducting Grievance Hearings also provide a list of three *examples* of mitigating circumstances: lack of notice, inconsistent application, and improper motive.²⁹ This list is not exhaustive, but merely meant to describe some examples of potential mitigating circumstances.

The hearing officer should have considered the grievant's evidence related to her medical condition on mitigation. The grievant offered evidence regarding her medical condition and her attorney specifically discussed the grievant's condition as evidence of mitigation during closing statements. For these reasons, it was error not to consider the evidence. This ruling in no way determines that the grievant's medical condition should be a mitigating circumstance requiring mitigation of the disciplinary action at issue in this case. Indeed, a grievant's medical condition may not need to be addressed as a mitigating factor, depending on the nature of the case. However, in a case such as this, when the grievant presented substantial evidence regarding her medical condition and specifically argued that her medical condition was a mitigating circumstance, the hearing officer must address that issue in his decision. Therefore, the grievance must be remanded for the hearing officer to consider whether the discipline exceeded the limits of reasonableness in light of the grievant's medical condition.

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the hearing officer is directed to consider the grievant's evidence regarding the FMLA and ADA. The hearing officer must further consider the grievant's medical condition as a potential mitigating factor, and determine, based on the evidence, whether the discipline exceeded the limits of reasonableness.

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.³⁰ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.³¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³²

²⁶ Hearing Tape 3, Side B, at Counter Nos. 449-56.

²⁷ Hearing Decision at 6-7.

²⁸ *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1.

²⁹ *Id.*

³⁰ *Grievance Procedure Manual* § 7.2(d).

³¹ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

³² *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).

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