

Issue: Compliance - Grievance Procedure (hearings); Ruling Date: August 4, 2011;
Ruling No. 2012-3038; Agency: Department of Corrections; Outcome: Hearing
Officer Not in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2012-3038
August 4, 2011

The Department of Corrections (the agency) requests a compliance ruling to clarify the burden of proof in a grievance qualified by this Department on June 1, 2011, in EDR Ruling No. 2011-2960.

FACTS

The facts of this case, as set forth in EDR Ruling 2011-2960, are as follows:

Due to a medical condition, the grievant states that he needs to have close access to a restroom and requested an accommodation under the Americans with Disabilities Act (ADA) to work posts that are near a restroom. Because there are certain posts that are either not close to a restroom or require an on-duty employee to be relieved by another employee, which can take time, the grievant requested not to have to work certain posts. Though the agency granted a temporary accommodation, the permanent request was eventually denied. The agency states that an essential duty of the grievant's position is that he be able to work all posts, and proposed that the grievant could use a device or a diaper to work those other posts. The grievant did not accept those offers as reasonable, and refused to work any posts without quick access to a restroom. As a result, the agency determined that the grievant could not perform the essential duties of his position, i.e., work all posts, and terminated his employment.¹

The grievant had grieved the agency's determination that he was unable to perform the essential functions of his position. This Department qualified the grievance finding that:

The agency maintains that the ability to work all posts is a requirement of the position, as stated in the position's conditions of work document. While such a document weighs heavily in support of the agency's position, under the ADA, the realities of the work environment at the grievant's facility must also be assessed. Here, while each employee appears to work different posts, and a particular post does not appear to be guaranteed, there does not appear to be a regularly defined system of rotation through all posts for all employees, at least during the time

¹ EDR Ruling 2011-2960, at 2.

period at issue in this case. In addition, the facts are in dispute as to whether all employees in the grievant's position can fully work all posts. The grievant asserts there are many employees at the facility who are unable to work all posts. The agency indicates that these employees work all posts without restriction. However, the grievant states, for example, that one such employee has limited use of one side of his body and another employee must carry a nebulizer due to a medical condition and is incapable of performing strenuous activity. While the agency states that these employees are working all posts, the information presented by the grievant raises a sufficient question for purposes of qualification as to whether these employees could reasonably perform some of the more demanding or physically intensive posts or duties that could be required of a corrections officer. The grievance thus raises a sufficient question as to whether all employees in the grievant's position are indeed required to be able to fully work all posts and, consequently, whether working all posts is truly an essential function.²

Based on the forgoing, this Department qualified the grievant's claims of misapplication of policy and/or discrimination on the basis of a disability.

According to the agency, during the prehearing conference the hearing officer and grievant's advocate agreed that this was a termination case and that the agency would bear both the burden of going forward and the ultimate burden of proof. The agency asserts that it pointed out that EDR Ruling 2011-2960 qualified the issues of potential misapplication of policy and discrimination, claims for which the grievant ultimately bears the burden of proof. The hearing officer ruled that "it all boils down to the issue of termination," and, thus, the agency would bear the burden of going forward at hearing. The agency now appeals that determination.

DISCUSSION

This Department notes that the *Rules for Conducting Grievance Hearings* ("Rules") does not expressly address the burden of proof in a case where an agency has dismissed an employee for his inability to perform all duties associated with a position. We are cognizant of the potential ambiguities regarding the burden in a case such as this, however, in somewhat analogous cases this Department held that when disciplined employees assert that discipline was issued for an improper reason, such as in violation of the Family Medical Leave Act ("FMLA") or the Americans with Disabilities Act ("ADA"), the employees were deemed to be raising affirmative defenses and it was the employee's burden to prove the affirmative defense.³

This Department believes that that there is no reason to deviate from its past precedent in these relatively analogous cases. Having the grievant bear the burden here is consistent with prior rulings and the *Grievance Procedure Manual* ("GPM") and *Rules*, which both state that in

² *Id.*, at 4.

³ EDR Ruling 2010-2569; EDR Ruling 2009-2300.

cases involving alleged discrimination or misapplication of policy, the grievant bears the burden of proof.⁴ Furthermore, we are persuaded that cases like this, which are unquestionably discharge cases, are nevertheless not disciplinary actions or dismissals for unsatisfactory performance for which the agency indeed does carry the burden. Rather, such discharges are properly viewed as “removals” under the Standards of Conduct (“SOC”), which occurs when an employee is unable to perform his job due to circumstances beyond his control.⁵ Finally, having the grievant bear the burden is consistent with the manner in which courts treat the burden in ADA claims.⁶

CONCLUSION

The hearing officer is directed to require the grievant to present first at hearing and to bear the ultimate burden of proof. This Department’s rulings on matters of compliance are final and nonappealable.⁷

Claudia T. Farr
Director

⁴ *GPM* § 5.8; *Rules IV (C)*.

⁵ *See* SOC (Department of Human Resource Management (“DHRM” Policy 1.60) (H)(1) which expressly lists “the inability to perform the essential functions of the job after reasonable accommodation (if required) has been considered” as a reason justifying removal.

⁶ *Davis v. Old Dominion Tobacco Co.*, 755 F. Supp. 2d 682, 708 (E.D. Va. 2010).

⁷ *See* Va. Code §§ 2.2-1001(5), 2.2-3003(G).