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SECOND ADMINISTRATIVE REVIEW

In the matter of the Virginia Community College System
Ruling Number 2024-5699
May 31, 2024

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review the hearing officer's reconsideration decision in Case Number 12024-R. For the reasons set forth below, EDR will not disturb the reconsideration decision.

FACTS

The relevant facts in Case Number 12024, as found by the hearing officer, were recited in EDR's first administrative review in this matter, and they are incorporated herein by reference.[1] Following that ruling, which remanded the matter to the hearing officer for reconsideration, the hearing officer upheld a Group III Written Notice with termination that had cited the grievant for the misconduct of excessive absences,[2] finding that the grievant had not proven an affirmative defense grounded in the federal Family and Medical Leave Act (FMLA):

> The evidence does not show which, if any, portion of the definition [of "serious health condition" under the FMLA] applied to the grievant. The burden of proof to show eligibility for FMLA coverage was on the grievant. She failed to meet that burden.
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> …
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> The record does not show that the grievant took the necessary steps to follow through with any desire she had for FMLA coverage.[3]

The grievant now appeals the reconsideration decision to EDR.

[1] EDR Ruling No. 2024-5681, at 1-2.
[2] Reconsideration Decision of Hearing Officer, Case No. 12024-R ("Reconsideration Decision"), April 9, 2024.
[3] *Id.* at 1-2.

DISCUSSION

By statute, EDR has 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."[4] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.[5] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[6] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for review, the grievant maintains that she did in fact present evidence to prove a "serious health condition" under the FMLA. She further argues that the Virginia Community College System (the "college" or "agency") failed to provide her with adequate instructions or information to allow her to invoke FMLA leave, considering that she misunderstood how FMLA requirements differ from those of other medical leave entitlements. Citing the hearing officer's finding (upheld on appeal to EDR) that the college initially failed to comply with FMLA notice requirements, the grievant contends that the appropriate remedy for such failure is to rescind the college's disciplinary action and order reinstatement.

Upon a thorough review of the grievant's request, we cannot find that she has presented a basis to disturb the hearing officer's reconsideration decision. The grievant appears to argue that she should have been entitled to FMLA job protection because she asserted a "health condition" in her claim to the college's third-party administrator for short-term disability benefits.[7] Although the grievant did present evidence that she had reasonably notified her employer that she had a health condition of some kind, the hearing officer found upon reconsideration that the evidence "does not show which, if any, portion of the definition [of "serious health condition" under the FMLA] applied to the grievant."[8] Because the grievant has not identified any evidence that would demonstrate that she had a "serious health condition" as defined by the FMLA,[9] we have no basis to disturb this conclusion.

The grievant further argues that the agency did not adequately notify her of her rights or the processes by which to seek FMLA certification, and that the appropriate remedy for this failure is reinstatement. However, our first administrative review did not leave this issue open for

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[4] Va. Code §§ 2.2-1202.1(2), (3), (5).
[5] *See Grievance Procedure Manual* § 6.4(3).
[6] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[7] Request for Administrative Review at 1-2, 6-7. The grievant maintains that she provided additional information about the nature of her condition to the third-party administrator but chose not present such information to the college or to the hearing officer for privacy reasons. Although the grievant may choose to prioritize her privacy, FMLA protection required her to certify her need for FMLA-qualifying leave to her employer, and then to prove her entitlement to such need at the hearing. It is not clear why the grievant's undisclosed communications to the third-party administrator should have satisfied either requirement for these claims in her grievance to succeed.
[8] Reconsideration Decision at 1.
[9] This standard was discussed in our first administrative review. *See* EDR Ruling No. 2024-5681, at 6.

reconsideration. In EDR Ruling Number 2024-5681, we observed that "it is not clear how the agency's failure to provide timely notice ultimately deprived the grievant of FMLA protections to which she may have been entitled."[10] We further concluded as follows:

> [M]edical certification for FMLA purposes was, per DHRM policy, initially in the hands of the third-party benefits administrator. When no certification was forthcoming as the grievant's paid leave benefits depleted, the agency appropriately gave the grievant an opportunity to have her medical provider complete the FMLA certification directly. We are unable to identify evidence in the record that the grievant ever took advantage of this opportunity to establish her entitlement to FMLA protection and have the agency designate it appropriately as such.[11]

Although the grievant maintains that the college did not do enough to convey FMLA requirements to her, we cannot agree that the FMLA or any other law or policy required additional action after college staff provided the grievant with the appropriate form to certify her FMLA need.[12] Although the grievant continues to assert that she is "unaware of the details of the law," the relevant requirements are articulated in DHRM Policy 4.20, *Family and Medical Leave*, as described in our previous ruling.[13] As such, we cannot find that such requirements were not reasonably available to the grievant at any point. Finally, as we also previously observed, even assuming that the grievant's absence should have qualified for FMLA protection, her absence period substantially exceeded the 12-week maximum protection period provided by the statute.[14] In any event, the hearing officer correctly observed that the grievant ultimately bore the burden to prove her entitlement to FMLA protections that would have covered all of the absences charged on the Group III Written Notice at issue in this case.[15] As stated above, we have no basis to disturb his conclusion that the evidence did not prove such entitlement.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's reconsideration decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[16] Within 30 calendar days of a final hearing decision, either party may appeal the

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[10] *Id.*
[11] *Id.* at 7.
[12] The grievant appears to challenge the college's communications on grounds that they occurred via email because email is "prone to misinterpretation." Request for Administrative Review at 6-7. Although agencies should ensure that subject-matter experts are available to answer employee questions about FMLA protections, we are not aware of any requirement to convey such information orally. Moreover, for evidentiary purposes, we would generally approve email as a reliable means of documenting communications for future reference.
[13] *Id.* at 4.
[14] EDR Ruling No. 2024-5681, at 6; *see* 29 U.S.C. § 2612(a)(1).
[15] Reconsideration Decision at 1.
[16] *Grievance Procedure Manual* § 7.2(d).

final decision to the circuit court in the jurisdiction in which the grievance arose.[17] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[18]

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[17] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[18] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).