



1-27-2011

DEPARTMENT OF FINANCE AND  
ADMINISTRATION, PETITIONER VS.  
SARAH SHEA, Grievant

Follow this and additional works at: [http://trace.tennessee.edu/utk\\_lawopinions](http://trace.tennessee.edu/utk_lawopinions)

 Part of the [Administrative Law Commons](#)

---

This Initial Order by the Administrative Judges of the Administrative Procedures Division, Tennessee Department of State, is a public document made available by the College of Law Library, and the Tennessee Department of State, Administrative Procedures Division. For more information about this public document, please contact [administrative.procedures@tn.gov](mailto:administrative.procedures@tn.gov)

**BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION**

**DEPARTMENT OF FINANCE AND  
ADMINISTRATION,  
PETITIONER**

**VS.**

**SARAH SHEA,  
GRIEVANT**

**DOCKET NO: 26.09-106080J**

**INITIAL ORDER**

This contested case came to be heard on January 27, 2011, in Nashville, Tennessee, before Administrative Judge Lynn M. England, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Tennessee Civil Service Commission. Michael Begley, Attorney, Department of Finance and Administration, represented the Bureau of TennCare. The Grievant, Sarah Shea, was present and was represented by Jonathan Stephens of the Nashville Bar.

The subject of this hearing was Grievant's appeal of TennCare's denial of back pay and benefits from August 21, 2009, until her reinstatement on January 11, 2010. After consideration of the testimony and evidence presented, the arguments of counsel, and the entire record in this matter, it is determined that the Grievant is entitled to back pay and benefits from August 21, 2009, until her reinstatement on January 11, 2010.

**FINDINGS OF FACT**

1. The Grievant, Sarah Shea, is a career service employee of the Bureau of TennCare.
2. The Grievant is a Public Health Nurse Consultant in the Medical Appeals Division and Solutions Unit of the Bureau of TennCare.

3. On July 13, 2009, the Grievant's mother, Imogene Shea, completed the State of Tennessee Application for Family or Medical Leave (FMLA) on behalf of the Grievant. Grievant was not present when her mother completed the application.
4. TennCare approved Grievant's application for FMLA by letter dated July 15, 2009. This letter provided her FMLA would begin July 13, 2009 and end on October 2, 2009.
5. The letter further set forth certain obligations that required Grievant's compliance. However, consequences for non compliance for every obligation were not specifically stated.
6. One of the obligations set forth in the letter stated, "You will be required to furnish us with periodic reports of your status and intent to return to work to us every 30 days while on FMLA leave." However, no consequence for failure to do so was set forth.
7. Grievant was admitted to New Life Lodge, an inpatient residential treatment facility, on July 13, 2009.
8. During the time Grievant was a patient at New Life Lodge, she became physically ill requiring two (2) rounds of antibiotics. Due to her illness, she was unable to enter the intensive out-patient program at New life which was to follow her in-patient treatment. She was discharged from New Life Lodge on August 6, 2009. She notified her counselor at New Life Lodge, leaving a voice mail message, that she was sick and not able to begin the out-patient program at New Life as planned.
9. On August 17, 2009, she was admitted to St. Thomas Hospital, through the emergency room, where she was diagnosed with alcohol gastritis; and failure to

thrive, secondary to alcohol and hypokalemia. She was discharged August 19, 2009.

10. On August 18, 2009, Grievant's physician notified Nancy Heaney, TennCare Human Resources Director, that grievant had been admitted to St. Thomas Hospital and she may contact him for further information. Grievant's mother also notified Ms. Heaney of Grievant's hospitalization on the same day.
11. Upon discharge from St. Thomas Hospital, and following a week of recuperation, Grievant enrolled in the Cumberland Heights intensive outpatient treatment program on August 25, 2009. Ms. Heaney agreed that there was a possible connection between Grievant's hospitalization at St. Thomas and her nonappearance for outpatient treatment at New Life Lodge.
12. On August 21, 2009, New Life Lodge sent a letter<sup>1</sup> to Ms. Heaney advising TennCare that Grievant "did not complete all requirements of this program and received an Against Medical Advice Discharge on 08/17/2009 for Nonappearance". Grievant did not receive a copy of this letter. The letter also stated that she successfully completed the inpatient portion of the program on August 6, 2009.
13. Grievant completed the Cumberland Heights intensive outpatient program September 28, 2009.
14. TennCare terminated the Grievant by letter dated September 8, 2009. Her termination was effective August 21, 2009 stating she was no longer approved for leave under the FMLA as of August 17, 2009. On August 18, 2009, they

---

<sup>1</sup> A previous letter was sent by New Life Lodge to Ms. Heaney dated August 18, 2009. The previous letter gave a date for discharge as "against medical advice of August 4, 2009".

classified her as being on unapproved leave without pay and terminated her for job abandonment.

15. On October 27, 2009, Grievant completed a Request for Amendment/Correction of Protected Health Information with New Life Lodge. On November 2, 2009, New Life Lodge provided by facsimile a letter to Ms. Heaney informing her that Grievant had successfully completed all the requirements of the New Life Lodge Intensive Outpatient Program and received a "regular" discharge on August 17, 2009.<sup>2</sup>

16. The Grievant timely appealed her termination and by TennCare was granted a fourth step hearing on December 9, 2009. By letter dated December 18, 2009, Commissioner Goetz determined Grievant would be reinstated, however, her reinstatement would not be retroactive. The date of reinstatement would be left to the discretion of Ms. Heaney and Grievant's immediate supervisor. The letter further stated, "Work days missed from the effective date of termination, August 21, 2009, until reinstatement will be treated as non-FMLA approved leave without pay unless Ms. Heaney deems otherwise."

17. Grievant's immediate supervisor was Don Sharp, Director of Medical Appeals. Whenever an employee is out of the office on FMLA, he must "pull" employees from other units to assist in the workload. Mr. Sharp stated Grievant's effect on the unit during her FMLA leave was no different than when any other employee was out for FMLA.

---

<sup>2</sup> This "amended" letter from New Life Lodge correcting the November 2, 2009 letter is dated August 21, 2009.

## CONCLUSIONS OF LAW

1. The Petitioner in this case has the burden to introduce evidence that would by a preponderance of the evidence prove the issues should be resolved in Petitioner's favor. Rule 1360-4-1-.02.
2. Tenn. Code Ann. §8-3-326 Dismissal. – (c) Any employee who is absent from duty for more than three (3) consecutive work days without giving notice to the appointing authority or appropriate manager to include the reason for such absence, and without securing permission to be on leave, or who fails to report for duty or to the immediate supervisor; or the appointing authority within two (2) work days after the expiration of any authorized leave of absence, is considered as having resigned not in good standing, *absent existing circumstances causing the employee's absence or preventing the employee's return*. A regular employee who is designated resigned in accordance with these circumstances shall have the right to appeal such action through the grievance procedure and to be reviewed by the commission. (*emphasis added*)
3. Tennessee Department of Personnel Rule 1120-2-.14(5) Job Abandonment. An employee who is absent from duty for more than three (3) consecutive days without giving notice to the appointing authority or appropriate manager concerning the reason for such absence and without securing permission to be on leave, or who fails to report for duty or to the immediate supervisor or the appointing authority within two (2) business days after the expiration of any authorized leave of absence, *absent unusual circumstances cause the employee's absence or preventing the employee's return*, is considered as having resigned not in good standing. (*emphasis added*)
4. 29 C.F.R. § 825.300 (c) - Rights and responsibilities notice.
  - (1) Employers shall provide written notice detailing specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations.
    - (i) That the leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying (see §§ 825.300(c) and 825.301) and the applicable 12-month period for FMLA entitlement (see §§ 825.127 (c), 825.200(b), (f) and (g));
    - (ii) Any requirements for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of active duty or call to active duty status, and the consequences of failing to do so (see §§ 825.305, 825.309, 825.310, 825.313);
    - (iii) The employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave (see § 825.207);
    - (iv) Any requirements for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (see § 825.210), and the possible consequences of failure to

make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);

- (v) The employee's status as a "key employee": and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see § 825.218);
- (vi) The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave (see §§ 825.214, 825.604); and
- (vii) The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see § 825.213).

(2) The notice of rights and responsibilities may include other information – e.g., whether the employer will require periodic reports of the employee's status and intent to return to work-but is not required to do so.

(3) The notice of rights and responsibilities may be accompanied by any required certification form.

5. Tennessee DOHR Attendance and Leave Policy – Chapter 6 Family and Medical Leave Act.

Employee Medical Certification requirements – Situations Where Appointing Authority May Require Medical Certification: "...The appointing authority must give notice of the requirement to provide medical certification each time certification is required. This notification must be in writing at certain times, as covered in the section on 'Requirements for Providing Information of FMLA Rights and responsibilities' of this policy. An appointing authority's oral request for an employee to furnish subsequent medical certification information is sufficient."

"If the appointing authority has reason to question the appropriateness of the leave or its duration, certification may be requested at a later date. An employee should be advised of the consequence of not providing medical certification at the time the certification is requested."

6. Prohibition Against Discriminatory Practices – Requirements for Providing Information on FMLA Rights and Responsibilities: "The appointing authority must also provide the employee with written notice detailing specific obligations of the employee and consequences of failure to meet these obligations...(2) any requirements for furnishing medical certification of a serious health condition and information regarding the consequence of not providing this information."

"The notice must be given within a reasonable time after the employee notifies the appointing authority of the need for FMLA leave, preferable between one and two business days. If the leave has already begun, the notice should be mailed to the employee's address of record."

"If the initial notice to the employee for the six month period and the agency's handbook or other written documentation clearly indicate the agency's requirements for the employee to provide medical certification or 'fitness for duty' information,

then subsequent notification to the employee of these requirements is not necessary.”

“If the appointing authority does not provide the employee with required notices, no action can be taken against the employee for failure to comply with the employee’s obligations.”

#### 7. Employee Failure to Provide Medical Certification

In situations of foreseeable leave, if an employee fails to provide certification within the requested allowable time frame (minimally fifteen calendar days), he or she may be denied leave until certification is provided.

When the need for leave is unforeseeable, an employee must provide certification within the reasonable period of time set by the appointing authority, based on the particular medical circumstances. An employee failing to provide certification within this time frame may be denied leave continuation.

### ANALYSIS

Grievant applied for and TennCare approved Grievant’s application for FMLA by letter dated July 15, 2009. This letter provided her FMLA would begin July 13, 2009 and end on October 2, 2009. The letter further set forth certain obligations that required Grievant’s compliance. One of the obligations set forth in the letter stated, “You will be required to furnish us with periodic reports of your status and intent to return to work to us every 30 days while on FMLA leave.” However, no consequence for failure to do so was set forth.

The law is very clear that an employer requesting FMLA medical certification is required to provide the employee when requesting medical certification with written notice detailing specific obligations of the employee and consequences associated with employee’s failure to meet these obligations.

TennCare requested the Grievant provide continuing medical certification but stated no consequence for failure to do so. Furthermore, reference to the Department of Human Resources policy states that a failure to comply will only result in a denial of leave, not termination for job abandonment.

This is clearly a case of unforeseen and unusual circumstances. The Grievant was admitted to New Life Lodge, an inpatient alcohol treatment facility on July 13, 2009. While at New Life, she first became physically ill and upon discharge to her home, she became even sicker. She was then hospitalized at St. Thomas through the emergency room for two days for among other things, failure to thrive. One week later, she began her outpatient portion of her treatment plan at Cumberland Heights, which she successfully completed.

It is determined that misinformation was passed back and forth between Ms. Heaney, the Grievant and New Life Lodge. However, regardless of the inaccuracies of the letters from New Life Lodge and the misinformation between the parties, TennCare still failed to follow the requirements under FMLA wherein they were to notify Grievant of the consequences of termination for her failure to provide them with medical certification. Even Commissioner Goetz recognized the unusual circumstances surrounding Grievant's leave and subsequently reinstated her to her position with TennCare in his decision of her 4<sup>th</sup> step grievance process.<sup>3</sup> However, Commissioner Goetz left her reinstatement date up to Ms. Heaney and Mr. Long. Ms. Heaney and Mr. Long arbitrarily determined that her reinstatement would not be retroactive to her date of termination. They gave no sound reason other than Ms. Heaney's testimony that Grievant failed to provide the required medical documentation and as a result she should be punished. The law does not support that decision.

After consideration of the testimony and evidence presented, the arguments of counsel and the entire record in this matter, it is determined that the State did NOT meet its burden of proof, by a preponderance of the evidence that Grievant's

---

<sup>3</sup> The 4<sup>th</sup> step grievance disposition letter is dated December 18, 2009. Grievant's reinstatement date was January 11, 2010. No evidence was presented regarding the lapse in time between those dates.

reinstatement date should not be effective the date of her termination which was August 21, 2009.

It is hereby Ordered that Grievant's reinstatement date shall be August 21, 2009.

This Order entered and effective this 30th day of August, 2011. England  
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this  
the \_\_\_\_\_ day of August, 2011.

---

THOMAS G. STOVALL, DIRECTOR  
ADMINISTRATIVE PROCEDURES DIVISION