University of Tennessee, Knoxville
Trace: Tennessee Research and Creative Exchange

Tennessee Department of State, Opinions from the Administrative Procedures Division

Law

11-2-2011

TENNESSEE DEPARTMENT OF HEALTH v. GODFREY VAZ, Grievant

Follow this and additional works at: 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

BEFORE THE CIVIL SERVICE COMMISSION OF THE STATE OF TENNESSEE

IN THE MATTER OF: **TENNESSEE DEPARTMENT OF HEALTH** **v.** **GODFREY VAZ** ***Grievant***	**DOCKET NO: 26.17-111343J**

INITIAL ORDER OF DISMISSAL

This case was filed by the Grievant to contest final action of the appointing authority, the Department of Health, resulting in a temporary reassignment of duties and a requirement to complete a competency examination. Mary Juanita Presley represents the Department of Health, the Petitioner in this matter. The Grievant Godfrey Vaz is represented by Robert J. Kraemer, Jr., of the Wilson County bar.

On August 26, 2011, an Order was entered which required to parties to file legal argument regarding the grievability of this matter under relevant civil service law. Both parties timely filed such argument. After consideration of the arguments of the parties, it is determined that there is no grievable issue implicated in this matter, and therefore the case should be dismissed.

FINDINGS OF FACT

1. On September 7, 2010, the Commissioner of the Department of Health transmitted a letter to the Grievant, notifying him of the Department's intent to terminate his employment on the basis of inefficiency, negligence, and incompetence, among other charges.

2. After the Grievant appealed the dismissal, a Level IV hearing was held on November 16, 2010, resulting in reinstatement of the Grievant's position as a physician, with full back pay and benefits. Additionally, the Grievant was assigned to non-clinical duties, and was required to successfully complete the Special Purpose Examination (SPEX).

3. The Grievant was instructed to report to work on January 18, 2011, and to submit an application to take the SPEX no later than January 24, 2011.

4. The decision at the Level IV hearing was communicated to the Grievant in a letter dated January 11, 2011, and constitutes final agency action.

5. The Grievant reported to work on January 18, 2011, but failed to register for the SPEX as instructed.

6. The Grievant was dissatisfied with the result of the Level IV hearing, and requested a Level V hearing, resulting in the instant case.

RELEVANT LAW

1. Rule 1120-11-.06, Tenn. Comp. R. & Regs., contains a description of "Grievable Matters," which includes the following actions:

(1) Disciplinary suspension or demotion;

(2) Disciplinary dismissal;

(3) Any disciplinary action or layoff that the employee believes is the result of discrimination prohibited by T.C.A. § 8-50-103 or T.C.A. § 4-21-401. The employee may file such grievance directly with the appointing authority, warden, or superintendent;

(4) Involuntary geographical transfer of an employee or official duty station more than fifty (50) miles. Distance will be determined by drawing a circle, with a fifty (50) mile radius, centered on the previous official duty station;

(5) Non-compliance with an approved reduction in force plan by an appointing authority;

(6) Prohibited political activity as outlined in T.C.A. Title 2, Chapter 19 (the "Little Hatch Act");

(7) Coercion of an employee to waive his right to consideration on an eligibles list;

(8) Final performance evaluations based on procedural grounds to the fourth step; and

(9) Other matters determined at the sole discretion of the appointing authority to be grievable, but not included in section 1120-11-.07 below.

2. Rule 1120-11-.07 contains "Exceptions and Non-Grievable Matters," relevant sections of which provide the following:

(4) Normal supervisory counseling and management;

. . .

(11) Reasonable work assignments outside those normally associated with the employee's assigned job classification;

. . .

(16) Matters relating to internal agency or program management based on discretionary decision making. . . .

ANALYSIS and CONCLUSIONS OF LAW

As a threshold matter, before this case can proceed, it must be determined whether the issues implicated in the appeal constitute grievable matters under relevant civil service law. Specifically, as noted by the Grievant, these issues are twofold: (1) the temporary reassignment of duties to a non-clinical position; and (2) the requirement to successfully complete a professional competency examination.

The Department of Health is charged with "general supervision of the interests of health and life of the citizens of this state."[1] The Commissioner of Health oversees the Department to carry out this function. In this role, the Commissioner, as well as Department of Health supervisors reporting to the Commissioner, must insure that the services provided by the Department are safe and do not endanger the public. This function is an integral part of normal supervisory management of the Department.

The record in this matter shows that the Department of Health had serious concerns about the Grievant's competence in performing his clinical duties. Because of this concern, the Grievant was assigned to non-clinical duties. He was also required to successfully complete a clinical competency examination. Both actions were reasonable managerial responses to identified clinical issues. As such, they are specifically non-grievable according to Rule 1120-11-.06(4).

The Grievant argued that the Department's action did not consist of "normal supervisory…management," since there is no departmental wide policy requiring other employees to take the examination. This argument is not persuasive. Any reasonable supervisor who believed that an employee's deficiencies could pose a risk to the public would take steps to alleviate a possible danger; relieving the employee of clinical duties and requiring a competency examination are appropriate measures in this scenario. More importantly, these actions are a function of normal supervisory management; as such, they are explicitly non-grievable under the civil service rules.[2]

---

[1] Tenn. Code Ann. § 68-1-104.

[2] It could also be argued that the Department's actions in this matter are non-grievable under the categories of "reasonable work assignments outside those normally associated with the employee's assigned job classification" and "matters relating to internal agency… management based on discretionary decision making." Rule 1120-11-.06(11) and (16). However, these factors are not discussed since the previous factor is dispositive.

Not only are the issues in this matter encompassed in the "Exceptions and Non-Grievable Matters" in Rule 1120-11-.07, they do not fit into the categories listed in "Grievable Matters" specified in Rule 1120-11-.06. The Grievant contended that these issues are included in Rule 1120-11-.06(9): "other matters determined at the sole discretion of the appointing authority to be grievable but not included in section 1120-11-.07 below." In support of this argument, the Grievant pointed to language in the Department's letter dated January 11, 2011: "You have the right to appeal this decision to the Fifth Step Grievance Level (Civil Service Commission)."

This argument, too, must fail. First, the right to file an appeal does not automatically confer jurisdiction upon the Civil Service Commission to hear the case. Even had the appointing authority determined that these issues are grievable, a proposition that is not supported by the language of the letter, that decision is not binding upon the Civil Service Commission or upon the Administrative Judge sitting for the Commission. Second, the argument ignores the final phrase of the cited rule, which disallows any actions included in the list of non-grievable matters contained in Rule 1120-11-.07. As determined above, the issues implicated here are among those enumerated in that list; therefore, they cannot be determined to be grievable by the appointing authority.

Accordingly, since it is determined that there are no grievable issues in this case, it is **Ordered** that this matter is hereby **Dismissed**.

THIS INITIAL ORDER ENTERED AND EFFECTIVE this the _____ day of _____, 2011.

_____

ANN M. JOHNSON
ADMINISTRATIVE JUDGE
615-253-5562

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 2nd day of November, 2011.

THOMAS G. STOVALL, DIRECTOR
Administrative Procedures Division