Issue: Benefits/Leave (FMLA); Hearing Date: 09/28/17; Decision Issued: 11/28/17; Agency: Department of Veterans Services; AHO: Carl Wilson Schmidt, Esq.; Case No. 11075; Outcome: Full Relief.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11075

Hearing Date: September 28, 2017
Decision Issued: November 28, 2017

PROCEDURAL HISTORY

On July 17, 2017, the Equal Employment and Dispute Resolution division issued Ruling 2017-4575 qualifying this grievance for hearing. On August 22, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On September 28, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's Representative
Witnesses

ISSUES

1. Whether Grievant has a serious health condition for which intermittent leave and/or a reduced leave schedule was medically necessary?

2. Whether the Agency's actions in relation to Grievant's request for FMLA leave constitute interference with the grievance's exercise of rights under the FMLA

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the Agency's action was

Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Veterans Services employed Grievant as a Certified Nursing Assistant at one of its facilities. She began working for the Agency in March 2012.

Grievant's regular work schedule was an eight hour shift. The Facility where Grievant worked operated on a 24 hour basis. It had to be continuously staffed to provide necessary medical services to Facility Residents. If an employee called the Facility and said he or she would not be reporting to work as scheduled, the Facility selected employees at the Facility to continue working for up to an additional eight hour shift. The Facility posted a schedule 14 days in advance showing which days an employee was subject to being forced to work overtime. Working overtime was a condition of employment for employees holding Grievant's position.

On or about January 3, 2017, the Agency received a Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act) form regarding Grievant's medical condition. Grievant's Doctor indicated that he treated her on January 3, 2017 and her medical condition commenced on January 3, 2017. The Doctor prescribed medication for Grievant. The Doctor wrote:

> Chronic lower back pain exacerbated by working > 8 hour shifts & has occasional flare ups of sciatica.[1]

The possible duration of the condition was from January 3, 2017 to January 4, 2018.

In a separate letter, the Doctor wrote that Grievant could work with modified duty and that she "[m]ay only work 8 hour shifts at this time."[2]

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[1] Agency Exhibit 1.

[2] Agency Exhibit 1.

Grievant complied with her Doctor's instructions and notified the Agency she would not work more than an eight hour shift even if she would otherwise have been expected to work mandatory overtime.

Grievant's last work day was January 10, 2017.

On January 24, 2017, the Director of Human Resources sent Grievant a letter stating, in part:

> I was notified on January 5, 2017 by the Administrator … that [Facility] would not be able to accommodate your work restrictions dated January 3, 2017 for the whole year of 2017. Your restrictions state that you are unable to perform any of the functions of your job and you can only work 8 hours a day. ***
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> Your Family Medical Leave (FML) began January 10, 2017, this allows for 12 weeks per year of paid or unpaid leave. In order for this leave to be paid you must have personal leave hours to cover the time missed or it will be unpaid which will put you in a Leave without Pay (LWOP) status. ***
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> Failure to follow instructions and/or policy could result in termination.[3]

On February 10, 2017, the Director of Human Resources sent Grievant a letter stating, in part:

> This letter is to notify you that while on FMLA you are responsible for paying your portion of Health Care [dollar amount] and optional life [dollar amount]. *** Failure to pay your portion will result in loss of coverage.[4]

On February 22, 2017, the Doctor wrote a letter stating:

> I was asked to write a statement by [Grievant] explaining her intermittent leave under FMLA. [Grievant's] FMLA was [meant] to cover her intermittent absences and stated that she was unable to do her job when she had acute flare ups of her back pain. Most of the time, she is able to perform all of her job duties. I hope this resolves any confusion.[5]

On March 7, 2017, the Director of Human Resources sent Grievant a letter stating in part:

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[3] Agency Exhibit 3.

[4] Agency Exhibit 3.

[5] Agency Exhibit 2.

A review of your new medical information was completed and I am notifying you that we cannot accommodate your restrictions of only 8 hours a day until March 2018 due to our mandation policy. ***

I am also notifying you that you have not paid your Healthcare and Optional Life premiums per my letter of February 10, 2017. Therefore, your coverage will be cancelled as of January 31, 2017 and you will be responsible for any claims that have been paid in February and March ….

Your twelve weeks of Family Medical Leave expires April 3, 2017, at that time you will need to be on VSDP or able to return to work full duty without any restrictions or you will be terminated from the agency or you can voluntarily resign.[6]

On April 26, 2017, the Director of Nursing wrote:

I met with the grievant [Grievant's name]. There are no changes in [Grievant's] status. She is still limited to working eight hour shifts through at least 1/3/2018. Due to the policies of our facility and the extreme vulnerability of our residents this restriction cannot be accommodated.[7]

On May 18, 2017, the Administrator sent Grievant a letter stating, in part:

We have worked with you since the first of the year on this issue and have accommodated your twelve (12) week absence under FMLA. We have kept you on the payroll even though you have not worked.

In conclusion, there are two resulting scenarios. 1. Your physician's most current statement states that "Most of the time, she is able to perform all of her job duties." Meaning there are no restrictions when you feel well enough to come to work. Or, (2) if you cannot work any additional time over eight (8) hours, then you do not meet the requirements of the position. ***

Therefore, your options are to continue your employment and fulfill all of the job duties of a CNA, or tender your resignation.[8]

[6] Agency Exhibit 3.

[7] Agency Exhibit 2.

[8] Agency Exhibit 2.

CONCLUSIONS OF POLICY

DHRM Policy 4.20, Family and Medical Leave (the "FMLA Policy") provides "guidance regarding the interaction of the FMLA and the Commonwealth's other Human Resource policies" for state employees. Under the FMLA Policy, eligible employees are entitled to receive "up to 12 weeks of unpaid family and medical leave per leave year because of their own serious health condition . . . ." To be eligible for FMLA leave, an employee must "have been employed by the Commonwealth for a total of at least 12 months in the past seven years and have worked for at least 1,250 hours in the previous 12-month period …." The FMLA Policy provides that "[e]ligibility determinations are made as of the date that the family and medical leave is to begin."

Grievant has a serious health condition involving continuous treatment by a health care provider. She is entitled to take Family Medical Leave as allowed by State policy and federal regulation.

29 CFR 825.102 defines Intermittent Leave as:

> leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.

This section also defines Reduced Leave Schedule as:

> means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

29 CFR 825.202 addresses Intermittent Leave or Reduced Leave Schedule. This section provides:

> FMLA leave may be taken intermittently or on a reduced leave schedule under certain circumstances. *Intermittent leave* is FMLA leave taken in separate blocks of time due to a single qualifying reason. A *reduced leave schedule* is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time. ***
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> An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full time schedule. ***

> Intermittent or reduced schedule leave may be taken for absences where the employee … is … unable to perform the essential functions of the position because of a chronic serious health condition … even if he or she does not received treatment by a health care provider.

29 CFR 825.205 addresses Increments of FMLA leave for Intermittent or Reduced Schedule Leave. This section provides:

> (c) If an employee would normally be required to work overtime, but is unable to do so because of a FMLA-qualifying reason that limits the employee's ability to work overtime, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement. In such a case, the employee is using intermittent or reduced schedule leave. For example, if an employee would normally be required to work for 48 hour in a particular week, but due to a serious health condition the employee is unable to work more than 40 hours that week, the employee would utilize eight hours of FMLA protected leave out of the 48 hour workweek, or one-sixth (1/6) of a week of FMLA leave.

The US Department of Labor's website addresses frequently asked questions and states:

> **Intermittent/reduced leave schedule**
> **(Q) Does an employee have to take leave all at once or can it be taken periodically or to reduce the employee's schedule?**
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> When it is medically necessary, employees may take FMLA leave intermittently – taking leave in separate blocks of time for a single qualifying reason – or on a reduced leave schedule – reducing the employee's usual weekly or daily work schedule. When leave is needed for planned medical treatment, the employee must make a reasonable effort to schedule treatment so as not to unduly disrupt the employer's operation.
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> Leave to care for or bond with a newborn child or for a newly placed adopted or foster child may only be taken intermittently with the employer's approval and must conclude within 12 months after the birth or placement.

Grievant's Doctor placed Grievant on a Reduced Leave Schedule on January 3, 2017 because she "[m]ay only work 8 hour shifts at this time." The Agency was required to allow Grievant to work her usual eight hour shift and take FMLA leave instead of working mandatory overtime to the extent she had FMLA available. The Agency erred when it prohibited her from working.

An employer may not "interfere with, restrain, or deny the exercise of or the attempt to exercise" any rights provided by the FMLA.[9] Any violation of the FMLA or regulations implementing the FMLA is considered interference with an employee's exercise of rights

The Agency's action amounted to her removal from employment. Grievant is entitled to be restored to the position she was in prior to the Agency's action. Grievant's request for relief must be granted in accordance with the remedies afforded by the Grievance Procedure Manual.

The Agency argued that working overtime was a condition of employment and it could not accommodate Grievant's request to work only eight hours per shift. This argument is not persuasive. Under the Americans with Disabilities Act ("ADA"), an employer must make reasonable accommodations to the known physical or mental limitations of a qualified employee with a disability, unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business [or government]." To the extent the Agency is arguing that the ability to work overtime is an essential function of Grievant's position and eliminating the requirement that she work mandated overtime would impose an undue hardship, no such defense is available for an employee's request for leave under the FMLA. In a situation where an employee is otherwise entitled to use her statutorily mandated FMLA leave, an employer cannot deny that request solely on the basis that it would impose an undue hardship.

DECISION

For the reasons stated herein, the Agency is **Ordered** to:

- Return Grievant to her benefits and pay status prior to January 3, 2017.
- Pay Grievant back pay from January 3, 2017 less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.
- Restore Grievant's FMLA leave balances to the FMLA leave available to her on January 3, 2017.
- Restore Grievant's health insurance coverage and optional life insurance coverage unless Grievant elects, at her sole discretion, to waive this requirement.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

[9] 29 C.F.R. 825.220(a).

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.