COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11601

Hearing Date: December 9, 2020
Decision Issued: January 5, 2021

PROCEDURAL HISTORY

Grievant was absent from work and presented the Agency with a note from a Nurse Practitioner requiring her to self-isolate for five days. Grievant sought leave but her request was denied.

On May 5, 2020, Grievant timely filed a grievance to challenge the Agency's decision to deny her request for leave. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On September 16, 2020, the Office of Employment Dispute Resolution issued Ruling 2021-5138 qualifying the matter for hearing. On October 13, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 9, 2020, a hearing was held by remote conference.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

1. Whether Grievant's reason for taking leave from April 6, 2020 to April, 12, 2020 was sufficiently "related to the declared public health threat during a pandemic illness" such that she was entitled to use PHEL pursuant to Policy 4.52.

BURDEN OF PROOF

The burden of proof is on Grievant to show by a preponderance of the evidence that the relief she seeks should be granted. 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 Behavioral Health and Developmental Services employs Grievant as a Treatment Associate at one of its facilities. She has been employed by the Agency since 2017. The Agency considered Grievant to be an essential employee.

On March 12, 2020, the Governor of Virginia declared a state of emergency to respond "to the potential spread of COVID-19, a communicable disease of public health threat."

On March 20, 2020, Grievant had a conversation with Resident BE. Grievant was standing within six feet of Resident BE and speaking without personal protective equipment.

On March 23, 2020, the Facility Director issued a memorandum with the subject line "If you feel ill". He instructed staff:

> 1. STAY HOME – Do not come to work if you are displaying symptoms of CoVid 19 or the flu.
> 2. Contact your doctor.
> 3. Contact your supervisor.
>
> a. Inform them of your symptoms.
>
> b. Your supervisor will contact the infection control nurse and inform her of your status.

The memorandum further instructed employees to contact their supervisors "if your doctor has quarantined you in response to CoVid 19" and to advise of the basis for quarantine.

Between March 20, 2020 and April 2, 2020, Grievant had developed COVID19 symptoms including a dry cough and fatigue. Grievant was treating her symptoms but they continued to progress.

On April 2, 2020, Grievant was at the Facility and given a mask to wear. She had not been provided with a mask prior to this date. Grievant thought the mask was disposable so she discarded it when she left the Facility. When she returned to the Facility, she went to Ms. D's office to obtain a new mask. Nurse D entered the office and spoke with Grievant. During the conversation, Grievant said she was concerned about being exposed to a resident who might test positive for COVID19. Nurse D indicated she did not believe that the resident would test positive.

On April 6, 2020, Resident BE tested positive for COVID19.

Grievant reported to Ms. P. On April 6, 2020, Ms. P sent emails to Facility staff informing them that she had been informed that a resident had tested positive for COVID19. Grievant told Ms. P that Grievant would be contacting her doctor because she felt sick and had been exposed to that resident on March 20, 2020. No one at the Facility told Grievant she had to be tested for COVID19 or where to be tested.

On April 6, 2020, Grievant sent an email to Ms. P, Nurse D, and the HR Director stating:

> I informed my primary care physician today that I was in direct contact with a resident (BE) two weeks ago that has now been confirmed with COVID-19. I have been instructed to leave and come have the test performed. I will provide documentation of the results.[1]

As of April 6, 2020, Grievant did not have a telework agreement signed and in place. She could not telework on April 6, 2020 or thereafter until such time as she and the Agency entered into a telework agreement.

CV is a community-based non-profit that provides health care to patients in need. CV is not a "public health official." CV is a Federally Qualified Health Center that served as a community testing site during the pandemic.

On April 6, 2020, Grievant was seen by a Nurse Practitioner at CV. Grievant told the Nurse Practitioner that Grievant had been exposed to someone who tested positive for COVID19. Grievant told the Nurse Practitioner that she had symptoms of a cough but not shortness of breath, fever or chills, or body aches. The Nurse Practitioner said they could not test Grievant for COVID19 because she did not have a fever and under the Center for Disease Control guidelines only people with fevers could be tested. Grievant was prescribed medication. The Nurse Practitioner presented Grievant with a note that Grievant gave to the Agency. The note stated:

[1] Grievant Exhibit p. 49.

> Due to COVID-19, this note is being issued for the following reason: Patient is high-risk and should be self-quarantining. X 5 days --, if symptom free may return to work.[2]

Grievant complied with the instructions of the Nurse Practitioner and remained out of work for five days.

Grievant returned to work on April 13, 2020 and entered into a telework agreement and obtained a flash drive enabling her to telework. She requested Public Health Emergency Leave ("PHEL") to cover approximately 40 hours of absence from April 6, 2020 through April 12, 2020.

On May 1, the Agency determined that Grievant was not eligible for PHEL because her quarantine was "precautionary" and not supported by a COVID19 test. Thus, her absence was charged to her existing sick and annual leave balances.

On May 5, 2020, Grievant initiated a grievance alleging that she was entitled to PHEL during the week of April 6, 2020 and that, by denying it, the Agency had misapplied DHRM Policy 4.52, Public Health Emergency Leave. The Agency maintained that the Grievant was not entitled to PHEL and declined to grant relief or to qualify the grievance for a hearing.

On May 6, 2020, the Employee Relations Manager asked Nurse D if Grievant had been tracked as a potential exposure to a resident who had tested positive. Nurse D indicated that Grievant had "face to face contact with the resident [on] 3/18 and 3/19 but was out of the time frame for possible exposure of residents to staff."[3] Nurse D "went back" two days from the onset of symptoms and test results and then "went back" five to six days to account for incubation. Nurse D concluded Grievant could only have been exposed to the virus from March 23, 2020 or March 24, 2020 going forward. Grievant did not have contact with Resident BE after March 23, 2020, according to Nurse D. Thus, the Agency concluded Grievant did not contract the virus from Resident BE.

Nurse D did not know how Resident BE acquired COVID19. Resident BE could have acquired the virus from a sick employee who entered the Facility and came into contact with Resident BE.

During the management steps, the Agency indicated that its practice was to approve PHEL under five scenarios. Of the scenarios related to an employee's own medical needs, all required either receiving a test for COVID-19 or being ordered to quarantine by the Agency. At the qualification stage, the Agency Head asserted that the clear intent of Policy 4.52 "is to provide PHEL to eligible employees who have tested

[2] Agency Exhibit p. 23.

[3] Grievant Exhibit p. 55.

positive of COVID-19 or been exposed and have symptoms or need to have childcare arrangements."

CONCLUSIONS OF POLICY

The Governor's order activated DHRM Policy 4.52. DHRM Policy 4.52 governs Public Health Emergency Leave. The purpose of this policy is:

> It is the policy of the Commonwealth to protect the health of state employees and the public and to provide continuity of services to the citizens of the Commonwealth during times of pandemic illness.
>
> The policy summary provides:
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> This policy permits or requires eligible employees to attend to their own medical needs and those of their immediate family members by providing up to 80 hours of paid leave per leave year when Communicable Disease of Public Health Threat conditions have been declared by the State Health Commissioner and Governor. Use of this policy is intended for illness directly related to the declared communicable disease threat.
>
> The policy provides:
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> Upon declaration and within the period of a Communicable Disease of Public Health Threat, all salaried employees are eligible for up to 80 hours of paid leave per leave year to attend to their own medical condition and/or to care for immediate family members residing in an Affected Area.
>
> The Illness in the Workplace section provides:
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> 1. Upon declaration of a Communicable Disease of Public Health Threat, agencies should direct ill employees to leave the workplace and attend to their medical needs.
> 2. Time away from the job site to comply with this directive shall be applied toward the 80 hours of pre-authorized Public Health Emergency Leave.
> 3. These employees are subject to the same leave request process as all other employees as noted in the Paid Public Health Emergency Leave section.
> 4. An employee's refusal to leave the workplace under these circumstances may result in disciplinary action.
>
> Section G(1) provides:

> Employees are expected to report to work as usual unless ill or as otherwise directed by the Governor, their Agency Head, or the State Health Commissioner. Failure to report to work or to perform assigned duties may result in disciplinary action.

Policy Guidance issued March 26, 2020, stated, "[e]ffective 3-26-2020 the number of hours is expanded from 80 to 160." The Policy Guidance stated:

> • Medical documentation normally required to access leave may be waived during this event due to the strain on the medical community.
> • Employees required by public health officials to be monitored during the incubation period may use PHEL to be paid for that period of time.
> • Employees potentially exposed but asymptomatic who choose to self-monitor may telework for the incubation period.
> • If an employee's job is not conducive to telework or other off-site arrangements, the employee will be provided PHEL.
>
> > • Agencies are encouraged to be creative in identifying ways to enable asymptomatic employees to self-monitor away from the workplace while continuing to work.
> > • Agencies that require self-monitoring to mitigate potential risk of exposure to other employees must permit teleworking or other arrangements. If other arrangements cannot be made, the agencies should award PHEL.

DHRM issued an Addendum[4] on April 28, 2020 providing:

> The following questions can be asked of employees:
>
> 1. Today or in the past 24 hours, have you had any of the following symptoms?
> • Cough
> • Shortness of breath or difficulty breathing
>
> Or at least two of these symptoms:
>
> • Fever
> • Chills
> • Repeated shaking with chills
> • Muscle pain
> • Headache
> • Sore throat
> • New loss of taste or smell

[4] Although the Addendum was issued after the dates Grievant was absent from work, the Addendum illustrates the intent behind DHRM Policy 4.52.

2. In the past 14 days, have you had contact with a person known to be infected with COVID-19?

Employees should not be asked about symptoms of any other conditions. Employees who respond yes to either question, should be denied entry into the work environment and asked to return home, self-monitor and seek medical care if needed. The period of self-monitoring should be for a total of 14 days from when the employee first had a fever, felt feverish or had chills, cough, sore throat, shortness of breath, difficulty breathing and/or came into contact with a person known to be infected. Agencies will need to work with the employee to determine the appropriate leave type to utilize if needed or if the employee has the ability to work remotely while self-monitoring.

The purpose of DHRM Policy 4.52 is not merely to provide a sick employee with leave as is the case with other sick leave policies. The objective of DHRM Policy 4.52 is to provide a tool to stop the spread of COVID19 in order to protect other employees and Agency patients and residents. The policy is prophylactic in nature and must be constructed in the context of reducing the risk to public health.

Grievant is entitled to PHEL for two reasons. First, DHRM Policy 4.52 is to be construed liberally to grant leave in favor of employees. For example, the policy allows waiver of medical documentation requirements, avoiding "stringent medical documentation", and encourages agencies to "exercise reasonable judgment".

Grievant was instructed to self-quarantine by a medical provider. The Agency argued that Grievant was not entitled to PHEL because the instruction to self-quarantine did not come from a public health official as required under DHRM Policy 4.52. The validity, importance, or significance of having a public health official instruct Grievant to self-quarantine instead of a health care provider is not known. Requiring an employee to provide documentation from a public health official is consistent with the policy wording but not the intent to avoid stringent medical documentation. Reasonable judgment would require an expectation that a note from a medical provider should be treated the same as a note from a public health official. It would be reasonable for Grievant to rely on her medical provider's opinion to the same extent as she would be able to rely on the opinion of a public health official.

The Agency asserted that Grievant was not entitled to PHEL because she only encountered Resident BE prior to the resident becoming infected with COVID19. The source of Grievant's possible exposure, however, is not relevant. Grievant could have been exposed to COVID19 by any person she encountered at work or outside of work. Indeed, Grievant could have been exposed to the person entering the Facility who transmitted the virus to Resident BE. Grievant's failure to identify the source of her symptoms or connect them to Resident BE does not affect the merits of her case. Grievant experienced COVID19 symptoms and it was reasonable for her to question whether she had contracted COVID19.

The Agency attributed significance to the fact that Grievant had not tested positive for COVID19. DHRM Policy 4.52 does not require an employee to have tested positive for COVID19 in order to receive PHEL. Indeed, DHRM's Return to Work Documentation During COVID19 (April 2, 2020) provides:

> Testing capacity for COVID-19 is currently limited; VDH has advised clinicians to reserve testing for those who meet certain testing criteria. A test for COVID-19 may not be available or necessary for every patient with symptoms. Therefore, an expectation of testing prior to returning to duty is not reasonable.

Grievant attempted to be tested for COVID19 so that she would know whether or not she was exposed to the virus. The lack of testing capacity cannot be held against her since she had no control over whether she could be tested.

The Agency asserted Grievant could have teleworked during her absence. The evidence showed Grievant had not been approved by the Agency to telework prior to her leaving the Facility. She could not have performed work duties by telework while she was absent from work.

Second, Grievant is entitled to leave under the FFCRA and, the principles applicable to FFCRA are similar to those applicable to DHRM Policy 4.52.

The Families First Coronavirus Response Act requires "full-time employees are entitled to 80 hours of paid sick time, which is available immediately, for use if the employee *** has been advised by a **health-care provider** to self-quarantine." (Emphasis added.) Grievant was advised by a health care provider to self-quarantine due to COVID19 and, thus, she would be entitled to leave under the FFCRA. The Agency believes it is not subject to the FFCRA because it is a health care provider. DHRM wrote in Families First Coronavirus Response Act Questions and Answers:

> 4. Who is not eligible for FFCRA benefits?
> There is an exclusion for health care providers and emergency responders. As defined in the Act, these include:
> • Health care providers: Anyone employed at any doctor's office, hospital, health care center, clinic, postsecondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions. ***
>
> **Despite the exclusion**, employees in these categories who are displaying symptoms or are known to have been exposed and required to self-quarantine by a public health official or **medical care provider** should be

removed from the workplace and provided the paid emergency sick leave. (Emphasis added).

The EDR Ruling does not address this conclusion even though Grievant raised the FFCRA as a basis for relief. DHRM's answer to question number 4 shows agencies should disregard a specific exclusion from the FFCRA and apply the principles of the FFCRA which is to grant leave when a medical care provider believes an employee should be removed from the workplace due to exposure to COVID19. Because the FFCRA would allow Grievant leave, it is reasonable to interpret a similar policy, DHRM Policy 4.52, to allow Grievant PHEL.

In conclusion, the Agency's strict application of the wording of DHRM Policy 4.52 resulted in the unfair application of the policy amounting to a disregard of the applicable policy's intent. Grievant's actions were directly related to a communicable disease threat. She suspected she may have been exposed to COVID19 and her actions were intended to eliminate the risk that she might expose others to COVID19.

DECISION

For the reasons stated herein, the Agency is ordered to provide Grievant with PHEL from April 2, 2020 through April 12, 2020.

APPEAL RIGHTS

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

Please address your request to:

Office of Employment 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 EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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