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QUALIFICATION RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2021-5138
September 16, 2020

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") on whether her May 5, 2020 grievance with the Department of Behavioral Health and Developmental Services (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is qualified for a hearing.

FACTS

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."[1] On March 23, the director of the facility where the grievant works issued a memo to staff instructing them: "STAY HOME – Do not come to work if you are displaying symptoms of CoVid 19 or the flu." The memo 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.

According to the grievant, she came down with a dry cough on or about March 25. On April 2, after learning that a resident of the facility where she works was being tested for COVID-19, she allegedly informed the agency's infection control nurse that she had had sustained face-to-face contact with that resident on March 20[2] and was continuing to experience two potential symptoms of COVID-19. On or about April 5, the grievant learned the resident had tested positive for the virus and, in the absence of immediate instruction from her agency, she sought her medical provider's opinion as to her potential exposure and continuing symptoms. Her medical provider

[1] Exec. Order No. 51 (2020), *Declaration of a State of Emergency Due to Novel Coronavirus (COVID-19)*. The Commissioner of the Virginia Department of Health had declared the COVID-19 virus a Communicable Disease of Public Health Threat on February 7, 2020. The World Health Organization confirmed that COVID-19 was a pandemic on March 11, 2020.

[2] The record presents a factual dispute whether the grievant's contact with the resident could have reasonably exposed her to the virus. It appears that the agency assessed the situation based on contact dates of March 18 and/or 19, not March 20, and it considered this timeframe to be outside the relevant incubation period where transmission was a concern.

referred her to a COVID-19 test site, where she was advised to quarantine for five days and then return to work if she was symptom-free.[3] The grievant claims she made both her supervisor and the agency's infection control nurse aware of this advice, and both confirmed she should follow it. The grievant further alleges that her supervisor instructed her not to take the necessary steps for telework – including retrieving an encrypted flash drive in person from her facility – until she was medically cleared to return to the facility.

The agency offers a different account of these events. The agency maintains that the grievant did not exhibit symptoms of COVID-19, but instead was instructed to self-quarantine due to an "underlying medical condition." The agency further asserts that the grievant did not discuss the possibility of teleworking with her supervisor, even though the agency had made that option available for employees to prevent the spread of illness. The agency indicates that, had the grievant been willing to telework, she could have done so instead of taking leave.

The grievant returned to work on April 13 and thereafter requested to claim Public Health Emergency Leave ("PHEL") to cover approximately 40 hours of absence from April 6 through April 12. On May 1, the agency determined that the grievant was not eligible for PHEL because her quarantine was "precautionary" and not supported by a COVID-19 test. Thus, her absence was charged to her existing sick and annual leave balances. On May 5, 2020, the grievant initiated a grievance alleging that she was entitled to PHEL during the week of April 6 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. The grievant has appealed the latter determination to EDR.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[4] The grievant here asserts that the agency has misapplied and/or unfairly applied the provisions of DHRM Policy 4.52, *Public Health Emergency Leave*. For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, the available facts must raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action in its totality was so unfair as to amount to a disregard of the applicable policy's intent.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[5] Typically, then, a threshold question is whether the grievant has suffered an employment action. An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as

[3] The grievant provided medical documentation stating: "Due to COVID-19, . . . Patient is High Risk and should be self-quarantining." The grievant's medical provider subsequently provided an additional note explaining that the grievant did not receive a COVID-19 test because, at the time she was evaluated, testing centers were experiencing test-kit shortages. As a result, per guidelines from the U.S. Centers for Disease Control and Prevention, COVID-19 testing was limited to patients with certain symptoms that the grievant did not have, and other potentially infected individuals were advised to quarantine and monitor symptoms.

[4] *See Grievance Procedure Manual* § 4.1.

[5] *See id.* § 4.1(b)

hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7] Because this situation has allegedly resulted in a depletion of her paid leave benefits, the grievant has sufficiently alleged an adverse employment action.

The stated purposes of Policy 4.52 are 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."[8] The policy may be implemented upon, among other things, the declaration of a Communicable Disease of Public Health Threat by the Commissioner of the Virginia Department of Health.[9] Upon such a declaration, "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 . . . ."[10] In addition, during such periods, "agencies should direct ill employees to leave the workplace and attend to their medical needs."[11] "Time away from the job site to comply with this directive *shall* be applied toward the 80 hours of [PHEL]."[12]

On March 26, 2020, DHRM issued a Policy Guide with respect to Policy 4.52 as activated specifically for the COVID-19 public health emergency. The Policy Guide expanded leave benefits to "160 hours of paid leave per leave year to eligible employees to attend to their own medical needs . . . related to the declared public health threat during a pandemic illness."[13] Among other modifications, the Policy Guide provided that "[m]edical documentation normally required to access leave may be waived during this event due to the strain on the medical community."[14] The Policy Guide further noted that employees could claim PHEL for periods in which public health officials required them to be monitored during an incubation period and/or for periods in which they were potentially exposed and could not work remotely.[15] The Policy Guide encouraged agencies to "be creative" in enabling remote work opportunities, but provided that they "should" award PHEL in the absence of other work arrangements to employees who were required to self-monitor in order to mitigate potential risk of exposure to others.[16]

Based on these provisions, the record presents a sufficient question whether the grievant was entitled to use PHEL but was denied this paid leave benefit, in a misapplication or unfair application of Policy 4.52. Based on declarations by the Governor and other public officials, Policy 4.52 was in effect at the time the grievant learned that she may have been exposed to COVID-19 at her work facility. Consistent with the policy, the director of the grievant's facility had given employees clear instructions not to come to work if they had symptoms of COVID-19, and DHRM had issued its COVID-19-specific Policy Guide. According to the grievant's description of the facts, she had two symptoms of COVID-19 and had been in contact with a confirmed positive case within that person's incubation period. She was absent from work from April 6 to 12 based on

[6] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[8] DHRM Policy 4.52, *Public Health Emergency Leave*, at 1.
[9] *Id.* at 1, 7.
[10] *Id.* at 3.
[11] *Id.* at 4.
[12] *Id.* (Emphasis added.)
[13] Policy Guide – DHRM Policy 4.52, *Public Health Emergency Leave (COVID-19 ONLY)*, Mar. 26, 2020, at 1.
[14] *Id.*
[15] *Id.*
[16] *Id.*

medical instructions to self-quarantine due to COVID-19. The grievant claims her supervisor instructed her not to come to the facility per these medical instructions, and she was not given an opportunity to work remotely during this time. Although the agency maintains the grievant was not exposed to the virus, was not symptomatic, and was authorized and able to telework, these allegations present factual disputes that would be best resolved by a hearing officer.

During the management steps, the grievant's facility management 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 positive of COVID-19 or been exposed and have symptoms or need to have childcare arrangements." To the extent that the agency has interpreted Policy 4.52 to categorically require a COVID-19 test and/or a quarantine directive by the agency itself, EDR cannot agree that the text or purpose of the policy would necessarily support this reading, especially in light of evolving public health guidance as to testing resources and transmission by asymptomatic individuals.

Ultimately, the grievant's evidence presents a sufficient question whether she was exposed to a confirmed-positive resident, exhibited symptoms within the incubation period, and therefore was entitled to PHEL to attend to her own COVID-19-related medical condition as instructed by her agency management and her personal medical provider. As to whether the evidence supports a misapplication or unfair application of policy, the hearing officer will determine based on the evidence presented whether the grievant's reason for taking leave from April 6 to 12 was sufficiently "related to the declared public health threat during a pandemic illness"[17] such that she was entitled to use PHEL pursuant to Policy 4.52. If so, the hearing officer could find, as a matter of policy, that the agency's denial of PHEL violated a mandatory policy provision or was so unfair as to amount to a disregard of the applicable policy's intent.

CONCLUSION

The facts presented by the grievant constitute a claim that qualify for a hearing under the grievance procedure.[18] Because the grievant has raised a sufficient question as to whether the agency misapplied or unfairly applied policy as to the grievant's entitlement to PHEL from April 6 to 12, 2020, the grievance qualifies for a hearing on these grounds.

At the hearing, the grievant will have the burden of proof.[19] If the hearing officer finds that the grievant has met this burden, they may order corrective action as authorized by the grievance statutes and grievance procedure, including restoration of benefits such as leave.[20] Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

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[17] Policy Guide – DHRM Policy 4.52, *Public Health Emergency Leave (COVID-19 ONLY)*, Mar. 26, 2020, at 1.
[18] *See Grievance Procedure Manual* § 4.1.
[19] *Rules for Conducting Grievance Hearings* § VI(C).
[20] Va. Code § 2.2-3005.1(A); *Rules for Conducting Grievance Hearings* § VI(C).

EDR's qualification rulings are final and nonappealable.[21]

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[21] *See* Va. Code § 2.2-1202.1(5).