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QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2020-4983
October 18, 2019

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR")[1] at the Virginia Department of Human Resource Management ("DHRM") on whether his June 7, 2019 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is partially qualified for a hearing.

FACTS

On or about June 7, 2019, the grievant filed a grievance challenging the classification of his absence from work on May 10, 2019 as leave without pay ("LWOP"). The grievant alleges that, on May 8, 2019, he sought approval from his acting supervisor to take School Assistance/Volunteer Service ("SA/VS") Leave on May 10.[2] However, on May 9, the grievant left work early due to illness. He then apprised the agency that he would be absent on May 10 for FMLA-related reasons. At the time of his absence, the grievant was certified to use intermittent leave pursuant to the Family & Medical Leave Act ("FMLA").[3]

Upon his return to work, the grievant presented documentation to support SA/VS Leave for May 10, which the agency denied.[4] Although the grievant also presented a medical note for his absence on May 10, the agency also declined to apply Family and Medical Leave ("FML") to that work day, reasoning that the grievant's attempt to use SA/VS Leave "lends itself to the appearance

[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.

[2] The parties dispute whether the grievant received SA/VS approval on May 8. The grievant claims that his acting supervisor approved the May 10 absence. The acting supervisor asserted that he did not give approval, but merely advised the grievant to seek approval from his regular supervisor, who was due to return on May 9. The grievant did not seek approval from his regular supervisor.

[3] The FMLA Notice of Rights that appears to cover the grievant's absence on May 10, 2019 advises that the agency will require him to substitute sick, vacation, and other paid leave for unpaid FMLA leave. The Notice further advises that, should such substitution not be required, the grievant will have the right to use "sick" leave and "other leave" concurrently with FMLA leave.

[4] The agency denied SA/VS Leave on grounds that the grievant had not received prior approval and that, in any event, SA/VS Leave did not apply to the grievant's stated reason for being absent.

of abusing FMLA." The grievant alleges that he was entitled not only to the SA/VS Leave on May 10 but also to FML. Because the grievant should have then been able to apply any paid leave he had available to FML absences,[5] he argues, he should not have been docked pay for the 11.5 hours he had been scheduled to work on May 10. The agency denied this relief and also declined to qualify the grievance for a hearing. The grievant has appealed the latter determination to EDR.[6]

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.[7] The grievant here appears to allege that the agency has misapplied and/or unfairly applied the statutory and/or policy provisions of the FMLA and other types of leave.[8] 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."[9] 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 hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[10] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[11] Because this situation has allegedly resulted in a loss in pay, the grievant has sufficiently alleged an adverse employment action.

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[5] Undated agency leave records indicate that, for the pay period beginning on May 10, the grievant had balances of 4.6 hours of sick leave, 26.4 hours of Family/Personal leave, and 327.4 hours of annual leave. Although the records indicate that the grievant used 11.5 hours each of FML and Family/Personal leave on May 10, a notation states that May 10 is "being docked per" the facility superintendent. The superintendent appeared to confirm this in her second step response, explaining that the grievant's work hours for May 10 "will remain in LWOP status. The fact that you brought in a doctor's note for FMLA after attempting to use [SA/VS leave] is not acceptable and will not be accepted."

[6] To the extent that the grievant seeks to challenge timeliness issues during the management steps process, EDR finds that any such issues are moot. By proceeding with the grievance process after becoming aware of a procedural violation, a party generally forfeits the right to challenge the noncompliance at a later time. *Grievance Procedure Manual* § 6.3. Further, after the allegedly non-compliant party has cured its noncompliance, a request to remedy noncompliance is moot. *See, e.g.*, EDR Ruling No. 2019-4940. Here, while the grievant appears to claim that the agency's qualification determination exceeded the timeline required by the grievance procedure, the agency ultimately cured any such noncompliance when it submitted that response. Accordingly, the focus of this ruling is the substance of the agency's qualification determination.

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

[8] *See* 29 U.S.C. §§ 2601 through 2654; DHRM Policy 4.20, *Family and Medical Leave*; DHRM Policy 4.57, *Virginia Sickness and Disability Program*; DHRM Policy 4.10, *Annual Leave*; DHRM Policy 4.40, *School Assistance and Volunteer Service Leave*.

[9] *See Grievance Procedure Manual* § 4.1(b)

[10] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

[11] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

School Assistance/Volunteer Service Leave

DHRM Policy 4.40, *School Assistance and Volunteer Service Leave*, provides that eligible employees are entitled to "16 hours of paid leave in any leave year to provide volunteer services . . . as a member of a service organization or through authorized school assistance."[12] Employees with children may use paid leave under this policy to, among other things, "attend a school function in which such children are participating." This provision applies to "any public preschool, elementary, middle, or high school." While agencies "should attempt to approve" such leave, "[e]mployees must receive approval from their supervisors prior to using volunteer leave."

In this case, the agency denied the grievant's request to use SA/VS Leave primarily because neither his acting supervisor nor his regular supervisor confirmed that they approved it prior to the grievant's absence on May 10. The grievant disputes his acting supervisor's account, claiming that the acting supervisor on May 8 gave verbal approval. However, the agency chose to credit the acting supervisor's account that he merely told the grievant to seek approval from his regular supervisor when he returned the following day. Thus, the agency determined that the grievant failed to obtain prior approval to use SA/VS Leave under DHRM Policy 4.40, and it declined, in its discretion, to approve such leave after the fact. While the grievant understandably disagrees with this position, the agency retains the right to manage the methods, means, and personnel by which work activities are to be performed.[13] Accordingly, EDR cannot say that the agency was required to accept the account of the grievant over that of his acting supervisor; nor does EDR perceive facts to suggest that the agency's determination was so unfair as to amount to a disregard of the applicable policy's intent.[14] The grievance is not qualified with respect to the application of SA/VS leave.

FMLA and Concurrent Paid Leave

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.[15] Under the FMLA Policy, eligible employees are entitled to "up to 12 weeks of unpaid family leave per leave year because of their own serious health condition . . . ."[16] 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 . . . ."[17] The FMLA Policy provides that "[e]ligibility determinations are made as of the date that the family and medical leave is to begin."[18] In this case, the parties do not appear to dispute that the agency approved the grievant for Intermittent FML from January 1, 2019 through December 31, 2019, and the grievant produced a physician's note for his absence on May

[12] A "leave year" is defined as the period between January 10 of one year and January 9 of the following year. *See* DHRM Policy 4.10, *Annual Leave*.
[13] *See* Va. Code § 2.2-3004(C).
[14] Because EDR concludes that the agency was within its authority to conclude that no supervisor actually approved the grievant's SA/VS Leave, EDR does not reach the question whether the grievant's requested leave would have been within the scope of DHRM Policy 4.40. Nothing in this ruling should be interpreted to mean that SA/VS leave cannot be applied to a high school student's participation in his or her school's college-preparation activities.
[15] DHRM Policy 4.20, *Family and Medical Leave*.
[16] *Id.*; *see* U.S.C. § 2612(a)(1).
[17] DHRM Policy 4.20, *Family and Medical Leave*; *see* 29 U.S.C. § 2611(2)(A).
[18] DHRM Policy 4.20, *Family and Medical Leave*.

10. Thus, EDR finds that the grievant has raised a sufficient question as to whether he was entitled to take FMLA leave on May 10.

Under the FMLA, eligible employees "may elect . . . to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee" for unpaid FMLA leave taken because of the employee's own serious health condition.[19] While substitution of "accrued paid leave is determined by the terms and conditions of the employer's normal leave policy," an employer "may not discriminate against employees on FMLA leave in the administration of their paid leave policies."[20]

Likewise, under DHRM's FMLA Policy, "[e]mployees have the option of using paid leave, as appropriate under each particular leave policy, for absences covered under family and medical leave."[21] Thus, an employee taking leave protected by the FMLA Policy could concurrently use Sick or Family/Personal Leave pursuant to the normal provisions of DHRM Policy 4.57, *Virginia Sickness and Disability Program*. For example, Policy 4.57 requires employees claiming Family/Personal Leave to "request the use of F/P leave in accordance with agency procedures prior to its use."[22] Similarly, an employee taking leave under the FMLA Policy can use Annual Leave in accordance with the normal provisions of DHRM Policy 4.10, *Annual Leave*, as well as with the agency's own policies regarding Annual Leave requests.[23]

Having thoroughly reviewed all the facts and circumstances, EDR finds that the grievant in this case has raised a sufficient question whether the agency violated mandatory provisions of the FMLA Policy, and whether the agency's denial of paid leave substitution was so unfair as to amount to a disregard of the FMLA Policy's intent. The FMLA Notice of Rights given to the grievant in connection with his certification of intermittent FML indicates that the grievant should expect Sick Leave, Family/Personal Leave, and "other leave" to run concurrent with FML; even if the agency did not require such substitution, the Notice included the grievant's right to use Sick Leave and "other leave" for such absences if he so chose.

To the extent that the FMLA Notice of Rights is still subject to the employer's normal leave policies, it is undisputed that the grievant left work on May 9 due to illness, received emergency care, and then contacted the agency the same day to advise his workplace that the illness would also keep him out of work on May 10. EDR is not aware of any facts to suggest that these communications were unreasonable or otherwise a basis to deny leave under the FMLA Policy or DHRM Policy 4.57. Agency documents suggest that the grievant had positive Sick

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[19] 29 U.S.C. § 2612(d)(2)(B); *see* 29 C.F.R. § 825.207(a). In this context, substitution means that "the paid leave provided by the employer, and accrued pursuant to established policies of the employer, will run concurrently with the unpaid FMLA leave. Accordingly, the employee receives pay pursuant to the employer's applicable paid leave policy during the period of otherwise unpaid FMLA leave." 29 C.F.R. § 825.207(a).

[20] 29 C.F.R. § 825.207(a).

[21] DHRM Policy 4.20, *Family and Medical Leave*. Policy 4.20 further provides: "Employees who take intermittent leave or work a reduced schedule may either use their available paid leave balances as permitted by each specific leave policy or take unpaid family and medical leave."

[22] DHRM Policy 4.57, *Virginia Sickness and Disability Program* ("Family/Personal Leave (F/P) may be taken at the discretion of the employee for any purpose . . . provided the employee gives reasonable notice and his/her supervisor approves the absence."). Policy 4.57 also advises that agencies "should approve" Family/Personal Leave unless business "demands require the employee to work during the requested time."

[23] Here, the agency's Operating Procedure 110.1(IV)(B) provides that employees should provide at least 48 hours' notice when requesting Annual Leave.

Leave, Family/Personal Leave, and Annual Leave balances on May 10. Further, it appears that the grievant *was* initially charged for 11.5 hours of Family/Personal Leave on May 10, yet a handwritten notation indicates that his pay should nevertheless be docked for that day.[24]

The available evidence suggests that the agency denied paid leave not based on any specific requirements for Sick, Family/Personal, and/or Annual Leave, but instead due to its apparent suspicions that the grievant's FMLA claim, paid or unpaid, was illegitimate. However, as explained above, the grievant has presented a sufficient question whether he was entitled to take FML on May 10, and both federal law and DHRM's FMLA Policy protect his right to use paid leave concurrently, consistent with ordinary leave requirements. While the agency has indicated that it would *not* normally have approved paid leave on May 10 due to its operational needs, certain facts raise a sufficient question whether its denial of leave nevertheless misapplied or unfairly applied mandatory provisions of DHRM policies.

First, the evidence is that the agency denied FML outright, despite the grievant's advance notice of his FML absence and subsequent production of a medical note. Denial was solely on grounds that the grievant first attempted to apply SA/VS leave to his absence. While the agency imputes fraudulent intent to this request, it is equally plausible based on the record that the grievant perceived multiple different rights to paid leave and simply asked for his preferred option first. Second, the FMLA Notice of Rights applicable to the grievant's May 10 absence created a clear impression that Sick Leave and Family/Personal Leave balances, if not also Annual Leave balances, would run concurrent with the grievant's otherwise unpaid FML absences. Consistent with this expectation, the grievant's Family/Personal Leave was initially charged for his scheduled May 10 hours, only to be revoked purportedly based on the above-mentioned abuse suspicion. Third, following the subsequent exhaustion of the grievant's Sick and Family/Personal Leave balances, the agency sought re-certification of the grievant's eligibility for intermittent FML; in doing so, it apparently sought to impose a categorical prohibition on the grievant's use of accrued Annual Leave during his FML absences. This broad, pre-emptive restriction is not consistent with either federal or DHRM requirements as to an employee's right to substitute paid leave for unpaid FML. While agencies may invoke their usual notice requirements for any paid leave to run concurrent with FML, denials of leave that effectively prevent intermittent FML users from claiming their accrued paid leave would be a misapplication of DHRM Policy 4.20 and could constitute interference with and/or retaliation for an employee's rights under the FMLA.

Because the grievant has presented a sufficient question whether the agency improperly or unfairly denied his requests for FML, Sick Leave, Family/Personal Leave, and Annual Leave on May 10, 2019, his claims with respect to whether he was entitled to leave on that date under DHRM Policy 4.20, Policy 4.57, and Policy 4.10 are qualified for hearing as discussed above.

CONCLUSION

The facts presented by the grievant constitute certain claims that qualify for a hearing under the grievance procedure.[25] Because the grievant has raised sufficient questions as to whether the agency misapplied or unfairly applied policies as to the grievant's entitlement on May 10 to (1)

[24] A different leave balance sheet indicates that no FML or F/P hours were applied to the grievant's time on May 10, with the hours instead being categorized as LWOP.
[25] *See Grievance Procedure Manual* § 4.1.

Family and Medical Leave and (2) the use of any paid leave concurrent with Family and Medical Leave, the grievance qualifies for a hearing on these grounds.

At the hearing, the grievant will have the burden of proof.[26] If the hearing officer finds that the grievant has met this burden, he or she may order corrective action as authorized by the grievance statutes and grievance procedure, including back pay and restoration of benefits such as leave.[27] 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.EDR's qualification rulings are final and nonappealable.[28]

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[26] *Rules for Conducting Grievance Hearings* § VI(C).
[27] Va. Code § 2.2-3005.1(A); *Rules for Conducting Grievance Hearings* § VI(C).
[28] *See* Va. Code § 2.2-1202.1(5).