Issue: Qualification/Compensation/Leave/FMLA; Ruling date: July 3, 2003; Ruling # 2003-117; Agency: Department of Corrections; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections/ No. 2003-117
July 3, 2003

The grievant has requested a ruling on whether her April 8, 2003 grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that DOC wrongfully terminated her for failing to return from an extended medical leave, even though her physician excused her from working. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant was a Senior Correctional Officer with DOC until she was removed on March 25, 2003. On August 16, 2002, the grievant went out on conditional leave without pay for personal reasons.[1] In January of 2003, the grievant was in a car accident and suffered nerve damage in her left hand, requiring further absences from work.[2] On February 14, 2003, DOC notified the grievant that it was designating her leave as conditional family and medical leave under the Family and Medical Leave Act (FMLA), effective January 1, 2003 and expiring March 24, 2003. DOC further notified the grievant that if she failed to return to work on March 25, 2003 she would be separated from state service.

On March 25, the grievant was still under a physician's care and was unable to return to work. She claims that she called Human Resources on this date to advise them that her physician released her to return to work on April 2, 2003. She later provided a medical slip to this effect, dated March 26. On March 27, DOC notified the grievant that she was terminated, effective March 25, for failing to return to work upon the expiration of her FMLA leave. The grievant challenged the agency's action, claiming that it was unfair to terminate her while she was under a doctor's care.

DISCUSSION

Removal/Unfair Application of Policy

[1] During this Department's investigation, the grievant claimed that she took leave and was under a doctor's care following the death of her mother.

[2] The grievant describes her condition as "nerve blockage" in the left hand, which requires frequent shot treatments. She stated that if the treatments fail to correct the condition, she may need surgery. The grievant is right-handed.

The grievant claims that DOC should not have removed her while she was under a doctor's care and excused from returning to work on March 25. DOC asserts that the grievant had exhausted her leave, including her Family and Medical Leave, on March 24 and was therefore removed when she failed to return to work. The grievant's challenge to the agency's action can best be described as a claim of misapplication or unfair application of state and agency policies. For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that 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 intent of the applicable policy.

Family and Medical Leave and "Light-Duty"

Under the FMLA, employees are guaranteed up to 12 work-weeks of unpaid leave during a calendar year for medical reasons.[3] Similarly, Department of Human Resource Management (DHRM) policy allows employees to take leave without pay for up to 12 work-weeks during a calendar year for the birth or adoption of a child, to care for a family member with a serious medical condition, or because the employee's own "serious personal health condition" makes him or her unable to perform the functions of his or her position.[4] In this case, it is undisputed that the grievant's injury to her left hand constituted a serious medical condition that rendered her unable to perform the functions of her position as a Correctional Officer.[5]

According to the FMLA, if an employee is unable to return to work after she has exhausted her 12 weeks of unpaid leave she "has no right to [job] restoration . . . under the FMLA."[6] Therefore, it appears that the FMLA did not require DOC to secure the grievant's position beyond her "return to work" date. In this case, DOC had designated March 25 as the grievant's "return to work" date; however, the grievant was unable to return at this time. DOC based the grievant's return date on her FMLA start date of January 1, 2003.

The FMLA grants an employer the authority to choose its method for determining the "12-month period" in which employees may take their 12 weeks of leave.[7] Such methods might include (1) the calendar year, beginning on January 1; (2) any fixed 12-month "leave year;" (3) counting from the employee's first day of FMLA leave; or (4) measuring backward

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[3] Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.* *See also* 29 C.F.R. 825.200.

[4] DHRM Policy 4.20, "Family and Medical Leave." *See also* 2002 Virginia Sickness and Disability Program (VSDP) Handbook, page 21. "Serious health condition" is defined as "an illness, injury, or physical or cognitive condition that involves" hospitalization, absence of more than three days, or continuous treatment by a health care provider. 2002 VSDP Handbook, page 21.

[5] A full discussion of the essential functions of the grievant's position and her inability to perform those functions follows in the portion of this ruling that addresses the Americans with Disabilities Act (ADA).

[6] 29 C.F.R. 825.214; *see also* http://www.dol.gov/elaws/esa/fmla/faq.asp <last visited June 24, 2003> (U.S. Department of Labor's "Frequently Asked Questions" concerning FMLA).

[7] 29 C.F.R. 825.200.

from the date begins FMLA leave.[8] The Commonwealth has elected option #2, setting its FMLA "leave year" from January 10 through January 9 of the following year.[9] Therefore, DOC should have begun counting the grievant's 12 weeks of leave beginning on January 10, not January 1. Using this start date, it appears that the grievant's FMLA leave would have expired April 4. The grievant contends that her physician released her to work on April 2, which would have occurred prior to the exhaustion of her FMLA leave.

However, according to the grievant's medical release to return on April 2, her physician only released her to *light duty*. Under DOC policy, "an employee who suffers a short-term impairment . . . may request a temporary adjustment in work assignments."[10] The policy further notes that the Organizational Unit Head *may* grant such an adjustment and that light duty assignments shall not exceed 90 calendar days unless extended by the Organizational Unit Head and approved by the Administrator of Employee Relations and Training.[11] In this case, the Warden stated that DOC had already accommodated the grievant with seven months of leave and did not feel that additional accommodations were appropriate under the circumstances.[12] It appears that, under policy, this decision was wholly within management's discretion. According to agency policy, "[i]f an adjustment to the employee's work assignments is not feasible," the agency has a number of options, including separation.[13] Therefore, it appears that DOC did not misapply or unfairly apply policy when it did not grant the grievant a temporary, light-duty accommodation beginning April 2. Moreover, because the grievant was unable to return to work full duty when her FMLA leave *should have* expired, it does not appear that DOC misapplied the Commonwealth's FMLA policy by removing her.

The Americans with Disabilities Act

The FMLA notes that if an employee cannot perform the essential functions of her position because of a physical condition, "the employer's obligations may be governed by the Americans with Disabilities Act."[14] The relevant policy governing disability discrimination is DHRM Policy 2.05, which references the Americans with Disabilities Act (ADA).[15] The ADA prohibits an employer from discriminating against a qualified individual with a

[8] *Id.* *See also* Fact Sheet #28: The Family and Medical Leave Act of 1993, http:www.dol.gov/esa/regs/compliance/whd/whdfs28.htm <last visited June 24, 2003>.
[9] *See* Memorandum from Director of Department of Personnel and Training (now DHRM) to Agency Human Resource Directors, dated May 28, 1997, "Change in Pay Periods Effective June 1, 1997," page 5.
[10] DOC Policy 5-52.6. Temporary adjustments may include an alteration to the employee's normal duties or temporary assignment to another shift or post. *Id.*
[11] DOC Policies 5-52.8 and 5-52.10.
[12] The Warden of the grievant's facility has since moved to another facility. Both the former and the new Wardens of the grievant's facility stated during this Department's investigation that the grievant's leave time amounted to a "temporary accommodation" under agency policy.
[13] DOC Policy 5-52.11(E).
[14] 29 C.F.R. 825.214(b).
[15] 42 U.S.C. §§ 12101 *et seq.* *See also* DHRM Policy 2.05, "Equal Employment Opportunity."

disability on the basis of the individual's disability.[16] A qualified individual is defined as an individual with a disability, who, with or without "reasonable accommodation" can perform the essential functions of the job. The "essential functions" are the "fundamental duties of the job the person with a disability holds or desires."[17] Courts have recognized that an accommodation is unreasonable if it requires the elimination of an "essential function."[18]

In this case, DOC policy defines the essential functions of correctional officer positions.[19] Those duties include, among other things, "intervening in situations (whether physical or verbal) when the inmate is out of control, . . . the ability to exercise good judgment regarding the appropriate use of physical or lethal force to maintain security, . . . [and] the ability to work all posts."[20] During this Department's investigation, the grievant acknowledged that she has limited use of her left hand, and that she would be unable to intervene should a fight break out among inmates. She claims that she would be able to work all posts; however, the Warden of the grievant's facility stated that an employee who is unable to intervene in crisis situations involving inmates cannot work all posts. The agency considers all these duties to be essential functions of her job, and there is no evidence that these duties are nonessential. Eliminating any of these duties to accommodate the grievant's disability would not be reasonable under the law. Therefore, even if the grievant is found to have a "disability" within the meaning of the ADA, it does not appear that she is a *qualified* individual with a disability because she is not able to perform the essential functions of her job. Accordingly, there is no evidence that the agency has failed to comply with the ADA or with state or agency policies addressing the ADA.

Conditional Leave Without Pay

Another option available for employees who are temporarily disabled is conditional leave without pay.[21] Conditional leave without pay guarantees reinstatement only if the employee's position is still available when the employee returns from an extended absence.[22] According to state and agency policy, an agency *may* grant an employee conditional leave without pay and a request for leave without pay may be denied.[23] Therefore, under policy, management is granted discretion in making determinations whether or not to grant leave without pay. In this case, the grievant had been on conditional leave without pay since

[16] According to state policy, "[a]n individual is considered to have a disability if that individual either (1) has a physical or mental impairment which substantially limits one or more of his major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment. DHRM Policy 2.05.
[17] Courts have considered a number of factors in determining what functions are essential. These include, but are not limited to, the employer's judgement regarding which functions are essential, the number of employees available among whom the performance of the functions can be distributed, the amount of time spent performing the functions, the consequences of not performing the function, and the actual work experience of past or current incumbents in the same or similar jobs. *See* 29 CFR § 1630.2(N); Hill v. Harper, 6 F. Supp.2d 540, 543 (E.D. Va. 1998).
[18] Hill v. Harper, 6 F. Supp.2d at 543, *citing* Hall v. U.S. Postal Service, 857 F.2d 1073, 1078 (6th Cir. 1988).
[19] *See* DOC Policy 5-54.11(D).
[20] DOC Policy 5-54.11(D)(4), (5), and (9).
[21] DOC Policy 5-12.13(A)(6). *See also* DHRM Policy 4.45.
[22] DHRM Policy 4.45(II)(A).
[23] *See* DHRM Policy 4.45 III(A) and DOC Policy 5-12.17(G).

August 16, 2002 for various reasons, and DOC determined that it could no longer afford to support the grievant's need for leave without pay. This determination was wholly within management's discretion and does not appear to be a misapplication or unfair application of policy.

In light of the above, it does not appear that DOC unfairly applied or misapplied policy when it terminated the grievant's employment. Under state and agency policies, agencies may accommodate employees who suffer temporary disabilities with temporary assignments and extended periods of leave. In this case, DOC granted the grievant more than seven months of leave while she was dealing with a number of personal issues. Once her FMLA leave expired, the agency determined that no other accommodations were appropriate under the circumstances. Therefore, the issue of unfair separation does not qualify for a hearing.

Due Process

Although not an issue on her Grievance Form A, the grievant claimed in a later-dated memorandum that she was denied due process when DOC removed her and denied her access to a hearing. Under the grievance procedure, all disciplinary actions and dismissals for unsatisfactory work performance automatically qualify for hearing.[24] The Commonwealth's *Standards of Conduct* states that when an employee is unable to meet the working conditions of his or her employment due to certain circumstances (including, but not limited to, the loss of a driver's license or certification required for the job, or incarceration for an extended period of time), he may be "removed" from his job.[25] An inability to perform the essential functions of a position would appear to be one such circumstance of an employee's inability to meet the working conditions of employment. Thus, if an individual is unable to perform the essential functions of his job because of a disability, temporary or permanent, any separation from service should be classified as a *removal* instead of a disciplinary *termination* under the *Standards of Conduct*.[26] Removals, as opposed to terminations for discipline or performance, do not automatically qualify for a hearing.[27] However, prior to a removal, the agency must notify the employee, verbally or in writing, of the reasons for the removal, giving the employee a reasonable opportunity to respond to those reasons.[28] The grievant appears to have received notice and an opportunity to respond as required for "removals" in the *Standards of Conduct*. On February 14, 2003, the facility's Human Resources Office informed her that "[i]f you fail to return after [your FMLA leave expires], we will have to separate you from state service."[29] Therefore, it does not appear that DOC deprived the grievant of any due process rights by not granting the grievant a hearing under the grievance procedure.

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[24] *Grievance Procedure Manual* § 4.1(a), page 10.
[25] DHRM Policy 1.60(IV)(A).
[26] *See* DHRM Policy 1.60(VII).
[27] *Grievance Procedure Manual* § 4.1(a), page 10
[28] DHRM Policy 1.60 (IV)(C).
[29] *See* Letter to the Grievant, from the Personnel Analyst, dated February 14, 2003 (notifying grievant of her placement on FMLA leave).

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal the qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

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Claudia T. Farr
Director

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