Issue: Qualification/Benefits and Leave/FMLA, Compensation/Voluntary Demotion and Involuntary Demotion/Discipline/Demotion or Transfer/Work Conditions/Supervisor/employee Conflict; Ruling Date: August 3, 2005; Ruling #2005-1045; Agency: Department of Correctional Education; Outcome: FMLA; Supervisor/employee conflict not qualified; all other issues qualified.

Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Correctional Education
Ruling No. 2005-1045
August 3, 2005

The grievant has requested qualification of his April 9, 2005 grievance. The grievant alleges that the Department of Correctional Education (DCE or the agency) misapplied and/or unfairly applied policy by coercing him into self-demotion, failing to honor its agreement with him about a transfer, taking an adverse action against him while he was on Family and Medical Leave Act (FMLA) leave, failing to advise him in writing of the reasons for his demotion, harassing and defaming him, and failing to consider mitigating circumstances.

FACTS

The grievant is currently employed by the agency as an Assistant Regional Principal. He was previously employed by the agency as a Regional Principal. On December 17, 2004, the grievant had hip replacement surgery. As a result of the surgery, the grievant was out of work from December 17, 2004 until April 6, 2005. The grievant requested and was approved to use accrued annual and sick leave during this period.

The grievant states that on March 2, 2005, his supervisor contacted him to schedule a meeting on March 11, 2005. During that meeting, the grievant was advised that the agency had decided to demote him because of performance problems. The agency offered the grievant a choice, however: he could either accept a voluntary demotion to the Assistant Regional Principal position with no reduction in salary and no Written Notice, or he would receive a Written Notice and his salary would be reduced by 5%. The grievant agreed to accept the self-demotion, although he asserts that he did so with the understanding that in conjunction with his demotion he would be transferred to Facility X. Although the grievant was initially advised that he would be assigned to Facility X upon his return from leave, he was later advised that he would instead be assigned to Facility Y.

During the March 11th meeting, the grievant's supervisor also apparently advised the grievant that she was "in possession" of a statement by the grievant's physician indicating that he was able to return to work on January 24, 2005. By letter dated March 16, 2005, the supervisor ordered the grievant to return to work one day after his receipt of the March 16th letter (or within five days of March 16th, if the agency did not receive a dated return receipt for the letter). The supervisor also directed the grievant to provide medical documentation for his failure to return to work on January 24, 2005, and advised the grievant that if he failed to submit this documentation on his return, he would be

disciplined. The supervisor subsequently informed the grievant, by letter dated March 23, 2005, that she had received two letters from his health care providers indicating that he had not yet been cleared to return to work full time. This letter also advised the grievant that he would not be assigned to Facility X but would instead be assigned to Facility Y.

On March 24, 2005, the grievant wrote the agency's Employee Benefits Manager to ask if he had been charged FMLA leave at the same time he had been using either his annual or sick leave. By letter dated December 16, 2004, the agency had previously advised the grievant that his leave would be counted against his leave entitlement under the FMLA. In response to the grievant's March 24th letter, the agency advised the grievant on April 5, 2005 that he had been charged FMLA leave during the period from December 17, 2004 until March 31, 2005.[1] The agency also advised the grievant that his FMLA entitlement had been exhausted as of April 1, 2005, and that his position with the agency was no longer protected under the FMLA. The grievant returned to work on April 6, 2005.

On April 9, 2005, the grievant initiated a grievance challenging the agency's actions. After the parties failed to resolve the grievance in the management resolution steps, the grievant requested that the agency head qualify his grievance for hearing. The agency head qualified the issue of the grievant's transfer and demotion for hearing, but denied qualification on the grievant's remaining claims.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the agency's actions result in an adverse employment action[3] and the grievant presents evidence raising a sufficient question as to whether the actions were taken for disciplinary reasons, were influenced by discrimination or retaliation, or were the result of a misapplication or unfair application of policy.[4] Here, the grievant asserts that the agency coerced him into self-demotion, failed to honor its agreement to transfer him to Facility Y, wrongly demoted him while he

[1] The agency charged the period from December 17, 2004 through January 5, 2005 against the grievant's FMLA entitlement for 2004. The period from January 10, 2005 through March 31, 2005 was charged against the grievant's 2005 FMLA entitlement. The grievant has provided copies of his time sheets showing that those forms do not consistently designate his absences as FMLA leave. This inconsistency appears to reflect an error on the part of the grievant's supervisor, but it does not affect the grievant's claim that the agency misapplied policy by designating his paid leave as FMLA leave.
[2] Va. Code § 2.2-3004(B).
[3] An "adverse employment action" is defined as a "tangible employment act constituting 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." Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[4] Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (C).

was on FMLA leave, failed to advise him in writing of the reasons for his demotion, harassed and defamed him, and failed to consider mitigating circumstances. Each of these claims is addressed below.

Demotion and Transfer

Where an agency effects a disciplinary demotion or transfer through a Written Notice, the agency's action automatically qualifies for a hearing if challenged through the grievance procedure.[5] In the absence of an accompanying Written Notice, a disciplinary action qualifies for a hearing only if there is a sufficient question as to whether it was an adverse employment action and was taken primarily to correct or punish behavior, or to establish the professional or personal standards for conduct of an employee.[6] These policy and procedural safeguards are designed to ensure that the discipline is merited.

On May 4, 2005, the agency head qualified the issue of "whether the transfer and demotion taken by the agency, was a proper decision by the Grievant's supervisor." During this Department's investigation, the agency indicated that it considered its qualification to include the first two issues raised in the grievance—specifically, that the grievant was coerced into self-demotion and that the agency failed to honor its agreement regarding the grievant's transfer.

In addition to these two claims regarding his demotion and transfer, the grievant also alleges that he was not given any reason in writing for his demotion. The grievant contends that although he accepted the demotion voluntarily, because the demotion was disciplinary in nature, the agency was still required to give him written notice of the allegations leading to the demotion. In addition, the grievant alleges that the agency promised him a written statement of the reasons for its actions, but failed to provide him with such a document. While the agency apparently does not deny that the grievant's allegations (regarding the lack of written notice) are related to the broader issues of the grievant's demotion and transfer, it asserts that the grievant's claims regarding the agency's purported failure to provide him with a written statement constitute an "argument," rather than a grievance issue.

In light of the common facts and allegations among those issues qualified for hearing by the agency and the grievant's claim regarding written notice, this Department deems it appropriate to qualify this claim for hearing, to help ensure a full exploration of what could be interrelated facts and issues. We note, however, that this ruling in no way determines that the agency's actions with respect to the grievant were a misapplication or an unfair application of policy, but only that further exploration of the facts by a hearing officer is appropriate.

FMLA and Health Issues

[5] Va. Code § 2.2-3004 (A); DHRM Policy No. 1.60, Standards of Conduct (IX); *Grievance Procedure Manual* § 4.1 (a).
[6] Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (B) and (c).

The grievant also raises claims regarding the agency's application of the FMLA policy and the agency's decision to advise him of his demotion while he was on leave for hip replacement surgery. Specifically, the grievant argues that the agency misapplied and/or unfairly applied policy by charging him with use of his FMLA leave entitlement at the same time that he was being charged with paid annual and sick leave, by taking an adverse action against him while he was on leave, and by sending him letters requiring him to report to work or to provide additional medical documentation.

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.[7] In this case, the policy at issue is Department of Human Resource Management (DHRM) Policy No. 4.20, "Family and Medical Leave," as well as the federal Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, on which Policy 4.20 is based.

Designation of Paid Leave as FMLA Leave

During the period when the grievant was absent due to his surgery, he asked and was approved to use his accrued annual and sick leave. The agency also counted his leave time against his annual FMLA leave entitlement. The grievant argues that he should not have been forced to take FMLA leave while also taking paid leave.[8]

Policy 4.20 permits an agency to designate paid leave taken as family and medical leave, when the leave is for a purpose covered by family and medical leave. These purposes include the birth, adoption or placement of a child, the serious health condition of a family member, or, as here, the employee's own serious health condition. Policy 4.20 is consistent in this regard with the Family and Medical Leave Act.[9] Because the actions taken by the agency are expressly permitted by policy and law, the grievant has failed to demonstrate that a misapplication of policy occurred with respect to the agency's designation of his paid leave as FMLA leave. Moreover, the grievant has not presented any evidence that the agency's application of Policy 4.20 was inconsistent or otherwise unfair. Accordingly, this issue is not qualified for hearing.

Adverse Action

The grievant also alleges that the agency misapplied and/or unfairly applied policy by taking an adverse action—*i.e.*, the demotion and related transfer—against him while he was on leave. However, neither Policy 4.20 nor the Family and Medical Leave Act precludes an employer from taking an adverse action against an employee during a

[7] Va. Code § 2.2-3004(A)(ii); *Grievance Procedure Manual* § 4.1(b)(1).
[8] For purposes of this ruling, this Department will assume, without deciding, that improperly charging an employee with the use of FMLA leave would constitute an adverse employment action.
[9] *See* 29 CFR § 825.207.

period of leave, provided the action was not in retaliation for or because of the employee's use of FMLA leave.[10] Here, the grievant does not allege that there was a causal connection between his use of FMLA leave and the disciplinary action, and he offers no evidence that would support such a claim. We also note that while the grievant objects to his supervisor's request that he meet with her to discuss the adverse action while he was on leave, he admits that he could have told his supervisor that he would not come to the facility to meet with her, but that he elected not to do so. Finally, the grievant has made no argument that the agency has treated others in comparable circumstances more favorably. For all these reasons, we find the grievant has failed to raise a sufficient question as to whether the agency misapplied or unfairly applied Policy 4.20 or the Family and Medical Leave Act when it took adverse action against him.

"Threatening" Letters

The grievant also asserts that the agency acted improperly in sending him "threatening" letters during his leave. In particular, the grievant objects to a letter from his supervisor dated March 16, 2005. That letter states that the agency's documentation indicates the grievant was cleared to return to work on January 24, 2005, and he therefore must return to work and submit additional medical documentation for the period from January 24th through the date of his return. The grievant argues that his supervisor could simply have called and talked to him about her concerns, and that the letter was unnecessary.

As previously noted, for a claim of misapplication of policy to qualify for hearing, the grievant must show that the agency's conduct resulted in an adverse employment action. Because the allegedly threatening letters did not in themselves have a significant detrimental effect on the terms, conditions, or benefits of the grievant's employment, they do not constitute an adverse employment action.[11] For this reason, the grievant's allegations regarding the letters do not qualify for hearing.

Moreover, we cannot agree that the March 16th letter, or any other communication produced to this Department by the grievant regarding his FMLA leave, was threatening in nature. Rather, they appear to be efforts by the agency to apprise the grievant of his status and his continuing rights and obligations. Although we understand the grievant's desire to speak with his supervisor regarding the issues raised by the March 16th letter, neither Policy 4.20 nor the Family and Medical Leave Act mandates that management communicate verbally with employees regarding their FMLA leave, nor do they prohibit an agency from using written communication for this purpose.

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[10] *See* Policy 4.20; *see also* Phelan v. City of Chicago, 347 F.3d 679, 683-84 (7th Cir. 2003) (finding that employer did not violate FMLA when it fired employee for poor performance while on FMLA leave); Kohls v. Beverly Enterprises Wisconsin, Inc., 259 F.3d 799, 805-06 (7th Cir. 2001) (finding that right to reinstatement under FMLA did not preclude employer from terminating employee for disciplinary reasons).

[11] Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

Harassment

The grievant also alleges that the agency has harassed him with letters demanding his return to work or additional medical documentation, by breaking its promise to him that he would be transferred to Facility X, by assigning him to Facility Y, by forcing him to come into work to discuss his demotion while he was on sick leave, and by punishing him for the poor conduct of others.[12]

For a claim of hostile work environment or harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on his protected status or prior protected activity; (3) sufficiently severe or pervasive so as to alter his conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[13] Here, the grievant has not alleged or presented evidence to show that any of the challenged conduct was based on the grievant's protected status or prior protected activity. Accordingly, the grievant's claims of harassment do not qualify for hearing.

Defamation

The grievant further alleges that the agency has defamed him by terminating his secretary and forcing him to accept demotion. He states that he feels the agency's conduct has damaged his reputation among his colleagues and associates.

Although all complaints may proceed through the three resolution steps, thereby allowing employees to bring legitimate concerns to management's attention, only certain issues qualify for a hearing. Claims such as false accusations, defamation and slander are not among the issues identified by the General Assembly as qualifying for a grievance hearing.[14] Accordingly, this issue cannot be qualified for a hearing.[15]

Failure to Consider Mitigating Circumstances

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[12] The grievant also alleges that after he initiated his grievance, the agency's Employee Relations Manager advised him that if he prevailed on the grievance, the agency could choose to exercise its "first option" of termination. During the course of this Department's investigation, the manager admitted that he told the grievant that a ruling by the hearing officer in favor of the grievant could possibly open the door to the agency again considering terminating the grievant. The manager stated that he spoke to the grievant as a "friend," because he wanted him to be aware of the possible outcomes, and that he prefaced the conversation by telling the grievant, "I don't know, but I just thought about something." Under the Grievance Procedure Manual, once a grievance is initiated, additional claims cannot be added. *Grievance Procedure Manual* § 2.3. Because the manager's statement was not raised in the Form A, it cannot be considered here. We wish to note, however, that regardless of the manager's intent in speaking with the grievant, his statements could have been construed by the grievant as a threat of termination if he continued to exercise his grievance rights, and for this reason, such conduct should be avoided.

[13] *See generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).

[14] Va. Code § 2.2-3004 (A); *Grievance Procedure Manual §* 4.1.

[15] To the extent the grievant's claim of defamation implicates a right to clear his name (*see* Board of Regents v. Roth, 408 U.S. 564, 573 (1972)), the grievant's claims relating to his demotion and transfer have been qualified for a full administrative hearing and the name-clearing issue may be addressed at that time.

Finally, the grievant alleges that the agency improperly failed to mitigate its disciplinary action. Specifically, he asserts that the agency should have taken into account his previous work history, the placement of "incompetent" assistant principals under him, and the size and nature of his workload.

At issue is DHRM Policy No. 1.60, "Standards of Conduct." That policy *allows* an agency to consider mitigating circumstances in issuing discipline, but it does not *require* an agency to do so. Moreover, the grievant has not shown that the agency's alleged failure to consider mitigating circumstances was inconsistent with the manner in which it has treated other similarly situated employees. Because the grievant has failed to show that the agency's actions constituted a misapplication or unfair application of policy, his claim that the agency failed to consider mitigating circumstances does not qualify for hearing. We note, however, that in determining whether the demotion and transfer were warranted, the hearing officer must consider any mitigating circumstances.[16]

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's claim regarding the agency's purported failure to provide him with a written statement of the reasons for his demotion is qualified for hearing with those claims previously qualified by the agency. The grievant's remaining claims are not qualified for hearing.

By copy of this ruling, the grievant and the agency are advised that the agency has five workdays from receipt of this ruling to request the appointment of a hearing officer. 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 issues in 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.

Claudia T. Farr
Director

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[16] *Grievance Procedure Manual* § 5.9; *Rules for Conducting Grievance Hearings* at V (C), VI (B).