Issue: Qualification/Benefits/FMLA; Ruling Date: June 26, 2006; Ruling #2006-1302; Agency: Department of Corrections; Outcome: not qualified

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution
QUALIFICATION RULING OF THE DIRECTOR

In the matter of Department of Corrections
No. 2006-1302
June 26, 2006

The grievant, through his attorney, has requested a ruling on whether his September 8, 2005 grievance with the Department of Corrections (DOC or agency) qualifies for hearing. For the reasons set forth below, this grievance does not qualify.

FACTS

The grievant served as Deputy Chief Probation & Parole Officer with DOC. In 2004, the grievant was on Short Term Disability (STD) leave on three separate occasions. He was out from June 6th through the 28th; August 17th through September 13th; and on September 9th he went out and did not return to work in 2004. As a result, the grievant worked 1142 hours in 2004.

The grievant was on Short Term Disability from January 1, 2005 until March 22, 2005. He returned to work on March 23rd and worked for a total of 97 hours before going out on Long Term Disability (LTD) leave on April 13, 2005. He asserts that he was released to return to work on July 5, 2005. The grievant further asserts that he was told not to return to work at that time and that he did not learn that his employment had been terminated when he moved into LTD until August 17, 2005, when he received a letter from the agency's Human Resources Director.

DISCUSSION

Family and Medical Leave Act Policy

The grievant asserts that the agency terminated him in violation of his rights under the Family and Medical Leave Act (FMLA). Specifically, he claims that he was prepared to return to work on July 5, 2005, but was never allowed to return. He further asserts that he was not provided with any FMLA paperwork nor was he advised when his FMLA protected status ended.

Although not expressly couched as such, the grievance is appropriately viewed as a misapplication of policy claim. 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.[1] In this case, the policies at issue are the 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, and the Virginia Sickness and Disability Program (VSDP) Policy No. 4.57.

DHRM Policy 4.20 grants an employee up to 12 weeks of family and medical leave per calendar year if they have worked at least 1250 hours during the twelve month period immediately prior to the start of that leave.[2] Further, under DHRM Policy 4.57, FMLA leave runs concurrently with VSDP leave.[3]

In this case, as stated above, the grievant claims that he was prepared to return to work on July 5, 2005, but was never allowed to return to work. The agency, however, has provided documentation indicating that the grievant did not work the required 1250 hours immediately preceding his movement into LTD on April 13, 2005. Instead, information provided by the agency shows that the grievant worked approximately 770 hours in the 12 month period immediately prior to April 13, 2005. While the grievant does not concede that he worked less than 1250 hours, he has not provided any evidence that tends to refute the agency's documentation showing that he fell far short of the required hours. Because the grievant did not work the required 1250 hours, he was not entitled to any FMLA leave when he moved into LTD on April 13th.

The grievant, through his attorney, appears to assert that even if he had not worked 1250 hours in the 12 month period immediately preceding his movement into LTD on April 13, 2005, he is nevertheless entitled to leave based on a June 7, 2005 correspondence from a Human Resource Officer informing him that his 2005 FMLA had been exhausted. The grievant points to a Code of Federal Regulations (CFR) provision, 29 C.F.R. § 825.110(d), for the proposition that an employer has the duty to inform an employee, at the time leave commences, of whether he is eligible for FMLA leave. According to § 825.110(d), "the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met." The grievant notes that § 825.110(d) further states that "[i]f the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility." Accordingly, the grievant concludes that if the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible, and the employer may not then deny leave.

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[1] Va. Code § 2.2-3004(A)(ii); *Grievance Procedure Manual* § 4.1(b)(1).
[2] DHRM Policy 4.20 § II (A).
[3] *See also* VSDP Handbook, which has long stated that, if eligible, days on VSDP disability will also count towards Family Medical Leave.

The grievant's counsel is correct that under 29 C.F.R. § 825.110(d), if the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility. However, a number of courts have found § 825.110(d) to be invalid because it essentially attempts to alter the FMLA by making eligible employees who, under the language of the statute, are ineligible for family leave.[4] We find the reasoning of these courts persuasive and, because the Commonwealth's policy is based on the FMLA, cannot conclude that the agency misapplied or unfairly applied policy by denying the grievant FMLA leave.

The grievant's attorney also argues that the grievant relied, to his detriment, on agency representations regarding his eligibility for FMLA leave.
Counsel asserts that:

> [the grievant] relied on the advice and information provided to him by the Department of Corrections, that he believed that he was on FMLA and that, once his doctor released him from disability, he would return to his former position. Had [he] known that his position would be terminated, he would have arranged to return to work. His primary limitation was from driving. He would have arranged for transportation at his expense in order to retain his job.

Because of the particular facts of this case, we find it neither necessary to reject or accept the doctrine of detrimental reliance or equitable estoppel as have some courts.[5] The grievant's assertion now that he *could have* worked from April 13th through July 5th is at odds with the assertion that he is required to make to be eligible for FMLA leave: that he was "unable to perform the functions of the [his] job."[6]

Finally, we are compelled to respond to the grievant's attorney's assertion made in the March 8, 2006 Ruling Request that the agency ignored this Department's ruling that an agency must clearly inform an employee that his employment with the Commonwealth terminates due to movement into LTD. It is correct that we held in Ruling No. 2006-1166 that an agency must clearly inform an employee that his

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[4] *See* Wolke v. Dreadnought Marine, Inc., 954 F. Supp. 1133, 1137 (E.D. Va. 1997); (holding that the "Department of Labor regulation . . . purports to transform employees who are ineligible under the FMLA statute into eligible employees"); Brungart v. BellSouth Telecomm., Inc., 231 F.3d 791, 796-97 (11th Cir. 2000), cert. denied, 149 L. Ed. 2d 1001, 121 S. Ct. 1998 (2001); Dormeyer v. Comerica Bank-Illinois, 223 F.3d 579, 582 (7th Cir. 2000)(holding that "The statutory text is perfectly clear and covers the issue. The right of family leave is conferred only on employees who have worked at least 1,250 hours in the previous 12 months"); *see also* Woodford v. Community Action of Green County, Inc., 268 F.3d 51 (2nd Cir. 2001)(holding § 825.110(d) to be invalid) McQuain v. Ebner Furnaces, Inc., 55 F. Supp. 2d 763 (N.D.Ohio 1999)(same); Seaman v. Downtown Partnership of Baltimore, Inc., 991 F. Supp. 751 (D.Md.1998) (same). *But see* Miller v. Defiance Metal Products, Inc., 989 F. Supp. 945 (N.D.Ohio 1997) (holding § 825.110(d) to be valid).

[5] *See* Minard v. ITC Deltacom Communications, Inc., 2006 U.S. App. LEXIS 9721 (5th Cir. 2006); Summers v. Middleton & Reutlinger, P.S.C., 214 F. Supp.2d 751 (W.D. Ky. 2002).

[6] 29 C.F.R. § 825.112(a)(4). We also note that the grievant could not have relied to his detriment on the June 7, 2005 correspondence because that letter came months after he had moved into LTD.

employment with the Commonwealth has terminated because of movement into LTD, but that holding was pertinent only to the issue of when notice of termination was triggered for purposes of the 30-day grievance filing deadline, not any substantive employment right. The ruling merely stands for the proposition that an agency cannot bar a grievance on the basis of an untimely filing if the agency has not unambiguously informed the employee that his employment has ended as a result of moving into LTD.

CONCLUSION

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