Issue: Qualification – Benefits/Leave (FMLA); Ruling Date: June 20, 2008; Ruling #2008-2024; Agency: Department of Corrections; Outcome: Qualified for Hearing.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling No. 2008-2024
June 20, 2008

The grievant has requested qualification of her January 15, 2008 grievance with the Department of Corrections (the agency). For the reasons set forth below, this grievance qualifies for a hearing.

FACTS

Between December 23, 2007 and December 29, 2007, the grievant was caring for her husband at home because of a "sickle cell crisis." She informed a co-worker of the situation on December 23rd, but did not go to work. The grievant did work on December 24th, allegedly leaving a note from a health care provider about her prior absence. She was off on the scheduled holiday of December 25th, but her husband's condition apparently did not improve. At some point, she spoke with a supervisor and informed her of the situation. The facts are in dispute as to whether this conversation occurred on December 26th or December 27th. The grievant states she had also attempted earlier to leave messages for the on call supervisor and her immediate supervisor. The grievant did not work between December 26th and December 28th.

Upon returning to work, the grievant was apparently told that her pay would be docked for the time she was out and for the December 25th holiday. The grievant was also told that she would not be able to use annual leave or compensatory leave to cover the absences. The policy of the department in which the grievant works allegedly requires that an employee must speak with an administrative supervisor when not able to report to work as scheduled. Because the grievant did not speak to the proper supervisor when calling in on December 23rd, her pay was docked. The grievant's pay was also docked for December 26th through December 28th because she did not have sick or personal time to cover these days. Therefore, because the grievant was not on paid leave on the day after the December 25th holiday, she did not receive her holiday pay.[1] The grievant initiated her January 15, 2008 grievance to challenge her loss of pay.

[1] Department of Human Resource Management (DHRM) Policy 4.25, "Holidays," provides, in part, that "FLSA non-exempt employees are eligible for holiday pay unless they are on leave without pay any portion

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] Further, complaints relating solely to the establishment or revision of wages, salaries, position classifications, or general benefits "shall not proceed to a hearing"[3] unless there is sufficient evidence of discrimination, retaliation, discipline, or a misapplication or unfair application of policy.[4] In this case, the grievant essentially claims that the agency misapplied or unfairly applied policy by docking her pay and refusing to allow her to use her accrued annual leave or compensatory time to cover the days she was out of work.

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. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[5] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.[6] An adverse employment action is defined as a "tangible employment act 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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8] There is no question that an adverse employment action occurred in this case because the grievant lost pay.

Apart from the question of whether the agency properly applied its own policies in docking the grievant's pay, the reason for the grievant's absences implicates the Department of Human Resource Management (DHRM) Policy 4.20, "Family and Medical Leave," as well as the federal Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.*, on which Policy 4.20 is based. An eligible employee can take up to 12 workweeks (60 workdays or 480 work hours) of unpaid FMLA leave per calendar

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of their last scheduled work day before the holiday, their first scheduled day after the holiday, or the day of the actual holiday. This will result in loss of holiday pay."

[2] *See* Va. Code § 2.2-3004(B).

[3] Va. Code § 2.2-3004(C).

[4] *Grievance Procedure Manual* § 4.1(c).

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

[6] While evidence suggesting that the grievant suffered an "adverse employment action" is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an "adverse employment action." For example, consistent with recent developments in Title VII law, this Department substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. *See* EDR Ruling No. 2007-1538.

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

[8] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

year.[9] Significantly, both the FMLA and DHRM Policy 4.20 provide that an employee may use accumulated annual and compensatory time to provide for paid FMLA leave.[10]

One of the permissible reasons for taking FMLA leave is "in order to care for … a spouse … who has a serious health condition."[11] A serious health condition is defined as an "illness, injury, impairment or physical or mental condition that involves: (1) inpatient care in a hospital, hospice, or residential medical care facility; or (2) continuing treatment by a health care provider."[12] The grievant has stated that she was caring for her husband during the relevant period because of a "sickle cell crisis." Combined with the statements of the health care provider, these alleged facts indicate that the grievant's husband's condition could arguably qualify as a serious health condition under DHRM Policy 4.20 and the FMLA, and thus the grievant's accumulated annual or compensatory leave could arguably have been used to cover her pay for the days she missed.

While there is no indication that the grievant asked in advance for FMLA leave or for any leave, an employee need not specifically assert rights under the FMLA or even mention the statute by name to invoke its protection.[13] The employee must provide notice that leave is needed for a potentially qualifying reason.[14] It is then up to the employer to inquire further to determine if the leave is for an FMLA qualifying reason.[15]

When the need for leave is not foreseeable,[16] the employee should give notice to the employer of the need for leave "as soon as practicable under the facts and circumstances of the particular case."[17] Except in extraordinary circumstances, it is expected that such notice will be provided within no more than one or two working days of learning of the need for leave.[18] Neither the FMLA nor the related regulations define to whom notice must be given when the need for leave is unforeseeable.[19] Under the regulation related to foreseeable needs for leave, however, if verbal or other notice was

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[9] DHRM Policy 4.20; *see also* 29 U.S.C. § 2612(a)(1).
[10] DHRM Policy 4.20, *Family and Medical Leave Policy Revisions*, revised effective June 16, 1997 ("Employees may use all available annual, compensatory and overtime leave hours …."); *see also* 29 C.F.R. § 825.207(e).
[11] DHRM Policy 4.20; *see also* 29 U.S.C. § 2612(a)(1)(C).
[12] DHRM Policy 4.20; *see also* 29 U.S.C. § 2611(11).
[13] 29 C.F.R. §§ 825.302(c), 825.303(b).
[14] *See id*; *see also, e.g.,* Phillips v. Quebecor World Rai Inc., 450 F.3d 308, 310-311 (7th Cir. 2006); Cruz v. Publix Super Markets, Inc., 428 F.3d 1379, 1383 (11th Cir. 2005); Peeples v. Coastal Office Prods. Inc., 64 Fed. Appx. 860, 863 (4th Cir. 2003).
[15] *Id.*
[16] Based on the information provided in this ruling, the grievant has at least raised a sufficient question as to whether her need for leave was unforeseeable. However, should contrary facts be discovered, different rules related to notice could apply.
[17] 29 C.F.R. § 825.303(a).
[18] *Id.*
[19] However, the regulations do indicate that "[i]n the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved." *Id.*

nevertheless timely, an employee's failure to follow the employer's internal procedures for requesting leave will not bar an employee from taking FMLA leave or from exercising related FMLA rights (such as using accumulated annual or compensatory leave to cover her pay).[20] Though not expressly applicable when the need for leave is unforeseeable, it follows that the same would be the case in both situations.[21] The adequacy of the notice provided to the employer will turn on the specific facts of each case.

In this case, it appears that the grievant notified the agency of the reason for her absence, i.e., to care for her ill husband. The grievant also provided medical documentation of her husband's condition and the need for her care during her absences from work.[22] These allegations raise a sufficient question that the FMLA and DHRM Policy 4.20 covered the grievant's situation[23] and, if so, whether the agency's action in docking her pay were consistent with the FMLA and DHRM Policy 4.20.[24]

In light of all of the above, the grievance qualifies for hearing. We note, however, that this qualification ruling in no way determines that the agency's actions violated policy or were otherwise improper, but only that a further exploration of the facts by a hearing officer is appropriate.

Alternative Theories and Claims

The grievant has raised other theories and claims in her grievance, including, but not limited to, inconsistent treatment under policy.[25] Because the grievant's claim regarding the misapplication or unfair application of policy qualifies for hearing, this Department deems it appropriate to send all alternative theories and claims raised by the

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[20] 29 C.F.R. § 825.302(d).

[21] *See, e.g.*, Cavin v. Honda of Am. Mfg., Inc., 346 F.3d 713, 721-23 (6th Cir. 2003).

[22] The agency disputes that the medical documentation indicated that the grievant was needed at home to care for her husband. While this is certainly an issue that should be considered by the hearing officer, it would appear that the documentation at least raises a question that the situation could qualify under the FMLA. *See* 29 C.F.R. § 825.116 (indicating that care for a family member includes "psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care").

[23] It should be noted, however, that the hearing officer will need to examine, based on the evidence presented at hearing, whether the grievant provided sufficient notice of the need for leave under the applicable regulations described above.

[24] The agency has asserted that the grievant did not use the appropriate call out procedure under the facility's policies. However, if the grievant's notice was adequate under the FMLA and her situation meets the qualification for FMLA leave, whether the grievant followed the agency's call out procedures is not relevant to the issue of allowing the grievant to use paid leave to cover her absence. *See* 29 C.F.R. § 825.207(e). Nothing in this ruling, however, addresses the question of whether the agency could take disciplinary action against an employee for failing to follow call out policies.

[25] The grievant has also alleged that she had to "make up" the days she was absent by working weekends. While this would not be a claim that could qualify for hearing independently as part of this grievance, because it occurred after the initiation of the grievance, the facts may be relevant to other claims and theories raised by the grievance, i.e., informal discipline.

grievance for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

CONCLUSION

For the reasons set forth above, the grievant's January 15, 2008 grievance is qualified for hearing. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer using the Grievance Form B.

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Claudia T. Farr
Director