Issues: Qualification – Benefits/Leave (FMLA), Management Actions (Assignment of Duties and Non-disciplinary Transfer); Ruling Date: August 27, 2009; Ruling #2009-2322; Agency: Department of Behavioral Health and Developmental Services; Outcome: Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Motor Vehicles
Ruling No. 2010-2373
August 27, 2009

The grievant has requested qualification of her April 6, 2009 grievance with the Department of Motor Vehicles (DMV or the agency). For the reasons set forth below, this grievance qualifies for a hearing.

FACTS

The grievant states that during a meeting on April 6, 2009, she was informed she was being transferred from the X Customer Service Center (CSC), which was located near her home, to a CSC approximately 32 miles away. The grievant asserts that this transfer was in retaliation and harassment for her absences under the Family and Medical Leave Act (FMLA). During the course of this Department's investigation, the grievant also asserted that the decision to transfer her was made by her former supervisor in retaliation for the grievant's 2004 ending of her friendship with the supervisor and refusal to move to another city with the supervisor.

After the parties failed to resolve this grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. The agency head denied the grievant's request, and she has appealed to this Department.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[1] Further, complaints relating solely to the establishment or revision of wages, salaries, position classifications, or general benefits "shall not proceed to a hearing"[2] unless there is sufficient evidence of discrimination, retaliation, discipline, or a misapplication or unfair application of policy.[3] In this case, the grievant asserts that the agency retaliated against her for her use of FMLA-protected leave. She also appears to assert that the agency

[1] *See* Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(C).
[3] *Grievance Procedure Manual* § 4.1(c).

misapplied and/or unfairly applied policy by transferring her in retaliation for ending her personal friendship with the grievant.

Retaliation for Use of FMLA Rights

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[4] (2) the employee suffered a materially adverse action;[5] and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[6] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[7]

Under Department of Human Resource Management (DHRM) Policy 4.20, "Family and Medical Leave," as well as the federal 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 year, thus in using FMLA leave, the grievant engaged in a protected act.[8] Further, the grievant has arguably suffered a materially adverse action—her transfer from a work location close to her home and in the same town as her health care providers to a work location 32 miles away. The grievant has also shown evidence raising a sufficient question as to whether a causal connection exists between her use of FMLA-protected leave and the transfer. In particular, the agency has advised the grievant that her transfer was due, at least in part, to her need to take leave on an erratic and sporatic basis. In addition, the agency does not appear to dispute that this leave was, in whole or in part, protected leave under the FMLA.

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[4] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

[5] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); s*ee, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. A materially adverse action is one that might dissuade a reasonable employee in the grievant's position from participating in protected conduct. In *Burlington Northern*, the Court noted that "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." 548 U.S. at 69. "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children." *Id.* The Court determined that "plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 68. (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

[6] *See* EEOC v. Navy Fed Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).

[7] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

[8] DHRM Policy 4.20; *see also* 29 U.S.C. § 2612(a)(1) and § 2615(a).

In light of this evidence, the grievance qualifies for hearing. We note, however, that this qualification ruling in no way determines that the agency's actions were retaliatory 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 and the related investigation by this Department, including, but not limited to, a claim that her transfer was in retaliation for ending a personal friendship with her former supervisor. Because the grievant's claim of retaliation qualifies for hearing, this Department deems it appropriate to send all alternative theories and claims raised by the 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 April 6, 2009 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