Issue: Qualification – Retaliation (Grievance Activity); Ruling Date: October 22, 2010; Ruling #2010-2672; 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
Ruling No. 2010-2672
October 22, 2010

The grievant has requested a ruling on whether his January 26, 2010 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

On July 8, 2009, the grievant initiated a grievance challenging management's denial of his request for an alternate work schedule as retaliatory, discriminatory and a misapplication or unfair application of policy.[1] In the relief section of his July 8th grievance, the grievant proposed four alternate work schedules that would satisfy his request. One of these options was for the grievant to work from 8:00 a.m. until 5:00 p.m. with a lunch break from 2:45 p.m. until 3:45 p.m. The grievant recognized that this option would require him to make two trips to the office each day, but he indicated that he was "prepared to do that."

On September 15, 2009, during a meeting with his supervisor, the grievant claims that he was told that because he had an active grievance, he would not be allowed to take his lunch at 2:45 p.m. as requested. Also during this meeting, the grievant was ordered to provide a doctor's note for any future absences from work due to medical reasons. The grievant claims that when he asked his supervisor why he was being required to provide a note from his doctor for his absences, his supervisor said, "you have an active grievance going on." The grievant further claims that his supervisor gave him until 5:00 p.m. to withdraw his July 8th grievance and the "implication" was that if he withdrew his grievance, he would not be required to provide the doctor's notes and would be allowed to take his lunch break at 2:45 p.m.

The grievant declined to withdraw his July 8, 2009 grievance and instead, filed a second grievance challenging his supervisor's actions as retaliatory and intimidating. This grievance proceeded through the management steps without resolution and was denied qualification for hearing by the agency head. The grievant now appeals that determination and seeks a qualification determination from this Department.

[1] This grievance was ultimately qualified for a hearing and was heard on March 8, 2010. *See* Decision of Hearing Officer, Case No. 9258, issued March 15, 2010 ("Hearing Decision") at 1.

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 method, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have influenced management's decision, or whether state policy may have been misapplied or unfairly applied. In this case, the grievant challenges decisions concerning his work schedule and management's requirement that he provide a doctor's note when absent from work due to health reasons.

Work Schedule

The grievant claims that management's decision regarding when the grievant would be allowed to take his lunch break was retaliatory. 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;[3] (2) the employee suffered a materially adverse action;[4] and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the materially 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.[5] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[6]

The grievant has clearly engaged in a protected activity by filing an earlier grievance.[7] The grievant asserts that management conditioned his hours of work on the grievant concluding his July 8, 2009 grievance. The grievant views this action as retaliatory and intimidating. Based upon a review of the grievance record in this case, this Department finds that the grievant has failed to raise a sufficient question that the agency's actions with regard to this issue were retaliatory. More specifically, in an effort to resolve the July 8th grievance, the agency apparently offered the grievant an alternate work schedule, namely that he would be permitted to

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[2] Va. Code § 2.2-3004(B).
[3] *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 the 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).
[4] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006). For a grievance to qualify for hearing, the action taken against the grievant must have been materially adverse such that a reasonable employee in the grievant's position might be dissuaded from participating in protected conduct. *Id.* at 68.
[5] *E.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005); Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000).
[6] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).
[7] *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

take his lunch break from 2:45 – 3:30. The grievant rejected the agency's offer. As such, the agency rescinded its offer to allow the grievant to take his lunch break from 2:45 – 3:30. The agency was attempting to settle the July 8, 2009 grievance. Conditioning the offer of settlement on the conclusion of the grievance is an acceptable means of resolution to a grievance and the grievant has failed to raise a sufficient question that the agency's conditional offer was retaliatory.[8] Accordingly, the grievant's claim as to this issue does not qualify for a hearing.

Verification of Absences due to Medical Reasons

The grievant's January 26, 2010 grievance challenges the agency's requirement that the grievant provide verification of his need for sick leave as retaliatory and a misapplication of policy. More specifically, the grievance 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.[9]

Under the FMLA, an eligible employee can take up to 12 workweeks (60 workdays or 480 work hours) of unpaid FMLA leave per calendar year.[10] This leave may be taken on a continuous or intermittent basis when medically necessary because of the employee's serious health condition.[11] When leave is needed due to ones own serious health condition, either on a continuous or intermittent basis, the employer may require an employee to obtain a medical certification from a health care provider.[12] If an employee requests leave on an intermittent basis for the employee's serious health condition that may result in unforeseeable episodes of incapacity, the employer may seek information sufficient to establish the medical necessity for such intermittent leave and an estimate of the frequency and duration of the episodes of incapacity.[13] Further, "[i]f an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health

[8] Moreover, the grievant's request for an alternate work schedule was the subject of grievance hearing Case No. 9258. In that case, the hearing officer ordered the agency to reconsider the grievant's request for an alternate work schedule and telecommuting without regard to his need for child care during his lunch break. Hearing Decision at 11. Under the grievance procedure, if a grievant believes that an agency has not properly implemented a hearing officer's orders, he may petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of the final hearing decision. Va. Code § 2.2-3006(D); *Grievance Procedure Manual* § 7.3(c).

[9] In his grievance, the grievant states the following: "I was also told that it had come to [my supervisor's] attention, that I had taken more sick leave than she considered necessary. I had already submitted a doctor's report, advising [my supervisor] that I am a heart surgery patient and why I become so exhausted in the afternoons, and that I might have to leave early, due to excessive chest pains. [My supervisor] said that she would not accept the Doctor's statement and that from that day forward, I would be required to submit a doctor's release to return to work, on each occasion that I used my sick leave, whether it be less than 3 days, or not. When I asked her why this was being done, she stated 'Well, [grievant], you have an active grievance going on."

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

[11] *See* DHRM Policy 4.20; 29 U.S.C.S. § 2612 (b)(1). A "serious health condition" includes circumstances where the employee suffers "[a]ny period of incapacity or treatment for a chronic serious health condition which continues over an extended period of time, requires periodic visit to a health care provider at least twice a year, and may involve occasional episodes of incapacity." In addition, "[a] visit to a health care provider is not necessary for each absence." DHRM Policy 4.20.

[12] *See* DHRM Policy 4.20; 29 U.S.C.S. § 2613; and 29 C.F.R. 825.306.

[13] 29 U.S.C.S. § 2613(b)(6); 29 C.F.R. 825.306(a)(7). *See also* DHRM Policy 4.20

care provider."[14] As a general rule, if an employee provides a medical certification for leave as a result of his own serious health condition, the employer may request recertification no more often than every 30 days and only in connection with an absence by the employee.[15]

In this case, the grievant has presented evidence to raise a sufficient question that he suffers from a serious health condition. Moreover, as a result of this serious health condition, the grievant provided the agency with a note from his doctor dated August 31, 2009 indicating that the grievant's medications for his apparent serious health condition often make him tired and "[o]ccasionally, [the grievant] will need to take afternoons off." The physician's note goes on to state: "I would like [sic] request kindly that you allow this to potentiate his medical condition and continued work schedule."

Despite receiving the note from the grievant's physician, on September 16, 2009, the agency informed the grievant that because he had taken an excessive amount of sick leave at the end of August and the beginning of September, he would need to provide a doctor's note for all medical related absences upon his return to work. While it appears that some of the grievant's absences during this time period may have been in response to illness unrelated to his serious health condition, the grievant has raised a sufficient question as to whether the agency violated DHRM Policy 4.20 and the FMLA when it required him to submit a doctor's note for all medical related absences after having received a note from the grievant's doctor indicating that the grievant would need to take intermittent leave as a result of his apparent serious health condition.

In addition, the grievant asserts that the requirement that he present a doctor's note for all medical related absences was retaliatory. More specifically, the grievant claims that when he asked management why he was required to submit a doctor's note, he was told "because you have a grievance in process." If true, such an action by management would certainly be improper.

However, on December 18, 2009, during the management step stage of this grievance, the agency removed the requirement that the grievant present a doctor's note for all medical related absences. As such, management appears to have recognized that requiring the grievant to present a doctor's note for all medical related absences may not have been in accord with policy and/or was potentially retaliatory and took steps to correct the request for such documentation. Under such circumstances, this Department deems it appropriate to deny the grievant's request for qualification of his grievance for hearing, because management appears to have effectively addressed the broad doctor's note requirement that was challenged in his January 26, 2010 grievance. Significantly, however, this Department notes that in the future, (1) should agency management engage in any further alleged retaliatory or otherwise improper act(s) or omission(s) toward the grievant, (2) the grievant challenges the alleged act(s) or omission(s) through the grievance process, (3) the agency then corrects the alleged act(s) or omission(s), yet (4) the grievance raises a sufficient question as to the merit of the grievant's claims, this Department would not be so inclined to deny qualification. This Department is denying qualification in this

[14] 29 C.F.R. 825.307(a).
[15] 29 C.F.R. 825.308(a). In all cases, [however] an employer may request a recertification of a medical condition every six months in connection with an absence by the employee." 29 C.F.R. 825.308(b).

instance on the basis that management appears to have resolved the potential wrong. Should the grievant raise a sufficient question of further improper and/or retaliatory acts in the future, it may be reasonable to conclude that management's resolution of the alleged retaliatory and/or improper behavior in this case had not been truly effective, and that a hearing on the merits would be warranted.[16]

As such, while it appears that the grievant has presented evidence raising a sufficient question as to whether management violated policy and/or retaliated against him by requiring him to present a doctor's note for all medical related absences, based on the particular circumstances of this case, this Department denies the grievant's request for qualification of his January 26, 2010 grievance.

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 this Department's qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). 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 notifies the agency that he wishes to conclude the grievance.

Claudia T. Farr
Director

[16] A hearing decision is final and binding if consistent with law and policy. Va. Code § 2.2-3005(C)(iii). Either party may petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of the final decision or recommendation of a hearing officer. Va. Code § 2.2-3006(D).