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ADMINISTRATIVE REVIEW

In the matter of the Virginia Community College System
Ruling Number 2024-5681
April 5, 2024

The Virginia Community College System (the "college" or "agency") has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review the hearing officer's decision in Case Number 12024. For the reasons set forth below, EDR remands this matter for further consideration.

FACTS

The relevant facts in Case Number 12024, as found by the hearing officer, are as follows:[1]

> The grievant worked at the [college] in 2023 as an Education Support Specialist (Student Success Coach). She had been employed by the school for approximately ten years. Beginning May 24, 2023, the grievant missed work through her termination on September 11.
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> When the grievant failed to show up for work on May 24 she notified her supervisor that she needed to be off work for an indefinite amount of time for medical reasons. She filed a claim for disability benefits through the Virginia Sickness and Disability Program (VSDP) third party administrator (TPA). The school became aware of this claim no later than May 30. The [Assistant Vice President (AVP)] notified the grievant that she was "to be told of options" by another employee of the school. That employee was copied on the email from the AVP to the grievant. The grievant submitted information to the TPA, including a note from her physician dated May 27, 2023. The note stated that the grievant needed to be excused from work for 90 days.
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> On June 30, the AVP sent a letter to the grievant informing her of her exhausted paid leave. The letter stated that she was being placed on leave without pay status beginning June 30, 2023. The letter further stated, "to ensure we explored options, we consulted with VCCS Human Resources, who advised to inform you

[1] Decision of Hearing Officer, Case No. 12024 ("Hearing Decision"), February 25, 2024, at 2-3.

to either: 1) Return to work, or, 2) Resign." The grievant was given a deadline of July 6, 2023 to respond with her decision.

On July 3, the AVP sent an email to the grievant. The email stated that the grievant would be placed on leave without pay status as of July 10 unless she returned to work, or the TPA approved her claim. The email concluded by stating "for your review and consideration, I have attached information on FMLA and ADA. Should any of these options apply, please complete the forms and return by July 19, 2023." The information provided included a completed FMLA leave form dated July 3 and reflecting that the school received notice of the grievan[t's] health issues on May 26, 2023. It also indicated that the grievant was eligible for FLMA leave.

The TPA denied the initial request by the grievant for short-term disability benefits on July 13. The reason stated was "plan provision not met." No further explanation was given, and the parties presented no evidence as to what provision was lacking. The grievant requested an appeal of this denial. On or about August 25 the TPA acknowledged that it had requested a 45-day extension for making a final decision on the claim.

On September 11, the TPA sent notice of denial of the claim to the AVP. Approximately four hours later, the AVP notified the grievant that she was being terminated from employment for absenteeism, her claim through the VDSP having been denied. The school issued a Group III Written Notice on that date, terminating the grievant from employment.

The decision to issue this Group III Written Notice was based, in part, upon the grievant having an active Group I Written Notice from March 2, 2023, and an active Group II Written Notice from May 24, 2023. She had received a rating of "Contributor" in her most recent evaluation prior to her termination.

The Group III Written Notice with termination issued on September 11, 2023, charged the grievant with being "absent for 78 consecutive work days without approval."[2] The grievant timely grieved the dismissal, and a hearing was held on February 12, 2024.[3] In a decision dated February 25, 2024, the hearing officer determined that the disciplinary action was not consistent with the requirements of state policy related to family and medical leave.[4] Accordingly, the hearing officer ordered the college to rescind the disciplinary action and restore the grievant's employment.

The college now appeals the hearing decision to EDR.

[2] Agency Ex. "Issue 1 – Written Notice 9.11.2023"; *see* Hearing Decision at 1.
[3] *See* Hearing Decision at 1.
[4] Hearing Decision at 4; *see* DHRM Policy 4.20, *Family and Medical Leave*.

DISCUSSION

By statute, EDR has the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure."[5] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.[6] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[7] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[8] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[9] Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[10] Thus, in disciplinary actions, the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[11] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based on evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Family Medical Leave

In its request for administrative review, the college argues that, contrary to the hearing officer's conclusions, the grievant was not entitled to family-medical leave for multiple reasons. Primarily, the college challenges the hearing officer's finding that the grievant should have been entitled to family-medical leave at the time of her termination. The college also maintains that the grievant was timely notified of her eligibility for such leave and, even if notification had been untimely, the grievant was not prejudiced by a late notification such that relief in the form of reinstatement would be warranted.

In response, the grievant argues that she had provided all information requested to substantiate her need for medical leave, either to the college or to the state's third-party disability benefits administrator. In support, she points to evidence that the college was aware that her

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[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[8] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.
[10] *Rules for Conducting Grievance Hearings* § VI(B).
[11] *Grievance Procedure Manual* § 5.8.

absences were due to "a medical situation." She contends that, prior to her termination, she did not know "the difference in STD, [VSDP], FMLA, ADA, paid/unpaid leave and how they work with and independently of one another."

Grievant's Leave Entitlement

DHRM Policy 4.20, *Family and Medical Leave* provides "guidance regarding the interaction of the Family Medical Leave Act [FMLA] and the Commonwealth's other Human Resource policies."[12] An employee is generally "eligible" for FMLA leave if they meet minimum requirements for length of employment and hours of work for the Commonwealth during the past 12 months.[13] According to the FMLA and Policy 4.20, eligible employees are entitled to "up to 12 workweeks (480 hours) of unpaid family and medical leave during a 12-month rolling period" for reasons including "a serious health condition which renders the employee unable to perform the functions of their position."[14]

Under the FMLA's implementing regulations:

> when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. . . . Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period.[15]

In addition to the notice requirement, Policy 4.20 provides that "[m]edical certification is required except in the case of birth, adoption, or foster placement."[16] When the need for FMLA leave arises from the employee's own serious health condition, Policy 4.20 indicates that federal Form WH-380-E (linked in the electronically-available version of Policy 4.20) should be used to certify the employee's qualifying need.[17] "Medical certification shall be obtained by the employee and returned to their agency within 15 calendar days of the [FMLA] request . . . . If an employee fails to provide certification . . . in a timely manner then the agency may deny FMLA leave until the required certification is provided."[18]

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[12] DHRM Policy 4.20, *Family and Medical Leave*, at 1.
[13] 29 U.S.C. § 2611(2); DHRM Policy 4.20, *Family and Medical Leave*, at 3.
[14] *Id.* at 3-4; 29 U.S.C. § 2612(a)(1) ("an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period" for reasons including "a serious health condition that makes the employee unable to perform the functions of the position of such employee").
[15] 29 C.F.R. § 825.300(b)(1).
[16] DHRM Policy 4.20, *Family and Medical Leave*, at 6; *see generally* 29 C.F.R. § 825.305(a) ("An employer may require that an employee's leave . . . due to the employee's own serious health condition . . . be supported by a certification issued by the health care provider of the employee.").
[17] DHRM Policy 4.20, *Family and Medical Leave*, at 6; *see* 29 C.F.R. 825.306(b) (approving form WH-380E for certification when the employee's need for leave is for their own serious health condition).
[18] DHRM Policy 4.20, *Family Medical Leave*, at 6.

In this case, the hearing officer found that, although the grievant missed work from May 24 through September 11, 2023, the Group III Written Notice issued to the grievant was not consistent with the DHRM Policy 4.20. Because the college did not notify the grievant of her FMLA eligibility until July 3, 2023, the hearing officer found:

> By the time the school notified the grievant of her rights under Policy 4.20, she had already effectively used about 6 weeks of paid leave, instead of the 12 weeks of unpaid leave available to her. Using the July 10, 2023, date as the beginning of the leave without pay status (as stated in the July 3 email) the 12 weeks of unpaid medical leave available to the grievant under Policy 4.20 and federal law would have ended on October 2, 2023. The school chose to terminate her on September 11, only 9 weeks into the unpaid leave period. I find . . . the late notification of rights[] to be crucial in resolving this case.[19]

Indeed, the hearing officer emphasized that "[i]t is only because the grievant was not shown to have been given the timely chance to seek FMLA leave that I reverse her Group III discipline and termination."[20]

As to the issue of timely notice, EDR has no basis to disturb the hearing officer's finding that the college failed to provide a timely notification of eligibility required by the FMLA and DHRM Policy 4.20. The hearing decision found that, on May 24, 2023, the grievant "notified her supervisor that she needed to be off work for an indefinite amount of time for medical reasons"; he also found that the college became aware of the grievant's short-term disability claim no later than May 30, 2023.[21] These dates do not appear to be in dispute and are supported by evidence in the record.[22] Rather, the college argues that these communications did not trigger FMLA eligibility notice requirements in light of DHRM Policy 4.57, *Virginia Sickness and Disability Program*, which provides that the third-party administrator will determine whether a claim involves an FMLA-qualifying reason. However, Policy 4.57 makes clear that agencies remain "responsible for determining employee eligibility, notifying employees of FMLA rights and tracking FMLA."[23] As part of these responsibilities, agencies "should notify employees of the designation of leave as FMLA at the time employers are informed of the [disability] claim."[24] Accordingly, we agree with the hearing officer's reasoning that the college should have provided the grievant with the appropriate notice of FMLA eligibility no later than June 6, 2023, if not earlier.

However, notwithstanding this apparent compliance error by the agency, it is not clear that the hearing officer's analysis as to the grievant's actual leave entitlement is consistent with the FMLA principles discussed above. By state policy, the grievant's need for leave was required to

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[19] Hearing Decision at 4.
[20] *Id.*
[21] *Id.* at 2.
[22] *See, e.g.*, Grievant Ex. 1, at 8; Grievant Ex. 2, at 4.
[23] DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 29.
[24] *Id.* Such designation can be provisional to the extent more information is needed to verify a qualifying reason. *See* DHRM Policy 4.20, *Family and Medical Leave*, at 7 ("Agencies must make a determination on a family and medical leave request within five business days of receiving sufficient information to make a determination" and, in the meantime, can indicate on federal Form WH-382 that more information is needed prior to official designation).

be certified as FMLA-qualifying, either by (1) her own medical provider, using Form WH-380-E, or (2) the third-party administrator handling her disability claim.[25] Typically, such certification includes information about the type of qualifying condition for which leave is sought, sufficient to determine whether FMLA designation is appropriate, and the amount of leave needed. In this case, the hearing decision contains no findings as to whether the grievant actually had a serious health condition as defined by the FMLA,[26] whether the grievant satisfied reasonable requirements to certify her need for leave as FMLA-qualifying for designation purposes, or whether such need should have been certified for the full 12-week protected period. Moreover, our review of the record indicates that it contains only scant, if any, evidence on these issues. The grievant's exhibits include a heavily-redacted medical note dated on or about May 27, 2023, only indicating the grievant's need to be out of work for 90 days – or until about August 25, 2023.[27]

Even assuming that the medical note and/or other record evidence supports the grievant's need for FMLA-qualifying leave, EDR concludes that the hearing decision does not contain findings sufficient to support July 10, 2023, as the first day of the grievant's leave that should have been within the scope of FMLA protection, thus triggering a potential 12-week leave entitlement from that date. As the hearing decision indicated, the grievant's last day reporting to work was May 23, 2023, and she filed a short-term disability claim within a few days after her extended absence began.[28] As discussed above, we agree with the hearing officer's assessment that this absence, and the grievant's initial communications related to it, should have triggered the employer FMLA notice requirements. However, it is not clear how the agency's failure to provide timely notice ultimately deprived the grievant of FMLA protections to which she may have been entitled.

Federal courts have long held that the FMLA "provides no relief unless the employee has been prejudiced by the violation."[29] Here, the record indicates that the grievant may have been entitled to up to 12 weeks of job-protected leave beginning on or about May 23, 2023[30] – which it appears she received. Based on the hearing officer's findings of fact and supporting evidence, it appears that the agency applied the grievant's paid leave balances to her extended absence until those benefits were depleted, and then notified her that, upon exhaustion of her paid-leave benefits, she would be considered in a leave-without-pay status pending approval or denial of her claim for disability benefits.[31] The college at that time provided the grievant with the federal Notice of Eligibility for FMLA form, giving her an opportunity to invoke FMLA job protection for her medical absence that had begun on or about May 23, 2023, by having her medical provider

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[25] *See* DHRM Policy 4.20, *Family and Medical Leave*, at 6; DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 29.
[26] For FMLA purposes, a serious health condition is defined as "an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in [29 C.F.R.] § 825.114 or continuing treatment by a health care provider as defined in § 825.115." 29 C.F.R. § 825.113(a); *see also* DHRM Policy 4.20, *Family and Medical Leave*, at 12 (defining "Serious Health Condition" as it relates to inpatient care and continuing treatment).
[27] *See* Grievant Ex. 3, at 12.
[28] *See* Agency Ex. 12.
[29] Adkins v. CSX Transp., Inc., 70 F.4th 785, 796 (4th Cir. 2023) (quoting Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 89 (2002)).
[30] *See* Grievant Ex. 3, at 2.
[31] *See* Hearing Decision at 3; Grievant Ex. 3, at 1.

complete the included certification form.[32] It is not clear how a timely notice in late May or early June would have changed the sequence of events in any material way. Even with timely notice, medical certification for FMLA purposes was, per DHRM policy, initially in the hands of the third-party benefits administrator. When no certification was forthcoming as the grievant's paid leave benefits depleted, the agency appropriately gave the grievant an opportunity to have her medical provider complete the FMLA certification directly. We are unable to identify evidence in the record that the grievant ever took advantage of this opportunity to establish her entitlement to FMLA protection and have the agency designate it appropriately as such. Even if she had, however, we find nothing to support excluding the grievant's pre-notice weeks of medical leave (late May to early July) from the scope of the FMLA-protected period.

For these reasons, EDR is unable to identify record support for the hearing officer's finding that the grievant was entitled to 12 weeks of FMLA job protection that began on July 10 and ended on October 2, 2023. Accordingly, we remand the hearing decision for reconsideration in this regard. On remand, the hearing officer should reconsider whether the grievant was entitled to job protection for otherwise unauthorized absences that formed the basis of the Group III Written Notice.[33] A finding that the grievant was entitled to FMLA job-protected leave at any point must cite record evidence that the relevant absences were due to the grievant's serious health condition as defined by the FMLA and that she substantially complied with the college's reasonable requirements to certify such health condition, so that all such absences should have been designated as FMLA leave. Such a finding would also require supporting evidence as to the appropriate length of the grievant's leave entitlement. If the evidence does not support such findings, the Group III Written Notice with termination must be upheld, given the hearing officer's determination that FMLA requirements were the sole basis to overturn discipline in this matter.

CONCLUSION AND APPEAL RIGHTS

For the reasons discussed above, this matter is remanded for reconsideration of the applicability of FMLA rights to the disciplinary issues presented in this grievance. Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any new matter addressed in the remand decision (*i.e.* any matters not resolved by the original decision). Any such requests must be **received** by EDR **within 15 calendar days** of the date of the issuance of the remand decision.[34]

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[35] Within 30 calendar days of a final hearing decision, either party may appeal the final

[32] Grievant Ex. 3 at 7-10.
[33] Although the written notice cites 78 days of absence from work, unauthorized absence of three or more consecutive work days is generally sufficient under DHRM Policy 1.60, *Standards of Conduct*, to sustain discipline at the Group III level. *See* DHRM Policy 1.60, Att. A: "Examples of Offenses Grouped by Level." Therefore, in this case the written notice may be upheld if the evidence shows that at least three days of the grievant's absence were not authorized or otherwise protected by law or policy.
[34] *See Grievance Procedure Manual* § 7.2.
[35] *Grievance Procedure Manual* § 7.2(d).

decision to the circuit court in the jurisdiction in which the grievance arose.[36] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[37]

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Director
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[36] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[37] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).