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QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2019-4855
May 15, 2019

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management[1] on whether her August 28, 2018 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

On or about July 23, 2018, the grievant submitted a medical certification form to the agency requesting intermittent leave to care for a family member pursuant to the Family and Medical Leave Act ("FMLA"). The agency approved the grievant's request for intermittent FMLA leave. On July 31, 2018, the grievant asked to use FMLA leave for the day to care for the family member in question. The agency denied the grievant's request and she was placed on leave without pay ("LWOP") for July 31. The grievant filed a grievance on August 28, 2018, disputing the agency's denial of her request for FMLA leave on July 31, among other related matters. After proceeding through the management resolution steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EDR.

DISCUSSION

Grievant's Request for FMLA Leave

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[2] Furthermore, EDR has recognized that, even if a grievance challenges a management action that might qualify for a hearing, there are some cases when qualification is inappropriate. For example, during the resolution steps, an issue may have become moot, either because the agency

[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.
[2] *See Grievance Procedure Manual* §§ 4.1 (a), (b).

granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

While this ruling was pending with EDR, the agency notified the grievant that it would retroactively apply eight hours of her sick leave from 2018 to cover her absence on July 31, 2018, as if her request for FMLA on that date had originally been approved. The agency also restored six hours of annual leave that the grievant would have accrued if she had not been placed on LWOP on July 31, 2018. At a hearing on this issue, the hearing officer would have the authority to "order the agency to reapply the policy from the point at which it became tainted," or, if "written policy require[d] a particular result without the exercise of agency discretion," the hearing officer could "order the agency to implement those particular policy mandates."[3] In this case, then, the potential relief available to the grievant would be an order for the agency to approve the grievant's request for FMLA leave on July 31, apply available leave to cover the absence as appropriate, and restore any other benefits that the grievant would have received but for the denial of FMLA leave. As a result, EDR finds that a hearing officer would be unable to provide the grievant with any additional relief beyond that which has already been granted to her by the agency.

Accordingly, there is no reason for this issue to proceed to a hearing. EDR does not generally grant qualification for a grievance hearing to determine whether an agency has failed to comply with policy where, as here, the agency has cured the alleged error. This issue is, therefore, not qualified and will not proceed further.[4]

Remaining Issues and Additional Guidance

In attachments submitted to the agency and to EDR after she initiated her August 28, 2018 grievance, the grievant addresses a number of additional issues with her employment that are related to her use of leave, attendance, and work schedule, as well as alleged improper conduct by her supervisor. In these attachments, the grievant alleges, among other things, that the agency placed her on LWOP on several other days in April, May, and June 2018, and further disputes her receipt of a Notice of Improvement Needed/Substandard Performance on July 12, 2018. The grievant also claims that her supervisor and other members of agency management began harassing her as a form of retaliation after she initiated her August 28, 2018 grievance. Most recently, the grievant has alleged to EDR that she received a Group II Written Notice related to her absence from work on July 31, 2018, after the agency corrected the issue with her FMLA leave on that date as discussed above.[5] Finally, the grievant transferred to a different agency facility as of April 10, 2019, and thus no longer works with the supervisor who engaged in the allegedly retaliatory conduct; however, the grievant also alleges that the supervisor provided information as part of reference check conducted by another state agency as part of a recruitment process in which she participated, with the result that the grievant was not offered a position with the other agency.

[3] *Rules for Conducting Grievance Hearings* § VI(C)(1).
[4] This ruling does not mean that EDR deems the alleged conduct at issue, if true, to be appropriate, only that the grievance does not qualify for a hearing as the grievance procedure is unable to provide the grievant with any further relief.
[5] The grievant indicated that she filed a grievance to challenge the issuance of the Written Notice.

The grievance procedure provides that additional management actions or omissions cannot be added to a grievance after it is filed.[6] As a result, EDR cannot address whether those issues that were not challenged in the August 28, 2018 grievance when it was filed qualify for a hearing under the grievance procedure.[7] Nonetheless, some of the grievant's claims regarding the supervisor's behavior are concerning, if true. To the extent it has not already done so, the agency should make note of the events that are identified in the attachments to the grievance and/or discussed in this ruling, and look into them as appropriate. For example, the justification for an alleged Group II Written Notice for an absence that has now been designated as approved FMLA leave is unclear. That issue could be reviewed and appropriately addressed in the applicable grievance.

EDR's qualification rulings are final and nonappealable.[8]

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[6] *Grievance Procedure Manual* § 2.4.
[7] It also appears that many of the actions cited by the grievant in the attachments occurred more than thirty calendar days preceding the initiation of her grievance, and thus would not have been timely challenged even if they had been raised in the grievance. Va. Code § 2.2-3003(C); *Grievance Procedure Manual* §§ 2.2, 2.4.
[8] Va. Code § 2.2-1202.1(5).