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QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2019-4899
May 17, 2019

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”)¹ on whether his January 23, 2019 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

Prior to January 10, 2019, the grievant and other employees at the facility where he works submitted a “yearly vacation packet” listing all of their requested dates for leave in 2019. The facility uses this information to make a master schedule ensuring staff coverage for the year. On or about January 10, 2019, the grievant was notified that eight of his requests for leave in 2019 were denied because he did not yet have sufficient accrued annual leave to cover those absences. The grievant initiated a grievance on January 23, 2019, alleging that the agency had unfairly denied his requests for annual leave. After proceeding through the management steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EDR.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.² Thus, by statute and under the grievance procedure, complaints relating solely to the establishment and revision of salaries, wages, and general benefits “shall not proceed to a hearing”³ unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. Further, the grievance procedure generally limits grievances that qualify for a hearing to

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 Va. Code § 2.2-3004(B).

³ *Id.* §§ 2.2-3004(A), 2.2-3004(C).

those that involve “adverse employment actions.”⁴ Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a “tangible employment action 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.”⁵ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁶ For purposes of this ruling only, EDR will assume the grievant has alleged an adverse employment action, in that he asserts the agency improperly limited his use of annual leave, which is a benefit of his employment.

In essence, the grievant appears to argue that the agency misapplied and/or unfairly applied policy by denying some of the requests for annual leave in his 2019 yearly vacation packet. 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. In support of his position, the grievant contends that he will accrue sufficient annual leave during the year to cover his planned absences, and thus all of the requests should have been approved. The grievant also asserts that management has “kept [employees] from using their [leave] time” because the facility is short on staff.

DHRM Policy 4.10, *Annual Leave*, provides that “[e]mployees cannot use annual leave until it is accrued.”⁷ The agency’s Operating Procedure (“OP”) 110.1, *Hours of Work and Leaves of Absence*, similarly states that “[n]o leave of absence with pay will be granted in anticipation of future leave accruals.”⁸ In this case, the grievant requested to use annual leave in 2019 that he had not yet accrued when he submitted his yearly vacation packet. Based on the applicable policy provisions, the agency could not approve annual leave requested by the grievant that he had not yet accrued. According to the agency, it approved as many of the grievant’s requests as his leave balance would allow and advised him to request additional days off after he had accrued additional leave. The agency has further indicated that it uses this practice for all employees at the grievant’s facility, and EDR has reviewed nothing to demonstrate that other employees may have been treated differently than the grievant.⁹

With regard to employees’ use of leave in general, DHRM Policy 4.10, *Annual Leave*, further states that

[e]mployees must request and receive approval from their supervisors to take annual leave. Employees should make their requests for leave as far in advance as possible. When practical, and for as long as the agency’s operations are not affected adversely, an agency should attempt to approve an employee’s request for

⁴ See *id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

⁵ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁶ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁷ DHRM Policy 4.10, *Annual Leave*, at 5.

⁸ Department of Corrections OP 110.1, *Hours of Work and Leaves of Absence*, § IV(C)(7).

⁹ While the agency acknowledges that the grievant’s facility previously allowed employees to request, and receive approval for, annual leave in anticipation of future accruals, it has discontinued that practice to ensure compliance with the provisions state and agency policy relating to the use of annual leave discussed in this ruling.

annual leave. However, supervisors may deny the use of annual leave because of agency business requirements. Approval of leave may be rescinded if the needs of the agency change.¹⁰

OP 110.1 contains similar language that management “reserves the right to approve or disapprove all requests for use of [annual] leave.”¹¹ These policies grant management the discretion to approve or deny an employee’s request for leave. The agency states that an employee’s request to use future, unaccrued leave may still be placed on the facility’s master schedule for the year, but cannot be officially approved until the leave has accrued and the employee has submitted a request to use the leave. In other words, the grievant may request leave for the dates in his yearly vacation packet that were initially denied after he has accrued additional annual leave. If the agency’s operational needs permit, those requests should be approved by management.

In conclusion, and while the grievant clearly disagrees with the agency’s decision, he has not raised a sufficient question as to whether the agency misapplied and/or unfairly applied policy, acted in a manner that was inconsistent with other decisions regarding the approval of leave for employees, or was otherwise arbitrary or capricious. Under the circumstances presented in this case, it appears that the agency’s decision regarding the grievant’s leave was consistent with the discretion granted by policy. Accordingly, the grievance does not qualify for a hearing on this basis.

EDR’s qualification rulings are final and nonappealable.¹²



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¹⁰ DHRM Policy 4.10, *Annual Leave*.

¹¹ Department of Corrections OP 110.1, *Hours of Work and Leaves of Absence*, § IV(D)(4).

¹² See Va. Code § 2.2-1202.1(5).