



EMILY S. ELLIOTT
DIRECTOR

COMMONWEALTH OF VIRGINIA
Department Of Human Resource Management
Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219
Tel: (804) 225-2131
(TTY) 711

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2019-4926
June 7, 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 March 9, 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

On or about February 10, 2019, the grievant became aware that 14 hours of his accrued compensatory leave had lapsed in January: six hours on January 12, and eight hours on January 15. The grievant initiated a grievance on March 9, alleging that the agency had not allowed him to schedule time off and use the compensatory leave before it lapsed. As relief, the grievant asked the agency to reinstate the 14 hours of lapsed compensatory leave. After the grievance proceeded through the management steps, the agency head denied the requested relief and declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

DISCUSSION

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 Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.³ Claims relating solely to the establishment and revision of salaries, wages, and general benefits 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 improperly influenced management’s decision,

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).

³ See Va. Code § 2.2-3004(B).

or whether state or agency policy may have been misapplied or unfairly applied.⁴ The grievant has not alleged discrimination, retaliation, or discipline. Therefore, the grievant's claims could only qualify for hearing based upon a theory that the agency has misapplied or unfairly applied policy.

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. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁵ 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."⁶ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁷ For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action because he asserts that he was denied use and retention of leave.

In this case, the grievant alleges that the agency improperly allowed 14 hours of accrued compensatory leave to lapse without his having the opportunity to use the leave. In support of his position, the grievant asserts that he was "unable to take or use the compensatory time" because he was "forced to work overtime" and directed to work at another agency facility that was short on staff. The grievant further argues that he has been treated unfairly because "other non-security and non-critical staff have the opportunity to use their time as they want," while he works as a Corrections Officer and was unable to use his accrued compensatory leave before it lapsed.⁸ Finally, the grievant alleges that the agency should have extended his time to use the compensatory leave due to the nature of his position and the difficulty he experienced in scheduling time off.

While the grievant's frustration at having lost 14 hours of compensatory leave is understandable, he has not identified, and EDR has not found, a mandatory policy provision that has been misapplied or unfairly applied by the agency. DHRM Policy provides that "[a]ccrued compensatory leave lapses within 12 months from the date it is earned."⁹ The policy further states that "[w]hen practicable, and for as long as the agency's operations are not affected adversely, an agency *should* attempt to approve an employee's request to use compensatory

⁴ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

⁵ *See Grievance Procedure Manual* § 4.1(b).

⁶ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁷ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁸ Although the grievant characterizes this allegation as an issue of discrimination, the grievance procedure provides that grievances alleging discrimination on the grounds of race, sex, color, national origin, religion, sexual orientation, gender identity or expression, age, political affiliation, genetics, disability, or veteran status may be qualified for a hearing. *See Grievance Procedure Manual* § 4.1(b); *see also* Executive Order 1, *Equal Opportunity* (2018); DHRM Policy 2.05, *Equal Employment Opportunity*. The grievant's assertion that he has experienced discrimination on the basis of his employment in a security position does not fall within one of these categories and, thus, this claim will be addressed as a misapplication and/or unfair application of policy.

⁹ DHRM Policy 3.10, *Compensatory Leave*.

leave.”¹⁰ Agency policy OP 110.1 contains similar language, stating that “[a]s far as practicable, compensatory leave shall be granted at the times requested by the employee.”¹¹ These policies give management the discretion to deny an employee’s request for compensatory leave when necessary.¹²

DHRM policy further states that “[a]n agency *may* extend indefinitely the time employees have to use earned compensatory leave” for positions that are “critical to the agency’s mission and for which the agency has significant difficulty retaining qualified employees.”¹³ Even assuming the grievant’s position has been designated as one for which the time to use compensatory leave could be extended, this language in the policy is discretionary and does not mandate an agency to extend an employee’s time to use accrued compensatory leave to prevent it from lapsing.

EDR cannot second-guess management’s decisions regarding the administration of its standard facility operating procedures, absent evidence that the agency’s actions are plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.¹⁴ Here, the agency has indicated to EDR that compensatory leave for other employees at the grievant’s facility also lapsed in January 2019, and that other employees were also unable to use accrued compensatory leave due to staffing needs at the facility. In addition, there is no information in the grievance record to suggest that the agency extended other similarly situated employees’ time to use compensatory leave while denying the grievant that opportunity. For these reasons, EDR finds that the grievance does not raise 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.

EDR’s qualification rulings are final and nonappealable.¹⁵



Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹⁰ *Id.* (emphasis added).

¹¹ Department of Corrections Operating Procedure 110.1, *Hours of Work and Leaves of Absence*, § IV(H)(3).

¹² *E.g., id.* § IV(H)(3)(b) (“Organizational Unit Heads should consider the needs of the unit prior to granting use of compensatory leave.”).

¹³ DHRM Policy 3.10, *Compensatory Leave* (emphasis added).

¹⁴ *See, e.g.*, EDR Ruling No. 2009-2090.

¹⁵ *See* Va. Code § 2.2-1202.1(5).