Issue: Qualification – Benefits/Leave (FMLA); Ruling Date: September 11, 2017; Ruling No. 2018-4593; Agency: Department of Corrections; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2018-4593
September 11, 2017

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management on whether her April 7, 2017 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as a Corrections Officer. In January 2017, she submitted certification forms to the agency documenting her need for intermittent leave under the Family and Medical Leave Act ("FMLA")[1] to care for two family members. It appears as though the grievant's request relating to one family member was approved by the agency on or about January 20, 2017; however, the request relating to the second family member was not. On March 8, 2017, the agency notified the grievant that forms she submitted in January were not sufficient to establish whether her request for intermittent leave qualified under the FMLA and requested additional information to correct the issue within seven calendar days. The grievant submitted two new certification forms to the agency and her requests for intermittent FMLA leave were ultimately approved on April 24.

On April 7, 2017, while at least one of the grievant's requests for FMLA leave was pending, she filed a grievance alleging that the agency was "not in compliance with" the FMLA because her "[n]otices were not being returned in a timely manner" and she was "being written up" for using FMLA leave. The grievant further claims that the agency has discriminated and retaliated against her for use of FMLA 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 EEDR.

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

[1] *See* 29 U.S.C. § 2601 *et seq*.
[2] *See Grievance Procedure Manual* § 4.1.

manage the affairs and operations of state government.[3] Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out, as well as the contents of statutes, ordinances, personnel policies, procedures, rules, and regulations, 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, or whether state policy may have been misapplied or unfairly applied.[4]

Further, while grievances that allege discrimination and/or retaliation may qualify for a hearing, 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]

Based on the facts presented to EEDR, it does not appear that the agency's actions in this case constitute an adverse employment action or can be considered inconsistent with the requirements of policy or law. Under the FMLA, an employee "must provide a complete and sufficient certification" supporting her need for leave.[8] Regulatory guidance further provides that "[a] certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous, or non-responsive."[9] If an employee's certification is insufficient, an employer must advise the employee of that fact, "state in writing what additional information is necessary to make the certification complete and sufficient," and "provide the employee with seven calendar days . . . to cure any such deficiency."[10] In this case, it does not appear that the agency's request for additional information from the grievant was inconsistent with the FMLA or otherwise improper.

In addition, EEDR has reviewed nothing to suggest that any other agency actions cited by the grievant can be considered adverse. While the grievant asserts that she was "written up" for arriving late at work while her request for FMLA leave was pending, there is no information in the grievance record showing that she experienced a loss in pay, received a Written Notice of formal disciplinary action, or was otherwise subject to some change in the terms, conditions, or benefits of her employment. It appears the grievant may have received verbal and/or written counseling to address issues with tardiness; however, such informal counseling, by itself, is not generally considered adverse.[11] Although the grievant's concerns are understandable, EEDR

[3] *See* Va. Code § 2.2-3004(B).
[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] *See, e.g.*, Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[8] 29 C.F.R. § 825.305(c); *see* 29 U.S.C. § 2813.
[9] 29 C.F.R. § 825.305(c).
[10] *Id.*
[11] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).

finds that the grievant has not presented evidence to raise a sufficient question as to whether she has experienced an adverse employment action. To the contrary, it would appear from EEDR's review of the grievance record that the agency's request for additional information from the grievant regarding her need for FMLA leave was reasonably intended to resolve issues with her original certification forms and, indeed, the grievant's request for FMLA leave was ultimately approved. Accordingly, the grievance does not qualify for a hearing.[12]

EEDR's qualification rulings are final and nonappealable.[13]

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Office of Equal Employment and Dispute Resolution

[12] Although the grievant has not alleged an adverse employment action at this time based on EEDR's review of the facts presented in the grievance, this ruling does not prevent the grievant from filing a subsequent grievance should further or related issues occur with her FMLA status in the future.
[13] Va. Code § 2.2-1202.1(5).