

Issue: Qualification – Benefits/Leave (LWOP); Ruling Date: April 24, 2014; Ruling No. 2014-3861; Agency: Department of Corrections; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2014-3861
April 24, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management on whether her March 21, 2014 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 with the agency as an Auditor. Prior to the start of her shift on March 17, 2014, the grievant left a voicemail for another employee indicating that she would not be able to come to work that day due to inclement weather. The grievant did not report to work on March 17. On March 18, 2014, prior to the start of her shift, the grievant left a voicemail for her supervisor indicating that she was running late due to the weather. At some point after the beginning of the grievant's shift, she called her supervisor back and requested to alter her hours of work for that day. Her supervisor denied this request. The grievant subsequently sent an email to another employee advising that she would not be coming in that day. The grievant did not report to work on March 18. The grievant's supervisor did not approve her absence from work on either day and accordingly, the agency docked the grievant's pay eight hours for the March 17 absence and eight hours for the March 18 absence.

On or about March 21, 2014, the grievant initiated an expedited grievance to challenge the agency's action. After proceeding through the management resolution steps, the agency head denied qualification for hearing. 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.¹ 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 hearing"² unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of

¹ See Va. Code § 2.2-3004(B).

² Va. Code § 2.2-3004(A), (C).

policy. 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."³ 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."⁴ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁵ There is no question that an adverse employment action occurred in this case because the grievant lost pay.

Here, we are unable to conclude that any policy violation has occurred under the facts presented. Under Department of Human Resource Management Policy (DHRM) 4.30, an agency's approval is required before utilizing leave, except that "[i]f an employee could not have anticipated the need for a leave of absence," the employee can request to use leave after the fact.⁶ This policy also provides that an employee's leave request should comply with any specific requirements of an agency's policy.⁷ The facility's leave policy, Local Operating Procedure 110.1 (LOP 110.1), states that notification of absence, or request for use of leave, does not mean that leave will be approved, and that when leave is not approved, subsequent failure by the employee to report as required will be considered an unauthorized absence or absence without leave.⁸ An unauthorized absence may result in the employee being placed on leave without pay.⁹

Here, the agency considered the grievant's absence unauthorized¹⁰ and did not approve her leave request, subsequently placing her on leave without pay, consistent with policy. As such, EDR can find no violation of any mandatory provision of the applicable policies in the agency's handling of the grievant's situation. Further, the grievance does not raise a sufficient question as to whether the agency's action was inconsistent with other decisions made by the agency or otherwise arbitrary or capricious. There was no indication that the grievant was treated inconsistently compared to other employees in similar situations. Indeed, the agency

³ See *Grievance Procedure Manual* § 4.1(b).

⁴ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁵ *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁶ DHRM Policy 4.30.

⁷ *Id.*

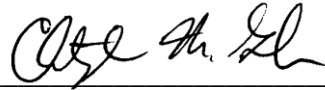
⁸ Local Operating Procedure 110.1, *Hours of Work and Leaves of Absence* ("LOP 110.1") § IV.C(4)(a), (b).

⁹ *Id.*; see also DHRM Policy 4.30.

¹⁰ The agency presents evidence that on March 10, 2014, an email was sent to all employees in the grievant's work unit advising that, due to a backlog of work, no requests for discretionary leave would be approved from that date through April 4, 2014. The email went on to state that emergency leave requests, as at issue in this case, would be evaluated on a case-by-case basis.

states that all other employees who did not report to work as scheduled over the same time frame had their pay docked for the days of absence. Therefore, EDR concludes that the grievant has not presented evidence raising a sufficient question that any policies have been either misapplied and/or unfairly applied to qualify for hearing.

EDR's qualification rulings are final and nonappealable.¹¹



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¹¹ Va. Code § 2.2-1202.1(5).