Issue: Qualification – Benefits/Leave (LWOP); Ruling Date: May 15, 2015; Ruling No. 2015-4151; Agency: Department of Corrections; Outcome: Not Qualified.

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

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2015-4151
May 21, 2015

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") of the Department of Human Resource Management ("DHRM") on whether her March 18, 2015 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

The grievant is employed as a Corrections Sergeant at one of the agency's facilities. On February 17, 2015, inclement weather conditions prompted the agency to permit liberal leave for non-essential staff at the grievant's facility. The grievant is designated as an essential employee for emergency closings and was scheduled to work on February 17. While she was attempting to drive to the facility, the grievant's vehicle slid off the road and became stuck, with the result that she was unable to report to work. The grievant walked home and called the facility to notify management that she would not be able to come to work that day. She was subsequently informed that, because she is designated as an essential employee, she was required to work on February 17 and her pay would be "docked" for 8 hours due to her absence. On March 18, 2015, the grievant initiated a grievance challenging the agency's decision to charge her absence on February 17 to leave without pay. After proceeding through the management resolution steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that decision 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.[1] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[2] 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] *See Grievance Procedure Manual* §§ 4.1 (a), (b).
[2] *See* Va. Code § 2.2-3004(B).

or whether state or agency policy may have been misapplied or unfairly applied.[3] 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."[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, we will assume that the grievant has alleged an adverse employment action because she has raised issues with her compensation and use of leave as they relate to the emergency closing at her facility on February 17.[7]

In her grievance, the grievant broadly disputes the agency's decision to charge her absence on February 17 to leave without pay and seeks to have her lost pay restored. She questions why she was "punished because [she] made an attempt to get to work but . . . failed because of the road conditions," argues that extenuating circumstances prevented her from reporting to work, and appears to claim that the agency treated her differently than other employees at her facility.[8]

DHRM Policy 1.35, *Emergency Closings*, states that executive branch agencies "shall develop written procedures" that, among other things, establish emergency closing procedures and identify "what positions are designated, and considered to be essential" during emergency situations.[9] Designated employees "are required to work during an authorized closing because their positions have been designated by their agencies as essential to agency operations during

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[3] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[4] *See 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] Although it is not clear from the grievance record, it would appear that the grievant wished to use leave on February 17 and was denied the opportunity to do so.
[8] In an attachment disagreeing with the second step-respondent's decision, the grievant appears to further allege that the agency did not award her compensatory leave for working on previous emergency closing days. To the extent this claim can be considered timely, we note that additional management actions or omissions cannot be added to a grievance after it is filed. *Grievance Procedure Manual* § 2.4. Accordingly, this ruling will not address the grievant's argument regarding compensatory leave from past emergency closings. If the grievant wishes to challenge this management action, she may file an additional grievance raising the issue, provided any such grievance satisfies the timeliness requirements of the grievance procedure. *See id.* § 2.2.
[9] DHRM Policy 1.35, *Emergency Closings*.

emergencies," while non-designated employees "are not required to work during an authorized closing because their positions have not been designated as essential during emergency conditions."[10] Under agency Operating Procedure ("OP") 110.3, *Emergency Closings*, agency facilities may allow liberal leave ("Code Yellow") or order an authorized closing ("Code Red"), depending on weather conditions.[11] Under a Code Yellow, "[n]on-designated staff . . . may call their place of employment and request to exercise the liberal leave option" to either delay their arrival or not report to work on that day.[12] For a Code Red, "[n]on-designated staff will not be required to report" for any closed shifts at their facility.[13]

OP 110.3 states that Corrections Sergeants are designated agency employees who "are required to work during emergency events and inclement weather to maintain critical services."[14] "Designated staff who do not report to work as scheduled . . . will be unable to utilize accumulated leave to cover the hours that they failed to report to work."[15] Designated agency employees must report to work during both Code Yellow and Code Red events.[16]

The grievant is employed as a Corrections Sergeant, and thus was appropriately designated as essential under OP 110.3. Because she is a designated employee and was scheduled to work on February 17, the grievant was expected to report for her shift despite the weather conditions. While the grievant's frustration at having lost eight hours of pay is understandable, agency policy explicitly states that designated employees are not permitted to use leave to cover an unauthorized absence during an emergency closing, such as the one at issue here. Furthermore, although the grievant asserts that some employees at her facility have been treated differently, she has not presented any specific information to suggest that other employees may have failed to report to work on February 17 or on other Code Yellow/Code Red days and were permitted to use leave to cover their absence. Indeed, the agency has indicated to EDR that all designated employees at the grievant's facility who were scheduled to work on February 17 and failed to report had their absences charged to leave without pay, like the grievant.[17]

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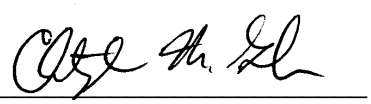
[10] *Id.*
[11] *See* Department of Corrections Operating Procedure 110.3, *Emergency Closings*, §§ IV(B)(1), IV(C).
[12] *Id.* §§ IV(B)(3), (IV)(B)(4).
[13] *Id.* § IV(C)(4). "For organizational units that provide 24-hour services, the decision to close shall be made for each individual shift," not for an entire day. *Id.*
[14] *Id.* §§ III, IV(A)(1).
[15] *Id.* § IV(D)(8)(c).
[16] Essential employees who are authorized to be absent from work, however, are not expected to report during emergency closings. An employee's absence would be authorized if, for example, the date of the emergency closing were her normal day off, she had requested and received advance approval to use annual leave for the emergency closing day, or she were sick and notified the agency in accordance with agency policy. Here, the grievant does not claim that her absence on February 17 was authorized by the agency.
[17] The grievant argues generally that "[n]othing at [her facility] is conducted fairly" and cites to several examples of employees receiving allegedly disparate treatment. However, it appears that none of these situations involve emergency closings or the charging of an unauthorized absence to leave without pay. As a result, there is no basis for EDR to conclude that those employees mentioned by the grievant are similarly situated for purposes of assessing whether the agency may have unfairly applied OP 110.3 to the grievant.

Agency management has significant discretion in the administration of its policies and standard facility operating procedures.[18] Indeed, agency and state policy clearly grant management the discretionary right to charge an absence to leave without pay when an essential employee does not report to work during inclement weather. EDR cannot second-guess management's decisions regarding the administration of such procedures absent evidence that the agency's actions are plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[19] In this case, the grievant has not presented evidence to show that the agency's action was either inconsistent with other decisions or was otherwise arbitrary or capricious. For these reasons, we conclude that the grievant has not raised a question as to whether the agency violated a mandatory policy provision, or that it misapplied or unfairly applied policy in charging her absence on February 17 to leave without pay. Accordingly, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.[20]



Christopher M. Grab
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[18] *See, e.g.*, EDR Ruling No. 2011-2903.
[19] *See, e.g.*, EDR Ruling No. 2009-2090.
[20] Va. Code § 2.2-1202.1(5).