

Issue: Qualification – Benefits (LWOP); Ruling Date: June 22, 2016; Ruling No. 2016-4370; Agency: Department for Aging and Rehabilitative Services; 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 Aging and Rehabilitative Services
Ruling Number 2016-4370
June 22, 2016

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 May 13, 2016 grievance¹ with the Department of Aging and Rehabilitative Services (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

On May 5, 2016, the grievant submitted a request for unconditional leave without pay (“LWOP”) from June 13 through August 31. When asked to provide additional information about the nature of her leave request, the grievant indicated that her absence was necessary to provide care for her spouse and/or parent. The agency denied the grievant’s LWOP request on the following day, May 6. On May 13, the grievant initiated a grievance challenging the agency’s denial of her request for LWOP. During the management resolution steps, the agency suggested that the grievant pursue a request for leave under the Family and Medical Leave Act (“FMLA”). The grievant chose not to request FMLA. 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.² Additionally, the grievance statutes and procedure reserve to management the exclusive right to 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 generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to

¹ Although the Grievance Form A states that the initiation date is June 13, 2016, it appears from the information in the grievance record that the grievance was actually filed on May 13, 2016. As the June 13 date on the Form A appears to be a typographical error, EDR will treat the grievance as having been initiated on May 13.

² See *Grievance Procedure Manual* § 4.1.

³ Va. Code § 2.2-3004(B).

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, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁵ Thus, typically, the 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, EDR will assume that the grievant has alleged an adverse employment action because she has challenged issues related to her use of leave.

In effect, the grievant appears to argue that the agency has misapplied and/or unfairly applied policy in denying her request for LWOP, and seeks to have the request approved. The applicable policy that governs LWOP is Department of Human Resource Management ("DHRM") Policy 4.45, *Leave Without Pay – Conditional and Unconditional*. According to this policy, "[a]n agency may grant unconditional leave without pay for reasons that include . . . personal purposes"⁸ Accordingly, an agency *may* approve an employee's request for unconditional LWOP, but management is granted the discretion to deny such a request.⁹ In the absence of any requirement under policy or law that would mandate approval of the grievant's LWOP request—such as, for example, an approved absence pursuant to the FMLA¹⁰—the agency's decision to deny her request for LWOP was wholly within management's discretion and does not appear to be a misapplication or unfair application of policy.

Agency management has significant discretion in the administration of its policies and standard operating procedures.¹¹ Indeed, agency and state policy clearly grant management the discretionary right to deny an employee's request for unconditional LWOP when approval of the request is not otherwise required by policy and/or law. 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.¹² In this case, the grievant has not presented evidence to show that the

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 DHRM Policy 4.45, *Leave Without Pay – Conditional and Unconditional*.

⁹ *Id.*

¹⁰ DHRM Policy 4.20, *Family and Medical Leave*, provides "guidance regarding the interaction of the FMLA and the Commonwealth's other Human Resource policies," and states that eligible employees are entitled to receive "up to 12 weeks of unpaid family and medical leave per year because of . . . the serious health condition of an eligible family member" Agencies "may require certification for leave requested . . . for his or her family member's serious health condition . . . before granting family and medical leave." *Id.*

¹¹ *See, e.g.*, EDR Ruling No. 2011-2903.

¹² *See, e.g.*, EDR Ruling No. 2009-2090.

agency's decision 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 by denying her request for unconditional LWOP. Accordingly, the grievance does not qualify for a hearing on this basis.

In reaching a decision in this case, EDR has not considered whether the grievant may be eligible for leave pursuant the provisions of the FMLA. Based on the information in the grievance record, the agency has advised the grievant of her rights under the FMLA and the grievant has expressly declined to submit a request for FMLA leave. EDR has reviewed nothing to indicate that the agency has failed to comply with the requirements of the FMLA or that the grievant wishes to pursue a request for leave under the FMLA. As a result, EDR will not address that issue in this ruling and finds no basis on which the agency has failed to fulfill its obligations under the FMLA as a matter of the grievance procedure.

EDR's qualification rulings are final and nonappealable.¹³



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¹³ Va. Code § 2.2-1202.1(5).