

Issues: Qualification – Benefits/Leave (annual leave) and Work Conditions (employee/supervisor conflict); Ruling Date: February 11, 2019; Ruling No. 2019-4834; 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 2019-4834
February 11, 2019

The grievant has requested a ruling from the Office of Equal and Employment Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) on whether his September 4, 2018 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

On or about September 4, 2018, the grievant initiated a grievance alleging that the agency had unfairly denied an August 22 request for leave. In attachments to the grievance, the grievant clarified that, on August 22, he submitted a request to use annual leave to attend a medical appointment for a family member on September 6, and that the agency denied his request on September 2.¹ The grievant did not report to work on September 6 and received a written counseling on September 16 describing the agency’s expectations for attendance, as well as the notification procedure for unanticipated absences. 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.²

¹ It appears the grievant is assigned to the night shift at his facility, and so would have actually used leave on September 6 and 7. For the sake of clarity, this ruling will refer to the request as having been for September 6. Moreover, the August 22 request for leave also seeks approval to use annual leave in December for “court.” The grievant does not appear to have specifically disputed the agency’s decision regarding that portion of his leave request in his grievance, and thus it will not be discussed in this ruling.

² In an attachment appealing the agency head’s qualification decision to EEDR, the grievant may be attempting to challenge additional issues relating to multiple other requests for leave that were also denied by the agency. Some of these requests appear to have been made before the grievance was filed, and others were submitted while the grievance was proceeding through the management steps. Because additional management actions or omissions cannot be added to a grievance after it is filed, this ruling will not address the grievant’s arguments regarding these additional issues. *Grievance Procedure Manual* § 2.4. The grievant may file another grievance, if timely, to challenge additional management actions or omissions. Any such grievance must comply with the initiation requirements of the grievance procedure, as set forth in Section 2.4 of the *Grievance Procedure Manual*.

DISCUSSION

Compliance Issues

In his request for qualification, the grievant appears to argue that several of the management step-respondents failed to provide him with a written response to the grievance within five workdays. Even accepting the grievant's claims regarding the untimeliness of the agency's responses as true, the agency appears to have brought itself into compliance by providing the appropriate responses at each step. As a result, there would be no finding of noncompliance on the issues raised by the grievant, and this matter will not be addressed further in this ruling.³

Misapplication/Unfair Application of Leave Policy

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.⁴ Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.⁵ 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 whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.⁶

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁷ 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."⁸ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁹ For purposes of this ruling and with respect to the denial of his leave requests only, EEDR will assume that the grievant has alleged an adverse employment action, in that he asserts the agency improperly limited his use of annual leave, which is a benefit of his employment.

In essence, the grievant appears to argue that the agency misapplied and/or unfairly applied policy by denying his August 22, 2018 request for annual leave. For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be

³ The same result would be reached had it been the grievant who had missed a five workday deadline.

⁴ See *Grievance Procedure Manual* § 4.1.

⁵ Va. Code § 2.2-3004(B).

⁶ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b), (c).

⁷ See *Grievance Procedure Manual* § 4.1(b).

⁸ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁹ *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

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. In support of his position, the grievant asserts that it would have been a violation of his family member's privacy to share information about the September 6 medical appointment with the agency.¹⁰ The grievant further states that he sent an email to agency management on August 21, 2018 explaining his upcoming need for leave on September 6.

In relevant part, DHRM Policy 4.10, *Annual Leave*, states that

[e]mployees must request and receive approval from their supervisors to take annual leave. Employees should make their requests for leave as far in advance as possible. When practical, and for as long as the agency's operations are not affected adversely, an agency should attempt to approve an employee's request for annual leave. However, supervisors may deny the use of annual leave because of agency business requirements. Approval of leave may be rescinded if the needs of the agency change.¹¹

The agency's Operating Procedure 110.1, *Hours of Work and Leaves of Absence*, contains similar language that management "reserves the right to approve or disapprove all requests for use of [annual] leave."¹² These policies grant management the discretion to approve or deny an employee's request for leave. Agencies are afforded great flexibility in making such decisions, but this discretion is not without limitation. EEDR has repeatedly held that even where an agency has significant discretion to make decisions (for example, an agency's assessment of a position's job duties), qualification is warranted where evidence presented by the grievant raises a sufficient question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.¹³

In this case, the grievant submitted a request on August 22, 2018 to use annual leave on September 6 for a "medical app[oin]tmen[t]." The agency asked for verification of the grievant's need for leave on August 29, which the grievant did not provide due to concerns about the family member's privacy. On September 2, the agency denied the grievant's request for annual leave because there was "no documentation provided" to verify his need for leave on September 6. The agency's denial further clarified that the grievant did not have to explain the reason for the appointment or disclose medical information. The grievant did not report to work on September 6 and received a written counseling on September 16 describing the agency's expectations for attendance and notification of unanticipated absences.

¹⁰ In particular, the grievant contends that disclosing information about the family member's appointment would have violated the Health Insurance Portability and Accountability Act ("HIPAA"). Generally speaking, a state grievance is not the most appropriate means by which to raise a potential or alleged violation of HIPAA. Specific enforcement authority for HIPAA is provided in the Act itself. More importantly, EEDR has not reviewed any information to indicate that there was any actual disclosure of potentially protected health information in this case.

¹¹ DHRM Policy 4.10, *Annual Leave*.

¹² Department of Corrections Operating Procedure 110.1, *Hours of Work and Leaves of Absence*, § IV(D)(4).

¹³ See *Grievance Procedure Manual* § 9 (defining arbitrary or capricious as a decision made "[i]n disregard of the facts or without a reasoned basis"); see also, e.g., EDR Ruling 2008-1879.

As discussed above, state and agency policy give management the discretion to approve or deny an employee's request for leave. EEDR's review of the grievance record indicates that the grievant had sought to use leave on several occasions prior to August 22, did not receive approval, and then failed to report to work on the dates for which he had requested leave.¹⁴ Under these circumstances, EEDR finds that the agency's decision to require verification of the grievant's need for leave on September 6, and to deny his request when no verification was provided, was reasonable.¹⁵

While the grievant clearly disagrees with the agency's decision, he has not raised 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 to deny the grievant's August 22, 2018 request for annual leave was consistent with the discretion granted by policy. Accordingly, the grievance does not qualify for a hearing on this basis.

EEDR's qualification rulings are final and nonappealable.¹⁶



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¹⁴ Similar incidents appear to have occurred after the grievant submitted his August 22 leave request.

¹⁵ Since the grievant's request for leave on September 6, 2018 was arguably to provide medical care for a family member, he could have sought family and personal leave pursuant to DHRM Policy 4.57, *Virginia Sickness and Disability Program*, and/or family and medical leave under DHRM Policy 4.20, *Family and Medical Leave*. However, the grievant apparently chose not to do so, nor does he appear to have clearly communicated the nature of the leave in his August 22, 2018 request or immediately thereafter.

¹⁶ See Va. Code § 2.2-1202.1(5).