Issues: Qualification – Benefits/Leave (Sick Leave) and Compensation (Other); Ruling Date: November 15, 2013; Ruling No.2013-3625; Agency: Department of Juvenile Justice; 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 Juvenile Justice
Ruling Number 2013-3625
November 15, 2013

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") of the Department of Human Resource Management ("DHRM") on whether his April 1, 2013 grievance with the Department of Juvenile Justice (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

The grievant called into work sick on March 6, 2013, which was an inclement weather day. The agency asked him to provide a doctor's note, but the grievant was unable to provide one, as his illness was not serious and he had not sought medical attention. He was subsequently notified that he was being "docked" eight hours of pay for March 6th and would receive a counseling memorandum regarding his absence. On April 1, 2013, the grievant initiated a grievance challenging the agency's actions. After the parties failed to resolve the grievance during the management resolution steps, the grievant requested qualification of his grievance for hearing. The agency head denied his request and the grievant has appealed 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, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as to 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.[3]

[1] *See Grievance Procedure Manual* § 4.1.
[2] *See* Va. Code § 2.2-3004(B).
[3] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

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, it will be assumed that the agency's characterization of the grievant's March 6th time as unpaid leave could constitute an adverse employment action.[7]

The grievant asserts that the agency misapplied and/or unfairly applied policy by requiring him to provide a doctor's note following his March 6, 2013 absence and by subsequently treating his lost time on March 6th as unpaid leave. The grievant states that a doctor's visit was unnecessary, as he was able to use over-the-counter medicine to treat his symptoms, and that he does not have a pattern of abusing his sick leave time.[8] The grievant also states that he was never advised that he would be required to provide a doctor's note if calling in sick during inclement weather. Given these circumstances, he argues, the agency should not have docked his pay for his absence.

The agency notes that the grievant was designated an essential employee and was therefore required to report during inclement weather absent extenuating circumstances. While the agency agrees that sickness could constitute an extenuating circumstance, it states that because of the nature of the agency's operations, it requires essential employees who fail to report to provide documentation of their need for leave.[9] Agency policy provides that "[i]f requested, employees must provide medical certification that their use of sick leave is medically necessary and consistent with the provisions of this procedure."[10] Similarly, DHRM Policy 4.55, *Sick Leave*, states:

> An employee who wishes to use sick leave must comply with management's request for verification of the appropriateness of using sick leave.
>
> An employee's use of paid sick leave may be denied if the employee fails to

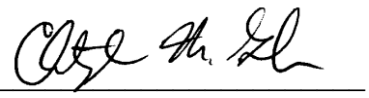
[4] *See Grievance Procedure Manual* § 4.1(b).
[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[7] The counseling memorandum challenged by the grievant clearly does not rise to this level, however, and will not be addressed further in this ruling. *See, e.g.*, EDR Ruling No. 2014-3703.
[8] The grievant notes that he had over 21 hours of sick leave remaining at the end of 2012.
[9] The agency has not identified any policy that specifically advises employees that they will be required to produce medical documentation if calling in sick on an inclement weather day.
[10] DJJ Procedure 05-004.10, Leave Administration, at § III(C)(13).

> comply with a reasonable management request for verification of the need for sick leave, or if the verification provided is inadequate.

DHRM Policy 1.35, *Emergency Closings*, further provides that a designated employee's failure to report to work can result in disciplinary action and/or "requiring the hours missed to be charged to leave with or without pay, as appropriate."

While the grievant's failure to seek medical attention for a minor, though incapacitating, ailment is understandable, as is his frustration at having lost eight hours of pay, he has not identified a mandatory policy provision that the agency has misapplied or unfairly applied in its demand that he produce medical documentation of his need for sick leave. To the contrary, agency and state policy clearly grant management the discretionary right to make reasonable requests for documentation whenever sick leave is taken, as well as the right to charge undocumented leave as unpaid time.[11] 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] Certainly, it would have been the better practice for the agency to have advised employees clearly that medical documentation would be required for employees calling in sick during inclement weather,[13] and it is unfortunate that the grievant, who does not have a pattern of abusing sick leave, was apparently unaware that he would be required to produce a doctor's note or face a loss of pay. However, we cannot find that the agency violated a mandatory policy provision in this case, or that its actions were either inconsistent with other decisions or is arbitrary or capricious. Accordingly, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.[14]



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[11] *See, e.g.*, EDR Ruling No. 2010-2531.
[12] *See, e.g.*, EDR Ruling No. 2009-2090.
[13] The outcome of this ruling might be different had the date missed not been an inclement weather day involving State office closings.
[14] Va. Code § 2.2-1202.1(5).