Issue: Qualification – Benefits (annual leave, military leave, VSDP); Ruling Date: December 4, 2013; Ruling No. 2014-3737; Agency: Department of Military Affairs; 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 Military Affairs
Ruling Number 2014-3737
December 4, 2013

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) on whether his August 2, 2013 grievance with the Department of Military Affairs (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant was employed as a Firefighter/Medic with the agency.[1] On or about August 2, 2013, he filed a grievance to challenge the agency's application of state policy regarding leave practices to him and others in his position. He alleges that, with respect to both leave earned and leave taken, the agency has misapplied the policies of the Commonwealth, and thus, he has been treated unfairly by the agency as compared to other state employees.

The grievant indicates that as a Firefighter/Medic, he worked twenty-four hour shifts, averaging a total of 53 hours per week. Therefore, in order for him to take off a full day from work, he would be required to utilize twenty-four hours of leave, whereas those employees who work a regular eight hour shift would only need to utilize eight hours of leave in order to take off a full day. The grievant asserts that because his shift schedule causes him to work a total of 53 hours as opposed to 40 hours each week, he should earn leave at a higher rate, specifically, 32.5% higher, since he calculates that he works 32.5% more hours each week than an employee working a standard 40-hour workweek. As support for this position, the grievant cites to DHRM Policy 2.20, *Types of Employment*, which addresses a "quasi-full-time" or "Q" status employee, who accrues annual leave at a rate proportionate to the number of hours worked, based upon total years of salaried service.[2] The grievant argues that he should be treated as a quasi-full-time employee, earning leave at a rate proportionate to his hours worked. However, the grievant indicates that he actually earns leave at the same rate as any full-time employee of the Commonwealth, and he believes this to be a misapplication of policy.

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[1] The grievant has since resigned from the agency.

[2] *See* DHRM Policy No. 2.20, *Types of Employment;* Quick Reference Guide: Status and Eligibility for Benefits - Classified Employees, *available at* http://www.dhrm.virginia.gov/hrpolicy/policyguides/EmployeeStatusandBenefits.pdf.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] 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 a hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.[4] Here, the grievant alleges that the agency has misapplied or unfairly applied policy with respect to his annual leave, sick leave, and military leave.

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."[5] 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."[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, it will be assumed that the grievant has alleged an adverse employment action in that he asserts issues with his leave.

Here, we are unable to conclude that any policy violation has occurred under the facts presented with respect to the grievant's annual and sick leave. DHRM policy regarding annual leave indicates that the amount of annual leave that is accrued by all full-time state employees each pay period shall be determined based solely upon the employee's years of service with the Commonwealth.[8] Similarly, all full-time and quasi-full-time employees of the Commonwealth covered by the Virginia Sickness and Disability Program receive a set number of hours yearly of sick leave, based solely upon the employee's years of service.[9] The agency asserts that the grievant receives annual and sick leave at a rate consistent with this policy, and the grievant does not dispute that he earns annual and sick leave at the same rate as all other full-time employees.

Rather, the grievant argues that he should be granted annual and sick leave at a rate proportionate to the number of hours he works yearly. He calculates that he works 32.5% more hours each year than a state employee with a regular 40 hour per week work schedule, and thus believes he should accrue leave at a rate that is 32.5% higher than those set forth for all full-time

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[3] *See* Va. Code § 2.2-3004(B).
[4] Va. Code § 2.2-3004(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).
[8] *See* DHRM Policy No. 4.10, *Annual Leave.*
[9] *See* DHRM Policy No. 4.57, *Virginia Sickness and Disability Program.*

employees. As support for this position, he compares his situation to that of the "quasi-full-time" or "Q" status employee outlined by DHRM Policy 2.20, *Types of Employment*. Under this policy, the amount of leave earned by a Q status employee is reduced by the amount of hours actually worked.[10] Thus, a Q status employee working 32 hours weekly, or 80% of a full work week, would receive 80% of the amount of leave he would otherwise accrue. The grievant argues that essentially, he should be treated as a quasi-full-time employee, earning leave at a rate proportionate to his actual hours worked. However, the grievant is employed as a full-time employee of the Commonwealth, not as a quasi-full-time employee. We can find no provision in the applicable policy allowing for leave to be determined at a different rate among full-time employees, even if their shifts require more actual hours of work. In this instance, the fact that the grievant has earned annual and sick leave in the same amount as all other full-time employees of the Commonwealth appears to be consistent with DHRM policy.

The grievant further argues that the agency has misapplied policy with respect to his military leave. DHRM policy regarding military leave mirrors the Code of Virginia in mandating that an eligible employee "shall be granted up to 15 workdays of paid military leave" and defines a "workday" as "1/260 of the total working hours an employee is scheduled to work during the entire federal fiscal year."[11] The grievant calculates that because his shift schedule causes him to work 24 hours in one workday, he should be entitled to a total of 159 hours of military leave annually. However, there are some cases where qualification is inappropriate even if an agency has misapplied policy. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate where the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

Even though a hearing officer is not limited to the specific relief requested by the grievant,[12] this is a case where further effectual relief is unavailable. When there has been a misapplication of policy, a hearing officer could order the agency to reapply policy correctly. In such an instance, a hearing officer could order that the agency reapply the policy regarding military leave to correct any denied leave while this ruling was under consideration, however, in this instance, the grievant resigned his employment with the Commonwealth. Further, his grievance can only be read to properly challenge a misapplication of policy occurring within 30 calendar days prior to the date of the grievance[13] and any continuing misapplication thereafter. Upon EDR's inquiry, the agency indicates that as of the date of the grievant's resignation, he had utilized less than the maximum amount of leave to which it had determined he was entitled. Therefore, it does not appear that any event within the applicable time frame existed such that a

[10] *See* DHRM Policy No. 2.20, *Types of Employment;* Quick Reference Guide: Status and Eligibility for Benefits - Classified Employees, *available at* http://www.dhrm.virginia.gov/hrpolicy/policyguides/EmployeeStatusandBenefits.pdf.
[11] DHRM Policy No. 4.50, *Military Leave*; *see* Va. Code § 44-93(A).
[12] *Rules for Conducting Grievance Hearings* § VI(A).
[13] *See* Va. Code § 2.2-3003(C); *Grievance Procedure Manual* §§ 2.2, 2.4.

hearing officer could grant the requested relief. Because a hearing officer could not provide the grievant with any further meaningful relief, this grievance does not qualify for hearing.[14]

EDR's qualification rulings are final and nonappealable.[15]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[14] This ruling only determines that under the grievance statutes this grievance does not qualify for a hearing; it does not address whether the grievant may have some other legal or equitable remedy.
[15] Va. Code § 2.2-1202.1(5).