Issues: Qualification – Benefits/Leave (FMLA, Annual Leave, Sick Leave), Work Conditions (Supervisor/Employee Conflict), and Retaliation (Grievance Activity); Ruling Date: July 8, 2014; Ruling No. 2014-3910; Agency: Virginia Department of Transportation; Outcome: Not Qualified.

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

QUALIFICATION RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2014-3910
July 8, 2014

The Virginia Department of Transportation (the "agency") qualified the grievant's March 18, 2014 grievance in part. However, the agency asserts that it has already awarded relief to the grievant as to the qualified issues and seeks to conclude the grievance. The grievant has also requested a qualification ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management on those issues not qualified by the agency. For the reasons set forth below, this grievance will not proceed to hearing.

FACTS

The grievant is employed by the agency as an Engineering Technician III. On or about January 27, 2014, he notified the agency that he needed to use leave pursuant to the Family and Medical Leave Act ("FMLA"). The agency provided the grievant with a Notice of Eligibility and Rights and Responsibilities form on February 4, stating that he needed to provide the agency with additional information to support his request for FMLA leave by February 20. The grievant obtained the necessary documentation from his doctor on February 5. The grievant's doctor stated that the grievant would be incapacitated for treatment and recovery between January 19 and February 21. On February 20, the grievant also provided the agency with a doctor's note stating that "[s]tarting February 24th [the grievant] can return to work for 4 hours a day, 20 hours a week" for "the next 4 weeks."

On February 20, a Human Resources Manager emailed the grievant, stating that she had received the grievant's documentation but that his note did not "indicate whether [he was] eligible to return to full duty" based on his current Employee Work Profile ("EWP"). On February 24, the grievant advised the agency that he was unable to obtain another doctor's note and explained that he was able to perform the job functions described in his EWP, with the four-hour workday restriction imposed by his doctor. The Human Resources Manager emailed the grievant again on February 25, stating that the agency required "either a full duty/full time release to work" or "the identification of specific work restrictions before" he could return to work. She stated that the grievant's note "only address[ed] part of this requirement" and was "not sufficient."

As the Human Resources Manager did not consider the grievant's medical documentation sufficient to allow him to return to work, the grievant used a combination of annual leave and sick leave to cover his absence from work. The grievant returned to work on April 21, after providing the agency with additional medical information. Between February 24 and April 21, the grievant used a total of 160 hours of leave.

The grievant filed a grievance on March 18, 2014, alleging that the agency had refused to allow to return with his "documented previously accepted accommodations," claiming that the Human Resources Manager had engaged in retaliation and workplace harassment, and requesting that the leave he used while absent from work be returned.[1] During the management resolution steps, the third step-respondent granted the grievant's request for relief in part by reinstating the 160 hours of leave he used between February 24 and April 21. The grievant then requested qualification of the remaining issues by the agency head. On June 2, the agency notified the grievant that it had qualified the grievant's claim regarding his loss of 160 hours of sick leave and annual leave, but declined to qualify his allegations of retaliation and workplace harassment.

Both the agency and the grievant now appeal to EDR. The grievant appeals the agency's determination that his claims of retaliation and workplace harassment do not qualify for a hearing. The agency argues that, as it has already granted the grievant's requested relief as to the 160 hours of sick leave and annual leave, there is no need for that issue to proceed to a hearing.

DISCUSSION

Annual and Sick Leave

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] Furthermore, EDR has recognized that even if a grievant's allegations are true there are still some cases when qualification is inappropriate, even if law and/or policy has been violated or misapplied. 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 when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

In this case, the agency notified the grievant that his claim regarding his use of 160 hours of annual leave and sick leave between February 24 and April 21 had been qualified for a hearing. However, the third-step respondent granted the relief requested by the grievant (restoration of 160 hours of leave),[3] which would have been the potential remedy available at a grievance hearing. When there has been a misapplication of policy, a hearing officer could order that the agency reapply policy correctly.[4] The effect of such an order in this case would be to put the grievant back in the position where the misapplication of policy occurred, i.e., as if he had been at work during that time period and had not used the leave to cover his absence.

---

[1] In the grievance, the grievant also raises similar claims related to previous medically-related issues with his employment in 2011. Those issues were presented to the agency in a grievance that was filed when those management actions occurred. A grievance must be "presented to management within 30 calendar days of . . . the management action or omission being grieved" and may not challenge "the same management action or omission challenged by another grievance." *Grievance Procedure Manual* § 2.4. EDR will consider these arguments about prior management actions as relevant background information as to the grievant's present claims of retaliation and workplace harassment, but they are not the proper subject of an award of relief under the grievance procedure.

[2] *See Grievance Procedure Manual* § 4.1.

[3] EDR makes no determinations in this ruling that 160 hours is the appropriate amount due. However, the grievant has not challenged this amount in the grievance paperwork. As such, we assume 160 hours to be the accurate amount of leave lost.

[4] *See Rules for Conducting Grievance Hearings* § VI(C)(1).

Because a grievance hearing on this matter would be unable to provide the grievant any other relief beyond that which has already been granted, there is no reason for this issue to proceed to a hearing. It would be pointless to hold a grievance hearing to determine whether the agency misapplied policy regarding the grievant's ability to return work between February 24 and April 21 and his subsequent use of leave during this time period, when, as here, the agency has cured the alleged error.[5] The issue is not qualified for the reasons discussed above and will not proceed further.[6]

Workplace Harassment

In this case, the grievant alleges that the Human Resources Manager has created a hostile work environment. For a claim of hostile work environment or workplace harassment to qualify for a hearing, the grievant must present evidence that raises a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status or prior protected activity[7]; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[8] "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[9]

The grievant claims that the Human Resources Manager "cause[d] a hostile work environment by not allowing [him] to return to work" on February 24 after he submitted appropriate medical documentation. After notifying the grievant on February 25 that she needed more information from his doctor about his ability to perform the job functions listed in his EWP, the Human Resources Manager explained that he was "not authorized to return to work." When the grievant provided the agency with additional information, the Human Resources Manager approved the grievant to return to work on April 21. The grievant claims that the information he submitted on February 20 was sufficient, that the Human Resources Manager intentionally refused to allow him to return to work as a form of harassment and retaliation. While the agency denies any harassment or retaliation, the agency's central human resources office has concurred that the grievant should have been permitted to return to work with the initial documentation submitted in February.

---

[5] Whether the grievant's claims in this regard are assessed as a failure to adhere to the FMLA or associated state policy, or as a failure to accommodate under the Americans with Disabilities Act ("ADA"), any of which might apply to the issues raised, the result is the same. The agency has essentially granted the relief that could be ordered by a hearing officer to correct the impact on the grievant, i.e., the loss of leave.

[6] This ruling does not mean that EDR deems the alleged conduct at issue, if true, to be appropriate, only that the grievance does not qualify for a hearing as the grievance procedure is unable to provide this grievant with any further relief.

[7] In this case, the grievant engaged in protected activity when he initiated a 2011 grievance asserting that another agency employee had harassed him and possibly discriminated against him on the basis of disability, as well as when he sought and used FMLA leave in 2014. In addition, the grievant arguably asserts a claim that the Human Resource Manager's conduct was based on his disability status.

[8] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).

[9] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

As a result of the Human Resources Manager's conduct, the grievant was required to use 160 hours of leave when he was absent from work between February 24 and April 21. Whether this single series of events rises to the level of severe or pervasive harassment is questionable. It is not questionable, however, that the decision to refuse the grievant's return to work resulted in an adverse employment action[10] by forcing the grievant to resort to the use of a significant amount of leave unnecessarily.

Importantly, however, it appears the agency has taken action to correct the adverse effect the Human Resources Manager's actions had on the grievant's employment. As discussed above, for example, the third step-respondent restored the 160 hours of leave used by the grievant between February 24 and April 21. The agency also reviewed the grievant's allegations during the management resolution steps and has since taken steps to inform its Human Resources staff about the procedures related to employees' use of FMLA leave, particularly the submission of additional medical documentation. These steps are critical to consideration of the grievant's qualification request because EDR is presented with a fact pattern in which the grievant's return to work was apparently mishandled and he alleges that he may have received similar treatment in previous incident(s) in the past. However, we are persuaded that the agency has taken appropriate action to address the grievant's concerns and to prevent any recurrence of this situation. In short, even if the allegations in the grievance could raise a question as to whether the Human Resources Manager has created a severe or pervasive retaliatory hostile work environment,[11] there is no more relief that the hearing officer could provide to remedy the employment effects in the current situation or prevent future improper conduct that the agency has not already done. Accordingly, the grievance does not qualify for a hearing on this basis.

This ruling does not mean that EDR deems the alleged behavior of the Human Resources Manager, if true, to be appropriate, only that the grievant's claim of retaliatory workplace harassment does not qualify for a hearing at this time. Moreover, this ruling in no way prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens.[12]

EDR's qualification rulings are final and nonappealable.[13]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

---

[10] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment. Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

[11] This ruling does not reach the conclusion that such a hostile work environment was created or that the grievance even raises a sufficient question as to all of the elements of such a claim. For instance, nothing in this ruling is meant to indicate that EDR has found that the Human Resources Manager's conduct was based on a protected status or activity.

[12] While it appears that the agency's actions were sufficient to address the issues raised by the grievant at this time, further instances of conduct of this nature, if challenged in a grievance filed either by the grievant or another employee, might demonstrate that the agency's efforts were ineffective. Depending on the circumstances, qualification of such a grievance might be warranted.

[13] *See* Va. Code § 2.2-1202.1(5).