Issue: Qualification – Benefits/Leave (LWOP); Ruling Date: September 11, 2015; Ruling No. 2016-4207; Agency: Department of Corrections; 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 Corrections
Ruling Number 2016-4207
September 11, 2015

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management on whether his May 28, 2015 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

The grievant is employed with the agency as a Correctional Officer. The grievant was apparently absent from work from May 10-12, 2015, due to illness. The grievant had no sick leave available for those dates. Following an assessment of his situation, the agency did not approve his request to use other available leave and docked his pay for 31.2 hours. The agency's decision relied at least in part on an alleged pattern of call-outs. On or about May 28, 2015, the grievant initiated an expedited grievance challenging the agency's actions. The grievant asserts that the agency acted improperly by docking his pay, rather than allowing him to use his available annual, compensatory and family/personal leave.

After the parties failed to resolve the grievance, the grievant asked the agency head to qualify the grievance for hearing. The agency head denied the grievant's request, and the grievant has appealed to EDR.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[1] 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"[2] unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. The grievant has not alleged discrimination, retaliation, or discipline. Therefore, the grievant's claims could only qualify for hearing based upon a theory that the agency has misapplied or unfairly applied policy.

[1] *See* Va. Code § 2.2-3004(B).
[2] *Id.* §§ 2.2-3004(A), 2.2-3004(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."[3] 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."[4] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[5] There is no question that an adverse employment action occurred in this case because the grievant lost pay.

Here, we are unable to conclude that any policy violation has occurred under the facts presented. The agency's Operating Procedure 110.1, *Hours of Works and Leaves of Absence*, (OP 110.1) states that "[a]bsences that exceed current leave balances shall be charged as leave without pay and are subject to appropriate discipline."[6] That policy further provides that "[a]ny absence without prior approval or unauthorized absence may be charged as leave without pay, even though leave balances exist,"[7] and that simply requesting leave "does not mean that leave will be approved."[8] The policy provides management with a large degree of discretion. Given the precise circumstances presented by this case, EDR cannot find that management exercised that discretion in an arbitrary or capricious manner. Further, it appears that agency management had met with the grievant at least once in the prior leave year to discuss his unscheduled absences. Combined with the policy language, EDR cannot find that the agency has made a misapplication or interpretation of policy of which the grievant was completely unaware.

The grievant also asserts, in effect, that he has a chronic medical condition that necessitated his absences, and that under the Family and Medical Leave Act ("FMLA") and DHRM Policy 4.20, *Family and Medical Leave*, he should have been allowed to use his other available leave to cover his absence.[9] The agency provided the grievant with an FMLA notice and a certification form, but the grievant failed to return the completed certification form to the agency. Had the grievant completed the FMLA paperwork with an appropriate medical provider and submitted the information to the agency, he would likely have been able to utilize his available leave balances at least for any future FMLA-qualified absences. Unfortunately it appears that did not happen here.

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[3] *See Grievance Procedure Manual* § 4.1(b).
[4] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[5] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[6] Department of Corrections Operating Procedure 110.1, *Hours of Work and Leaves of Absence*, § IV(K)(5)(a).
[7] *Id.* § IV(C)(6).
[8] *Id.*§ IV(C)(4).
[9] *See* 29 CFR 825.207(a) (stating that "FMLA permits an eligible employee to choose to substitute accrued paid leave for FMLA leave.")

As the grievant did not provide the agency with the requested information, the agency's decision to place him on leave without pay was consistent with policy. Further, the grievance does not raise a sufficient question as to whether the agency's action was inconsistent with other decisions made by the agency or otherwise arbitrary or capricious. There was no indication that the grievant was treated inconsistently compared to other employees in similar situations. Therefore, EDR concludes that the grievant has not presented evidence raising a sufficient question that any policies have been either misapplied and/or unfairly applied to qualify for hearing.

EDR's qualification rulings are final and nonappealable.[10]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[10] Va. Code § 2.2-1202.1(5).