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QUALIFICATION RULING

In the matter of the Virginia Department of Professional and Occupational Regulation
Ruling Number 2020-5007
December 10, 2019

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”)¹ at the Virginia Department of Human Resource Management (“DHRM”) on whether her September 24, 2019 grievance with the Virginia Department of Professional and Occupational Regulation (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

According to the grievant, on or about August 12, 2019, she requested her supervisor’s approval to take leave without pay one day per week for educational reasons during the 2019-2020 academic year. After the supervisor escalated the request pursuant to agency policy, management denied the request in writing as of September 19, 2019. The stated reasons for denial were: (1) the grievant’s proposed degree program was not related to her work or the agency’s mission; and (2) granting leave without pay for 8 hours each workweek was not in the best interests of the agency. The agency advised the grievant that, “[f]or future scheduling adjustments or use of paid leave to be considered, you must follow policy by completing the Educational Assistance Agreement form and submitting it to your supervisor prior to each semester or course enrollment.”

On September 24, 2019, the grievant grieved the agency’s denial and requirement to sign the Educational Assistance Agreement as a condition of leave without pay, alleging that the agency’s policy approach was “artfully carved around my request in . . . retaliation for prior grievances and . . . establishing circumstances for termination.” She sought relief including application of an “appropriate process” for education leave requests with increased transparency, as well as “[r]einstatement of leave lost through the delay” in properly considering her request.

¹ The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as “EDR” in this ruling. EDR’s role with regard to the grievance procedure remains the same.

The agency head declined to grant relief or to qualify the grievance for a hearing.² The grievant appeals the latter determination 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.³ Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.⁴ Thus, claims relating to issues such as the means, methods, 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.⁵

Further, while grievances that allege retaliation or other misapplication of policy may qualify for a hearing, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."⁶ Typically, then, 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."⁷ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁸ Because the agency's position in this case has allegedly caused the grievant to deplete her accrued leave, as well as possibly have her absences recorded as unapproved and her pay docked, EDR concludes for purposes of this ruling that the grievant has suffered an adverse employment action.

EDR has consistently held that an allegation of misapplication of policy or unfair application of policy may qualify for a hearing only if the available facts 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 applicable policy's intent.⁹ Here, the applicable policies grant broad discretion for agencies to approve or deny requests based on institutional considerations. Thus, as explained in further detail below, EDR identifies no mandatory policy provision violated by the agency, and we cannot say at this time that the agency's approach amounts to a disregard of the applicable policies' intent.

² During the grievance process, it appears that the grievant used accrued paid leave to cover absences according to the schedule she initially requested. As a result, she faced her continued absences being classified as unapproved, which can result in pay docking, leave not accruing, and potential disciplinary action. When the grievant inquired about the agency's "intended course of action" with respect to discipline for such unapproved absences, the agency head responded that the agency's "only intended course of action is to comply with DHRM policy for maintaining accurate leave records and to provide mutually beneficial flexibility to employees and the agency in exercising approved leave benefits."

³ See *Grievance Procedure Manual* § 4.1.

⁴ Va. Code § 2.2-3004(B).

⁵ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

⁶ Va. Code § 2.2-3004(A); see *Grievance Procedure Manual* § 4.1(b).

⁷ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁸ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁹ See, e.g., EDR Ruling No. 2020-4986.

Educational Assistance Policies

DHRM Policy 5.10, *Educational Assistance*, was established “[t]o support employees’ pursuit of educational opportunities that will benefit their agencies, enhance employees’ current job performance, and improve their opportunities for advancement in their agencies.”¹⁰ As contemplated by Policy 5.10, educational assistance may include tuition payment and/or schedule adjustments, including leave. DHRM Policy 4.15, *Educational Leave*, sets forth “the Commonwealth’s objective to allow employees to take leave from work to pursue study related to their work or the work of their agencies.”¹¹ Such leave may be granted “at the discretion of the agency” with full, partial, or no pay.¹² Under Policy 5.10, “[a]gencies must establish internal guidelines and procedures for administering educational assistance equitably and uniformly.”¹³ Before agencies provide such assistance, they “must develop Educational Assistance Agreements that detail the benefits that will be provided and obligations of the employee and agency related to educational assistance.”

In this case, the agency’s Human Resources Policy 200-21 establishes “guidelines for administering the [agency]’s educational assistance in an equitable and uniform manner.”¹⁴ Policy 200-21 provides that educational assistance “may involve work schedule changes” that take the form of “alternate workweek schedules, use of personal leave[,] and leave without pay.”¹⁵ An educational course is eligible for the agency’s educational assistance under the policy if it is “required for a degree program, professional certification, or professional license” and “meet[s] at least one of the following criteria”:

- a. Available through an accredited institution including state and private universities and colleges and community colleges
- b. Relate to current job duties
- c. Provide new knowledge and skills to enhance current job performance and/or support the agency mission
- d. Are required for a job-related degree program
- e. Enhance the agency’s ability to respond to current and future needs; or
- f. Support the Employee Development Plan section of the Employee’s Work Profile.¹⁶

¹⁰ DHRM Policy 5.10, *Educational Assistance*.

¹¹ DHRM Policy 4.15, *Educational Leave*.

¹² Educational leave with no pay is subject to the provisions of DHRM Policy 4.45, *Leave Without Pay – Conditional and Unconditional*, which applies when an employee is absent for more than 14 consecutive calendar days. In that case, an agency may grant unconditional leave-without-pay status for reasons including “educational purposes that require a longer period of absence than that permitted for educational leave with pay.” DHRM Policy 4.45, *Leave Without Pay*. Under that circumstance, it is within an agency’s discretion to “allow employees to retain their accrued annual leave . . . in accordance with the provisions in Policy 4.10, *Annual Leave*.” *Id.* Because the grievant in this case has not sought to be absent for more than 14 consecutive calendar days, it would appear that DHRM Policy 4.45 is not applicable, and her request for intermittent unpaid leave would be governed primarily by DHRM Policy 4.30, *Leave Policies – General Provisions*.

¹³ DHRM Policy 5.10, *Educational Assistance*.

¹⁴ Human Resources Policy 200-21, *Educational Assistance* at 1.

¹⁵ *Id.* Alternate full-time work schedules permitted by the agency are set forth in its Human Resources Policy 200-15, *Hours of Work* (e.g. four 10-hour days during a workweek).

¹⁶ *Id.* at 2.

Policy 200-21 also requires an employee to “enter into an Educational Assistance Agreement with” the agency.¹⁷ The standard agreement used by the agency includes the following acknowledgments by employee signature:

- I understand that the Agency agrees to pay tuition costs required for educational course(s) or attainment of a certification or license Tuition costs should be limited to amounts and conditions detailed within the policy and on this Educational Assistance Agreement.
- I agree to notify the Human Resources Office if I drop any course.
- I agree to provide the Human Resources Office with a copy of my final grade(s) within 30 days of the end of the term
- I understand that I must successfully complete education course(s) by obtaining a minimum grade of “C” for an undergraduate course and “B” for a graduate course
- I understand that continued employment with the Department for 180 days following the completion of the course is required as a condition of participation in the Educational Assistance Program. . . .¹⁸

Upon thorough review of the grievance record and relevant policies, EDR identifies no evidence that presents a sufficient question whether the agency’s exercise of discretion in denying educational assistance violated a mandatory policy provision or amounted to a disregard of any applicable policies’ intent. The relevant policies provide a framework for an agency and its employees to pursue a mutual educational benefit, using clear communication about each party’s expectations for the arrangement. Where the agency does not recognize the benefit to the agency, it has broad discretion to deny educational assistance as described by DHRM Policy 5.10.

Here, the grievant identifies several aspects of the agency’s decision process that she viewed as unreasonable. For example, agency management consistently urged her to submit her request using an agreement that appeared to impose inapplicable obligations that neither party necessarily desired. The grievant also contends that the agency’s practices, in several respects, prevented adequate and timely consideration of her request for intermittent leave without pay.¹⁹ Even assuming the grievant’s objections are reasonable, however, EDR concludes that the agency’s procedures in this case did not exceed its discretion to consider and deny requests for educational assistance, or leave without pay generally. Despite apparent miscommunications and an ongoing dispute about the agency’s educational assistance agreement, it appears that the agency head fully considered the grievant’s request; she ultimately met and discussed with the grievant the nature of the educational assistance sought, nevertheless concluding that the request did not align with the agency’s interests. While the grievant may disagree with this conclusion, EDR cannot say it was outside the scope of the agency’s authority to manage its affairs.

That said, the agency’s standard educational assistance agreement, which it apparently requires at the outset of its assistance request process, could create barriers to the appropriate administration of some educational benefits contemplated by DHRM Policy 5.10, including

¹⁷ *Id.*

¹⁸ Educational Assistance Agreement at 2.

¹⁹ The grievant alleges that the agency denied her request without giving her a sufficient opportunity to explain it; that the agency generally lacks adequate procedures to request leave without pay, including for educational purposes; and that the agency unjustifiably delayed giving proper consideration to her request.

educational leave. For example, a requirement for all employees to execute a tuition-focused agreement as part of *any initial request* for educational assistance presents an obstacle to discussions to determine case-specific costs and benefits. If the agency failed to consider a request for educational benefits unless the employee executed its agreement, such evidence may raise a sufficient question with regard to the agency's application of and adherence to the intent of DHRM Policies 5.10 and 4.15, which contemplate a variety of educational arrangements that may or may not involve tuition. However, because it appears in this case that the agency's denial was independent of whether the grievant executed the standard agreement, EDR cannot say that the agreement, in and of itself, gives rise to a qualifiable issue here.

In addition, the grievance record suggests that the grievant intends to continue seeking approval for weekly absences through the 2019-2020 academic year, whether or not the agency chooses to grant such absences as "educational assistance." EDR notes that agencies have broad discretion to approve or deny general requests for alternate work schedules and leave, whether paid or unpaid.²⁰ However, "[w]hen practicable, and for as long as the agency's operations are not affected adversely, an agency should attempt to approve an employee's request for a leave of absence for the time requested by the employee"²¹

Discrimination/Retaliation

For a claim of workplace discrimination to qualify for a hearing, the grievant must present evidence raising a sufficient question whether an adverse employment action was caused by prohibited discrimination.²² If the agency provides a legitimate, nondiscriminatory business reason for the acts or omissions grieved, the grievance will not be qualified for hearing absent sufficient evidence that the agency's proffered justification was a pretext for such discrimination. Similarly, a grievant claiming retaliation must present evidence raising a sufficient question whether the acts or omissions grieved would not have occurred, but for her engagement in an activity protected from retaliation.²³

Here, the grievant asserts that discrimination is suggested by the agency head's comment that she did not "see a path to a doctorate" in the grievant's position. The grievant further contends that the agency has denied her request in retaliation for her filing of an earlier grievance. However, the agency has set forth business-related explanations for denying the grievant's request for unpaid leave for educational reasons. Even assuming that the grievant reasonably questions the wisdom of the agency's viewpoint and decision process, this in itself does not raise a sufficient question whether discrimination or retaliation motivated the outcome here.²⁴ Thus, EDR cannot qualify the grievance for a hearing on either of these grounds.

²⁰ See generally DHRM Policy 4.30, *Leave Policies – General Provisions*.

²¹ *Id.* at 2.

²² See *Strothers v. City of Laurel*, 895 F.3d 317, 327-28 (4th Cir. 2018). DHRM Policy 2.05, *Equal Employment Opportunity*, requires that "all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability."

²³ See *Felt v. MEI Techs., Inc.*, 584 Fed. App'x 139, 140 (4th Cir. 2014) (citing *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013)).

²⁴ The grievant claims that the agency's reasoning for denying unpaid leave has been "artfully carved around [her] request." While EDR does not find that this grievance record indicates inconsistent application of unpaid-leave approvals, a future grievance could potentially qualify for a hearing on grounds that, for example, similarly situated employees' requests for unpaid leave were approved with fewer procedural hurdles than the grievant faced.

CONCLUSION

The facts presented by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure at this time.²⁵ However, it appears that the parties may be effectively deadlocked as to the grievant's desired absences, given the agency's indication that it does not approve these absences but plans no disciplinary action. Although the agency has broad discretion to deny the grievant's leave requests on various grounds, EDR strongly encourages the parties to continue discussions to determine whether any potential schedule adjustments could be mutually acceptable for the parties' respective interests going forward. At either party's request, EDR is available to support such efforts through a variety of conflict resolution services. For more information, the parties may speak with an EDR consultant by calling 888-232-3842.

EDR's qualification rulings are final and nonappealable.²⁶



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²⁵ See *Grievance Procedure Manual* § 4.1.

²⁶ See Va. Code § 2.2-1202.1(5).