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QUALIFICATION RULING

In the matter of the Department of Social Services
Ruling Number 2021-5230
April 5, 2021

The grievant seeks a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) as to whether this grievance with the Department of Social Services (the “agency”) qualifies for a hearing. For the reasons set forth below, EDR finds that the grievance is not qualified for a hearing.

FACTUAL BACKGROUND

The subject of this grievance concerns the emergency closing of state facilities on February 12 and 18, 2021, and a three-hour delayed opening on February 19, 2021, due to inclement weather. The grievant had requested to use personal leave in advance for a planned absence on February 12. Due to the emergency closing, the grievant sought to have her personal leave restored and the time charged to the emergency closure. The grievant worked remotely on February 18 and 19, and seeks to earn compensatory leave (11 hours) for the time worked during those emergency closures. The grievance has proceeded through the resolution steps and the grievant now seeks qualification of her grievance for hearing.

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, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.² Thus, claims relating to issues such as those in this grievance 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 For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, the available facts must raise a sufficient question as to whether management violated a mandatory

¹ See *Grievance Procedure Manual* § 4.1.

² Va. Code § 2.2-3004(B).

³ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

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.

Further, while grievances that allege misapplication of policy may qualify for a hearing, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."⁴ 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."⁵ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁶ As the grievance asserts issues with her leave use and accrual, the grievant has raised an adverse employment action.

The grievance record reflects that the grievant worked during emergency closures on February 18 and 19. In certain circumstances, employees who work during an emergency closure are awarded compensatory leave.⁷ However, state policy provides that "[e]mployees who telework during authorized closings are not eligible to receive compensatory leave."⁸ The grievant has been working remotely (telework) and is not normally required to travel to the agency's facility that was closed. Because the grievant teleworked as normal on February 18 and 19, she would not be entitled to earn compensatory leave for working on those days.

The grievant argues that she is indeed entitled to such leave because she did not have an approved telework agreement. While EDR appreciates the grievant's point, the lack of a telework agreement does not appear to change the result here. According to the agency, the grievant has been working remotely since before the COVID-19 pandemic. While the grievant previously had an approved telework agreement, it had lapsed. Nevertheless, the grievant continued to telework without an agreement.⁹ Importantly, the *Emergency Closings* policy authorizes telework without a telework agreement during an emergency closure with management approval.¹⁰ Accordingly, EDR does not view the *Emergency Closings* policy language as hinging on an approved telework agreement as the grievant argues. The grievant teleworked on February 18 and 19 and, according to the policy, compensatory leave was not due to be awarded. As such, EDR cannot find that the grievance raises a sufficient question as to a misapplication of policy to qualify for a hearing.

Regarding the other question initially raised in this grievance, it does not appear that the grievant's request regarding her pre-approved leave on February 12 is still at issue. Documentation in the grievance record appears to reflect that the agency initially denied the grievant's request to have her leave reassigned to the emergency closure rather than personal leave. However, later communication from the second-step respondent in this grievance indicated that the grievant's

⁴ Va. Code § 2.2-3004(A); *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) (citation omitted).

⁷ DHRM Policy 1.35, *Emergency Closings*, at 3.

⁸ *Id.* at 7.

⁹ The agency has indicated that management was in the process of updating Employee Work Profiles and updating telework agreements in conjunction with that process, which was not yet complete.

¹⁰ DHRM Policy 1.35, *Emergency Closings*, at 7. Although the policy encourages agencies to complete telework agreements "as soon as possible so that work and performance expectations are clearly conveyed to the employee," *id.*, EDR has not reviewed any indication that there was confusion as to the grievant's work expectations to work remotely following the lapse of the telework agreement.

time would be assigned to the emergency closure and an email from the grievant apparently reflected that such a change had been made. The grievant's request for a qualification ruling does not address this issue either. Therefore, EDR will not address this question further as it does not appear to be a live issue in the grievance.¹¹

For the foregoing reasons, this grievance is not qualified for a hearing. EDR's qualification rulings are final and nonappealable.¹²

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¹¹ If this issue was to be addressed in this ruling, EDR has not reviewed evidence in the grievance record that would raise a sufficient question as to a misapplication or policy with regard to the grievant's leave on February 12.

¹² See Va. Code § 2.2-1202.1(5).