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QUALIFICATION RULING

In the matter of the Department of Agriculture and Consumer Services
Ruling Number 2021-5210
March 4, 2021

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") on whether her December 11, 2020 grievance with the Department of Agriculture and Consumer Services (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is qualified for a hearing.

FACTS

The events giving rise to the grievant's December 11, 2020 grievance occurred during the Thanksgiving holiday period. State employees are typically awarded 20 hours of holiday leave for the period between Wednesday and Friday of Thanksgiving; the leave awarded for 2020 was 4 hours on Wednesday, November 25, 8 hours on Thursday, November 26, and 8 hours on Friday, November 27. While the grievant previously sought to take leave for this period, due to the nature of her work, she was scheduled to work on November 25 and November 27. The grievant called in sick on November 25 and did not work. The grievant's supervisor informed the grievant in a text message on November 25 that she was required to bring a doctor's note to verify her need for leave. The grievant provided a doctor's note for the absence, which appears to have been accepted as adequate.

The grievant also called out sick on November 27. Though not immediately informed that she needed to bring a doctor's note to cover November 27, the grievant received a text message on Sunday, November 29, indicating that anyone who called out sick during the Thanksgiving time period needed to bring a doctor's note on the following Monday. The grievant ultimately provided an updated doctor's note to the agency, dated November 30, covering the period of her absence (November 25-27). The grievant's supervisor determined that the updated doctor's note was not adequate and denied the grievant's request for sick leave on November 27. The supervisor appears to have deemed the note inadequate because it was obtained after the fact and that the grievant had not followed a recommendation on the prior doctor's note that suggested further evaluation if the grievant was not feeling better by the end of November 26.

DHRM Policy 4.25, *Holidays*, provides that non-exempt employees are only eligible for holiday leave if they were working or on paid leave on both their last scheduled work day before the holiday and their first scheduled work day after the holiday. As the agency determined that the grievant's updated doctor's note was inadequate to cover her absence on November 27, the agency denied the grievant's leave use and she was accordingly on leave without pay for that day.[1] Thus, because the grievant was not working or on paid leave for her first work day after the holiday (November 27), the agency denied the grievant the entire 20-hour period of holiday leave between November 25 and November 27. In addition to not being paid for this period, the grievant did not accrue certain leave benefits as she was on leave without pay.

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.[2] The grievant here asserts that the agency has misapplied and/or unfairly applied the provisions of state policies regarding leave use. 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 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, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[3] Typically, then, 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] Because this situation has resulted in a loss of leave and pay, the grievant has sufficiently alleged an adverse employment action.

The provisions of DHRM Policy 4.57, *Virginia Sickness and Disability Leave Program*, regarding sick leave indicate that an employee's use of such leave can be denied if the verification provided was inadequate. The policy provides no definition or standards by which a verification is to be evaluated to determine its adequacy. To the extent such a determination is within an agency's discretion, that discretion is not without limit. As such, a grievant's claims arising in such a case could qualify for hearing if the grievance record presents a sufficient question as to whether the verification of sick leave was adequate or that the agency's basis for determining the verification was inadequate was unreasonable, unfair, and/or arbitrary or capricious.

The grievant submitted a doctor's note, dated November 30, that clearly covered the days for which the grievant sought to use sick leave (November 25-27). On its face, therefore, this note would appear to be at least arguably adequate verification of the appropriateness of sick leave. The agency deemed the note inadequate, in part, because it was obtained after the fact, on November

[1] *See* DHRM Policy 4.30, *Leave Policies – General Provisions*.
[2] *See Grievance Procedure Manual* § 4.1.
[3] *See id.* § 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).

30. At this stage, the record presents at least a sufficient question as to whether this basis was arbitrary or capricious. The grievant states that the agency had not previously required the submission of a doctor's note to use sick leave in the normal course. The grievant was immediately informed when she called out on November 25 that she needed to present a doctor's note for the absence. The grievant did not receive a similar requirement as to her November 27 absence until November 29, which was already after the fact of her absence.[6] At that point, the only way she could have obtained verification was after the fact of her absence. Accordingly, we are unable to find that this basis definitively determines the updated doctor's note was appropriately determined to be inadequate at this stage.

The agency also appears to hold the grievant responsible for not going back to the doctor for further evaluation as recommended in the original doctor's note. EDR cannot find that reliance on this factor resolves the sufficient question that the grievance record already raises as to the adequacy of the updated doctor's note. The agency appears to surmise that the grievant was not sick on November 27 as evidenced by her decision not to go back to the doctor on that date. However, the original doctor's note appears to merely recommend that the grievant receive further evaluation at some point in the future if she was not feeling better. In addition, while we understand the agency's analysis, we note that the grievant's medical provider still issued the updated doctor's note (after the fact) even without a further evaluation on November 27. As such, the record does not present a sufficient basis for EDR to ignore the evidence of the updated doctor's note as verification of the grievant's need for sick leave.

Based on the totality of the circumstances, the grievance record presents a sufficient question as to whether the grievant provided adequate verification of her need to use sick leave, but was denied this paid leave benefit, in a misapplication or unfair application of state policy. If the grievant had been on approved sick leave on November 27, she would have been entitled to the entire 20 hours of holiday leave and additional leave accruals lost during her period of leave without pay. As to whether the evidence supports a misapplication or unfair application of policy, the hearing officer will determine based on the evidence presented whether the grievant's verification of leave use was appropriately determined to be inadequate by the agency or that she was entitled to use sick leave pursuant to Policy 4.57. The hearing officer could find, as a matter of policy, that the agency's denial of sick leave and holiday leave violated a mandatory policy provision or was so unfair as to amount to a disregard of the applicable policy's intent.[7]

CONCLUSION

The facts presented by the grievant constitute a claim that qualifies for a hearing under the grievance procedure.[8] Nothing in this ruling is meant to determine that the agency has violated or

[6] If the grievant was provided a requirement prior to November 29, it does not appear in the grievance record. EDR would also note that it appears that the division in which the grievant works now requires a doctor's note to be provided for all uses of sick leave. The division appears to have been notified of this requirement on December 3, 2020. Accordingly, it is reasonable to assume that if such a requirement had existed prior to that date the December 3 communication would have been unnecessary.

[7] This ruling does not detail the specific relief that could be warranted if the hearing officer makes such findings. If the hearing officer determines that relief is warranted, the goal would be to provide the grievant the pay and leave benefits she would have received and accrued without the misapplication or unfair application of policy (if that is determined to be the case).

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

misapplied policy. This ruling only determines that the grievant has raised a sufficient question as to such a claim to meet the qualification provisions of the grievance procedure. In addition, the grievance contains other claims and theories (such as retaliation) regarding the actions grieved and forms of relief not specifically addressed in this ruling. To ensure that the grievant's claims are fully considered at hearing, EDR deems it appropriate to send any alternative theories and claims related to her leave and pay allegations for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues. As such, the grievance is qualified in full.

At the hearing, the grievant will have the burden of proof.[9] If the hearing officer finds that the grievant has met this burden, they may order corrective action as authorized by the grievance statutes and grievance procedure, including restoration of pay and leave benefits.[10] Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

EDR's qualification rulings are final and nonappealable.[11]

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[9] *Rules for Conducting Grievance Hearings* § VI(C).
[10] Va. Code § 2.2-3005.1(A); *Rules for Conducting Grievance Hearings* § VI(C).
[11] *See* Va. Code § 2.2-1202.1(5).