Issue: Qualification-Leave-Approval/Denial; Ruling Date: December 21, 2001; Ruling #2001-171; Agency: Department of Corrections; Outcome: not qualified. Appeal filed to Circuit Court of Buchanan County; File date: July 1, 2002; Case #17-02; EDR Decision affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department Of Corrections/ No. 2001-171
December 21, 2001

The grievant has requested a ruling on whether his grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that DOC misapplied or unfairly applied its policy regarding the use of unverified sick leave. Specifically, he claims that he was penalized in accordance with applicable policy and procedure, while others were not. His grievance seeks a consistent application of policy and reimbursement for 7.8 hours of unverified sick leave that was charged as leave without pay (LWOP). For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is a Correctional Officer with DOC. Department of Human Resource Management (DHRM) Policy 4.55 states that "[a]n employee's use of paid sick leave may be denied if the employee fails to comply with a management request for verification of the need for sick leave."[1] Similarly, DOC has instituted Internal Operating Procedure (IOP) 207, which allows 34.5 hours (three days) of paid unverified sick leave. IOP 207 expressly states that "any sick leave used thereafter must be verified by a medical excuse [and that] failure to comply with this procedure shall result in the employee being placed on 'Leave Without Pay' status."[2] The grievant acknowledges that he was aware of IOP 207 and that charging his 7.8 hours as LWOP was consistent with IOP 207.

In applying IOP 207, the Warden had established a procedure of providing written notice to each employee who exceeded the 34.5 hour allotment. Under this procedure, no unverified sick leave is charged to LWOP until after an employee receives a written notice advising him that (1) his allotted time has been used, (2) for the remainder of the performance year all sick leave must be verified by a medical excuse, and (3) failure to comply may result in LWOP status. Under this procedure, once an employee receives his written notice, no additional hours of paid unverified sick leave are granted. On February

[1] DHRM Policy 4.55 (III)(A)(2).
[2] Internal Operating Procedure 207 "Hours of Work, Sick and Annual Leave," section 207-7.4.

16, 2001, the grievant signed such a notice sent to him by the Warden. The grievant acknowledges that he was aware of the Warden's procedure for written notices and that charging his 7.8 hours as LWOP was consistent with that procedure.

The grievant claims, however, that the Warden's written notice procedure produced results that at times contradicted IOP 207's express 34.5 hour allotment by unfairly awarding some employees more than 34.5 hours of paid unverified sick leave. In the step responses to this grievance, agency management acknowledged that the written notice procedure produced variances in the amount of paid unverified sick leave employees received--some employees (like the grievant) received their written notice after taking exactly 34.5 hours of unverified sick leave, while other employees, due to the particular blocks of time they had taken as unverified sick leave, did not receive their written notice until they had taken more than the allotted 34.5 hours. For example, if an employee had used 25.5 hours of unverified sick leave time, an additional missed shift of 11.5 hours would total to 37 hours. At that point, the employee would be notified that any *future* unverified sick leave absences would be treated as LWOP, thus giving that employee 2.5 hours of unverified sick leave in excess of the 34.5 allowed under IOP 207.

In the grievant's case, he became ill at work on April 18, 2001, and requested permission to leave early.[3] He indicated on his leave request form that he was taking personal sick leave time and left, using 7.8 hours of leave. He did not, however, provide a medical excuse for those hours upon his return to work, and consistent with the written notice he signed on February 16, the 7.8 hours were charged as LWOP.

DISCUSSION

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.

The grievant brings to light an agency procedure that apparently can result in pay inequities among employees. Indeed, it appears that as applied, the written notice procedure, however well intended, has produced results in some instances that contradict IOP 207's express provision that employees receive no more than 34.5 hours of unverified sick leave time. However, in this case the grievant was treated in accordance with both IOP 207 and the written notice procedure. The fact that the agency may have misapplied IOP 207 with respect to other employees, by granting them (unlike the

[3] The grievant has also submitted information regarding an absence from work on May 31. On this occasion, management again placed the grievant on LWOP status, and he again stated his belief that management was not applying leave policies fairly. The *Grievance Procedure Manual* § 2.4 states that "once a grievance is initiated, additional claims may not be added." Because the May 31 absence was not included on the original Form A, this ruling will not address that issue.

grievant) more than the 34.5 hours of paid unverified sick leave time, is not an issue for which a hearing officer may provide a remedy.

For example, a hearing officer could not order the agency to pay the grievant for the 7.8 hours of unverified sick leave, because in docking the grievant's pay, the agency did not violate either IOP 207 or its written notice procedure, indeed, the agency was in accordance with each. Likewise, a hearing officer could not order the agency to go back and dock the pay of *other* employees who benefited from the written notice procedure, because a hearing officer may not take "any adverse action against an employee" as relief for a grievant.[4] Finally, however internally contradictory an agency's policies and procedures may be, "the contents of statutes, ordinances, personnel policies, procedures, rules and regulations" may not be qualified for a hearing.[5] Only the agency -- not a hearing officer -- may enhance or change the terms of its policies and procedures.[6]

In sum, this grievance does not qualify for a hearing. Under the undisputed facts, the grievant was treated in accordance with established policy and procedure. Moreover, there is no remedy under the grievance procedure that a hearing officer could provide in this case.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this determination to the circuit court, he should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant notifies the agency that she does not wish to proceed.

_____
Neil A. G. McPhie, Esq.
Director

_____
Leigh A. Brabrand
Employment Relations Consultant

[4] *Grievance Procedure Manual* § 5.9(b), page 16.
[5] *Grievance Procedure Manual* § 4.1(c), page 11.
[6] *Rules for Conducting Hearings* § VI.A, page 10 ("challenges to the content of state or agency human resource policies and procedures are not permitted to advance to a hearing" and "the hearing officer has no authority to change the policy, no matter how unclear, imprudent or ineffective he believes it may be").