

Issue: Qualification/Military leave; Ruling Date: February 17, 2006; Ruling #2006-1262;
Agency: Department of Corrections; Outcome: not qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2006-1262
February 17, 2006

The grievant has requested a ruling on whether his November 25, 2005¹ grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. The grievant asserts that the agency misapplied and/or unfairly applied policy. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is employed with the agency as a Corrections Officer. Although he works in Virginia, he is a resident of West Virginia and is a member of the National Guard in that state.

On or about September 16, 2005, the grievant's National Guard unit was activated by the Governor of West Virginia, and on September 17, 2005, the grievant was ordered to report for duty.² The purpose of the activation was to provide assistance in the Gulf Coast area in the aftermath of Hurricane Katrina. The grievant states that he subsequently spent 30 days in New Orleans, Louisiana with the military.

When the grievant returned to work, he was apparently advised that he was not eligible for leave with pay under Department of Human Resource Management (DHRM) Policy 4.50, "Military Leave," because he had used his allotment of paid military leave for the fiscal year³ and had not been called up by the Governor of Virginia. Under Policy 4.50, employees who, as members of the reserve forces, participate in federally-funded military training duty or report for a tour of active federally-funded duty are eligible to receive military leave with pay for up to 15 workdays.⁴ In addition, Policy 4.50 provides that members of the

¹ The Grievance Form A identifies "11-25-06" as the initiation date. For purposes of this ruling, we assume that the "06" designation was in error and that the correct initiation date is November 25, 2005.

² The grievant asserts, and the agency apparently does not dispute, that he received federal orders.

³ The grievant admits that prior to his call-up for duty related to Hurricane Katrina, he had used his yearly 15-day leave allotment in its entirety.

⁴ DHRM Policy 4.50, "Military Leave" (effective 9/16/83, revised 7/10/04), at p. 3.

“Commonwealth’s Militia”⁵ who are called up by the Governor of Virginia to respond to nature or man-made disasters receive military leave with pay for the entire period of their duty, in addition to the 15-day paid leave allotment.⁶

On November 25, 2005, the grievant initiated a grievance challenging the agency’s designation of his leave as being without pay. He seeks to receive “lost wages and retirement points equal to what Virginia’s [National Guard] Units received.” After the parties failed to resolve the grievance during the resolution steps, the grievant asked the agency head to qualify the grievance for hearing. The agency head denied the grievant’s request, and he has appealed to this Department.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.⁷ Thus, all 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 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.⁸

In this case, the grievant asserts that the agency misapplied and/or unfairly applied Policy 4.50 in refusing to provide him with paid leave for the period of his National Guard service in Louisiana. Specifically, he challenges the agency’s application of the policy provision (entitled “Military Leave for Emergency Service”) which grants those employees who are members of the Virginia National Guard what the grievant terms “unlimited military hours,” in addition to and separate from the 15-day allotment.

During the course of this Department’s investigation, we requested informal clarification from DHRM on the application of Policy 4.50 to the facts presented in this matter. DHRM has advised this Department that under Policy 4.50, only those employees who serve in the Virginia National Guard (or other elements of the “Commonwealth’s Militia”) and are called up for duty by the Governor of Virginia are eligible for paid leave under the challenged policy provision. Therefore, as the grievant was a member of the West Virginia National Guard and activated by the Governor of West Virginia, he was not eligible for leave under this provision, regardless of whether he also received federal orders. Although we appreciate the grievant’s concern over the apparent inequity created by this

⁵ The term “Commonwealth’s Militia” is defined by Policy 4.50 to consist of “the National Guard, which includes the Army National Guard and the Air National Guard; the Virginia State Defense Force; and the naval militia.”

⁶ *Id.*

⁷ Va. Code § 2.2-3004(B).

⁸ Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(b) and (c).

policy, because DHRM, the agency charged with promulgation and interpretation of state policy, has reviewed the facts of this case and found no misapplication of that policy, this Department must deny qualification on this issue.⁹

The grievant asserts that the agency initially told him that he would receive unlimited paid military leave. In support of this argument, he has presented a document apparently sent to members of the National Guard and/or other military components which states, in relevant part, that “[b]ased upon the specific orders received, this time [for Katrina assistance] will either be considered normal work time and not be counted against the 15 days of military leave with pay or it will be considered military leave.”

By its terms, however, this e-mail does not guarantee unlimited paid leave. Rather, it advises employees that, depending on their particular circumstances, they would either receive paid leave not counted against the 15-day military leave allotment or receive military leave. Here, the grievant received military leave, but this leave was without pay as he had utilized his 15-day allotment.

We note that the grievant is, in essence, disputing the contents of the policy, not its application. The grievant is not arguing that the policy is *applied* unfairly; rather, he is arguing that the policy *is* unfair. However, the grievance procedure expressly excludes challenges to the “contents of . . . personnel policies” from qualification, unless there is some support for a claim of discrimination, retaliation, or discipline.¹⁰ The grievant asserts no such claim in this instance. Concerns about the contents of state policies are more appropriately addressed to DHRM, as that agency, by statute, has the authority to promulgate and interpret state personnel policies.¹¹ For this reason as well, this issue does not qualify for hearing.

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 the qualification determination to the circuit court, the grievant 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

⁹ Va. Code § 2.2-1201(13) states that DHRM shall “Develop state personnel policies and, after approval by the Governor, disseminate and interpret state personnel policies and procedures to all agencies.” Section 2.2-1201(13) further states that “The [DHRM] Director of the Department shall have the final authority to establish and interpret personnel policies and procedures and shall have the authority to ensure full compliance with such policies.” *See also* Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989). We note that the grievant has not alleged or presented evidence which would show an unfair application of Policy 4.50.

¹⁰ *Grievance Procedure Manual* § 4.1. The *Grievance Procedure Manual* defines discrimination to include “[d]ifferent or hostile treatment based on race, color, religion, political affiliation, age, disability, national origin, or sex.” *Id.* at § 9.

¹¹ Va. Code § 2.2-1201(13).

appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

Claudia T. Farr
Director

Gretchen M. White
EDR Consultant