

Issues: Compliance – Grievance Procedure (30-Day Rule) and Qualification – Compensation (Worker’s Compensation); Ruling Date: July 22, 2008; Ruling #2008-1971; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Grievant In Compliance/ Grievant Not In Compliance, Not Qualified for Hearing.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation
and Substance Abuse Services
Ruling No. 2008-1971
July 22, 2008

The grievant has requested a ruling on whether his December 12, 2007 grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency) qualifies for a hearing. In addition, the agency has raised the question of whether the grievance was initiated timely.

FACTS

In his December 12, 2007 grievance, the grievant claims that the agency has failed to properly reimburse his leave in relation to a workers' compensation claim. Under state and facility policy, when an employee is out of work for a work-related injury, the employee is required to use his or her personal leave balances (annual, sick, family personal, etc.) to cover the absences until the claim is approved as compensable. The employee's leave will then be restored. The agency, in this case, waited to restore the grievant's leave until it received reimbursement checks from its claims adjuster for each specific time period of absences. The agency then calculated the amount of leave that the amount of indemnity reimbursement received was worth and credited the grievant's leave. However, the grievant argues that the agency was delinquent in timely processing these reimbursements. Further, the grievant claims that the agency has not reimbursed approximately twenty hours of leave for 2007 and \$632 of lost time in 2006. The grievant has not filed a formal claim with the Virginia Workers' Compensation Commission (VWCC), and, therefore, there appears to be no VWCC award regarding the grievant's workers' compensation claim.

The agency responded to the grievant's allegations by providing a chart of the periods of the grievant's absences, the dates when the agency received reimbursement checks from the claims adjuster, and dates when the timekeeper was notified about the restoration of leave time. The agency stated that it could not reinstate the grievant's leave until after such checks are received. Additionally, there were certain partial-day absences for which the claims adjuster determined that the grievant was not due any benefits. As

such, the agency did not restore any leave for those periods. The first step-respondent also indicated that the grievance was not timely as to some of the alleged dates.

DISCUSSION

Compliance

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he or she knew or should have known of the event or action that is the basis of the grievance.¹ When an employee initiates a grievance beyond the 30-calendar day period without just cause, the grievance is not in compliance with the grievance procedure, and may be administratively closed.

The grievant has alleged loss of leave time in 2006 and 2007 in relation to his workers' compensation claim. Determining at what point the 30 calendar-day clock begins for these claims is difficult. The grievant states that he was never notified by the agency when his leave was restored.² However, he does receive notification from "the insurance company" when a reimbursement check is sent to the agency, receipt of which triggers the agency's duty to restore leave time pursuant to the agency's practice. The grievant also states that he generally receives leave statements each month. Based on these facts, it would appear the grievant would become aware of the agency's duty to restore his leave when he receives notice of the check being sent to the agency. Further, he should be aware of any potential issue in his leave time reimbursement upon reviewing his leave statement following the agency's receipt of the check. Additionally, when he is on notice that the agency received a check and should be processing a leave reimbursement, he could easily check the status by contacting the timekeeper or querying his leave report. The grievant would be on notice of a potential claim of lost leave and should initiate a grievance on the matter within 30 calendar days.

It appears that the agency received reimbursement checks from its claims adjuster no later than August 13, 2007 for many of the grievant's absences related to his workers' compensation claim. Presumably, the grievant would have received notice of the agency's receipt of these checks around the same time. Therefore, the grievance is untimely to challenge the associated restoration of leave time for these dates³ because the grievant did not initiate his grievance until December 12, 2007. The grievant was aware well more than 30 calendar days of the agency's receipt of the reimbursement checks and should have initiated a grievance to challenge the restoration of his leave much earlier.⁴

¹ Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4.

² The agency admits there is no standard practice for providing notification to the employee of the restoration of an employee's leave. An agency human resources employee indicated that some employees are copied on e-mails to the timekeeper regarding leave adjustments. Also, some employees receive notification by hand when an agreement is signed.

³ Based on an agency document, these periods would include all dates in 2006 and February – March 2007.

⁴ Although it is difficult to assign a precise starting point to the 30 calendar-day period in this case, it is clear that the initiation of the grievance on December 12, 2007, was beyond any reasonable measure of the 30 calendar days in this case.

Furthermore, the grievant has presented no evidence of just cause for his delay. He states that he was never notified about the agency's reimbursement of his leave. While that may be true, he should have known the agency had received the requisite checks from the claims adjuster. The grievant had the ability to inquire into the status of his leave. He should have known that there were potentially grievable matters at least by late August 2007, and certainly by September 2007. However, the grievance was not initiated until December 2007, making it untimely to challenge the specific dates of absences prior to April 2007.⁵

For the rest of the absences in 2007, the grievance is timely to challenge the leave reimbursements. The grievant had received no notice about reimbursement checks for the periods in August 2007 through December 2007. Further, the grievance is also timely to raise questions regarding the few dates in April and May 2007, for which the agency states the grievant was due no reimbursement. It does not appear the grievant was ever notified about any reimbursement, or lack thereof, for these dates until after the grievance was filed. Therefore, the 30 calendar-day period could not have lapsed for these claims. As such, the grievance is timely to raise questions on the leave reimbursements for those dates in 2007. This Department's rulings on matters of compliance are final and nonappealable.⁶

Qualification

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.⁷ Thus, by statute and under the grievance procedure, complaints relating solely to the establishment and revision of general benefits "shall not proceed to hearing"⁸ unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.⁹ In this case, the grievant is effectively arguing that the agency has misapplied or unfairly applied policy.

⁵ Though not cited by the grievant as reason for his delay, it is noteworthy that the grievant began an extended period of disability in August 2007, shortly after the agency received the reimbursement checks on August 13, 2007. This period of disability extended until November 12, 2007. This Department has long held that illness or impairment does not automatically constitute "just cause" for failure to meet procedural requirements. To the contrary, in most cases it will not. *See, e.g.*, EDR Ruling No. 2006-1201; EDR Ruling Nos. 2003-154, 155. Illness may constitute just cause for delay only where there is evidence indicating that the physical or mental impairment was so debilitating that compliance with the grievance procedure was virtually impossible. *Id.*; *see also* EDR Ruling No. 2005-1040. There is no evidence that during his period of disability the grievant was incapacitated to the point that he was unable to protect his grievance rights. As such, there is no basis to find that the grievant had just cause for delay as a result of being on disability.

⁶ *See* Va. Code § 2.2-1001(5), 2.2-3003(G).

⁷ Va. Code § 2.2-3004(B).

⁸ Va. Code § 2.2-3004(C).

⁹ *Grievance Procedure Manual* § 4.1(c).

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. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”¹⁰ Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.¹¹ 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.”¹² Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.¹³ For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action in that he potentially asserts issues with his leave balances.

The facility’s policy provides that until a workers’ compensation claim is deemed compensable, “the employee is required to use his/her personal leave balance or take leave without pay for missed time relating to the claim. If the claim is deemed compensable, lost time will be restored.” Based on the compliance ruling above, however, the only absences still the proper subject of this grievance are days in which the grievant was absent for less than a full day.¹⁴ These dates include April 3 and 5, May 8, and November 13, 2007. Department of Human Resource Management (DHRM) Policy 4.57, *Virginia Sickness and Disability Program*, discusses such circumstances of “intermittent disability.” “If the absence is accepted as compensable [as workers’ compensation] and the employee is eligible to receive indemnity benefits for the period

¹⁰ See *Grievance Procedure Manual* § 4.1(b).

¹¹ While evidence suggesting that the grievant suffered an “adverse employment action” is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an “adverse employment action.” For example, consistent with recent developments in Title VII law, this Department substitutes a lessened “materially adverse” standard for the “adverse employment action” standard in retaliation grievances. See EDR Ruling No. 2007-1538.

¹² *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

¹³ E.g., *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

¹⁴ In reviewing the materials provided by the agency during its investigation for this ruling, EDR also asked whether the grievant’s personal leave had been restored for the seven day waiting period prior to the commencement of his short-term disability benefits in August 2007. See DHRM Policy 4.57, “Short-term Disability (Work Related)” (“A 7 calendar day waiting period must be served to be eligible to receive STD benefits. Employees can use SL, annual leave, compensatory leave, overtime leave, or F/P leave to cover waiting period hours. ... If the employee’s approved absence is over 21 days, the agency will reinstate the employee’s leave used during the waiting period up to the value of the workers’ compensation payment covering the waiting period. The leave amount is calculated by using the amount of the workers’ compensation benefit payment received for the waiting period divided by the employee’s hourly rate of pay. The employee must use appropriate leave to receive 100% pay during the waiting period or be placed on LWOP.”). Although it appears the agency did not properly credit the grievant’s leave, the agency has since notified the grievant’s timekeeper to make the necessary changes to his leave time for that period. Consequently, because the agency has now complied with this portion of the policy, there is no reason to qualify the grievance for hearing on that basis.

under a Workers' Compensation VWCC award time will be reinstated to the employee based on the amount paid under the VWCC award." This policy language is determinative in this case.

According to the agency's claims adjuster, the grievant was entitled to no indemnity benefits for the four partial absences in 2007. Further, the VWCC has not awarded any such benefits. Consequently, it cannot be said that the agency has misapplied policy in this case. The agency did not restore any of the grievant's personal leave for those dates because, based on the information the agency received from its claims adjuster, the grievant was apparently not entitled to any indemnity benefits for this period, or at least the VWCC has not ordered as much.¹⁵ Because there was no portion of the grievant's absences attributable to workers' compensation, the agency correctly decided not to reimburse any leave for these dates. As such, this grievance does not qualify for hearing because there is no evidence that the agency misapplied or unfairly applied policy.

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 and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). 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 wishes to conclude the grievance and notifies the agency of that desire.

Claudia T. Farr
Director

¹⁵ Compensation due for a workers' compensation claim is a determination for the VWCC, not the grievance procedure. *See, e.g.*, Va. Code §§ 65.2-700, 65.2-702. The only issue in this case that are properly the subject for a grievance is the associated reimbursement of the grievant's leave time. *See, e.g.*, *Epps v. Inova Fair Oaks Hosp.*, VWC File No. 213-55-21, 2007 VA Wrk. Comp. LEXIS 219, at *14-15 (Mar. 23, 2007) (noting that the VWCC is without jurisdiction to restore or reinstate an employee's leave).