Issue: Benefits/Leave – Compensatory Leave; Ruling Date: October 31, 2008; Ruling #2009-2139; Agency: Department of Corrections; Outcome: Not Qualified.

# *COMMONWEALTH OF VIRGINIA*

***Department of Employment Dispute Resolution***

## QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling No. 2009-2139
October 31, 2008

The grievant has requested qualification of her July 16, 2008 grievance with the Department of Corrections (the agency). For the reasons set forth below, this grievance does not qualify for a hearing.

### FACTS

The grievant initiated her July 16, 2008 grievance because the agency did not approve her request to utilize compensatory leave to cover an absence from work for an illness. The grievant had arrived at work on June 11, 2008, but early in the day was unable to continue working because she felt ill. She was also absent from work on the following day, June 12, 2008. However, the grievant only had enough personal leave and sick leave to cover a portion of June 11, 2008. After returning to work, she sought to utilize her compensatory leave to cover the remaining portion of her absence. However, the agency did not approve her request. The agency states that it had recently notified staff at the facility that employees could no longer use annual and compensatory leave[1] unless it is pre-approved, i.e., it was not for unexpected illness except in "extreme and extenuating circumstances." Although facility procedure No. 213 states that such leave needed to be requested in advance and pre-approved, the facility had allowed employees to use compensatory leave in these instances in the past. The agency states that it had changed the practice to enforce the policy as written because it was having difficulty staffing shifts at the facility and predicting coverage. The grievant initiated her grievance because she feels that state policy should allow her to use compensatory leave for this absence.

### DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] Further, complaints relating solely to

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[1] The grievant argues that this restatement of policy included the use of compensatory leave. She points to an e-mail notification that mentioned only annual leave, not compensatory leave. However, the agency states that when this restatement occurred, it was made verbally in meetings that both annual and compensatory leave would be treated the same. Further, this is consistent with the facility's procedure No. 213, which addresses annual and compensatory leave together. Although the grievant states she did not receive notice of the change regarding compensatory leave, it appears the facility took sufficient action to notify its employees.

[2] *See* Va. Code § 2.2-3004(B).

the establishment or revision of wages, salaries, position classifications, or general benefits "shall not proceed to a hearing"[3] unless there is sufficient evidence of discrimination, retaliation, discipline, or a misapplication or unfair application of policy.[4] In this case, the grievant essentially claims that the agency misapplied or unfairly applied policy by refusing to allow her to use her accrued compensatory leave to cover the days she was out of work.

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."[5] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.[6] An adverse employment action is defined as a "tangible employment act 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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8] There is no question that an adverse employment action occurred in this case because the grievant lost pay.

An agency's approval is required before utilizing annual and compensatory leave.[9] The reason the agency denied the grievant's request for leave in this case was that it was not requested before the need for leave and, apparently, the grievant's need for leave did not fall into the "extreme or extenuating circumstances"[10] exception under the facility's new practice. Department of Human Resource Management Policy (DHRM) 4.30 provides that "[w]hen practicable, and for as long as the agency's operations are not affected adversely, an agency should attempt to approve an employee's request for a leave of absence for the time requested by

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[3] Va. Code § 2.2-3004(C).
[4] *Grievance Procedure Manual* § 4.1(c).
[5] *See Grievance Procedure Manual* § 4.1(b).
[6] 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.
[7] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998). In this case, the grievant has raised a sufficient question as to whether she experienced an adverse employment action.
[8] *See e.g.*, Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[9] DHRM Policy 4.30.
[10] It is not clear what "extreme or extenuating circumstances" are under the facility's practice. It should be noted that both the Family and Medical Leave Act (FMLA) and DHRM Policy 4.20 provide that an employee should be allowed to use accumulated annual and compensatory time to provide for paid leave in a situation qualifying under the FMLA. DHRM Policy 4.20, *Family and Medical Leave Policy Revisions*, revised effective June 16, 1997 ("Employees may use all available annual, compensatory, overtime, and sick leave …."); *see also* 29 C.F.R. § 825.207(e).

the employee."[11] The Policy further provides that "[i]f an employee could not have anticipated the need for a leave of absence," the employee can request to use leave after the fact.

Given that this DHRM Policy allows an employee to utilize leave that is not pre-approved (when the need for leave is unanticipated) and that agencies "should attempt to approve" the request for leave, a stricter agency policy that requires all annual and compensatory time to be pre-approved might be viewed as inconsistent with the intent of DHRM policy. However, the DHRM provision stating that the agency "should attempt to approve" a leave request is limited by the language "for as long as the agency's operations are not affected adversely." Here, it appears that the facility, in the past, approved annual and compensatory leave requests for unanticipated sick leave events when an employee had used all of his or her sick leave. However, the facility's ability to staff shifts and maintain predictable staffing levels was adversely affected by this practice. Under these facts, it does not appear that the facility's current practice of disallowing the use of annual and compensatory leave in situations similar to that raised by this grievance violates the provisions of DHRM Policy 4.30. It appears the agency's operations were affected and, as a result, it could no longer approve annual or compensatory leave except in "extreme or extenuating circumstances." Although DHRM Policy 3.10 does allow compensatory leave to be used to cover absences "for any purpose," the leave request must still be approved by management.[12] This Department cannot find that the agency has misapplied or unfairly applied policy by denying the grievant's leave request. As such, the grievance 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 this Department's 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 notifies the agency that she wishes to conclude the grievance.

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Claudia T. Farr
Director

[11] This portion of the Policy also provides that "compensatory and overtime leave may be scheduled by the agency at a time convenient to agency operations." DHRM Policy 4.30. This language appears to reinforce management's ability to limit employees' use of compensatory leave based on the business needs of the agency. However, further discussion of this language is not necessary in this case based on the analysis below.

[12] DHRM Policy 3.10; DHRM Policy 4.30.