

Issue: Qualification – Benefits/Leave (Leave Without Pay); Ruling Date: January 26, 2010; Ruling #2010-2446; 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. 2010-2446
January 26, 2010

The grievant has requested qualification of his July 27, 2009 grievance with the Department of Corrections (the agency). For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

On July 8, 2009, while traveling to work, the grievant's vehicle broke down. The grievant utilized another individual's cell phone to contact work and inform a supervisor about his situation. The supervisor apparently expected the grievant to come to work when he could. The grievant proceeded to take most of the rest of the day to have his vehicle repaired. By that time, the grievant's shift was nearly over and the grievant decided not to attempt to travel to work. The grievant did not call back at any other time to update his supervisors about his situation.

Upon returning to work on July 9, 2009, the grievant's supervisor discussed the matter with him. The grievant's supervisor asked him why he had not called back. The grievant said that he thought he was covered by calling in. The grievant's supervisor explained that he had expected him to come into work when he was able. As a result of the situation, the agency docked the grievant's pay for July 8, 2009. The grievant initiated his July 27, 2009 grievance to challenge that action.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.¹ Further, complaints relating solely to the establishment or revision of wages, salaries, position classifications, or general benefits "shall not proceed to a hearing"² unless there is sufficient evidence of discrimination, retaliation,

¹ See Va. Code § 2.2-3004(B).

² Va. Code § 2.2-3004(C).

discipline, or a misapplication or unfair application of policy.³ In this case, the grievant essentially claims that the agency misapplied or unfairly applied policy.⁴

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.

In this case, it appears that the agency considered the grievant to be absent without approved leave on July 8, 2009. Although he called in to explain his situation, he never called back to update management. Rather, he took much of the rest of the day to have his vehicle repaired and did not show up for work. It does not appear that the grievant sought to utilize leave after the fact and this was not an issue raised in his grievance. Department of Human Resource Management Policy (DHRM) 4.30 provides that an employee who experiences an unapproved absence will not be paid for the time missed and will not accrue leave.⁹ As such, this Department can find no violation of any mandatory provision of the applicable policy in the agency’s handling of the grievant’s situation based on the above scenario.

Further, the grievant has not presented evidence raising a sufficient question as to whether the agency unfairly applied policy in this case. Although the grievant states that the agency has not enforced its leave approval policy consistently, the specific situations identified do not appear similarly situated to the grievant’s scenario. The grievant states that shortly after his pay was docked, he was aware of at least four other employees who did not call in, arrived at work late, and nothing happened to those employees. One key difference between those

³ *Grievance Procedure Manual* § 4.1(c).

⁴ The grievant also appears to include a claim of “discrimination” in an attachment to his Grievance Form A. However, his claim of “discrimination” is not based on any protected status, such as those listed in DHRM Policy 2.30, but rather a general claim of inconsistent treatment, which is discussed below as part of his misapplication and/or unfair application of policy claim. Because there is no actual claim of discrimination, it will not be discussed further in this ruling.

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).

⁸ *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁹ DHRM Policy 4.30.

situations and the grievant's situation is that the other employees apparently showed up for work. The grievant's assertions do not raise a sufficient question that the grievant was subject to inconsistent treatment.

Further, this Department gathered additional information from the agency regarding the facility's approach in similar situations. While some employees may be permitted to use leave to cover unanticipated absences, the facility's determinations in those cases depend on the facts of each case. Based on the information gathered, there was no indication that the grievant was treated inconsistently from other employees in similar situations under the facility's practice. As such, because this Department cannot find that the agency has misapplied or unfairly applied policy, 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 he wishes to conclude the grievance.

Claudia T. Farr
Director