Issue: Qualification – Benefits/Leave (LWOP); Ruling Date: March 10, 2010; Ruling #2010-2531; 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. 2010-2531
March 10, 2010

The grievant has requested qualification of her October 28, 2009 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 called in sick on October 23, 2009. When she returned to work, she submitted her weekly timesheet, which reflected that she sought to use annual leave for her absence on October 23, 2009. The grievant's illness was not verified by a doctor's note. The agency declined to approve the grievant's use of annual leave. As a result, the grievant was put on leave without pay for that day. The grievant initiated this grievance on or about October 28, 2009 to challenge the denial of leave.

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, discipline, or a misapplication or unfair application of policy.[3] In this case, the grievant asserts claims of misapplication and/or unfair application of policy and retaliation.

Misapplication and/or Unfair Application of Policy

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

[1] *See* Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(C).
[3] *Grievance Procedure Manual* § 4.1(c).

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."[4] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.[5] 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."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7] An adverse employment action occurred in this case because the grievant lost pay.

Under Department of Human Resource Management Policy (DHRM) 4.10, an agency's approval is required before utilizing annual leave, except 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.[8] The facility's leave policy, Local Operating Procedure 110.1 (LOP 110.1), similarly allows for subsequent approval of annual leave.[9] LOP 110.1 also permits employees to use annual leave for illness-related absences. However, LOP 110.1 provides further that an employee is only allowed three days of unverified absences for sick leave per year.[10] After an employee uses three days of unverified sick leave, all sick leave is required to be verified by a doctor's note. Although the grievant had already used three days of unverified sick leave by the time of her October 23, 2009 absence, the grievant argues that this provision of LOP 110.1 does not apply to her situation, as she was attempting to use annual leave, not sick leave, for her illness-related absence. The agency, however, applies this sick leave verification provision to all illness-related absences after three days of unverified sick leave are used, regardless of the type of paid leave that is later requested to cover it.

An agency's interpretation of its own policies is generally afforded great deference. This Department has previously held that where the plain language of an agency policy is capable of more than one interpretation, the agency's interpretation of its own policy should be given substantial deference *unless* the agency's interpretation is clearly erroneous or inconsistent with the express language of the policy.[11] Further, we have held that even where an ambiguous policy is otherwise enforceable, whether the grievant had fair notice of the agency's interpretation may be considered.[12]

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[4] *See Grievance Procedure Manual* § 4.1(b).
[5] 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.
[6] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[8] DHRM Policy 4.10.
[9] Local Operating Procedure 110.1, Employee Hours of Work/Leave of Absences & Temporary Adjustment to Work Assignments ("LOP 110.1") § IV.B.1.
[10] LOP 110.1 § IV.F.
[11] *See, e.g.*, EDR Ruling No. 2008-1956 and 2008-1959.
[12] *See id.*

While the section on Sick Leave Verification clearly uses the terminology "sick leave," this Department cannot find that the agency's interpretation is clearly erroneous or inconsistent with the language of the policy. Requiring a doctor's note for any illness-related absence after an employee uses three days of unverified sick leave, regardless of the type of paid leave sought, allows the agency to effectuate this provision. Otherwise, an employee could very easily circumvent this limitation and take multiple unverified sick days well beyond the three day maximum per year. The agency has the discretion to enact and implement such requirements.

The grievant has also not demonstrated that the agency failed to provide fair notice of its interpretation. We cannot find that this policy language was so vague or ambiguous that a reasonable employee would not know that a failure to bring a doctor's note after using three days of unverified sick leave could put the employee at risk of being denied leave for illness-related absences.[13] While the policy language could arguably be subject to different interpretations, the grievant's mistaken reliance on a narrow reading without checking with the facility's human resources staff does not excuse her unverified illness-related absence.

DHRM Policy 4.30 provides that an employee who experiences an unapproved absence will not be paid for the time missed and will not accrue leave.[14] Because the grievant's illness-related absence on October 23, 2009 was not verified by a doctor's note, as required by LOP 110.1, her leave use was not approved. As such, this Department can find no violation of any mandatory provision of the applicable policies in the agency's handling of the grievant's situation.[15] Further, the grievance does not raise a sufficient question as to whether the agency unfairly applied policy in this case. There was no indication that the grievant was treated inconsistently from other employees in similar situations under the facility's policy.

Retaliation

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[16] (2) the employee suffered a materially adverse action;[17] and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the

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[13] *Cf.* United States v. Hoechst Celanese Corp., 128 F.3d 216, 224 (4th Cir. 1997).
[14] DHRM Policy 4.30.
[15] Because the grievant's unverified absence would not have been approved, regardless of the type of leave requested, it is immaterial whether the grievant had requested to use annual leave before or after her absence. As such, the grievant's apparent past practice of asking for and using leave interchangeably without identifying the type of leave requested does not affect the result here.
[16] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).
[17] Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2414-15 (2006); *see, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[18] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[19]

The grievant had engaged in protected activities by initiating a prior grievance and submitting a workplace violence complaint.[20] However, beyond the proximity in time between these events, the grievant has presented no evidence that a causal link exists between the grievant's prior protected acts and the alleged adverse action at issue in this case.[21] There is no indication that the agency's decision not to approve her use of annual leave was motivated by improper factors. Rather, as discussed above, it appears that the determination was based on the facility's application of the policy to the grievant's situation. Because the grievant has not raised a sufficient question as to the elements of a claim of retaliation, the grievant's claim 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 wishes to conclude the grievance and notifies the agency of that desire.

Claudia T. Farr
Director

[18] *See, e.g.*, EEOC v. Navy Fed Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).
[19] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).
[20] *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).
[21] Prior to the agency's denial of paid leave for her October 23, 2009 absence, the grievant had submitted a workplace violence complaint (on or about July 24, 2009) and a grievance (on or about August 12, 2009).