

Issue: Qualification – Benefits/Leave (Annual Leave); Ruling Date: March 29, 2010;  
Ruling #2010-2574; Agency: Department of Medical Assistance; Outcome: Not  
Qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Medical Assistance Services  
Ruling No. 2010-2574  
March 29, 2010

The grievant has requested a ruling on whether her November 20, 2009 grievance with the Department of Medical Assistance Services (“DMAS” or “the agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

This grievance concerns the grievant’s request for an exception to the maximum carryover of annual leave time permitted by policy. The grievant states she contacted her agency’s human resources department in July 2009 to discuss a carryover of approximately 97.5 hours she lost from the 2008 leave year.<sup>1</sup> In essence, she asked the agency to restore the 97.5 hours of annual leave to her account. The grievant presented a formal request to management in July 2009. It appears that agency management and human resources were initially open to granting the grievant’s request, but needed to determine whether granting the grievant’s request was appropriate under state policy. Based on guidance from DHRM, the agency decided that it could not grant the grievant’s request for an exception to the carryover limit, because the request had been made at least seven months after the end of the leave year. The grievant submitted this grievance to challenge the agency’s actions and seeks the restoration of 97.5 hours of annual leave lost from the 2008 leave year.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.<sup>2</sup> Further, complaints relating solely to the establishment or revision of wages, salaries, position classifications, or general benefits “shall not proceed to a hearing.”<sup>3</sup> Accordingly, challenges to such decisions do not qualify for a hearing unless the grievant presents evidence raising a sufficient question as to whether the agency misapplied or unfairly applied policy, or discrimination, retaliation or discipline

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<sup>1</sup> As defined by policy, the leave year runs from January 10 to January 9. Department of Human Resource Management (DHRM) Policy 4.10, *Annual Leave*.

<sup>2</sup> Va. Code § 2.2-3004(B).

<sup>3</sup> Va. Code § 2.2-3004(C).

improperly influenced the decision.<sup>4</sup> In this case, the grievant claims that the agency misapplied or unfairly applied 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 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.”<sup>5</sup> Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.<sup>6</sup> 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.”<sup>7</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>8</sup> Because this case involves the alleged loss of a leave benefit, it will be assumed, for purposes of this ruling only, that the grievant experienced an adverse employment action.

This grievance, however, does not raise a sufficient question as to whether the agency misapplied or unfairly applied policy. DHRM Policy 4.10 establishes defined limits on how much unused accrued annual leave employees may carry forward from one year to the next, with the following exception:

Agency heads may grant an exception to the limit of accrued annual leave that may be carried over into the next year when employees have not been allowed to use their leave because of agency work demands over a substantial period of time. Such exceptions should be given in writing and should indicate the timeframe during which the employee must use the additional leave time.<sup>9</sup>

Although there is no explicit timeframe for employees to request an exception, this policy language provides the agency head discretion in granting such requests. As such, the grievance procedure accords much deference to management’s exercise of judgment in this area, but not without limitation. Rather, this Department has repeatedly held that even where an agency has significant discretion to make decisions, qualification is warranted where evidence presented by the grievant raises a sufficient question as to whether the agency’s determination was plainly

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<sup>4</sup> Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1.

<sup>5</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>6</sup> 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.

<sup>7</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

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

<sup>9</sup> DHRM Policy 4.10, *Annual Leave*. Because it is the agency head’s option to grant this exception, whether the division director approved the grievant’s request is irrelevant. The agency head’s expressed opinion supports human resources’ denial of the grievant’s request.

inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.<sup>10</sup> Arbitrary or capricious is defined as a decision made “[i]n disregard of the facts or without a reasoned basis.”<sup>11</sup>

Here, there is no indication that the agency’s denial of the grievant’s request for an exception to the carryover limits was arbitrary or capricious. Rather, the decision appears to be based on a reasonable approach in that the grievant’s formal request was made well after the new leave year began.<sup>12</sup> Further, it appears that the agency sought input DHRM, which indicated that the extension would set an extraordinary precedent and not be approved by the Department of Accounts. It appears that this determination is also consistent with the agency’s own internal policy on annual leave carryover extensions, DMAS Human Resource Policy No. 5. That policy states that extensions to the leave year can be granted, but generally for no more than three months.<sup>13</sup> The grievant’s request to restore the 97.5 hours of unused annual leave occurred after the first three months following the end of the 2008 leave year. The agency’s approach appears to be based on appropriate rationales, rather than being arbitrary or capricious.

The grievant also argues that she was unaware of the opportunity to request the carryover exception or when that request needed to be made. However, the grievant should have been aware of the limits on leave carryover and the narrow exception stated in DHRM Policy 4.10 and DMAS Human Resource Policy No. 5. Indeed, under these policies, if an employee does not act to protect his/her leave balance, the annual leave time that exceeds the carryover limit is lost automatically at the end of the leave year. It is only when an exception applies and is approved by the agency head can this typical loss of leave be prevented.<sup>14</sup> The apparent requirement that an employee’s request for an exception be made prior to the end of the leave year, i.e., before the leave time is lost, is not unreasonable and the grievant should have been aware that making a request seven months later would be untimely. The grievant’s stated lack of knowledge here does not raise a question of a misapplication or unfair application of policy. In addition, there is no evidence that the grievant’s request was treated differently than other similar requests.

In sum, the grievance does not raise a sufficient question as to whether the agency’s determination was an unfair application of policy or otherwise arbitrary or capricious. As such, the grievance does not qualify for a 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

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<sup>10</sup> See, e.g., EDR Ruling 2008-1879; EDR Ruling No. 2007-1651.

<sup>11</sup> See *Grievance Procedure Manual* § 9.

<sup>12</sup> As also endorsed by DHRM, this appears to be an objectively reasonable approach given the administrative burden of recalculating leave accounts in subsequent leave years and the potential for inequitable treatment of agency employees if a request submitted so long after the end of the leave year was granted.

<sup>13</sup> DMAS Human Resource Policy No. 5, *Leave Types and Usage* § B.3.

<sup>14</sup> See DHRM Policy 4.10, *Annual Leave*; see also DMAS Human Resource Policy No. 5, *Leave Types and Usage* § B.3.

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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.

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Claudia T. Farr  
Director