

Issue: Qualification – Benefits/Leave (LWOP); Ruling Date: September 7, 2010;
Ruling #2011-2702; 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. 2011-2702
September 7, 2010

The grievant has requested qualification of her May 4, 2010 grievance with the Department of Corrections (the agency) regarding an absence on April 12, 2010. For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

On April 11, 2010, the grievant states she discovered that her car had been broken into and her wallet and medications stolen. Because she needed to sort out these issues, she sought to be off from work on April 12, 2010. She states that she attempted to call a supervisor, the Major, that morning but was unable to reach her. The grievant did not leave a message for the Major. Instead, the grievant contacted the Warden's assistant and told her about the situation. It does not appear that the grievant attempted any further communication to the facility and was away from work the entire day on April 12, 2010.

When the grievant returned to work on April 13, 2010, she was asked by the Major why she did not call and ask to use leave. The grievant felt her contact to the Warden's assistant was sufficient and that there would be no question about the appropriate use for leave in her situation. The grievant apparently sought to use four hours of sick personal leave, because she went to the doctor for an appointment and to refill her prescriptions, and four hours of annual leave to cover the day. The agency disapproved and placed the grievant on leave without pay for April 12, 2010 and docked her pay. It appears the agency asserts that the grievant did not contact a member of management to request leave prior to her absence from work. The grievant initiated this grievance to challenge these actions.

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 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 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 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.”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) 4.30, an agency’s approval is required before utilizing 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 This policy also provides that an employee’s leave request should comply with any specific requirements of an agency’s policy.⁹ The facility’s leave policy, Local Operating Procedure 110.1B (LOP 110.1B), states that annual leave taken without advance approval may be considered unauthorized leave.¹⁰ Further, for sick leave, the facility’s policy requires the employee to notify his/her supervisor or Shift Commander within certain time parameters.¹¹ An unauthorized absence may result in the employee being placed on leave without pay for the duration of the absence.¹²

The agency appears to have considered the grievant’s absence unauthorized and did not approve her after-the-fact leave request because she did not get in touch with a member of

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

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 4.30.

⁹ *Id.*

¹⁰ Local Operating Procedure 110.1B, Hours of Work; Sick and Annual Leave (“LOP 110.1B”) § IV.B.

¹¹ *Id.* § IV.C.

¹² *Id.*; *see also* DHRM Policy 4.30.

management to request the use of leave on the morning of her absence.¹³ Because the grievant did not comply with the agency's policy for requesting leave, the absence was not approved and she was placed on leave without pay, consistent with policy. 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. 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 compared to other employees in similar situations.

Retaliation/Harassment

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;¹⁴ (2) the employee suffered a materially adverse action;¹⁵ 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 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.¹⁶ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.¹⁷

Assuming for purposes of this ruling only that the grievant had engaged in a protected activity, the grievance still does not qualify for a hearing because the grievant has presented no evidence that a causal link exists between any protected acts and the alleged adverse action at issue in this case. There is no indication that the agency's decision not to approve her use of 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.

¹³ The grievant's argument that she was allowed to use annual leave to cover an absence on March 2, 2009, when she called in, is a different situation because she actually reached a member of management to request the use of leave. In addition, the grievant states that she called her supervisor to use personal leave on December 21, 2009 and left a message. The supervisor reportedly did not receive the message, but told the grievant not to worry about it. However, that situation is also different than the one at issue in this case, in which the grievant did not have any contact with her supervisor by leaving a message or otherwise.

¹⁴ 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).

¹⁵ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); see, e.g., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

¹⁶ See, e.g., *EEOC v. Navy Fed Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005).

¹⁷ See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

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