

Issue: Qualification – Benefits/Leave (LWOP); Ruling Date: March 11, 2011; Ruling No. 2011-2899; Agency: Department of Corrections; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2011-2899
March 11, 2011

The grievant has requested a ruling on whether his December 25, 2010 grievance with the Department of Corrections (the agency) qualifies for a hearing. For the reasons below, this grievance does not qualify for a hearing.

FACTS

In his December 25, 2010 grievance, the grievant alleges the agency improperly placed him on leave without pay status for 2.7 hours. The grievant requested to take 76 hours of leave from November 10-16, 2010, which the agency subsequently approved. At the time of his request, the grievant had 115 hours of available leave. However, on October 30, 2010, the grievant left work early reporting he was sick, used 5.7 hours of leave, and subsequently called in sick for the next three twelve hour shifts as well, resulting in the use of 41.7 hours of unscheduled leave. The grievant did not report back to work until after he took the 76 hours of pre-approved leave. On November 16, 2010, the grievant had exceeded his 115 available hours by 2.7 hours. As a result, the agency deducted the equivalent value of 2.7 hours from the grievant's December 16, 2010 paycheck.

The grievant asserts the agency should have notified him that his leave balance was exhausted, or in the alternative, should have given him an opportunity to make up his hours to avoid taking leave without pay. Furthermore, the grievant alleges that another officer was allowed to make up his hours to avoid taking leave without pay, but he was not afforded the same opportunity. Hence, 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

¹ See Va. Code § 2.2-3004(B).

“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.

For an allegation of misapplication 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. 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, each employee is accountable for knowing his correct leave balance and accrual rate.⁸ If it is discovered that an employee has used annual leave in excess of the amount to which he was entitled, the employee may be required to repay the agency for the leave taken in error.⁹ Repayment may occur by deducting the equivalent value of the leave time from the employee’s pay.¹⁰ Likewise, under the agency’s leave policy, “[e]mployees shall be responsible for keeping accurate, up-to-date personal leave records to assist in verifying leave records.”¹¹

Furthermore, under the agency’s leave policy, notification of an absence by the grievant does not mean that the agency will necessarily approve the leave taken.¹² In instances where leave is not approved or where the leave exceeds the employee’s current leave balance, agency policy mandates that the employee be placed on leave without pay.¹³ Specifically, the Department of Corrections (DOC) Operating Procedure 110.1 states:

² Va. Code § 2.2-3004(C).

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 4.10, Accrual of Annual Leave - Leave Accrued, Used, Or Paid in Error.

⁹ *Id.*

¹⁰ *Id.*

¹¹ DOC Operating Procedure 110.1, Attachment #3. *See also* DOC Procedure 5-12.24, Maintenance of Leave Records, Section A.2.

¹² DOC Operating Procedure 110.1, Hours of Work and Leave of Absences § IV.B.4.

¹³ *Id.* at § IV.J.1.

“Absence without prior approval may be charged as leave without pay even though a leave balance exists, and the employee taking such leave is subject to the appropriate discipline. Absences that exceed current leave balances shall be charged as leave without pay and are subject to appropriate discipline. There will be no accrual of annual leave (or traditional sick leave) in a pay period in which the employee is on leave without pay, or in a docking status (XX).”¹⁴

Here, the grievant took 41.7 hours of unscheduled leave in addition to 76 hours of pre-approved leave which exceeded the grievant’s leave balance. Policy does not require the agency to give notice to the grievant when he has exhausted his leave balance, but rather states that it is an employee’s responsibility to maintain accurate up-to-date personal leave records. Therefore, this Department cannot find that the agency acted erroneously or inconsistently with the language of the applicable policies. Instead, the agency’s management action appears to have been proper pursuant to mandatory policy provisions.

Additionally, the grievant asserts that the agency unfairly applied the policy because another officer was allowed to make up his hours to avoid leave without pay, yet he was not afforded the same opportunity. For an allegation of unfair application of policy to qualify for a hearing, this Department has repeatedly held that qualification is warranted only where evidence presented by the grievant raises a sufficient question that the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy or was otherwise arbitrary or capricious.¹⁵

Here, the grievant has not presented sufficient evidence to show that he is similarly situated to the other officer. By itself, the fact that another officer was allowed to “make up hours” does not alone support a finding of arbitrariness or raise a sufficient question as to whether an unfair application of applicable policies has occurred. On the contrary, the agency offers a reasoned basis for their staffing decision and asserts the grievant’s situation was not the same as the other officer. Since there was a potential staff shortage on December 11-12, 2010, the agency authorized the grievant’s supervisor to bring in one staff member from another shift to cover the anticipated shortage. Pursuant to agency policy,¹⁶ the supervisor reviewed his staff schedules and determined which staff member could work the extra hours without incurring overtime liability to the agency. According to the agency, the supervisor determined the other officer was short hours for the week and, if staffed, he would not fall into overtime status. Hence, the agency’s decision to staff the other officer was based solely on a facility need and as a way to control potential overtime costs, not as a result of an officer taking unscheduled leave and needing to make up hours to avoid leave without pay.

Therefore, this Department concludes that this grievance fails to raise a sufficient question as to whether the relevant leave policies have been either misapplied and/or unfairly applied. As such, this grievance does not qualify for hearing

¹⁴ *Id.*

¹⁵ See *Grievance Procedure Manual* § 9 (defining arbitrary and capricious as a decision made “[i]n disregard of the facts or without a reasoned basis”); see also, e.g., EDR Ruling No. 2008-1879.

¹⁶ DOC Operating Procedure 110.2, Overtime and Schedule Adjustments § V.A.

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