Issue: Qualification – Benefits/Leave (Annual Leave); Ruling Date: June 15, 2011; Ruling No. 2011-2961; 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
EDR Ruling No. 2011-2961
June 15, 2011

The grievant has requested a ruling on whether his December 14, 2010 grievance with the Department of Corrections (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In his December 14, 2010 grievance, the grievant alleges that the agency denied his leave request. He asserts that in the past, he has been allowed to schedule off as many days as he wanted, so long as he had leave to cover the time off. The agency has now limited annual leave to no more than five consecutive workdays.

DISCUSSION

The grievance statutes and procedure reserve to management 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 essentially claims misapplication or unfair application of policy.

Misapplication 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

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

those that involve "adverse employment actions."[4] Thus, typically, a 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] Assuming without deciding that the denial of leave in this case constitutes an adverse employment action, as explained below, the grievance does not qualify of hearing as the grievant has not presented a sufficient question of whether a misapplication of policy or an unfair application of policy occurred.

The applicable state policy in this case is Department of Human Resource Management (DHRM) Policy 4.10. DHRM Policy 4.10 provides, in part:

> Employees must request and receive approval from their supervisors to take annual leave. Employees should make their requests for leave as far in advance as possible. When practical, and for as long as the agency's operations are not affected adversely, an agency should attempt to approve an employee's request for annual leave. However, supervisors may deny the use of annual leave because of agency business requirements. Approval of leave may be rescinded if the needs of the agency change.

Clearly, state policy provides management the discretion to approve or deny an employee's request for leave. Moreover, state policy allows agencies to adopt policies which do not conflict with state policy.[8] Agency management has a great deal of discretion in fashioning policies and, so long as they are not inconsistent with state policy, agencies are free to adopt policies and procedures that, in management's estimation, best suit the needs of the agency. Here, the agency asserts that by granting blocks of leave not to exceed five consecutive workdays, agency staff is better informed, proper staffing is enhanced, and more people have greater opportunities take time off. The agency allows exceptions to the general rule of not more than five workdays of leave if special circumstances exist. We cannot conclude that agency has violated any mandatory policy by implementing its new agency policy change. The agency has articulated business reasons for the modification. Thus, we find no misapplication of policy.

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

[8] DHRM Policy 1.01.

Nor does this grievance raise a sufficient question as to whether the agency's application of policy was unfair, plainly inconsistent with other similar decisions within the agency, or otherwise arbitrary or capricious.[9] Here, the grievant has provided this Department with evidence that one other individual was granted an exception to the policy. The agency concedes the point, explaining that in scheduling there was an oversight. The agency explains that the scheduling of leave is an extremely onerous manual task coordinating multiple calendars with numerous requests. The grievant has provided no evidence to rebut the agency's contention that the exception was anything other than an error. Accordingly, in the absence of any violation of a mandatory policy provision or any unfairness in the application of this new policy change, 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 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

[9] *See Grievance Procedure Manual* § 9 (defining arbitrary or capricious as a decision made "[i]n disregard of the facts or without a reasoned basis"); *see also, e.g.*, EDR Ruling 2008-1879.