Issue: Qualification – Benefits/Leave (Leave Without Pay); Ruling Date: August 1, 2011; Ruling No. 2011-3025; Agency: Virginia Department of Transportation; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Transportation
Ruling No. 2011-3025
August 1, 2011

The grievant has requested a ruling on whether her January 24, 2011 grievance with the Department of Transportation (the "agency" or "VDOT") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Bridge Tunnel Patroller for the agency. On the evening of December 23, 2010, the grievant called in sick for her December 24, 2010 holiday shift and the supervisor on duty informed her that she would need to provide a doctor's note upon her return to work. On December 25, 2010, the grievant returned to work without a doctor's note and the supervisor on duty informed the grievant that she would be sent home until such note was produced. The grievant was relieved from her station after approximately 35 minutes of work on December 25, 2010.

On December 28, 2010, the agency informed the grievant that her December 30, 2010 direct deposit payroll check for the pay period of December 10-24, 2010 had been stopped because she had not produced medical documentation for her December 24th absence. She was therefore placed on leave without pay status for that day. Meanwhile, the grievant was unable to obtain a doctor's appointment until December 29, 2010, due to the Christmas holiday and a snow storm that occurred during that week. According to the grievant, she explained her predicament to her superintendent, but she alleges that her superintendent was unresponsive and unwilling to help with the situation. Furthermore, the grievant felt her superintendent went out of her way to make an example of the grievant by allegedly singling her out, harassing, and unfairly treating the grievant by taking such "extreme measures" when she called in sick on a holiday. On December 30, 2010, the grievant produced medical documentation to the agency which covered her absences from December 24-29, 2010. The agency then restored the grievant's vacation leave, holiday pay, and a payroll check was issued to the grievant on January 5, 2011.

The grievant initiated her grievance on January 24, 2011, alleging that it was an abuse of authority, disparate treatment, and harassment by her superintendent to place her on leave without pay status when she did not produce medical documentation for her December 24, 2010 absence. The agency states it had the authority, pursuant to the Department of Human Resource Management (DHRM) Policy 4.55 and the agency's personnel holiday call-in procedure, to

request a doctor's note for the grievant's December 24, 2010 absence. During the third resolution step meeting, the grievant stated that she incurred some late fees for bills she was unable to timely pay because her payroll check had not timely issued. Therefore, the third step respondent found it appropriate to reimburse the grievant for the late fees from December 30, 2010 through January 5, 2011. On April 1, 2011, the grievant requested the agency to qualify her grievance for hearing because she felt her issues were not concluded fairly. The agency head denied qualification for hearing, and the grievant now seeks a qualification determination from this Department.

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, general benefits, contents of statutes, ordinances, personnel policies, procedures, rules, and regulations "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 abuse of authority, disparate treatment, and harassment by management.

Management's Alleged Abuse of Authority - Misapplication and/or Unfair Application of Policy

Fairly read, the grievant's claims assert in a part a misapplication, or unfair application of policy. For such a claim to qualify for 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]

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[1] *See* Va. Code § 2.2-3004(B).
[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).

Although placing an employee on leave without pay status typically rises to the level of an adverse employment action, in this case, the grievant's leave request was ultimately approved and her vacation leave, holiday pay, and compensation were restored. As such, the superintendent's actions did not adversely affect the terms, conditions or benefits of the grievant's employment. Moreover, even if that the agency's action rose to the level of an adverse employment action in this case, the Department of Human Resource Management Policy (DHRM) 4.55, expressly gives management the authority to request verification for the use of sick leave.[8] This policy states:

> "An employee who wishes to use sick leave must comply with management's request for verification of the appropriateness of using sick leave. An employee's use of paid sick leave may be denied if the employee fails to comply with a reasonable management request for verification of the need for sick leave, or if the verification provided is inadequate."[9]

Similarly, VDOT's holiday call-in personnel procedure states that if an employee calls in sick on a holiday, then he or she will be required to bring a doctor's note to his or her supervisor dated for the same day.[10]

Here, pursuant to DHRM policy and agency personnel procedures, the agency appears to have acted within its authority by requiring the grievant to bring a doctor's note for her absence on December 24, 2010, and by putting the grievant on leave without pay status until the appropriate medical documentation was received. In such a case, this Department has repeatedly held that qualification is warranted only where evidence presented by the grievant raises a sufficient question as to whether the management action was nevertheless plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[11] In this case, the grievant has not presented sufficient evidence to show that the agency disregarded the intent of the applicable policies and treated other similarly situated employees differently, nor does the grievance show that the agency's decision to place the grievant on leave without pay status was arbitrary or capricious. Although the grievant provided a list of other employees who called in sick during a state holiday, this list does not indicate how the agency handled their sick leave requests any differently than the grievant's. Thus, the list alone does not support a finding of arbitrariness nor raise a sufficient question as to whether a misapplication or unfair application of policy has occurred. For the above reasons, this grievance fails to raise a sufficient question as to whether the relevant sick leave policies have been either misapplied and/or unfairly applied or that management acted arbitrarily or capriciously.

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[8] DHRM Policy 4.55, Traditional Sick Leave.
[9] *Id*.
[10] VDOT Holiday Call-In Procedure – Effective February 1, 2010.
[11] *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.

Disparate Treatment/Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination.[12] To qualify such a grievance for hearing, there must be more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[13]

The grievant has asserted disparate treatment because she alleges other employees called in sick during a state holiday, but that "these extreme measures were not taken" against them. However, beyond a bare allegation of "discrimination," the grievant has presented no claim or evidence that she was treated differently *based on a protected status*. Therefore, the claims in the grievance are insufficient to raise a question of disparate treatment and thus do not qualify for hearing.

Harassment

While grievable through the management resolution steps, claims of harassment qualify for a hearing only if the grievance claims and raises a sufficient question as to whether the challenged actions were based on protected status, race, color, national origin, age, sex, religion, political affiliation, disability, marital status or pregnancy.[14] In this case, the grievance does not base the claims of harassment on membership in any protected class, but rather states a generalized claim of supervisory harassment.[15] Accordingly, this issue does not qualify for a hearing.[16]

No Effectual Relief

Finally, to the extent the grievant is alleging hardship posed by the agency's failure to notify her of policy requirements and to timely issue her payroll check, it appears that there is no effectual relief that a hearing officer could order in this case. The agency restored the grievant's

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[12] *See* Va. Code § 2.2-3004(A) (grievances alleging discrimination on the basis of race, color, religion, political affiliation, age, disability, national origin or sex may be qualified for hearing); *See also* Executive Order No. 6 (2010).

[13] *See* Hutchinson v. INOVA Health System, Inc., C.A. No. 97-293-A, 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. Apr. 8, 1998).

[14] *Grievance Procedure Manual* § 4.1(b)(2); *see also* DHRM Policy 2.30 Workplace Harassment (effective 05/01/02).

[15] More specifically, in the facts section of her grievance, the grievant alleges that her superintendent "has been harassing [the grievant] since her arrival to [the facility]" and alleges the harassment began over a year ago with an unwarranted Written Notice and an incorrect paycheck. It appears the grievant did not challenge these management actions in a prior grievance.

[16] *See* EDR Ruling Nos. 2011-2874, 2009-2282, and 2009-2079.

vacation leave and holiday pay, and during the third resolution step found it appropriate to reimburse the grievant for the late fees she incurred from December 30, 2010 through January 5, 2011 while she waited for her payroll check to clear. As a result, even if the grievant were able to establish such a hardship at a hearing, a hearing officer could not order any portion of the remaining relief sought by the grievant (monetary damages for pain and hardship, an order that her superintendent attend training, and an order that the agency provide every employee with an agency policy handbook). The fact that there is no effectual relief that a hearing officer could order in this grievance is another reason that the grievant's request for qualification cannot be granted.[17]

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

[17] *See* EDR Ruling Nos. 2011-2698, 2010-2461, and 2010-2513.