

Issue: Qualification – Benefits (Annual Leave); Ruling Date: June 8, 2012; Ruling No. 2012-3347; Agency: Department of Rehabilitative Services; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Rehabilitative Services
Ruling Number 2012-3347
June 8, 2012

The grievant has requested a ruling on whether her March 1, 2012 grievance with the Department of Rehabilitative Services (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

For portions of 2011, the grievant was on approved short-term disability leave. During that leave period, the agency submitted leave requests on the grievant's behalf to utilize the grievant's annual leave balance such that the grievant continued to receive her full salary. Unfortunately, the grievant did not have sufficient leave to cover the entirety of those portions. Further complicating matters, the agency did not enter the grievant's leave appropriately. Thus, upon the grievant's return to work, her leave records showed an available balance of annual leave, which was not accurate. Consequently, the grievant took additional annual time during 2011, which, again, the grievant did not have available.

The matter was not realized by the agency until a leave audit was completed in early 2012. As a result, the grievant was notified of the discrepancy and told to repay the salary equivalent of leave taken beyond that which the grievant had available. The grievant's March 1, 2012 grievance challenges the agency's actions. Having progressed through the management steps without resolution, the grievant now seeks qualification of her grievance for a hearing.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.¹ Thus, by statute and under the grievance procedure, complaints relating solely to the establishment and revision of salaries, wages, and general benefits "shall not proceed to hearing"² unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. The grievant has not alleged discrimination, retaliation, or discipline. Therefore, the

¹ See Va. Code § 2.2-3004(B).

² Va. Code § 2.2-3004(C).

grievant's claims could only qualify for hearing based upon a theory that the agency has 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."³ Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.⁴ 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."⁵ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁶ For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action in that she asserts issues affecting her leave and compensation.

Although it appears that the grievant may be correct in asserting that the leave discrepancies were not entirely her responsibility, she has not shown that the agency's actions to fix the error and request reimbursement violated a specific mandatory policy provision. Indeed, state policy provides that "[e]mployees will be required to reimburse their agencies for time taken off from work if they did not have sufficient accrued leave to cover such time off."⁷ In addition, currently, both Virginia statutory law⁸ and the Department of Accounts' CAPP Manual⁹ appear to authorize (and indeed require in the case of the CAPP Manual) recovery of such overpayments without regard to fault. The grievant has also presented no evidence that the agency's action was inconsistent with other decisions made by the agency or otherwise arbitrary or capricious. Therefore, this Department concludes that the grievant has not presented evidence raising a sufficient question that any policies have been either misapplied and/or unfairly applied to qualify for hearing.

We understand the grievant's feeling of an unjust result here. Given the way these events transpired, it may well have been extremely difficult for the grievant to have actually known her

³ See *Grievance Procedure Manual* § 4.1(b).

⁴ 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.

⁵ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁶ *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁷ DHRM Policy 4.30. Once all the grievant's leave amounts were audited, it appears that the agency has accurately computed that a deficit occurred. Minor discrepancies were discovered during this Department's review, which the agency has stated it will be crediting to the grievant.

⁸ See Va. Code § 2.2-804.

⁹ See CAPP Manual, No. 50510, *Unpaid Leaves of Absences and Overpayments*, at 5 (stating that agencies "must take appropriate steps to collect" overpayments due to incorrect paperwork). The CAPP Manual also provides that the maximum period of repayment is the period of overpayment. *Id.*

leave balances upon returning to work. As such, we are encouraged that the agency states it is willing to revisit the repayment agreement and determine all available options under state policy. In so doing, the parties should be mindful of language included in the 2011 Budget Bill authorizing agencies “to seek compromise and settlement of erroneous payroll overpayments with the approval of the Attorney General pursuant to, and consistent with, § 2.2-514, Code of Virginia and as approved by the Governor or his designee.”¹⁰

Pursuant to such a possible compromise, the agency may want to consider how the reimbursement amount could be affected by re-calculating payments during the disability period as if the grievant did not utilize annual leave to obtain full 100% salary pay checks. Although the agency states the grievant gave authorization for the agency to do so, the grievant appears to dispute that at this time. Based on this Department’s review of the VSDP policy, it would appear that it might be the grievant’s option as to whether to utilize annual leave in this manner.¹¹ If we assume the grievant did not apply her annual leave during the disability period, she would undoubtedly be required to repay that portion of the salary above the 60% and 80% disability benefit that she received. However, it might also mean that the grievant would not have had an annual leave deficit during the latter part of 2011 and could have still been accruing annual leave through the end of the leave year. Consequently, the end result might be that the grievant would have a larger leave bank now to apply to the recomputed reimbursement to the agency. We have not made these calculations, so it is possible there could be no benefit or an extremely small benefit to the grievant if such assumptions are made. We merely point them out here to provide some thoughtful consideration for any further compromise or settlement discussions that may take place, especially given the fact that the grievant certainly was not at fault for leave requests submitted on her behalf not being entered accurately or timely.

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.

Claudia T. Farr
Director

¹⁰ 2011 Budget Bill § 4-6.01(e)(3).

¹¹ See DHRM Policy 4.57.