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QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2020-4990
December 9, 2019

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management[1] on whether her June 28, 2019 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is partially qualified for a hearing.

FACTS

Prior to the events at issue in this case, the grievant worked at Facility A. While working at Facility A, the grievant filed a grievance raising issues about her employment, and specifically alleging improper conduct by management at Facility A.[2] On April 10, 2019, the grievant transferred to Facility B. On or about June 19, 2019, management at Facility A submitted timesheets for the grievant for the weeks between March 5, 2019 and April 9, 2019. The agency asserts that the grievant did not complete her timesheets for these weeks before she transferred to Facility B. According to the agency, the warden at Facility A completed the timesheets using camera footage and other records to verify the grievant's arrival and departure times. In response, the grievant contends that she did in fact submit timesheets for these weeks, but they seemingly were not processed or approved by management at Facility A prior to her transfer.[3]

As completed by Facility A's warden, the timesheets indicate that the grievant did not work a full 8 hours on some days. The timesheets also indicate that the grievant did not have an available leave balance to cover her absences from work on other days. Management at Facility A substituted different types of leave to cover the grievant's absences when it was available. Nonetheless, the grievant did not have sufficient accrued leave to cover 0.4 hours of her absences at Facility A, as reflected on the timesheets completed by the warden.

[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.
[2] Those matters were, in part, addressed in EDR Ruling Number 2019-4855.
[3] The grievant has not presented EDR with copies of the timesheets she allegedly submitted.

The leave adjustments on the grievant's timesheets from Facility A also impacted her leave balances at Facility B. As a result, the grievant no longer had sufficient leave to cover some of her absences at Facility B between April 10 and June 3, 2019. The grievant's pay at Facility B was docked for a total of 41 hours due to absences between those dates for which she did not have leave. On June 21, the grievant was notified that her pay for those 41 hours, combined with the 0.4 hours to be docked from Facility A, would be deducted from her July 1 paycheck, for a total of 41.4 hours. According to the grievant, the July 1 adjustment further caused her to be docked an additional 8 hours of pay on her July 16 paycheck. Overall, the grievant was docked for 49.4 hours of pay between her July 1 and July 16 paychecks.

The grievant filed a grievance on June 28, 2019, alleging that Facility A had "falsified [her] timesheets" and was retaliating against her for her past grievance activity. The grievant further argues that she should have been permitted to use Civil and Work-Related Leave on two days when she attended job interviews, and that Facility A shared "derogatory information" about these matters with her supervisor at Facility B as a form of harassment. As relief, the grievant requested "reliable, solid evidence to back the alleged timesheets" completed by Facility A, restoration of her leave and pay for the hours she was docked, an independent review of the timesheets completed by Facility A, and "[n]o further harassment" from Facility A's management. Following the management resolution steps, the agency head determined that the grievance record did not contain evidence to demonstrate that a misapplication of agency policy had occurred or that the actions of management at Facility A constituted workplace harassment and/or retaliation. As a result, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[4] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[5] Claims relating solely to the establishment and revision of salaries, wages, and general benefits generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state or agency policy may have been misapplied or unfairly applied.[6]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[7] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action. 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

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[4] *See Grievance Procedure Manual* §§ 4.1 (a), (b).
[5] *See* Va. Code § 2.2-3004(B).
[6] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[7] *See Grievance Procedure Manual* § 4.1(b).

responsibilities, or a decision causing a significant change in benefits."[8] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[9] Because the grievant has raised issues related to her timesheets and use of leave that resulted in an alleged loss of pay for 49.4 hours of work, she has sufficiently alleged that she experienced an adverse employment action.

Civil and Work-Related Leave

DHRM Policy 4.05, *Civil and Work Related Leave*, states that employees may use Civil and Work Related Leave ("CWR Leave") "[t]o interview for other positions with the state," and provides that "[a]gencies may establish reasonable limits for this use of Civil and Work-Related Leave." The agency's Operating Procedure ("OP") 110.1, *Hours of Work and Leaves of Absence*, contains similar language allowing employees to use CWR Leave to "participate in interviews for state employment opportunities."[10] OP 110.1 generally prescribes that a maximum of 8 hours of CWR Leave may be used annually to attend state employment interviews. An employee's Organizational Unit Head has the discretion to approve additional CWR Leave for this purpose.[11]

Here, the grievant argues that she should have been permitted to use 16 hours of CWR Leave for state employment interviews on two days: March 29 and April 8, 2019. On the timesheets completed by Facility A, 16 hours of the grievant's Annual Leave were applied to her absence on those days. EDR has not, however, reviewed anything in the grievance record to show that the grievant requested permission to use CWR Leave for either or both of those days. Moreover, the grievant would have been authorized to take only 8 hours of CWR Leave for interviews pursuant to OP 110.1, absent approval from her Organizational Unit Head to use additional CWR Leave for this purpose. Most importantly, however, the agency has indicated that the grievant did not have any CWR Leave available that she could have used for interviews on those two dates. EDR has not reviewed evidence that the agency's decision with regard to this issue was a misapplication and/or unfair application of policy, was inconsistent with other decisions regarding the approval of CWR Leave for other employees, or was otherwise arbitrary or capricious. It appears instead that the agency's decision to apply Annual Leave for these two days when the grievant interviewed for other state positions was consistent with the discretion granted by policy. Accordingly, this issue is not qualified for a hearing and will not proceed further.

Agency's Completion of Timesheets

In the remainder of her grievance, the grievant generally asserts that Facility A "falsified" her timesheets in order to deplete her leave balances and dock her pay. She further contends that she has not received evidence from the agency to confirm the accuracy of the timesheets; that the timesheets were inaccurately completed by Facility A as a form of retaliation and/or harassment; that Facility A submitted the timesheets without notifying her beforehand; and that Facility A

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[8] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[9] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[10] Department of Corrections OP 110.1, *Hours of Work and Leaves of Absence*, at 13.
[11] *Id.*

contacted her management at Facility B about the timesheets in an attempt to "sabotage [her] new position."

Having thoroughly considered all the facts and circumstances surrounding this case, EDR finds that the grievant has raised a sufficient question as to whether the agency properly and accurately completed the grievant's timesheets. Based on a review of the grievance record, there is an irreconcilable factual dispute between the parties as to whether the timesheets provide an accurate reflection of the grievant's actual hours of work. EDR is unable to resolve this factual issue from the information provided by the parties. Accordingly, this is a matter best addressed by a hearing officer with the authority to make "findings of fact as to the material issues in the case and the basis for those findings"[12] and order relief as appropriate.[13]

The agency's Operating Procedure ("OP") 110.1, *Hours of Work and Leaves of Absence*, states that "[w]eekly timesheets must be signed and dated . . . no later than six calendar days following the end of the scheduled workweek."[14] The policy appears to make both the employee and management responsible for the timely submission of timesheets. Based on the evidence before EDR for purposes of this ruling, it appears that neither the grievant nor Facility A's management complied with the requirements of OP 110.1. The grievant argues that she properly submitted timesheets for the weeks in question. The agency denies that this was the case. What is clear is that the grievant's timesheets were not actually processed until approximately two months after she transferred to Facility B. Under OP 110.1, the grievant should have submitted these timesheets within six calendar days of the workweeks to which they applied. To the extent she failed to do so, it was management's responsibility to ensure that she complied with the requirements of OP 110.1. There is no information in the grievance record to show that management at Facility A took any action to address the grievant's timesheets before she transferred to Facility B.

With regard to the content of the timesheets themselves, the agency essentially argues that, given the delay between the weeks to which the timesheets applied and the time when they were completed, the only available resources to verify the grievant's hours of work were camera footage and other written records. Facility A's decision to verify the grievant's hours of work using these means is not, in itself, an unreasonable approach to the situation presented in this case. The grievant no longer worked at Facility A, could not be readily contacted, and, in any event, was not likely to remember her hours of work from almost two months in the past. Having thoroughly reviewed the information in the grievance record and the submissions of the parties, however, EDR is unable to fully determine whether there is factual support for the grievant's hours of work as recorded by the agency on the timesheets.

Though not explicitly stated in OP 110.1, the hours of work entered on an employee's timesheets must be an accurate reflection of their work time; failure to accurately record one's hours of work may give rise to a charge of falsification of records, which may justify the

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[12] Va. Code § 2.2-3005.1(C); *Grievance Procedure Manual* § 5.9.
[13] Va. Code § 2.2-3005.1(A); *Grievance Procedure Manual* § 5.9(a).
[14] Department of Corrections OP 110.1, *Hours of Work and Leaves of Absence*, at 5.

issuance of a Group III Written Notice with termination.[15] Here, each day entered on the timesheets by Facility A reflects the grievant's time of arrival to and departure from work. The agency recorded a 30-minute lunch break from 12:00 p.m. to 12:30 p.m. for each day the grievant worked.[16] On multiple days, a 30-minute lunch break caused Facility A to use a small amount of Annual Leave because the grievant's recorded work time did not total 8.5 hours (*i.e.*, 8 hours of work plus a 30-minute lunch break). On March 22, 2019, for example, the timesheet states that the grievant arrived at work at 7:59 a.m. and left work at 4:15 p.m. Applying a 30-minute lunch break reduced the grievant's work time to 7.8 hours and thus required the use of 0.2 hours of Annual Leave to account for a full 8-hour workday. At least three additional days on the timesheets reflect a similar practice that consumed less than one hour of the grievant's Annual Leave per day.

Moreover, Facility A applied 5.5 hours of Annual Leave on April 3, 8 hours of Annual Leave on April 4, and 2.3 hours of Annual Leave on April 5 because it apparently could not account for the grievant's whereabouts for the entirety of those days. On April 4, the timesheets note that there was no sign-in sheet or other method of confirming the grievant's work hours for the day. Despite the grievant's apparently unauthorized absence for 15.8 hours between April 3 and April 5, Facility A took no action other than to apply her Annual Leave to cover those hours. Furthermore, there is nothing in the grievance record to indicate that the grievant requested or intended to take leave between April 3 and 5, and the grievant denies that she was absent from work on those days.

In response to the content of the timesheets, the grievant argues that her times of arrival and departure did not always correspond to what would have been captured through camera footage or other records. She further contends that she did not take a 30-minute lunch break each day, but instead usually worked through lunch. EDR has not reviewed information from the agency that would disprove the grievant's arguments about her work practices, which, if true as she has described, would potentially remove the agency's basis for applying Annual Leave to some of the dates listed on the timesheets, thus reducing the overall number of hours for which her pay should have been docked. Moreover, the grievance record does not suggest that the agency considered, or attempted to consider, what the grievant's actual hours of work were during the period covered by the timesheets, particularly for those days where there are no records to confirm her arrival and/or departure from work.

While documentary evidence such as video recordings or sign-in sheets may adequately capture an employee's hours of work in many instances, this will not always be the case. For example, EDR has no information about whether it was an acceptable practice at Facility A to work through a lunch break; to adjust one's hours if working through a lunch break; or to record a 30-minute lunch break from 12:00 p.m. to 12:30 p.m. even if no break was actually taken. Indeed, as noted by the grievant, Facility A did not contact her to verify the content or accuracy of the timesheets before submitting them. While it may have been impossible to verify specific

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[15] *See* DHRM Policy 1.60, *Standards of Conduct*, Attachment A.

[16] It appears the grievant attended training for several days during the relevant time period. Facility A recorded her work hours on those days as a full 8 hours, again with a 30-minute lunch break.

details given the time delay, some of the issues noted above could have been addressed and/or corrected before the grievant's pay was docked.

In summary, the grievant has provided potentially legitimate justifications that would contradict some of the information on the timesheets, and the information provided to EDR by the parties does not fully demonstrate that the timesheets submitted by Facility A constitute an accurate record of her hours of work between March 5, 2019 and April 9, 2019. In the absence of evidence to disprove the grievant's arguments or otherwise verify the accuracy of the timesheets, EDR finds that the grievant has presented a sufficient question whether the agency improperly and/or unfairly recorded her hours of work for the period of time recorded on the timesheets at issue here. Accordingly, her claims with respect to that issue are qualified for a hearing.

In addition to her assertion that the timesheets are not an accurate record of her hours of work, the grievant further argues that management at Facility A improperly completed these documents as a form of harassment and/or retaliation. DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment[17] and bullying.[18] Likewise, a claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.[19] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[20]

In support of these additional arguments, the grievant raises a number of allegations about her employment at Facility A that are related to her use of leave, attendance, and work schedule, as well as alleged improper conduct by her former supervisor at Facility A. The grievant claims that these actions, including the completion of the timesheets after she transferred to Facility B, are part of a pattern of harassing and/or retaliatory behavior by management at Facility A that began after she filed a grievance in August 2018.[21] Given the factual questions about the content of the timesheets discussed above, as well as the grievant's assertions regarding the allegedly harassing and/or retaliatory motivation for Facility A's actions, EDR considers it appropriate to send these alternative theories and claims for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

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[17] Traditionally, workplace harassment claims were linked to a victim's protected status or protected activity. However, DHRM Policy 2.35 also recognizes non-discriminatory workplace harassment, defined as "[a]ny targeted or directed unwelcome verbal, written, social, or physical conduct that either denigrates or shows hostility or aversion towards a person not predicated on the person's protected class."

[18] DHRM Policy 2.35 defines bullying as "[d]isrespectful, intimidating, aggressive and unwanted behavior toward a person that is intended to force the person to do what one wants, or to denigrate or marginalize the targeted person." The policy specifies that bullying behavior "typically is severe or pervasive and persistent, creating a hostile work environment."

[19] *See* Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).

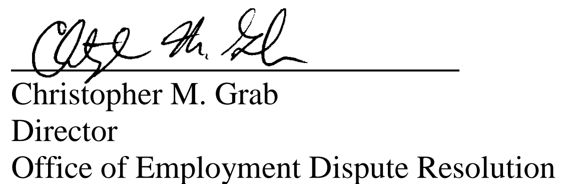
[20] *Id.*

[21] The grievant also alleges that the agency improperly issued her a Group II Written Notice relating to her attendance and use of leave. The Group II Written Notice was the subject of a separate grievance that advanced to a hearing. As of the date of this ruling, the hearing officer has not yet issued a decision in that case.

CONCLUSION

The grievant's June 28, 2019 grievance is qualified for a hearing as described above. At the hearing, the grievant will have the burden of proof.[22] If the hearing officer finds that the grievant has met this burden, they may order corrective action as authorized by the grievance statutes and grievance procedure, including back pay and restoration of benefits such as leave.[23] This qualification ruling in no way determines that any of the grievant's claims are supported by the evidence, but only that further exploration of the facts by a hearing officer is warranted. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for a hearing, using the Grievance Form B.

EDR's qualification rulings are final and nonappealable.[24]



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[22] *Rules for Conducting Grievance Hearings* § VI(C).
[23] Va. Code § 2.2-3005.1(A); *Rules for Conducting Grievance Hearings* § VI(C).
[24] *See* Va. Code § 2.2-1202.1(5).