Issue: Qualification – Discrimination (Race); Ruling Date: May 21, 2013; Ruling No. 2013-3545; Agency: Department of Juvenile Justice; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Virginia Department of Juvenile Justice
Ruling Number 2013-3545
May 21, 2013

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") on whether his January 7, 2013 grievance with the Department of Juvenile Justice ("DJJ" or "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a School Counselor with DJJ.[1] Effective December 15, 2012, the Director of DJJ approved Standard Operating Procedure ("SOP") 104, *Emergency Closings*. This policy defines a "designated employee" as an employee whose position is designated as essential to agency operations during emergencies. The policy further mandates that

> "all [Juvenile Correctional Center] employees (e.g., security, educational, BSU, food services, medical, etc.) are designated employees and required to report to work during authorized closings except for the following positions:
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> - Clerical staff
> - Business office staff
> - Human resources staff."

Thus, the grievant alleges that he became designated as an "essential" employee and required to report to work during emergency closings as a result of the implementation of this policy. He subsequently challenged the policy by initiating a grievance on January 7, 2013. The grievance advanced through the management resolution steps and to the agency head for qualification. On February 8, 2013, the agency head denied qualification and the grievant now seeks a qualification determination from EDR.

[1] Effective July 1, 2012, the former Department of Correctional Education ("DCE") merged with the Department of Juvenile Justice. The grievant had been an employee of DCE prior to the merger.

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.[2] Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[3] Thus, claims relating to issues such as the contents of statutes, ordinances, personnel policies, procedures, rules and regulations 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 policy may have been misapplied or unfairly applied.[4] In this case, the grievant primarily challenges the content of an agency policy designating him as "essential" in the case of an emergency. While he is entitled to pursue such a grievance through the management steps, as stated above, claims that solely challenge the contents of policy are not the type of cases that can be qualified for a grievance hearing.[5]

To the extent that the grievant alleges a misapplication of policy, we are unable to conclude that any policy violation has occurred under the facts presented. The grievant argues that his designation as "essential" under SOP 104 violates Department of Human Resource Management ("DHRM") policy because: 1) it went into effect prior to the changing of employees' Employee Work Profiles; 2) it is too vague to be enforceable because it does not specify how employees will be notified of their change in status to "essential;" 3) employees were not notified in a timely manner regarding potential disciplinary action that may follow if the policy is violated; and 4) the "essential" classification should only be utilized for those employees who provide for the health, safety, and life of the residents. DHRM policy grants management broad authority in designating employees as essential with respect to a variety of situations.[6] Specifically, DHRM policy states that "[a]n employee's 'non-designated' status may be changed to 'designated' as agency managers/ supervisors determine the necessity. Employees must be notified of their status as soon as practicable after any such change in status."[7] Nowhere within this policy can we find support for the grievant's assertions as outlined above. Accordingly, EDR can find no violation of any mandatory policy provision regarding SOP 104.

However, the grievant, who indicates that he is African-American, also challenges the discriminatory effect of the agency's Emergency Closings policy. As such, the grievant is essentially claiming that he is the victim of "disparate impact" discrimination (as opposed to "disparate treatment" discrimination). In order to prevail on a disparate impact claim, a grievant need not provide evidence of the employer's *subjective* intent to discriminate on the basis of his

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[2] *See Grievance Procedure Manual* § 4.1 (a), (b).
[3] *See* Va. Code § 2.2-3004(B).
[4] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).
[5] *See* EDR Ruling No. 2010-2407; EDR 2003-089; EDR Ruling No. 2001-U.
[6] *See* DHRM Policy 1.35, *Emergency Closings*.
[7] *Id*.

membership in a protected class. Instead, a grievant must demonstrate that a policy applied by the employer, although neutral on its face, is discriminatory in its application.[8]

A prima face case of disparate-impact discrimination is established when: (1) the plaintiff identifies a specific employment practice to be challenged; and (2) through relevant statistical analysis, proves that the challenged practice has an adverse impact on a protected group.[9] In meeting this test, "it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is 'responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities.'"[10] Once a prima facie case is proven, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employment practice.[11]

Here, the grievant seeks to demonstrate that the agency's Emergency Closings policy has a disparate impact upon minorities due to the fact that minorities hold, he alleges, over 75% of the agency's positions affected by this policy. Even assuming that the grievant is correct with respect to the statistics he cites, this evidence merely shows that application of the policy may have resulted in some disparate impact, not that any specific employment practice or policy has actually created the disparate impact within the agency. Further, we are unable to find where any court has extended a disparate impact analysis to include issues that do not involve selection procedures used in making decisions about one's employment, such as hiring, retention, or promotion, and we decline to do so here. Accordingly, this grievance is not qualified for hearing.

EDR's qualification rulings are final and nonappealable.[12]

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[8] Barnett v. Tech. Int'l, Inc., 1 F. Supp. 2d 572, 579 (E.D.Va. 1998) (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).
[9] Dunlap v. Tenn. Valley Auth., 519 F.3d 626, 639 (6th Cir. 2008) (citing Johnson v. U.S. Dep't of Health & Human Servs., 30 F.3d 45, 48 (6th Cir. 1994)).
[10] Smith v. City of Jackson, 544 U.S. 228, 241 (2005) (quoting Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989) (emphasis in original)).
[11] Johnson, 30 F.3d at 48.
[12] Va. Code § 2.2-1202.1(5).