Issues: Qualification – Retaliation (Grievance Activity) and Unpaid Suspension pending investigation results; Ruling Date: May 7, 2013; Ruling No. 2013-3563; 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 Department of Juvenile Justice
Ruling Number 2013-3563
May 7, 2013

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") of the Department of Human Resource Management ("DHRM") on whether his November 29, 2012 grievance with the Department of Juvenile Justice (the "agency") qualifies for a hearing. For the following reasons, the grievance does not qualify for hearing.

FACTS

The grievant is employed with the agency as a Juvenile Corrections Officer. On November 11, 2012, the grievant was apparently involved in an incident that resulted in a criminal charge against the grievant for assault of an inmate. The grievant was advised by the agency that he was being placed on unpaid suspension pending the outcome of criminal charges on November 28, 2012. On or about November 29, 2012, he initiated a grievance challenging the unpaid suspension.[1] The grievance proceeded through the management steps of the grievance process without resolution and the agency head denied the grievant's request for hearing. The grievant now seeks a qualification determination.

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 methods, means and personnel by which work activities are to be carried out 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 policy may have been misapplied or unfairly applied.[4]

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[1] The grievant asserts that the unpaid suspension was the most recent of a line of "continued adverse employment actions." To the extent those previous alleged actions have been raised by the grievant in the course of his present grievance, EDR has considered them to be background evidence.
[2] *See Grievance Procedure Manual* § 4.1.
[3] *See* Va. Code § 2.2-3004(B).
[4] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[5] Thus, typically, the 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 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]

In this case, the grievance, fairly read, asserts that the agency acted with a retaliatory intent in suspending him and that the suspension constitutes a misapplication and/or unfair application of policy. Each of these arguments will be addressed below.

Retaliation

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[8] (2) the employee suffered an adverse employment action;[9] and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[10] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[11]

In this case, the grievant has presented evidence that he has previously engaged in protected activity, including the initiation of grievances. Further, for purposes of this ruling, EDR will assume, without deciding, that his unpaid suspension could constitute an adverse employment action. The grievant's retaliation claim nevertheless does not qualify for hearing, however, as he has not raised a sufficient question that the agency's stated reason for his suspension—the criminal charge pending against him for allegedly assaulting an individual within the custody of the agency—was pretextual. To the contrary, the agency asserts that it has consistently suspended officers who have been charged with criminal conduct in the course of their work, and the grievant has not presented evidence that would challenge that assertion.

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[5] *See Grievance Procedure Manual* § 4.1(b).
[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).
[8] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).
[9] Although for the past six years EDR has used the "materially adverse action" standard for retaliation claims, we are returning to the "adverse employment action" standard for the assessment of all claims, including retaliation, as to whether they qualify for hearing. *See* Va. Code § 2.2-3004(A).
[10] *E.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005); Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000).
[11] *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981).

Accordingly, the grievant's claim that the agency retaliated against him in suspending him without pay is not qualified for hearing.

Misapplication of Policy/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. In this case, the grievant asserts that the agency misapplied and/or unfairly applied DHRM policy in suspending him without pay pending the resolution of the criminal charge against him.[12]

State policy permits an agency to suspend without pay an employee who is the subject of a criminal investigation, and such suspensions are not viewed as disciplinary actions.[13] Under the *Standards of Conduct*, an employee who is formally charged by outside authorities with a criminal offense related to the nature of his job or the agency's mission may be immediately suspended without pay for a period not to exceed ninety days.[14] If there has been no resolution of the criminal charges at the conclusion of the ninety-day period, the agency may continue the employee on paid suspension until the charge is resolved.[15]

In this case, the grievant was placed on unpaid suspension on November 28, 2012, as the result of a criminal charge related to his alleged assault of an individual within the agency's custody. He remained on unpaid suspension until February 28, 2013, when he was suspended with pay pending the resolution of the criminal charge. As previously noted, the agency states that it has applied this policy consistently to employees facing work-related criminal charges, and the grievant has not presented sufficient evidence to call this assertion into question. Accordingly, EDR concludes that there is insufficient evidence that the agency has misapplied or unfairly applied policy in this case to warrant qualification of this claim.

CONCLUSION

For all the foregoing reasons, the grievant's November 29, 2012 grievance is not qualified for hearing. EDR's qualification rulings are final and nonappealable.[16]

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Office of Employment Dispute Resolution

[12] The grievant also cites Executive Directive One for the proposition that "all state employees have the right to be treated fairly." As EDR's analysis of the agency's application of DHRM Policy 1.60 (which governs unpaid suspensions) includes consideration of whether the agency acted unfairly, we will merge the grievant's assertions regarding Executive Directive One into our discussion of that policy.
[13] DHRM Policy 1.60, *Standards of Conduct*, § C.2(b).
[14] *See id.*
[15] *Id.* at § C.2(c).
[16] Va. Code § 2.2-1202.1(5).