Issue: Qualification – Work Conditions (hours of work/shift); Ruling Date: April 11, 2014; Ruling No. 2014-3850; Agency: Department of Corrections; Outcome: Not Qualified.

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

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2014-3850
April 11, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether his December 25, 2013 grievance with Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as a Correctional Officer Senior. He is also a member of the United States Navy Reserve. The grievant was ordered to attend military drill at 7:00 a.m. on December 18, 2013 in order to complete a mandatory physical fitness test. The grievant was scheduled to work an overnight shift with the agency from the evening of December 17 through the morning of December 18. On or about December 12, the grievant notified his supervisor that he was scheduled for military drill on December 18 and requested to be excused from work on December 17. When the grievant's supervisor failed to confirm that he would be excused from work on that date, the grievant made a second request on December 16. After his supervisor again failed to respond, the grievant reported to work on December 17 and continued to state his need to be released for military drill. The grievant's facility was apparently short-staffed on December 17, and he was not released from work until 3:44 a.m. on December 18. The grievant reported for military drill at 7:00 a.m. on the same date, failed the physical fitness test, and is now "being processed for administrative separation from [t]he United States Navy Reserve."

On or about December 25, 2013, the grievant filed a grievance, alleging that the agency did not comply with the requirements of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA")[1] because he was not excused from work with sufficient time to report fit for service to military drill.[2] After proceeding through the

[1] 38 U.S.C. §§ 4301 *et seq.*; *see also* Executive Order No. 6, *Equal Opportunity* (2010); DHRM Policy 2.05, *Equal Employment Opportunity*.

[2] The grievant also makes reference in the grievance to DHRM Policy 4.50, *Military Leave*, which states that "[e]mployees are paid up to 8 hours per federal fiscal year for . . . physical examinations required for military service." The grievant does not, however, allege that he was improperly denied compensation or leave time for his physical examination contrary to the provisions of this policy. As a result, this issue will not be discussed further in this ruling.

management steps, 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.[3] Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[4] Thus, all claims relating to issues such as the means, methods, and personnel by which work activities are to be carried out 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.[5]

USERRA prohibits employers from discriminating or retaliating against members of the armed forces and guarantees reemployment rights and benefits to any person who is absent from work because he is required to perform military service.[6] Military service includes "a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform" military duties.[7] An employee is not required to begin the military service for which he is absent from work immediately upon being excused from work. "At a minimum, an employee must have enough time after leaving the employment position to travel safely to the uniformed service site and arrive fit to perform the service."[8] Depending on the circumstances, "additional time to rest . . . and report for duty" may be necessary to ensure that the employee arrives "fit to perform" the military service.[9] The Code of Federal Regulations provides the following example for illustrative purposes:

> If the employee performs a full overnight shift for the civilian employer and travels directly from the work site to perform a full day of uniformed service, the employee would not be considered fit to perform the uniformed service. An absence from that work shift is necessitated so that the employee can report for uniformed service fit for duty.[10]

Although the grievant did not work a full overnight shift as discussed in the example, we cannot identify any meaningful distinction between an employee working a full overnight shift

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[3] *See Grievance Procedure Manual* § 4.1.
[4] *See* Va. Code § 2.2-3004(B).
[5] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[6] 38 U.S.C. §§ 4311, 4312(a); 20 C.F.R. §§ 1002.18, 1002.32. States and their political subdivisions are employers for purposes of USERRA. 20 C.F.R. § 1002.39.
[7] 38 U.S.C. § 4303(13); 20 C.F.R. § 1002.54. "Service in the uniformed services" generally includes "all categories of military training and service" performed by active or reserve members of the Armed Forces and members of the National Guard. 20 C.F.R. § 1002.6; *see* 38 U.S.C. § 4303(13).
[8] 20 C.F.R. § 1002.74.
[9] *Id.*
[10] *Id.* § 1002.74(a).

prior to reporting for military service and the grievant working a partial overnight shift until 3:44 a.m. prior to reporting for military service at 7:00 a.m. It is at least debatable that the grievant did not report to military drill on December 18 "fit to perform" military service. The grievant claims that the agency's action caused the Navy Reserve to institute administrative proceedings to separate the grievant from military service. It is unclear whether the agency's decision to not release the grievant from work on December 17 actually prompted the separation proceeding, or whether this would have occurred even if the grievant had been excused from work on that date. Regardless of the agency's role in the matter, however, the grievant is clearly challenging the agency's application and interpretation of federal law and related regulatory guidance.

We do not disagree that there may be a fair argument as to whether the agency failed to comply with the requirements of USERRA. The crux of the grievant's claims, however, is that the agency's actions have caused the grievant to be in danger of losing his position with the Navy Reserve as well as the associated "benefits and revenue" that he would have received from military service. Consequently, it does not appear that the grievant's arguments with regard to the agency's application and interpretation of federal law are suited for resolution through a grievance hearing. While we sympathize with the grievant's position, it does not appear that the issues he has presented are ones that grievance hearings were designed to address.[11] The issues presented in this grievance would be more properly addressed through a legal proceeding in a court of appropriate jurisdiction or administrative process directly addressing the grievant's potential loss of military service rather than at a grievance hearing to address an employment-based issue. As a result, we must conclude the grievance does not raise a question that warrants qualification for a grievance hearing.

We further note that, even if the issues were such that qualifying the grievance was warranted, qualification is not appropriate in certain circumstances, such as when a hearing officer does not have the authority to grant the relief requested by the grievant and no other meaningful relief is available. This is such a case. It appears that the grievant primarily seeks to reverse the course of his separation from the Navy Reserve (i.e., to be allowed another opportunity to successfully complete the physical examination with sufficient time off from work to report fit for duty). Although a hearing officer may well conclude that the agency violated USERRA, he has no authority to order relief of this kind. For example, a hearing officer cannot order the Navy Reserve to reverse or reconsider its decision,[12] and retroactively directing the agency to release the grievant from work on December 17 would have no effect on his performance at the physical examination at this point. Because this appears to be a case in which a hearing officer could not provide the grievant with any effectual relief, it would be of little or no use to either party to qualify the grievance for a hearing. Accordingly, and for all the reasons set forth above, the grievant's claims regarding the agency's alleged failure to comply with USERRA do not qualify for a hearing. This ruling only determines that this issue does not qualify for a hearing under the grievance statutes. It does not address whether there may be some other legal or equitable remedy available to the grievant in relation to his claim.

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[11] *See* Va. Code § 2.2-3004(A).

[12] *See Grievance Procedure Manual* § 5.9(a). Although the grievant's requested relief is only that the grievance be "forwarded to the [A]ttorney [G]eneral," the Governor of Virginia, and "the Director and Regional Director" of the agency, this is likewise a form of relief that cannot be awarded by the hearing officer. *See id.*

EDR's qualification rulings are final and nonappealable.[13]

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Office of Employment Dispute Resolution

[13] *See* Va. Code § 2.2-1202.1(5).