Issue: Qualification-Discrimination/Race, Age, Other(national origin, color, creed, religion, veteran, political affiliation); Ruling Date: October 8, 2002; Ruling #2002-047; Agency: Department of Conservation and Recreation; Outcome: Not qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Conservation and Recreation/ No. 2002-047
October 8, 2002

The grievant has requested a ruling from this Department on whether his December 6, 2001 grievance with the Department of Conservation and Recreation (DCR) qualifies for a hearing on the issue of his supervisor's requirement that he report to her via e-mail his arrival and departure times.[1] The grievant claims that this requirement was (i) discriminatory based on his national origin, race, and age; (ii) retaliation; and (iii) a misapplication of policy. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as an Accountant Senior. The grievant's national origin is East Indian and he is over the age of forty. On November 30, 2001, the grievant's supervisor added a section to the grievant's Employee Work Profile (EWP) requiring him to "e-mail supervisor daily upon arrival to the office. Email or drop by supervisor's office prior to departure." The EWP further required the grievant to report any extended absences (for more than ten minutes) to the supervisor and to take his lunch break from noon to 12:30. The grievant claims that management, by implementing this requirement, discriminated against him based on his national origin, race, and age, because he was the only employee who was required to notify his supervisor of arrival and departure times. He further claims that the addition to his EWP was made in retaliation for his having requested another supervisor and for having questioned negative comments on his annual

[1] Some time after his qualification request to EDR, the grievant stated to the EDR Consultant reviewing his ruling request that he wished to obtain a qualification ruling on two additional issues that he had previously withdrawn in writing from his grievance, specifically, the agency's denial of his request for assignment to a supervisor of his choice and his request for a 10% pay increase. EDR, however, is reluctant to allow a party to renew claims previously withdrawn in writing. Moreover, even if the additional claims had not been withdrawn by the grievant, they would not qualify for a hearing because (1) policy does not allow employees to choose their own supervisors and (2) there is no evidence that the agency had promised him a pay increase, only that it would *consider* his request. An employee is not guaranteed a pay increase simply because other employees receive increases. Moreover, this grievance presents no evidence that these additional acts and/or omissions by management violated policy, unlawfully discriminated against the grievant, or were retaliatory in nature.

performance evaluation. Finally, the grievant alleges that the practice of requiring one employee, but not all employees, to report his arrival and departure times is a misapplication of state policy.

Management claims that the decision to require the grievant to email his supervisor upon arriving to and before leaving work was made in response to complaints by co-workers that the grievant was not putting in a full eight hours each day.[2] Furthermore, the grievant's supervisor herself noted that the grievant would "disappear" for long periods during the day and that he did not open late afternoon emails from her until the following day, long after his scheduled arrival time. To correct what she perceived as the grievant's attendance problems, the grievant's supervisor determined that she could (1) adjust the grievant's schedule to match hers,[3] so she could observe his behavior, (2) require the grievant to report to another employee, his subordinate, upon arriving to work, or (3) require the grievant to send her an email when he arrived at work. During this Department's investigation, the grievant's supervisor stated that she felt third option was the least intrusive to the grievant.[4] The grievant was released from his reporting obligation on March 15, 2002.

DISCUSSION

Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination on the basis of national origin, race, and age.[5] The grievant has the burden of proving that he was intentionally discriminated against because he is a member of protected group.[6] To qualify for hearing, a grievant must establish: (1) that he is a member of a protected class; (2) that his job performance was satisfactory; (3) that in spite of his performance he suffered an adverse employment action; and (4) that he was treated differently than similarly-situated employees outside the protected class.[7] If the agency provides a legitimate, non-discriminatory reason for its actions, the grievance should not be qualified for a hearing, absent sufficient evidence that the agency's professed business reason was a pretext or excuse for discrimination.[8]

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[2] The grievant claims that other employees are late to work or leave early on occasion, but he does not know whether his supervisor is aware of those employees. During this Department's investigation, management claimed that the grievant is the only employee it knows of with a perceived attendance problem.

[3] The grievant works 7:30 a.m. to 4:00 p.m. with a thirty-minute lunch. His supervisor comes in later than the grievant and leaves after the grievant does.

[4] She did not want to change the grievant's schedule, because he was happy with his work hours, and she did not want to humiliate him by having him report to a subordinate.

[5] *Grievance Procedure Manual* § 4.1(b), page 10.

[6] *See* Hutchinson v. INOVA Health Systems, Inc., 1998 U.S. Dist. LEXIS 7723 (E.D. Va 1998) at 3, (citing St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993)).

[7] *See* Hutchinson, 1998 U.S. Dist. LEXIS 7723 at 3-4 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

[8] *Id*.

In this case, the grievant has not met all of the above four elements of a discrimination claim. It is undisputed that the grievant is a member of a protected class based on his national origin, race, and/or age. However, the management action that the grievant challenges in this case does not constitute an "adverse employment action" for purposes of a discrimination claim. An adverse employment action is defined as a "tangible employment act constituting 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."[9] While the grievant found management's actions to be inappropriate, there is no evidence that the requirement to notify his supervisor of arrival and departure times had a significant detrimental effect on the "terms, conditions, or benefits of employment."[10] Specifically, he has suffered no loss of pay, position title, or shift, and there is no evidence that promotional opportunities were taken from him as a result of this requirement. Moreover, management has provided a legitimate, nondiscriminatory reason for its actions (to monitor grievant's attendence) and this grievance presents no evidence that management's stated reason is merely a pretext for unlawful discrimination. Accordingly, the claim of discrimination does not qualify for a hearing.

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; (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity.[11] If any of these three elements is not met, the grievance does not qualify for a hearing.

As noted above, the grievant has not suffered an adverse employment action, because the agency's action did not have a significant detrimental effect on factors such as the grievant's hiring, firing, compensation, job title, level of responsibility, or opportunity for promotion.[12] Moreover, management has provided a legitimate nonretaliatory reason for its actions (to monitor grievant's attendance), and this grievance presents no evidence that management's reason was a mere pretext for retaliation. Rather, the grievant's claim illustrates what appears to be an ongoing conflict between himself and his supervisor. Claims of supervisory conflict alone, absent a clear impact on the terms of the grievant's employment, do not present grounds for a qualifiable retaliation claim.

Misapplication of Policy

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[9] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[10] Munday v. Waste Management of North America, 126 F.3d 239, 243 (4th Cir. 1997).
[11] *See* Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 656 (4th Cir. 1998).
[12] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).

The grievant claims that his supervisor's requirement that he "report in" to her in an e-mail each morning was a misapplication of policy because it "was not applied across-the-board."[13] During this Department's investigation, the grievant stated specifically that the management practice violated Department of Human Resource Management (DHRM) Policy 2.05, which requires that "all aspects of human resource management be conducted without regard to race, color, religion, gender, age, national origin, disability, or political affiliation."[14] This claim is, in essence, a reiteration of the grievant's discrimination claim, which is discussed above. For the same reasons discussed above, this issue does not qualify for a hearing.

In closing, the grievance record reflects significant interpersonal conflict between the grievant and his supervisor. We wish to note that mediation through the agency or through EDR may be a viable option to pursue. EDR's mediation program is a voluntary and confidential process in which two mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work units involved. EDR also offers interactive training sessions on conflict resolution that may benefit both parties.

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 this determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling. 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.

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Claudia T. Farr
Director

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Leigh A. Brabrand
Employment Relations Consultant

[13] *See* Grievant's Qualification Request to EDR.
[14] DHRM Policy 2.05, Equal Employment Opportunity, "Purpose" (effective 9/25/00).