Issue: Qualification/ Methods/Means-Counseling (oral or written memorandum) other, Work Conditions/ Management Practices-Records, Confidentiality, Access to Policy, Other; Ruling Date: February 25, 2003; Ruling #2002-089; Agency: Department of State Police; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of State Police
Ruling Number 2002-089
February 25, 2003

The grievant has requested a ruling on whether her March 11, 2002 grievance with the Virginia State Police qualifies for a hearing. The grievant claims that management misapplied or unfairly applied the policy regulating breaks in the Fingerprint Section. Additionally, the grievant claims that she has been discriminated against on the basis of her race.[1] As relief, she seeks the punishment of her supervisors and restoration of her work breaks and compensation. For the reasons discussed below, the grievance does not qualify for a hearing.

FACTS

The grievant is employed by the State Police (or agency) as a Senior Fingerprint Technician with scheduled work hours of 11:00 p.m. to 7:00 a.m. Under this schedule, the grievant did not have any assigned breaks, although the agency allowed short breaks to "tend to personal needs." On April 12, 2001, an individual anonymously lodged a complaint with the State Employee Fraud, Waste and Abuse Hotline, alleging that grievant had abused state time by sleeping during work hours. The matter was referred to the Internal Affairs Unit, and following an investigation, the Division Commander concluded that because the grievant admitted to sleeping while on her break, the facts substantiated the reported allegations. The disposition was later changed to "Not Sustained" during the course of the grievance management resolution steps. Although grievant has not been issued a formal Written Notice regarding this matter, she seeks to change the disposition of the investigation to "Unfounded."

DISCUSSION

Discrimination Based on Race

State policy and federal law prohibit discrimination in employment based on race, color, religion, sex and national origin.[2] To qualify a claim for hearing based on

[1] The grievance Form A alleges 18 claims of purported wrongful actions by the agency ranging from "wrongful disposition" to "lies made by supervisor." The 18 claims can be fairly summarized as an objection to the agency's handling of an investigation into an allegation that the grievant was sleeping on the job. While this ruling does not expressly discuss each of the 18 claims, this Department has carefully considered them.

[2] *See* DHRM Policy 2.05 and Title VII of the Civil Rights Act (29 U.S.C. Section 2000e-2000e-17).

racial discrimination, the grievant must present evidence raising a sufficient question as to whether: 1) she is a member of a protected class; 2) her job performance was satisfactory; 3) in spite of her performance she suffered an adverse employment action; and 4) she was treated differently than similarly situated employees outside the protected class.[3]

As an African American, the grievant is a member of a protected class; however, it does not appear that the grievant has suffered an adverse employment action.[4] As mentioned above, the grievant was not issued a formal disciplinary notice. The only agency action taken in response to grievant's alleged conduct was an Internal Affairs Unit investigation, which ultimately resulted in a disposition of "Not Sustained."[5] Moreover, even if a "Not Sustained" disposition could be viewed as an adverse employment action, the grievant has provided no evidence that she has been treated any differently than similarly situated employees who are not in her protected class. In other words, she has provided no evidence that the agency's actions were based on her race. Accordingly, the issue of discrimination is not qualified for hearing.

Misapplication of Policy

For an allegation of misapplication 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.

Several policies are implicated in this grievance. First, the Department of Human Resource Management (DHRM) Policy No. 1.60, the Standards of Conduct, provides in Section V, paragraph (B)(3) that "sleeping during work hours" constitutes a Group III Offense. Agency policy also considers sleeping during work hours a Group III offense.[6] In addition, DHRM Policy No. 1.25, Section III paragraph C.2 declares that "[r]est breaks shall be included in the required hours of work per day." Also implicated is General Order 18. This agency policy governs internal investigations and states that upon the completion of an internal investigation, the matter under investigation is to be

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[3] *See* Hutchinson v. INOVA Health System, Inc., 1998 U.S. Dist. LEXIS 7723 (E.D. Va. 1998)(citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)).

[4] 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." Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998). An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001)(citing Munday v. Waste Mgmt. Of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

[5] In some circumstances an investigation finding of "Sustained" could potentially constitute an "adverse employment action." However, bearing in mind that a finding of "Not Sustained" merely indicates that "insufficient facts exist to either prove or disprove the allegations," it is difficult to conceive how such a neutral finding could amount to an adverse action.

[6] *See* Section 5-10.17(B)(8) of the Department of Corrections Procedures Manual.

forwarded to the division commander for final disposition.[7] General Order 18 provides that:

> Division commanders will use the following terminology when resolving complaints:
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> a. **Sustained**: The facts substantiate the specific allegations made or other misconduct.
> b. **Not Sustained**: Insufficient facts exist to either prove or disprove the allegations.
> c. **Unfounded**: The facts substantiate the allegations made are false.

In combining the above mentioned three policies, it appears that the Division Commander, in sustaining the charge, had concluded that because "rest breaks" are considered state time and "sleeping during work hours" is a violation of state policy, the grievant violated Policy No. 1.60 by sleeping during a "rest break."

In this case, there is no evidence that the agency misapplied state or agency policy in investigating the charges at issue or in reaching the conclusions it did. The grievant has not identified any mandatory policy provision purportedly violated by the agency nor provided any evidence that the agency's actions were, as a whole, so unfair as to amount to a disregard of the intent of the applicable policies. The grievant admits that she "napped/snoozed for a few minutes" while on her breaks, but claims that she would always wake up before her break ended. While evidence strongly suggests that supervisors in the Fingerprint Section had notice of and condoned sleeping during work breaks, it cannot be disputed that state policy declares that rest breaks "*shall be* included in the required hours of work per day."[8] Thus, based on the grievant's admission that she slept while on break and the requirement that the agency include rest breaks as part of the workday, the agency reasonably concluded that it could *not* find that the allegation that the grievant was "sleeping *during working hours*" was *false* (the standard for an "Unfounded" disposition).

This Department cannot conclude that the agency's disposition was arbitrary or capricious or otherwise so unfair as to amount to a disregard of the intent of the applicable policies. While reasonable persons might disagree as to the agency's final disposition of the investigation, this Department cannot second-guess management actions that are grounded in fact and policy, and that are not based on an unlawful motive such as retaliation or discrimination. Accordingly, the issue of unfair or misapplication of policy is not qualified for hearing.

Restoration of Work Breaks and Compensation

[7] General Order No. 18, paragraph 14.
[8] DHRM Policy 1.25(III)(C)(2)(b).

The grievant requests that her work breaks be restored and that she be compensated for all work breaks that were withheld. The agency claims that grievant was never denied her work breaks, hence she is not entitled to additional compensation and cannot be restored with something that was never taken away. The agency points out that the grievant worked forty hours per week, from 11:00 p.m. to 7:00 a.m., was allowed to take breaks as needed, and was paid for "each minute" of her 8-hour shift. The grievant has provided no credible evidence to refute agency's position.

Punishment of Supervisors and Employees

Grievant seeks mandatory punishment for the supervisors that may have unfairly applied state policy. Additionally, grievant believes that for policy to be applied fairly, all employees who have slept while on their work break (with the supervisor's consent) should be disciplined.

As an initial point, a hearing officer can grant only limited types of relief. That relief does not include authority to demand that disciplinary action be taken against an employee or supervisor. Further, as discussed above, the grievant has not presented any evidence of policy misapplication by her supervisors. Moreover, the grievant was never disciplined under the Standards of Conduct. Accordingly, this issue is not qualified.

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 the qualification 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