

Issue: Qualification/discrimination (race, national origin)/misapplication of policy;  
Ruling Date: November 12, 2004; Ruling #2004-894; Agency: College of William and  
Mary; Outcome: not qualified



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

QUALIFICATION RULING OF DIRECTOR

In the matter of College of William and Mary  
Ruling No. 2004-894  
November 12, 2004

The grievant has requested a ruling on whether her August 12, 2004 grievance with the College of William and Mary (the agency) qualifies for a hearing. The grievant claims that she has been subjected to discrimination because of her race and national origin. In addition, she alleges that the agency has misapplied or unfairly applied policy. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as a Housekeeper. She alleges that on August 12, 2004, her supervisor verbally attacked her in front of her co-workers; and that the supervisor's conduct, including hovering over and pointing her finger at the grievant, demeaned the grievant and made her feel "like a slave." The grievant states that while she does not know if her supervisor treated her in this manner because the grievant is Korean, the supervisor's conduct made the grievant feel as if the supervisor was prejudiced against her. On August 18, 2004, the grievant initiated a grievance regarding the supervisor's alleged conduct. As relief, the grievant asked that the supervisor be required to make a public apology, that the incident become part of the supervisor's "permanent file," and that the supervisor receive training in "how to reprimand employees in the correct way."

After the first-step respondent denied the grievant's request for relief, the grievant advanced her grievance to the second resolution step. At the second-step meeting, contradictory evidence was presented regarding the supervisor's conduct, with some witnesses supporting the grievant's position that the supervisor had acted inappropriately, and others stating that the supervisor did not verbally abuse the grievant and that the grievant herself had exhibited an "attitude." As a consequence, the second-step respondent found that there was insufficient evidence to grant the grievant's request for relief, but ordered that both the grievant and her supervisor be counseled by the first-step respondent. The grievant then advanced the grievance to the third resolution step, where her request for relief was again denied. After the agency

denied the grievant's request for a hearing, the grievant appealed the agency's decision to this Department.

### DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>1</sup> Thus, claims relating to issues such as the method, 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 influenced management's decision, or whether state policy may have been misapplied or unfairly applied.<sup>2</sup>

In addition, to advance to a hearing, the grievant must demonstrate that the action being grieved constitutes an "adverse employment action."<sup>3</sup> 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."<sup>4</sup>

In this case, the grievant has failed to present evidence that her supervisor's alleged conduct constituted an adverse employment action. Specifically, there is no evidence that the alleged verbal abuse resulted in the grievant's being fired, demoted, reassigned, disciplined, or otherwise subjected to any material change in the terms and conditions of her employment. As the grievant has failed to make the threshold showing of an adverse employment action, her grievance does not qualify for hearing.<sup>5</sup>

### 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

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<sup>1</sup> See Va. Code § 2.2-3004(B).

<sup>2</sup> Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (c).

<sup>3</sup> Va. Code § 2.2-3004(A).

<sup>4</sup> *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

<sup>5</sup> We have previously held that where a grievant alleges harassment, a showing of a hostile work environment will satisfy the requirement of an adverse employment action. See EDR Ruling 2004-750. In this case, even if we were to construe the grievant's claim as one of race or national origin harassment, her grievance would nevertheless fail to qualify for hearing, as there is no evidence that this single incident of alleged verbal abuse was sufficiently severe or pervasive so as to alter her conditions of employment and create an abusive or hostile work environment. See generally *White v. BFI Waste Services, LLC*, 375 F.3d 288, 296-97 (4<sup>th</sup> Cir. 2004).

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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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