Issue: Qualification/misapplication of policy and retaliation for protected activity; Ruling Date: December 7, 2004; Ruling #2004-899; Agency: College of William and Mary; Outcome: not qualified. Appealed in Circuit Court of Williamsburg/James City County; Case # Law No. 10502-00; Decision: Affirmed; issued on January 11, 2005

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the College of William and Mary
Ruling No. 2004-899
December 7, 2004

The grievant has requested a ruling on whether her grievance dated September 13, 2004 qualifies for a hearing. The grievant claims that the College of William and Mary (the agency) misapplied and/or unfairly applied policy and retaliated against her for protected activity. For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed with the agency as a Shipping and Receiving Coordinator. In this capacity, she is currently responsible for sorting the first-class and bulk mail received by the facility at which she works, among other job duties. The grievant alleges that in 1999, the agency upgraded another existing position at the facility, and that as part of this upgrade, responsibility for the mail was to shift from the grievant and her staff to the upgraded position. The grievant charges that to date the agency has not implemented this change in responsibility. At the same time, the grievant asserts, following recent building and renovation at the facility, the individual in the upgraded position received the work space designed for mail sorting, while the grievant is required to perform the sorting function in an inadequate space.

The grievant also claims that because the agency has failed to give her the space designed for mail sorting, and she is therefore forced to work out of eyesight of the space used for sorting, she cannot control the security of the mail. The grievant finds her inability to secure the mail particularly troubling as she believes that she is being held accountable for the mail's security.

The grievant states that although her department has always had the responsibility for sorting first-class mail, prior to her return from Family and Medical Leave Act (FMLA) leave in the summer of 2003, she had never been personally responsible for this task. She alleges that following her return from leave, her supervisor reassigned this task from clerks in the department to her.

The grievant also asserts that, in addition to sorting the first-class mail, she has also been required to perform other work not expressly identified on her Employee Work Profile (EWP). Specifically, the grievant states that she is required to track old orders that have not yet been received, including contacting vendors as appropriate, and to manage the invoices for all shipments sent on approval. The grievant also claims that she must accept freight deliveries when the individual in the new position is unavailable to accept deliveries of freight items. The grievant does not allege, however, that this responsibility contributes significantly to her work load. Rather, her concern is that she does not always know where the freight items should be placed once accepted.

The grievant is concerned that as a result of these duties, she will be unable to complete her work satisfactorily. She states that she feels she is being set up to fail, and that the agency is trying to force her to retire from her current position.

The grievant suggests that these actions have been taken against her because: (i) she used FMLA leave during the summer of 2003, which she believes angered her supervisor; (ii) she complained to the Board of Health after her supervisor handled suspicious substances in the mailroom in a manner she found irresponsible; (iii) she has refused to perform duties that she believes would cause her injury, such as pushing an extremely heavy basket of mail (although she admits that she has never been disciplined because of such refusal or required to perform the work in question); and (iv) she is a union president.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[1] Therefore, grievances challenging management's assignment of duties do not qualify for a hearing unless there is evidence raising a sufficient question as to whether discrimination, retaliation, or a misapplication of policy has occurred.[2] Here, the grievant challenges management's actions as being retaliatory and a misapplication and/or unfair application of policy.

For an allegation of retaliation or misapplication or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether whether or not the grievant has suffered an adverse employment action.[3] 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."[4]

[1] Va. Code § 2.2-3004(B).
[2] *Grievance Procedure Manual* § 4.1 (b) and (c).
[3] Va. Code § 2.2-3004(A).
[4] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

In this case, the management actions challenged in the grievance do not rise to the level of adverse employment actions, when viewed either individually or in their totality. While the grievant's frustration over the agency's decision not to reassign the mail duties to the newly upgraded position is understandable, neither the failure to reassign those duties, nor the assignment of the responsibility for first-class mail to the grievant, constitute a significant change in the grievant's employment status. To the contrary, the grievant admits that her mail responsibilities average only approximately 30-40 minutes per day. Similarly, the alleged additional responsibility for claims and on approval shipments, for which the grievant spends no more than one to two hours a week, also does not constitute a significant change in the grievant's employment status.[5] In this regard, we note that the grievant does not allege that she is being required to work overtime in order to accomplish her job tasks[6]; and while she has expressed concern that the additional work will result in diminished performance, this concern alone, in the absence of formal disciplinary action or a "below contributor" performance evaluation, does not give rise to an adverse employment action. Nor do the agency's alleged actions, if viewed in the aggregate, demonstrate the existence of a hostile work environment sufficient to state a claim of retaliatory harassment.[7] For these reasons, this grievance does not qualify for a hearing.[8]

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

[5] *See generally* MacLean v. City of St. Petersburg, 194 F. Supp. 2d 1290, 1299 (M.D. Fla. 2002).

[6] The grievant states that she often works through her lunch period in order to accomplish her work. She admits, however, that she has done so off and on since she began working in her current position (and prior to the assignment of additional job duties), that her need to work through lunch is sporadic rather than regular, and that she has never been asked to work through lunch by the agency. She also admits that part of her reason for eating at her desk has been the recent construction, which resulted in the employees' not having a lunchroom, and that she hopes to begin eating in the employee lounge now that construction on that area is complete.

[7] *See* Ruling No. 2004-750.

[8] However, this ruling does not limit the grievant's ability to introduce background evidence relating to the conduct challenged in the present grievance in the event such evidence is relevant to a subsequent adverse employment action challenged in a future grievance.

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