Issue: Qualification/discrimination/misapplication and/or unfair application of policy/violation of Virginia Code § 44-93/workplace harassment; Ruling Date: February 7, 2006; Ruling #'s 2006-1182, 2006-1197: Agency: Department of Corrections; Outcome: misapplication of policy qualified; other issues not qualified.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

QUALIFICATION RULINGS OF DIRECTOR

In the matter of Department of Corrections
Ruling Numbers 2006-1182 and 2006-1197
February 7, 2006

The grievant has requested a ruling on whether the two grievances he initiated on July 5, 2005 with the Department of Corrections (DOC or the agency) qualify for hearing. In the first of these two grievances (Grievance #1), the grievant claims that the agency (1) discriminated against him; (2) misapplied and/or unfairly applied policy; and (3) violated Virginia Code § 44-93 by failing to return him to his previous position upon his return from active military duty. In a second related grievance (Grievance #2), the grievant claims that the agency engaged in workplace harassment by stating he "wasn't a team player" and using this as a basis upon which to deny his return to his previous position. For the reasons discussed below, only Grievance #1 qualifies for hearing.

FACTS

The grievant is employed as a Security Officer III with DOC. In February 2004, the grievant, a member of the Army National Guard, was ordered on a one-year deployment to Iraq. At the time of his deployment, the grievant was a corrections officer with canine handler responsibilities. In his capacity as a corrections officer with canine handler responsibilities, the grievant and his dog provided security and supervision of the inmates.

Upon his return to work with DOC following his military deployment, the grievant was placed back into a corrections officer position; however he was no longer assigned a canine to assist him in carrying out his duties. When he questioned the agency on why he was no longer assigned a canine, the grievant claims that he was told he "wasn't a team player." In his second management resolution step response, the Warden stated that while he believes the grievant to be a valued member of the institutional team and DOC, he did not think it was in the best interest of the institution and/or the grievant for the grievant to be assigned to a canine post.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[1] Thus, all claims relating to issues such as the means, methods, and personnel by which work activities are to be carried out, and the transfer, reassignment, or scheduling of employees within the agency generally do not qualify for 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 policy may have been misapplied.[2]

Grievance #1

Misapplication of Policy

The grievant asserts that the agency has misapplied state policy, discriminated against him and violated Va. Code § 44-93 by failing to return him to his previous position upon his return from active military duty. The grievant's claims that the agency has discriminated against him and violated Va. Code § 44-93 are most appropriately viewed as misapplication/unfair application of policy claims.[3]

For an allegation of misapplication of policy or unfair application 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.

The applicable policy in this case is Department of Human Resource (DHRM) Policy 4.50, *Military Leave*.[4] Policy 4.50 provides state employees with military leave for active duty in the United States armed forces as well as reinstatement rights upon return from such duty.[5] In particular, DHRM Policy 4.50 states that "[v]eterans must be placed in positions they would have attained if they had remained continuously employed." DHRM Policy 4.50 goes on to state:

> "[e]mployees will be reinstated to their previous positions or to comparable positions in terms of pay, status and location when they meet

[1] Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(b) and (c).
[3] State Policy 2.05 prohibits discrimination on the basis of race, gender, color, national origin, religion, age, political affiliation, and disability. The grievant is not claiming discrimination on any of these grounds. His claim is confined to alleged discrimination on the basis of his National Guard membership which is addressed in DHRM Policy 4.50. Likewise, the grievant's claim that the agency has violated Va. Code §44-93 is a statutory issue that this Department would generally not assess. However, violations of Va. Code §44-93 are addressed in DHRM Policy 4.50 and as such, this Department will view this claim as a misapplication/unfair application of policy claim.
[4] DHRM Policy 4.50 (effective date 09/16/93, revised date 07/10/04).
[5] *Id.*

> the minimum requirements for the position. If the employees no longer meet the minimum qualifications of their former positions because of changes in job duties, they must meet the changed requirements within a reasonable time after reemployment, or be offered positions requiring skills comparable to those required in former jobs with like seniority, status, pay and location."[6]

DHRM Policy 4.50 also incorporates by reference state and federal laws which address an employee's right to military leave and reinstatement upon return from active duty with the armed forces.[7] More specifically, DHRM Policy 4.50 requires reinstatement policies and procedures to be consistent with the Uniformed Services Employment and Re-Employment Rights Act of 1994 (USERRA) "except where state law confers a greater benefit."[8]

The USERRA states that a person whose period of service in the armed forces exceeds 90 days shall be promptly reemployed "in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or in a position of like seniority, status and pay, the duties of which the person is qualified to perform;" or if the person is not qualified to perform such duties, he shall be promptly reemployed "in the position of employment in which [he] was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform."[9] Moreover, Section § 4311(a) of the USERRA prohibits an employer from discriminating against a member of the armed forces by denying that employee "initial employment, reemployment, retention in employment, promotion, or any benefit of employment" on the basis of that employee's performance of service in a uniformed service (e.g., the National Guard).[10]

The applicable state law in this case is Va. Code § 44-93 which states that employees of the Commonwealth that are "members of the organized reserve forces of any of the armed services of the United States, National Guard, or naval militia shall be entitled to leaves of absence from their respective duties, without loss of seniority, accrued leave, or efficiency rating, on all days during which they are engaged in federally funded military duty."[11] Further, "[w]hen relieved from such duty, [the employee] shall be restored to positions held by [the employee] when ordered to duty. If the office or position has been abolished or otherwise has ceased to exist during such leave of absence, [the employee] shall be reinstated in a position of like seniority, status and pay, if the

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[6] *Id.*
[7] *Id.*
[8] *Id.* Similarly, USERRA states that its provisions shall not "supersede, nullify or diminish" any state law "that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in [the USERRA provisions]." 38 USCS §4302(a).
[9] *See* 38 USCS §4313(a)(2)(A) and (B).
[10] 38 USCS §4311(a).
[11] Va. Code §44-93(A).

position exists, or in a comparable vacant position for which they are qualified, unless to do so would be unreasonable."[12]

In this case, although the grievant was reemployed by DOC in a corrections officer position upon his return from active military service, he was no longer a corrections officer with canine handler responsibilities. Based on the foregoing policies and laws, and in particular that provision of the Virginia statue that says an employee must be returned to the position he held when ordered to duty unless such position has been abolished or otherwise ceases to exist, this grievance raises a sufficient question as to whether the grievant was restored to the proper position upon his return from military service.[13] Accordingly, the grievant's misapplication of policy claim, which encompasses his claims that Virginia law has been violated and he has been discriminated against based on his membership in the National Guard, qualifies for hearing.[14]

For the reasons discussed above, this Department concludes that Grievance #1 is qualified and shall advance to hearing. By copy of this ruling, the grievant and the agency

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[12] *Id.*

[13] During its investigation, this Department found no judicial or other guidance regarding the interpretation of the above cited provisions of Va. Code § 44-93. We note, however, that the Fourth Circuit Court of Appeals has broadly interpreted the similar USERRA by opining that USERRA "was enacted to protect the rights of veterans and members of the uniformed services" and "must be broadly construed in favor of its military beneficiaries." Hill v. Michelin North America, Inc., 252 F.3d 307, 312-313 (4th Cir. 2001) (citing, e.g., Coffy v. Republic Steel Corp., 447 U.S. 191, 196, 65 L.Ed. 2d 53, 100 S.Ct. 2100 (1980) (noting that predecessor to USERRA "is to be liberally construed for the benefit of the returning veteran.") *See also* McGuire v. United Parcel Serv., 152 F.3d 673, 676 (7th Cir. 1998) ("USERRA is to be liberally construed in favor of those who served their country.") Based upon the apparent liberal view that the courts have taken of the USERRA provisions, this Department has likewise elected to view the Virginia statute broadly.

[14] This Department deems it significant to note that as a general rule, a grievant must suffer an "adverse employment action" in order for a misapplication or unfair application of policy claim to qualify for hearing. This Department has routinely defined "adverse employment action" in the misapplication/unfair application of policy context 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." *See e.g.*, EDR Ruling ## 2005-1039, 2005-970, and 2004-693. However, if there is a state or federal law that forms the basis of the policy at issue and that state or federal law does not require the presence of an "adverse employment action" for an actionable claim, this Department will defer to the standard set forth by that state or federal law. For instance, the policy at issue in this case, DHRM Policy 4.50, is based upon Va. Code § 44-93 and the federal USERRA provisions. Neither Va. Code § 44-93 nor the USERRA reinstatement provisions cited in this ruling expressly require that the employee suffer an "adverse employment action" nor did this Department's investigation reveal any such requirement under related case law. However, given the plain language of Va. Code § 44-93, which states that employees "shall be restored to positions held by [the employee] when ordered to duty," coupled with judicial admonishment that the USERRA statute should be viewed liberally, this Department finds under the facts of this case that the grievant does not need to show he suffered an "adverse employment action" in order for his misapplication of policy claim to qualify for a hearing.

are advised that the agency has five workdays from receipt of this ruling to request the appointment of a hearing officer.

Grievance #2

Workplace Harassment

In Grievance #2, the grievant claims that agency management engaged in workplace harassment when it accused the grievant of not being a "team player." While all grievances may proceed through the management resolution steps, to qualify for a hearing, claims of supervisory harassment must involve "hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status, or pregnancy."[15] Here, the grievant has not alleged that management's actions were based on any of these factors. Accordingly, Grievance #2 does not qualify for a hearing.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take in Grievance #2 as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal the qualification determination on Grievance #2 to the circuit court, he 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 notifies the agency that he does not wish to proceed.

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Claudia Farr
Director

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Jennifer S.C. Alger
EDR Consultant

[15] DHRM Policy 2.30 (effective date 5/1/02).