Issue: Qualification/Benefits-Annual leave, Work conditions/supervisor/employee conflict, violence in the workplace; Ruling Date: March 20, 2006; Ruling #2006-1296; Agency: Department of Housing and Community Development; Outcome: not qualified

Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Housing and Community Development
Ruling Number 2006-1296
March 20, 2006

The grievant has requested a ruling on whether her December 21, 2005 grievance with the Department of Housing and Community Development (DHCD or the agency) qualifies for hearing. She alleges that management misapplied policy by failing to timely approve her annual leave and by speaking to her in a harsh and disrespectful manner. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant was employed by the agency as a Program Support Tech.[1] She states that in mid-October, she "requested off" for November 21-23, 2005. The grievant claims that at the time she requested the leave, she was told permission would depend on her work performance and what she had to do at the time. She states that she asked again for the leave in November, and that she was told her leave would depend on how much work she accomplished. She asserts that on November 18, 2005, she was told that she had to be at work on November 21st and that if she had accomplished her assigned tasks, her supervisor would consider granting her vacation request for the rest of the week. The leave request was apparently approved on November 21st for the remainder of the requested period. The grievant asserts that on that date and since, her supervisor has spoken to or about her in a "harsh manner always insinuating that [the grievant is] dumb, stupid, or something along those lines."[2]

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[3] 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

[1] The grievant's employment with the agency ended in January 2006.
[2] When asked for examples of the supervisor's conduct, the only example the grievant was able to remember (in addition to the incident regarding the annual vacation) was an occasion when the supervisor allegedly forbade her to get assistance with an assignment from other employees, only to subsequently advise her several days later that she could request assistance from a particular employee.
[3] *See* Va. Code § 2.2-3004(B).

state policy may have been misapplied or unfairly applied.[4] Further, the General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions."[5] 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."[6]

Here, the grievant alleges that the agency misapplied and/or unfairly applied policy by not timely granting her request for annual leave.[7] She further asserts that her supervisor has treated her in a harsh, insulting and subservient manner; and that the supervisor's conduct has resulted in her having to "go[] to therapy." These allegations are addressed below.

Leave

A misapplication of policy may constitute an adverse employment action if, but only if, the misapplication results in an adverse employment action. In this case, the alleged failure to grant the grievant her desired vacation schedule in a timely manner does not constitute an adverse employment action, as it did not result in a significant adverse effect on the terms, conditions, or benefits of her employment.[8]

Supervisory Harassment

Although the grievant does not use the term, her claims regarding her supervisor's conduct may fairly be characterized as allegations of supervisory harassment. While all grievances may proceed through the management resolution steps, to qualify for a hearing, claims of supervisory harassment and/or a "hostile work environment" must involve "hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status, or pregnancy."[9] Here, the grievant has not alleged that management's actions were based on any of these factors. Rather, the facts cited in support of the grievant's claim can best be summarized as describing general work-related conflict between the grievant and her supervisor. Such claims of supervisory conflict are not among the issues identified by the General Assembly that may qualify for a hearing.[10]

Workplace Violence

Although the grievant does not expressly allege that the agency has misapplied and/or unfairly applied Department of Human Resource Management (DHRM) Policy 1.80, "Workplace Violence," her grievance may be fairly read to include such a claim. Policy 1.80 prohibits conduct

[4] Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (c).
[5] Va. Code § 2.2-3004(A).
[6] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[7] During the course of this Department's investigation, the grievant stated that she is not grieving the denial of leave, but rather the manner in which her supervisor allegedly handled her leave request.
[8] Cf. Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).
[9] DHRM Policy 2.30, "Workplace Harassment" (effective 5/1/02).
[10] *See* Va. Code § 2.2-3004 (A).

which subjects another individual to extreme emotional distress and includes, within its definition of "workplace violence," shouting and "an intimidating presence."[11] This Department has previously sought informal guidance from DHRM regarding the applicability of the Workplace Violence policy to claims of supervisor-subordinate conflict. DHRM subsequently advised this Department that shouting and threats of job loss by a supervisor may constitute a violation of Policy 1.80, where the employee subjectively experiences the supervisor's conduct as threatening or intimidating.[12]

However, this Department has repeatedly held that in order for a claim of misapplication and/or unfair application of policy to qualify for a grievance hearing, the grievant must demonstrate, as a threshold matter, that the alleged agency conduct resulted in an adverse employment action. Here, the grievant has failed to make this showing, as she has not alleged or shown that she experienced a significant change in employment status, such as termination, non-promotion, reassignment with significantly different responsibilities, or a significant change in benefits, as a result of the grieved conduct.[13] Accordingly, we conclude that the grievant's December 21, 2005 grievance does not qualify for hearing.

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

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Gretchen M. White
EDR Consultant

[11] DHRM Policy No. 1.80, "Workplace Violence" (effective 5/1/02).
[12] *See* EDR Ruling Nos. 2006-1248, 1249, 1278.
[13] Even if this Department were to require the grievant only to prove that she had been subjected to a hostile work environment (as required in harassment claims), rather than an adverse employment action, she would nevertheless not make this threshold showing. In order to demonstrate the existence of a hostile work environment, a grievant must show that she was subjected to conduct sufficiently severe or pervasive so as to alter her conditions of employment and create an abusive or hostile work environment. *See, e.g.,* EDR Ruling No. 2003-041. While we understand that the grievant may have experienced the grieved conduct as hostile or abusive, the alleged conduct by the supervisor and the agency do not, as a matter of law and policy, rise to the level of a hostile work environment. *See* Hottenroth v. Village of Slinger, 388 F.3d 1015, 1035 (7th Cir. 2004);Langadinos v. Appalachian School of Law, 2005 U.S. Dist. LEXIS 20958, at 29 (W.D. Va. Sept. 25, 2005); *see also* Von Gunten, 243 F.3d at 870.