Issues: Qualification and Consolidation – Compensation (other); Ruling Date: July 6, 2007; EDR Ruling #2007-1670; Agency: Department of State Police; Outcome: Qualified for Hearing and Consolidated with EDR Ruling #2007-1571.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND CONSOLIDATION RULING OF DIRECTOR

In the matter of Department of State Police
Ruling No. 2007-1670
July 6, 2007

The grievant has requested qualification of her December 5, 2006 grievance with the Department of State Police (the agency). For the reasons set forth below, this grievance qualifies and is consolidated for hearing with the grievance that was the subject of EDR Ruling 2007-1571.

FACTS

The grievant initiated this grievance on December 5, 2006, to challenge the agency's refusal to pay her the cash equivalent of forty hours of recognition leave. The relevant agency policy, General Order 11, provides that "[e]mployees receiving an overall performance rating of 'Extraordinary Contributor' will receive 40 hours of recognition leave."[1] General Order 11 further provides, under the definition of "recognition leave," that:

> *Leave awarded to an employee who is rated "Extraordinary Contributor" or "Major Contributor." This leave may be used within one year of receipt, after November 25. If the employee is unable to use this leave in the one year period for which it is granted, the Superintendent may extend a carryover period until the leave is used. Recognition leave award may be redeemed for cash if the employee leaves the agency; it will not count toward leave accrual amounts.*[2]

The grievant received an "Extraordinary Contributor" rating on her performance evaluation on August 22, 2006. On August 25, 2006, the grievant accepted another job with the Commonwealth, outside the agency. The grievant requested the cash redemption equivalent for the forty hours of recognition leave which she argues she earned, was awarded, and to which she is now entitled. The agency denied her request, asserting that even though she left the agency after being rated an "Extraordinary Contributor," she was not eligible for the cash redemption because she left the agency prior to November 26. The grievant did not receive relief during the management steps and now requests qualification of her grievance for hearing.

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[1] Department of State Police, General Order No. 11, *Performance Management System* ¶ 15(c)(1).
[2] General Order 11 ¶ 2(n).

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[3] Further, complaints relating solely to the establishment or revision of wages, salaries, position classifications, or general benefits "shall not proceed to hearing"[4] unless there is sufficient evidence of discrimination, retaliation, discipline, or a misapplication or unfair application of policy.[5]

In this case, the grievant claims that the agency misapplied or unfairly applied policy by refusing to pay her the cash redemption equivalent for forty hours of recognition leave. 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. In addition, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[6] Thus, the threshold question in this case is whether the grievant has suffered an adverse employment action.[7] An adverse employment action is defined as a "tangible employment act constitut[ing] 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."[8] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[9] Here the grievant has raised a sufficient question as to whether she experienced an adverse employment action through the agency's refusal to pay her the cash redemption equivalent for forty hours of recognition leave.

The grievant has also raised a sufficient question as to whether the agency misapplied or unfairly applied General Order 11. While an agency's interpretation of its own policies is generally afforded great deference, that deference is not without limitation. If the agency's interpretation is clearly erroneous or inconsistent with the express language of the policy, deference should not be given.[10] Further, even where an ambiguous policy is otherwise enforceable, a hearing officer may consider whether the absence of fair notice of the agency's interpretation of its policy should have a bearing on the outcome of a grievance.[11]

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[3] Va. Code § 2.2-3004(B).
[4] Va. Code § 2.2-3004(C).
[5] *Grievance Procedure Manual* § 4.1(c).
[6] *See Grievance Procedure Manual* § 4.1(b).
[7] While evidence suggesting that the grievant suffered an "adverse employment action" is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an "adverse employment action." For example, consistent with recent developments in Title VII law, this Department substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. *See* EDR Ruling No. 2007-1538.
[8] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[9] 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)).
[10] *See* EDR Ruling No. 2001-064 and EDR Ruling No. 2004-932.
[11] *Id.*

Here, we note that General Order 11 does not expressly state when an employee becomes vested in the right to recognition leave or the cash equivalent, although its express language could be viewed as differentiating between the *award* of leave occurring upon achieving an "Extraordinary Contributor" rating and the *use* of leave after November 25. The agency asserts that because General Order 11 provides that recognition leave cannot be used until after November 25 of each year, General Order 11 bars the payment of cash redemption equivalents for employees who earn the "Extraordinary Contributor" rating on their annual performance evaluation, but who leave the agency prior to November 26 the same calendar year.

Such an interpretation could be viewed as expanding rather than interpreting the provisions of General Order 11, particularly in light of the absence of any express provision as to when the right to recognition leave or the cash equivalent vests, and in light of the express provision that a "recognition leave award may be redeemed for cash if the employee leaves the agency." Moreover, the agency's interpretation of General Order 11 must be consistent with the provisions of Department of Human Resource Management policies. DHRM Policy 1.20, *Employee Recognition Programs*, could be interpreted to mandate that an employee receive a lump sum payment for his or her recognition leave when leaving the agency. Additionally, in contrast to the agency's arguments, there is no provision in state law or policy that requires this recognition leave to be awarded after November 25th, as with the annual performance increase in state employee salaries. Indeed, DHRM Policy 1.40, *Performance Planning and Evaluation*, does not discuss recognition leave at all.

In light of all the above, the grievance is qualified for hearing. This ruling does not determine that the agency has misapplied policy or unfairly applied policy, only that further review by a hearing officer of the policy and the agency's application of the policy to the facts of this case is warranted.

<u>Consolidation</u>

This Department has long held that it may consolidate grievances for hearing with or without a request from either party whenever more than one grievance is pending involving the same parties, legal issues, and/or factual background.[12] EDR strongly favors consolidation and will grant consolidation unless there is a persuasive reason to process the grievances individually.[13]

The issue in this case is essentially the same one raised in the November 22, 2006 grievance that was the subject of EDR Ruling 2007-1571. Both grievances involve the same agency and challenge the same agency policy. Given the commonality between this grievance and the grievance addressed in EDR Ruling 2007-1571, this Department finds that consolidation of those grievances appropriate. Accordingly, this grievance is consolidated with the EDR

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[12] *Grievance Procedure Manual* § 8.5.
[13] *Id.*

Ruling 2007-1571 grievance, and the two will be heard together by a single hearing officer at a single hearing.

CONCLUSION

For the reasons set forth above, this grievant's December 5, 2006 grievance is qualified for hearing and consolidated with the EDR Ruling 2007-1571 grievance. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer using the Grievance Form B.

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Claudia T. Farr
Director