Issue: Qualification/discrimination/race; qualification/FLSA/overtime; Compliance/30-day rule; consolidation/consolidate grievances for purposes of hearing; Ruling Date: September 15, 2006; Ruling #2006-1345, 2007-1418; Agency: Department of Juvenile Justice; Outcome: qualified in part and consolidated.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION, COMPLIANCE AND CONSOLIDATION RULING OF DIRECTOR

In the matter of Department of Juvenile Justice
Ruling Nos. 2006-1345, 2007-1418
September 15, 2006

The grievant has requested a ruling on whether his March 12, 2006 grievance with the Department of Juvenile Justice (DJJ or the agency) qualifies for a hearing. The grievant alleges that the agency has misapplied and/or unfairly applied policy and has subjected him to racial discrimination and/or harassment. For the following reasons, this grievance is qualified in part and consolidated for hearing with the grievant's February 16, 2006 grievance.

FACTS

The grievant is employed with the agency as a probation officer in a Court Service Unit.[1] On March 12, 2006, he initiated a grievance challenging the agency's alleged expectation, set forth in his Employee Work Profile (EWP), that he participate in community-based activities, as well as his supervisor's alleged communications with him regarding that expectation. In addition, the grievant claimed in his March 12th grievance that his supervisor sent him a Christmas card which he, as "an individual of European heritage," found racially offensive and insensitive.

After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. The agency head denied the grievant's request, and the grievant has appealed to this Department.[2]

DISCUSSION

[1] The grievant is designated in his Employee Work Profile (EWP) as a "non-exempt" employee under the Fair Labor Standards Act (FLSA).
[2] To the extent the grievant challenges any alleged untimeliness by the agency during the management resolution steps, these claims are moot, as the grievant has now apparently received the agency's step-responses.

Qualification:

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 state policy may have been misapplied or unfairly applied.[4]

The grievant alleges that the agency has misapplied and/or unfairly applied policy by requiring him to participate in community-based activities, by failing to compensate him for time performing such activities, and by requiring him to use his own vehicle in performing these activities. He also challenges the way in which his supervisor allegedly communicated with him in regard to these expectations.

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 grievant must show that the agency conduct at issue constituted an "adverse employment action,"[5] which 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]

For purposes of our analysis, we will assume without deciding that requiring an employee to perform community-based activities is not, in itself, a misapplication or unfair application of policy, where, as here, it appears the requirement applied to other similarly-situated employees. However, even if the alleged requirement is permissible, a misapplication could nevertheless occur if an agency failed to compensate an employee for his or her participation in these activities in accordance with state and/or agency policy.[7]

The grievant asserts that he was required to participate in community-based activities and was not compensated for the time spent performing the activities. He also

[3] *See* Va. Code § 2.2-3004(B).
[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] *See, e.g.*, DJJ Administrative Directive 05-004.08A, "Hours of Work and Management of Work Time," effective 12/20/05. By its express terms, this policy is "intended to ensure DJJ's compliance with the Fair Labor Standards Act (FLSA)," among other purposes.

alleges that he was not allowed to use a state vehicle for these activities and was instead forced to use his own vehicle without mileage reimbursement. Such actions, if established, could constitute an adverse employment action.

The agency apparently does not dispute the grievant's claim that he engaged in community-based activities, as apparently required by his EWP, and that he was entitled to compensation, use of a state vehicle, or reimbursement for performing these activities. Indeed, the agency head stated in his qualification decision that the time spent by the grievant "should be considered as hours worked," and that "[i]t is the practice of the Department to either provide employees with a state vehicle in order to carry out required job assignments, or to pay mileage…." The agency head noted, however, that it was his understanding that management "appropriately accounted for" time spent by the grievant performing community-based activities. Further, while the agency head indicated in his qualification decision that it was not clear whether the grievant had requested and been approved for mileage reimbursement,[8] the agency asserts that it has subsequently verified with the grievant that he was not owed any "time or money."[9] The grievant apparently disagrees that he has been fully compensated by the agency.

In light of this factual dispute between the parties, and because this grievance may be consolidated with the grievant's February 16, 2006 grievance for hearing, as discussed below, we find that further exploration by a hearing officer of the grievant's claims relating to community-based activities is appropriate.[10] We note, however, that this qualification ruling in no way determines that the agency's actions with respect to the grievant were a misapplication and/or unfair application of policy or were otherwise

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[8] In a subsequent communication to this Department, the agency indicated that the grievant had not submitted any requests for mileage reimbursement.

[9] During the course of this Department's investigation, the grievant, through his representative, asserted that he had not requested compensation for past activities as the agency had not advised him that he could do so. In a later communication with this Department, regarding another grievance, the grievant acknowledged that the agency had asked "if he was owed any money for mileage, or any time off for having attended these meetings over the years," but questioned why the agency did not exercise greater supervision and retain its own records.

[10] In cases brought under the FLSA for unpaid overtime wages, courts have held that an employee need not establish the exact amount of overtime work performed. While an employee has the burden of proving that he performed work for which he was not compensated, he need only produce "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." In addition, the employee must show that the employer had actual or constructive knowledge of his uncompensated work. The burden then shifts to the employer to show the precise amount of work performed or to negate the reasonableness of the inference drawn from the employee's evidence. *See* Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 686-88 (1946), *superseded by statute on other grounds*; Lyle v. Food Lion, 954 F.2d 984, 987 (4th Cir. 1992); Dole v. Tony and Susan Alamo Foundation, 915 F.2d 349, 351 (8th Cir. 1990); Pforr v. Food Lion, Inc., 851 F.2d 106, 108-09 (4th Cir. 1988); Hopkins v. Texas Mast Climbers, LLC, 2005 U.S. Dist. LEXIS 38721, at ** 17-18 (S.D. Tex. Dec. 14, 2005); Mayhew v. Wells, 1996 U.S. Dist. LEXIS 5508, at **5-6 (W.D.Va. Jan. 10, 1996), *aff'd*, 125 F.3d 216 (4th Cir. 1997).

improper. Rather, we merely recognize that, in light of the evidence presented, further exploration of the facts by a hearing officer is appropriate, as a hearing officer is in a better position to determine questions of motive and credibility. The parties should also be advised that under the *Rules for Conducting Grievance Hearings*, a hearing officer may not award monetary relief for events occurring more than 30 calendar days prior to the initiation of the March 12, 2006 grievance.[11]

Compliance:

The grievant also claims the agency has engaged in racial discrimination and/or harassment. The agency asserts that this claim is both untimely and unsupported.

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he knew or should have known of the event or action that is the basis of the grievance.[12] When an employee initiates a grievance beyond the 30-calendar day period without just cause, the grievance is not in compliance with the grievance procedure, and may be administratively closed.

Here, the grievant challenges having allegedly received a racially offensive Christmas card from his supervisor. The agency asserts that this claim is untimely as it occurred more than 30 days prior to the initiation of his grievance on March 12, 2006. The grievant has not challenged the agency's assertion of untimeliness, nor has he offered just cause for his delay. Accordingly, the grievant's claim of racial discrimination and/or harassment is not in compliance with the grievance procedure and that portion of the March 12th grievance may be administratively closed by the agency.[13]

Consolidation:

Written approval by the Director of this Department or her designee in the form of a compliance ruling is required before two or more grievances are permitted to be consolidated in a single hearing. EDR strongly favors consolidation and will generally consolidate grievances involving the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.[14]

This Department finds that consolidation of the grievant's February 16, 2006 grievance (which was qualified for hearing by the agency on March 30, 2006) with the qualified portion of the grievant's March 12, 2006 grievance is appropriate. The

[11] *See Rules for Conducting Grievance Hearings* § VI.C.1.
[12] Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4(1).
[13] Although we decide this issue on compliance grounds, we note that even if the grievant's claim regarding the alleged Christmas card were timely, it would not be qualified for hearing, as the grievant has not shown that the card constituted an adverse employment action or created an actionable racially hostile work environment.
[14] *Grievance Procedure Manual*, § 8.5.

grievances involve the same parties and will likely share many of the same witnesses. While the grievances do not appear to involve the same underlying issues, the claims raised by the grievances seem to be relatively straightforward, and, as a result, consolidation would not be impracticable. Although the grievant has indicated that he would prefer for his grievances to be heard individually, the interests of judicial economy and efficiency nevertheless warrant consolidation. This Department's rulings on compliance are final and nonappealable.[15]

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's March 12, 2006 grievance is qualified in part and consolidated for hearing with his February 16, 2006 grievance. By copy of this ruling, the grievant and the agency are advised that the agency has five workdays from receipt of this ruling to request the appointment of a hearing officer.

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Claudia T. Farr
Director

[15] Va. Code § 2.2-1001(5).