Issue: Qualification/misapplication of policy, harassment; Ruling Date: September 1, 2006; Ruling #2007-1398; Agency: Virginia Department of Transportation; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling Number 2007-1398
September 1, 2006

The grievant has requested a ruling on whether his May 15, 2006 grievance with the Department of Transportation (VDOT or the agency) qualifies for a hearing. The grievant claims that the agency is harassing him by making "threatening and degrading remarks" and that policy is not being followed. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

Prior to his demotion, the grievant was employed as an Engineering Technician III with VDOT. On April 20, 2006, the grievant was given a memorandum stating that disciplinary action was being considered due to his failure to obtain an E & S Certification from the Department of Conservation and Recreation (DCR E & S Certification) as required for his position. The letter further advised the grievant that if he failed to obtain the required DCR E & S Certification after taking the exam in May 2006, disciplinary action would be taken. In response to the above management actions, the grievant initiated a grievance on May 15, 2006, which alleges workplace harassment and failure to follow state policy.

On June 16, 2006, the grievant was issued a Group III Written Notice with demotion for failing to obtain the required DCR Erosion and Sedimentation Control Certification and meet the minimum requirements for his job. The grievant challenged the disciplinary action on July 14, 2006 by initiating another grievance.

DISCUSSION

Workplace Harassment

While grievable through the management resolution steps, claims of hostile work environment and harassment qualify for a hearing only if an employee presents sufficient

evidence showing that the challenged actions are based on race, color, national origin, age, sex, religion, political affiliation, disability, marital status or pregnancy.[1] In this case, it does not appear that the grievant's complaint of workplace harassment is based on any membership in a protected class, but rather on a generalized claim of unequal treatment.[2] Accordingly, the grievant's workplace harassment issue does not qualify for a hearing.

Unfair Application of Policy

The grievant claims that the agency is unfairly applying policy by treating similarly situated employees inconsistently with regard to obtaining the required DCR E & S Certification. 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. A mere misapplication or unfair application of policy itself, however, is insufficient to qualify for a hearing. The General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions."[3] The threshold question, therefore, is whether or not the grievant has suffered an adverse employment action.

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] As a matter of law, adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[5]

In this case, being told that he must obtain the required DCR E & S Certification and then being issued the April 20th letter, which advises the grievant of the agency's intent to take disciplinary action should he fail to do so, without more, does not constitute an adverse employment action. Accordingly, the grievant's claim of unfair application of policy does not qualify for hearing.[6]

---

[1] *Grievance Procedure Manual* § 4.1(b)(2); *see also* DHRM Policy 2.30 Workplace Harassment (effective 05/01/02).

[2] More specifically, the grievant claims that some employees have been allowed to take the DCR E & S Certification exam three, four, even five times without suffering any recourse for their failed attempts, while the grievant was allowed to take the exam only twice before being issued the April 20th letter stating the agency's intent to take disciplinary action against the grievant if he fails the scheduled DCR E & S Certification exam in May 2006.

[3] Va. Code § 2.2-3004(A).

[4] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

[5] 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)).

[6] However, as stated above, on June 16, 2006, the grievant was issued a Group III Written Notice with demotion for failure to obtain the required certification. On July 14, 2006, the grievant initiated a grievance challenging the disciplinary action as further workplace harassment and a misapplication and/or unfair application of policy. Given the commonality of facts in the two grievances, the grievant may offer

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.

_____
Claudia T. Farr
Director

into evidence information and facts surrounding the May 15th grievance and in particular, the April 20th letter, at the hearing on his July 14th grievance. If the evidence offered by the grievant is determined to be relevant to the July 14th grievance by the hearing officer, the hearing officer is obligated to allow it to be introduced into evidence. *See* Rules for Conducting Grievance Hearings, § IV(D).