Issue: Qualification/retaliation/misapplication of policy; Ruling Date: December 11, 2006; Ruling #2007-1444; Agency: Department of State Police; Outcome: grievance is qualified for hearing by EDR

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of State Police
Ruling Number 2007-1444
December 11, 2006

The grievant has requested a ruling on whether his July 24, 2006 grievance with the Department of State Police (VSP or the agency) qualifies for hearing. He alleges that VSP improperly denied his request to transfer to another position. For the reasons discussed below, this grievance qualifies for hearing.

FACTS

The grievant, a senior trooper with the VSP, sought a transfer to the Counter Terrorism and Criminal Interdiction (CCI) Unit. He put a transfer letter on file as early as October 9, 2003. In 2006, the VSP decided to fill an open CCI Unit trooper position and conducted a review to determine who should be transferred to fill the vacancy. The grievant and another agency employee were the only candidates who had requested a transfer to the CCI Unit. Agency records reflect that the evaluations of both candidates were similar and favorable. In mid-July 2006, the agency determined that the other candidate was the better choice for the position rather than the grievant. The position with the CCI Unit did not provide any increase in pay, but it was unique work, with allegedly better training of new skills and different supervision. The grievant claims that he was improperly denied the transfer because of his military status, in retaliation for having filed other grievances, and that the denial was also a misapplication of policy.[1] The grievant was and currently is a member of the Virginia National Guard.

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[1] The management action challenged by this grievance is the agency's denial of a transfer. In response to the agency head's conclusion that the grievance did not qualify for hearing, the grievant characterized the denied transfer as discriminatory, retaliatory, and a misapplication of policy in an attachment to his Form A. While these three theories were not expressly stated on the Form A as filed, the management action being grieved (the denial of transfer) was. For that reason the grievant's theories as to *why* that management action was improper will be addressed in this ruling. While this approach is a departure from EDR's past rulings on adding new "claims," *see*, *e.g.*, EDR Ruling Nos. 2006-1248, 1249, 1278; EDR Ruling No. 2006-1116, it does not conflict with the grievance statutes or the *Grievance Procedure Manual*, and is justified and necessary in cases like this. In this case, it does not appear that any prejudice will adversely affect the agency's position at hearing, as it has had notice of all these issues since mid-September 2006. Moreover, addressing the grievant's three theories on the alleged impropriety of the management action is consistent with EDR's strong preference to have grievances challenging management actions decided on their merits, rather than on procedural technicalities. *E.g.,* EDR Ruling No. 2007-1450. This Department's rulings on matters of compliance are final and nonappealable. Va. Code § 2.2-1001(5).

The grievant had also unsuccessfully applied for a different position with the CCI Unit previously. At that time, a member of management reportedly told the grievant that he was not selected because of his military status. The sergeant who made the recommendation of the best candidate in the earlier request for transfer also made the recommendation for the transfer addressed in this grievance. The same agency decision-makers were also allegedly involved. The grievant additionally asserts that the denials of both of these transfers were not the only instances in which he believes he has been discriminated against because of his military status. The grievant stated that when he left on military leave in the past, he had to turn in his manuals. Upon return to service with the VSP on one occasion, he allegedly did not receive his manuals, which prevented him from studying for promotional tests. The grievant also alleges that he has been assigned to schedules that were meant to cause him difficulty when he had military drills on weekends. For instance, the grievant reported that on a number of occasions, he was assigned to work a late shift on Friday night, when his supervisors knew he had military drill the following Saturday morning and all weekend. The grievant would then have an early Monday shift as well.

The grievant has also alleged that he was denied the transfer in retaliation for previous grievance activity. He had filed a grievance related to an overpayment and payback issue on June 5, 2006.[2] In addition, the grievant claims that there was a misapplication of policy in the selection decision. The grievant asserts that on both occasions when the grievant was denied transfer to the CCI Unit, the sergeant recommending the selection of the candidate picked two of the sergeant's own close friends.[3]

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[4] Thus, all claims relating to issues such as the methods, means, and personnel by which work activities are to be carried out, or to the transfer or reassignment 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 or applied unfairly.[5] In this case, the grievant has alleged discrimination, retaliation, and misapplication or unfair application of policy.

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[2] The grievant had been overpaid following return from military service. The grievant initiated a grievance challenging the method the agency proposed he should have to pay back the portion that he was overpaid.

[3] The grievant also argued that he did not receive an interview during the selection process. However, under VSP General Order 16, paragraph 8, the process whereby a candidate is chosen for transfer to the CCI Unit does not include an interview of the applicant.

[4] Va. Code § 2.2-3004(B).

[5] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(b) and (c).

Discrimination -- USERRA

The Uniformed Services Employment and Reemployment Rights Act (USERRA)[6] prohibits an employer from discriminating against a member of the armed forces. A person cannot be "denied initial employment, reemployment, retention in employment, promotion, or any *benefit of employment* by an employer" based on the employee's membership in a "uniformed service."[7] A benefit of employment is defined by the Act as:

> *any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.*[8]

"Because USERRA was enacted to protect the rights of veterans and members of the uniformed services, it must be broadly construed in favor of its military beneficiaries."[9] As such, the Fourth Circuit, among other courts, has liberally interpreted what qualifies as a benefit of employment.[10] In this case, the grievant asserts that the CCI Unit position would have provided him with better training in new skills as well as assisted in his opportunities for future advancement. While no court interpreting USERRA has directly considered whether additional training and opportunities for advancement are benefits of employment, courts have determined that employer decisions affecting such factors can be adverse employment actions in Title VII discrimination cases.[11] It would be inconsistent if an employer could take an adverse employment action against an employee based on the employee's military status and the claim would not fall under USERRA. Consequently, given the expansive way in which USERRA is interpreted by courts, the opportunities for further training and

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[6] 38 U.S.C. §§ 4301 et seq. See also Executive Order 1, which "specifically prohibits discrimination against veterans," and DHRM Policy 4.50, *Military Leave*, which "[p]ermits employees to take military leave, with or without pay, for active duty in the armed services of the United States, and permits employees who are former and inactive members of the armed services, or current members of the reserve forces of any of the United States' armed services, or of the Commonwealth's militia, or the National Defense Executive Reserve to take military leave in accordance with federal [USERRA] and state law."

[7] 38 U.S.C. § 4311(a) (emphasis added). "Uniformed service" includes the Armed Forces and National Guard. 38 U.S.C. § 4303(16).

[8] 38 U.S.C. § 4303(2).

[9] Hill v. Michelin N. Am., Inc., 252 F.3d 307, 312-13 (4th Cir. 2001) (citing Coffy v. Republic Steel Corp., 447 U.S. 191, 196 (1980) (noting that predecessor to USERRA "is to be liberally construed for the benefit of the returning veteran."); *accord* 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.")).

[10] *E.g., Hill*, 252 F.3d at 312-13.

[11] *See, e.g.,* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 376 (4th Cir. 2004) ("The question is whether there was a change in the terms or conditions of his employment which had a 'significant detrimental effect' on his opportunities for promotion or professional development."); Boone v. Goldin, 178 F.3d 253, 256-57 (4th Cir. 1999).

advancement provided by the CCI Unit position will be considered benefits of employment under USERRA by this Department.[12]

An employer shall be considered to have violated USERRA if the employee's military status was a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such a military status.[13] If the employee establishes that his military status was a motivating factor in the employer's decision, USERRA shifts the burden of proof to the employer.[14] Therefore, because the agency action denied the grievant a "benefit of employment," to qualify for a hearing, the grievant must present sufficient evidence to raise a question that his military status was a "motivating factor" in the agency's decision,[15] i.e., that the grievant's military status was "one of the reasons" he was denied the transfer.[16]

The grievant has presented evidence of a statement by a member of agency management who allegedly told the grievant that his military status was a reason he did not receive the first transfer to the CCI Unit. In the recent transfer, the agency evaluations of both candidates for the position were very similar, with little differentiating the two. Because the same decision-makers were involved in the recent transfer, and when considered in conjunction with the other alleged actions taken against the grievant related to his military service, the grievant has presented evidence raising a sufficient question as to whether his military status may have been a motivating factor in the denial of the transfer. This qualification ruling in no way determines that the agency's actions were in fact motivated by the grievant's military status, only that further exploration of the facts by a hearing officer is appropriate.

Alternative Theories and Claims

The grievant also asserts claims of retaliation (for prior grievance activity) and misapplication of policy (candidate chosen based on friendship, instead of knowledge, skills, and abilities). Because the grievant's claim of discrimination based on his military status qualifies for hearing, this Department deems it appropriate to send all alternative theories raised by the grievance for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the grievant's July 24, 2006 grievance is qualified for hearing. Within five workdays of receipt of this ruling, the agency shall request the

[12] *See also* Thomsen v. Department of Treasury, 169 F.3d 1378, 1381 (Fed. Cir. 1999) ("[T]he 'benefit of employment' that cannot be lawfully deprived by an employer is one that flows as a result of the person's employment.").
[13] 38 U.S.C. § 4311(c)(1).
[14] *See Hill*, 252 F.3d at 312.
[15] *See id.*
[16] 20 C.F.R. § 1002.22.

appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

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Claudia T. Farr
Director