Issue: Qualification – Benefits/Leave (Community Service); Ruling Date: September 24, 2008; Ruling #2008-1986; Agency: Radford University; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF THE DIRECTOR

In the matter of Radford University
Ruling No. 2008-1986
September 24, 2008

The grievant has requested qualification of her December 7, 2007 grievance with Radford University (the University). For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the University as an Accounting Support Technician. On July 27, 2007, the grievant signed up for a two hour University-sponsored river float trip which was part of the University's "Our Turn" faculty development program. When she notified her supervisor of her plans, she was informed that the trip was recreational and she would have to use annual leave to cover time missed from work. The grievant asserts that because she was not able to meet with the Human Resource Department prior to the event, she was forced to cancel participation with the float trip. The grievant asserts that she had given her supervisor 10 days of advance notice of her intent to participate with the float trip.

On October 4, 2007, an employee with the Human Resource Department signed the grievant up for a CommonHealth[1] massage therapy program after the grievant expressed interest in the program. The following day, the grievant received a memorandum from her supervisor stating that the grievant's email informing of the planned participation with the massage therapy session was out of order. The supervisor's memo stated that "[y]ou consistently miss the step that requires consulting with me before enrolling or signing up for programs that require absence from work," and that "[a]ll programs/activities held during working hours, even if no leave time will be used must be approved by me before you consider registering and/or attending."

On November 1, 2007, the grievant requested revision of her annual performance evaluation. Specifically, the grievant objected to the comment: "Non consultation with supervision before enrolling or signing up for programs that require absence from work has caused difficulty." The reviewer refused to alter the evaluation.

[1] CommonHealth is the employee wellness program for the Commonwealth of Virginia.

On November 28, 2007, the grievant completed an application for leave of absence for 4.5 hours to assist with a theater program at the county high school. The grievant asserts that her supervisor harassed her about taking the leave but ultimately allowed her to take time off.

DISCUSSION

Misapplication/Unfair Application of Leave

The grievant essentially asserts that her supervisor is misapplying or unfairly applying policy by harassing her when she attempts to participate in agency sponsored events.

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. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[2] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.[3] An adverse employment action is defined as a "tangible employment action 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."[4] 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, there is no evidence that the grievant suffered an adverse employment action. The grievant asserts that she had to cancel her participation in the river float trip. While repeated denials of benefits could potentially rise to the level of an adverse employment action,[6] here the grievant concedes that she canceled her participation in the event. While she asserts that she was "forced to cancel" her participation in the float trip, she concedes that she was forced to cancel because she not able to meet with the Human Resource Department prior to the date of the event. While scheduling a meeting with the Human Resource Department may have been difficult prior to the float trip, it does not stand to reason that she was precluded from contacting the Human Resources department by phone or e-mail to share her concerns over her supervisor's position on leave. In other words, it is not clear

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[2] *See Grievance Procedure Manual* § 4.1(b).
[3] 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.
[4] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[5] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[6] *See* Atkins v. Potter, OIC 4029 2002 U.S. Dist. LEXIS 18841, at *18 (N.D. Ill., Oct. 4, 2002).

that the grievant was required to cancel her participation for the float trip.[7] Moreover, even if she had been forced to cancel her participation, a single denial of benefits does not constitute an adverse employment action.[8]

As to the October massage therapy program and November school theater program, the grievant was able to attend these events. The memo she received counseling her about the need to check with her supervisor before scheduling participation in events does not rise to the level of an adverse employment action because such a document, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[9] Likewise, the questioning by her supervisor about the school program does not constitute an adverse employment action.[10] Accordingly, the leave issue is not qualified for hearing. We note, however, that if in the future the grievant is repeatedly denied the use of benefits afforded her under state and University policy, such denials could potentially constitute an adverse employment action[11] and, if grieved, could qualify for hearing if there were evidence that the denial was *improper*.[12]

Performance Evaluation

The grievant also seeks to have her performance evaluation modified by removing the reference to difficulties caused by her failure to consult with her supervisor prior to scheduling events. A satisfactory performance evaluation is not an adverse employment action where the employee presents no evidence of an adverse action relating to the evaluation.[13] In this case, although the grievant disagrees with the comment about consulting

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[7] On July 27, 2007, the grievant informed her supervisor that she intended to float the river on August 6, 2007. Her supervisor informed her the same day that she would need to use leave to cover the time spent on the trip. Thus, the grievant appeared to have approximately 10 days to seek clarification regarding leave from the human resources department.

[8] *See* Hart v. Life Care Center of Plano, 243 Fed. Appx 816, 818 (5th Cir. 2007) (unpublished decision) (denial of a single day of leave does not rise to the level of an adverse employment action.)

[9] *See* Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999).

[10] *See* Von Gunten v. Maryland, 243 F.3d 858, 869 (4th Cir. 2001)(holding that scrutinizing the employee's requests for leave, following her around and questioning her activities, and responding to a citizen's complaint against her by placing her on administrative leave were not adverse employment actions).

[11] *See* Atkins v. Potter, OIC 4029 2002 U.S. Dist. LEXIS 18841, at *18 (N.D. Ill., Oct. 4, 2002).

[12] The Department of Human Resource Management (DHRM), the state agency charged with the promulgation and interpretation of state polices, including leave policies, has stated that: "[I]f the state or individual agency sponsors an event for its employees[,]that implies that all employees are invited to attend." Further, "[t]he supervisor's role is to ensure that the office has sufficient coverage to meet business needs during these events, not to determine the merits of an event or program and deny attendance based on personal opinion." (December 6, 2007 email correspondence from Department of Human Resource Management (DHRM) Policy Analyst to grievant). We note that there appears to be potential tension between this statement of Commonwealth policy and the "Finance and Administration: Participation in University Events" policy discussed below in the "New Departmental Policy" section of this ruling, regarding the value of participation in programs such as "Our Turn."

[13] Rennard v. Woodworker's Supply, Inc., 101 Fed. Appx. 296, 307 (10th Cir. 2004) (citing Meredith v. Beech Aircraft Corp., 18 F.3d 890, 896 (10th Cir. 1994)); *see also* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 377-378 (4th Cir. 2004) (The court held that although the plaintiff's performance rating was lower than the previous yearly evaluation, there was no adverse employment action as the plaintiff failed to show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment, the evaluation

with her supervisor before enrolling in programs requiring an absence from work, the overall rating was "Contributor" and generally satisfactory. Most importantly, the grievant has presented no evidence that the 2007 performance evaluation has detrimentally altered the terms or conditions of her employment. Accordingly, this grievance does not qualify for hearing.[14] We note, however, that should the 2007 performance evaluation somehow later serve to support an adverse employment action against the grievant (e.g., demotion, termination, suspension and/or other discipline), the grievant may address the underlying merits of the evaluation through a subsequent grievance challenging any related adverse employment action.

New Departmental Policy

The grievant noted at several steps during the grievance process that her concerns regarding a new departmental policy were not addressed. On December 13, 2007, subsequent to initiating her December 7, 2007 grievance, the grievant received a new departmental directive entitled "Finance and Administration: Participation in University Events." That policy states, in pertinent part, that:

> Participation of Finance and Administration employees (administrative/professional and classified) in University sponsored training events (e.g., Our Turn) will be authorized by the supervisor based upon the value of the training to be derived and the workload/schedule of the department at the time of the event. Any training/events sponsored by Human Resources (e.g., CommonHealth) will authorized by the supervisor based on the workload/schedule of the department at the time of the event.

The grievant had several concerns about this new policy including that it could potentially deny Finance and Administration employees a program (Our Turn) intended as a benefit to university employees.

This concern cannot be qualified because it is a new issue that was not part of the original grievance. Once initiated, new claims cannot be added to a grievance.[15] However, if

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was generally positive, and he received both a pay-raise and a bonus for the year.). "[A] similarly thick body of precedent . . . refutes the notion that formal criticism or poor performance evaluations are necessarily adverse actions." Brown v. Brody, 199 F.3d 446, 458 (D.C. Cir. 1999).

[14] Although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the Act). Under the Act, if the grievant gives notice that she wishes to challenge, correct or explain information contained in her personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth her position regarding the information. Va. Code § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. Va. Code § 2.2-3806(A)(5).

[15] *Grievance Procedure Manual* § 2.4.

the grievant is denied the opportunity to participate in an Our Turn event in the future because her supervisor deems it insufficiently "valuable," the grievant could grieve such a denial.[16]

CONCLUSION

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 and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). 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

[16] *Cf.* EDR Ruling No. 2006-1317 (Grievant could challenge eligibility for benefits only after becoming eligible to apply for them.) See also note 12 above.