Issues: Qualification – Benefits/Leave (Sick Leave), Discipline (Verbal Counseling), Discrimination (Race); Ruling Date: September 30, 2008; Ruling #2009-2118, 2009-2121, 2009-2122, 2009-2123; Agency: Department of Corrections; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Nos. 2009-2118, 2009-2121, 2009-2122, 2009-2123
September 30, 2008

The grievant has requested a ruling on whether his four grievances (three initiated on June 4, 2008, and one on June 5, 2008) with the Department of Corrections (the agency) qualify for a hearing. For the reasons discussed below, these grievances do not qualify for a hearing.

FACTS

On May 9, 2008, the grievant was on an approved day of rest, but was at the agency's facility, in uniform, to assist with an employee event. One of the grievant's supervisors approached him on that day to question him and verbally counsel him. Following this incident, the grievant submitted an internal complaint to the agency. He followed up his complaint with a memo to the Warden of the facility on May 28, 2008, listing various forms of relief he wanted pursuant to his internal complaint, including reimbursement of sick time he had used in relation to the incident and a list of questions he wanted the supervisor who counseled him to answer. However, because of the lapse of time since he submitted the complaint, the grievant initiated a grievance on June 4, 2008 (Grievance 2) and another on June 5, 2008 (Grievance 4) alleging that his internal complaint had not been addressed and improperly handled.

Additionally, the grievant initiated a grievance (Grievance 1) to challenge the verbal counseling incident itself, raising the grounds contained in his internal complaint. The grievant also filed a grievance on June 4, 2008 (Grievance 3) to challenge the way in which the agency has handled his complaint as discrimination based on race. He states that "if I had done what the [supervisor] did I would have been dealt with within days."

DISCUSSION

Verbal Counseling

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[1] Claims relating to a verbal counseling session generally do not qualify for hearing. The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[2] Thus, typically, a 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, the counseling session does not constitute an adverse employment action, because such an event, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[6] For this reason, the grievant's claims in Grievance 1 relating to the verbal counseling do not qualify for a hearing.

Internal Complaint Investigation

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.

Misapplication or Unfair Application of Policy: 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.

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[1] Va. Code § 2.2-3004(B).
[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] *See, e.g.*, Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[6] *See* Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999); *cf.* Monk v. Stuart M. Perry, Inc., Civil Action No. 5.07c 0002 2008 U.S. Dist. LEXIS 62028, at *7 (W.D. Va. July 18, 2008) (Title VII of the Civil Rights Act "protects plaintiffs from retaliation that produces an injury or harm and does not serve to shield employees from trivial harms, petty slights, minor annoyances, the ordinary tribulations of the workplace, or simple lack of good manners" and "does not set forth a general civility code for the American workplace.") (citations and internal quotations omitted).

In reviewing the grievant's case, this Department is unaware of any state or agency policy, and the grievant cites to none, that the agency has misapplied or unfairly applied in handling the internal complaint. The agency has acknowledged that the complaint was not handled timely, but also states that there was no policy violated. This Department has found nothing to dispute the agency's assertions. Further, there is no indication that the grievant experienced an adverse employment action from the agency's delay in handling the internal complaint, which it has now addressed in responding to these grievances. The grievant has not raised a sufficient question that the agency misapplied or unfairly applied policy. As such, the grievant's claims regarding the agency's handling of the internal complaint (Grievance 2 and Grievance 4) under policy do not qualify for a hearing.

Discrimination: Grievances that may be qualified for a hearing include actions related to discrimination on the basis of race.[7] To qualify such a grievance for hearing, there must be more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[8]

The grievant appears to allege that the agency failed to address his complaint as a result of reverse discrimination based on race. However, beyond his bare allegation, the grievant has submitted no evidence to raise an inference of discrimination. Further, the agency has since addressed the issues raised by the grievant's complaint, while acknowledging the improper delay of time. Consequently, there is no basis for the grievant's claim of discrimination (Grievance 3) to qualify for hearing.

Relief Requested

To the extent the grievant is also requesting in any of his grievances the same relief he requested in the internal complaint, there is still no basis to qualify the grievances for a hearing. The grievant requested that he not be transferred and not be subjected to retaliation. There is no allegation that either has occurred. The only remaining request for relief is reimbursement of his sick leave.[9] However, again, the grievant has presented no evidence that he would be entitled to reinstatement of such leave. The grievant took sick leave around the time of the incident, according to the agency, for "situational anxiety." The grievant appears to allege that due to his supervisor's allegedly inappropriate conduct, he (the grievant) had to take sick leave, and

[7] *See Grievance Procedure Manual* § 4.1(b).
[8] *See* Hutchinson v. INOVA Health System, Inc., Civil Action 97-293-A 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. April 8, 1998).
[9] The grievant also requested that the supervisor answer a list of questions. However, such a claim would not qualify for hearing alone in this context. There is no indication that the grievant experienced an adverse employment action by not having the supervisor answer the listed questions.

the agency should reimburse him for that leave. This Department has found no provision of state policy that supports the grievant's argument.[10] As such, there is no basis to qualify these claims for a hearing.

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 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.

Claudia T. Farr
Director

[10] Department of Human Resource Management (DHRM) Policy 4.57, *Virginia Sickness and Disability Program*, discusses restoration of leave under "intermittent disability." "If the absence is accepted as compensable [as workers' compensation] and the employee is eligible to receive indemnity benefits for the period under a Workers' Compensation VWCC award time will be reinstated to the employee based on the amount paid under the VWCC award." As stated by the agency, the grievant did not receive any indemnity benefits for the period of his absence. As such, there would be no reinstatement of leave due under this portion of DHRM Policy 4.57.