Issues: Qualification – Benefits (Annual Leave) and Discrimination (Race); Ruling Date: December 9, 2008; Ruling #2009-2161; Agency: Virginia Department of Health; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Health
EDR Ruling No. 2009-2161
December 9, 2008

The grievant has requested a ruling on whether his July 17, 2008 grievance with the Department of Health (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In his July 17, 2008 grievance, the grievant alleges that he has been subject to "harassment and racial discrimination practices." He states that his annual leave request was denied after it was verbally approved. It appears that the grievant's supervisor indicated in an e-mail that the grievant's leave request would be approved once he completed two work assignments. In addition to this purported denial of leave, the grievant states that he has endured harassment on the basis of his race, including being denied the ability to work alternative schedules, having his laptop taken away a year and a half ago, having his beeper taken away for a brief time, problems with his recertification two years ago, which led to a demotion, and restrictions on the time he is permitted to remain in the office.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[1] Further, complaints relating solely to the establishment or revision of wages, salaries, position classifications, or general benefits "shall not proceed to a hearing"[2] unless there is sufficient evidence of discrimination, retaliation, discipline, or a misapplication or unfair application of policy.[3]

[1] *See* Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(C).
[3] *Grievance Procedure Manual* § 4.1(c).

In this case, the grievant essentially claims misapplication or unfair application of policy and discriminatory harassment based on his race.[4]

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. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[5] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.[6] 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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8]

In part, Department of Human Resource Management Policy 4.10 provides:

> Employees must request and receive approval from their supervisors to take annual leave. Employees should make their requests for leave as far in advance as possible. When practical, and for as long as the agency's operations are not affected adversely, an agency should attempt to approve an employee's request for annual leave. However, supervisors may deny the use of annual leave because of agency business requirements. Approval of leave may be rescinded if the needs of the agency change.

This policy provides management the discretion to approve or deny an employee's request for leave. However, even though agencies are afforded great flexibility in making such decisions, agency discretion is not without limitation. Rather, this Department has repeatedly held that even where an agency has significant discretion to make decisions (for example, an agency's assessment of a position's job duties), qualification is warranted where evidence presented by the grievant raises a sufficient

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[4] Though not included on the Form A, the grievant has also raised a retaliation claim at this point in the grievance process. That claim is addressed below.

[5] *See Grievance Procedure Manual* § 4.1(b).

[6] 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.

[7] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

[8] *See, e.g.*, Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[9]

The grievant has cited, and the agency has admitted to, inconsistent practices in granting leave on the precondition that certain work obligations be performed. This evidence of inconsistent treatment is sufficient to raise an inference of a misapplication of policy in the purported denial of the grievant's leave request. However, although the denial of one day of leave might rise to the level of an adverse employment action in some cases,[10] under the facts alleged here, it appears that the impact on the grievant of this purported denial of leave was not significant enough to meet the definition of an adverse employment action. The grievant has not submitted evidence indicating any significant impact in this instance. Indeed, this does not appear to be a case of a true denial of leave. The grievant's supervisor stated the grievant was approved to take the requested leave once he completed two assignments. As such, because this purported denial of leave does not appear to rise to the level of an adverse employment action in this case, the grievance does not qualify for a hearing.

Harassment/Hostile Work Environment

For a claim of hostile work environment or harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status or prior protected activity; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[11] "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[12]

Some, not all, of the grievant's allegations could raise a question that he may have been treated differently because of his race, but ultimately, the evidence is insufficient to show that the alleged discriminatory conduct rose to the level of "severe or pervasive," which is needed to sustain a claim of harassment or hostile work environment. Specifically, the grievant asserts that a leave request was denied,[13] he was not able to work an alternate schedule, his laptop was taken away a year and a half ago, his beeper

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[9] *See Grievance Procedure Manual* § 9 (defining arbitrary or capricious as a decision made "[i]n disregard of the facts or without a reasoned basis"); *see also, e.g.*, EDR Ruling 2008-1879.

[10] *See, e.g.*, Balinao v. Gonzalez, No. 9:06-0254-PMD-GCK, 2007 U.S. Dist. LEXIS 97440, at *49 (D.S.C. May 22, 2007); Liggett v. Rumsfeld, No. 04-1363, 2005 U.S. Dist. LEXIS 34162, at *12 (E.D. Va. Aug. 29, 2005). *But see, e.g.*, Scott-Brown v. Cohen, 220 F. Supp. 2d 504, 510-11 (D. Md. 2002); Lawson v. Principi, No. 7:00CV00851, 2001 U.S. Dist. LEXIS 13152, at *10 (W.D. Va. Aug. 21, 2001).

[11] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).

[12] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 114 S. Ct. 367, 371 (1993).

[13] As already indicated above, it does not appear that the purported denial of this one leave request was an adverse employment action.

was taken away for a brief time, his supervisor threatened him regarding problems with recertification two years ago, which led to a demotion, and there are restrictions on the time he is permitted to remain in the office. While the grievant's claims, if true, could reflect potentially problematic issues in management style, these claims of largely intermittent and/or relatively minor events do not rise to the level of "severe or pervasive" discriminatory conduct. Because the grievant has not raised a sufficient question as to the elements of a claim of hostile work environment or harassment, this claim does not qualify for hearing.

This ruling does not mean that EDR deems the alleged behavior of the supervisor, if true, to be appropriate, only that the claim of hostile work environment on the basis of race does not qualify for a hearing. Moreover, this ruling in no way prevents the grievant from raising the matter again at a later time if the alleged conduct continues or worsens.

Retaliation

The grievant has also alleged a claim of retaliation at the qualification stage of this process. However, it appears that the grievant's retaliation claim arises from an alleged protected act occurring at the second step of this grievance. Consequently, any alleged retaliation related to the alleged protected act would have occurred after the initiation of this grievance and cannot be added at this stage.[14] If the grievant wishes to raise such issues, a new grievance would need to be initiated.

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

[14] *Grievance Procedure Manual* § 2.4.