Issues: Qualification – Benefits/Leave (Annual Leave) and Discrimination (Other); Ruling Date: November 3, 2009; Ruling #2010-2431; Agency: Department of State Police; Outcome: Qualified for Hearing.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of State Police
Ruling Number 2010-2431
November 3, 2009

The grievant has requested a ruling on whether his June 24, 2009 grievance with the Department of State Police (VSP or the agency) qualifies for a hearing. For the reasons discussed below, this grievance qualifies for a hearing.

FACTS

The grievant is employed as a Trooper-Pilot with the agency. On June 24, 2009, he initiated a grievance alleging that the agency has discriminated against him because of his military service, by denying his requests to take earned leave, and has made him feel "harshly treated and even threatened or disciplined for requesting leave."

After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. The agency head denied the grievant's request, and the grievant has appealed to this Department.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[1] Thus, all claims relating to issues such as the means, methods, and personnel by which work activities are to be carried out, and the transfer, reassignment, or scheduling 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.[2]

The Uniformed Services Employment and Reemployment Rights Act (USERRA)[3] prohibits an employer from discriminating against a member of the armed forces. A person

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

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."[4] 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.[5]

Moreover, an employer shall be considered to have violated USERRA only if the employee's military status was a motivating factor in the employer's action, and the action would not have been taken in the absence of such a military status.[6] If the employee establishes that his military status was a motivating factor in the employer's action, USERRA shifts the burden of proof to the employer to show that the action would have been taken anyway, in the absence of his military status.[7]

Here, the agency's action could be viewed as denying the grievant a "benefit of employment," the ability to take earned leave. To qualify for a hearing, the grievance must also present evidence raising a sufficient question as to (i) whether the grievant's military status was a "motivating factor" in the agency's denial of earned leave, and if so, (ii) whether the agency would not have denied the leave request in the absence of his military status.[8] Further,

> [d]iscriminatory motivation under the USERRA may be reasonably inferred from a variety of factors, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses.[9]

In this case, the grievant alleges that the agency repeatedly denied his requests to take earned leave time because he had already been granted time off for National Guard service. In

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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."

[4] 38 U.S.C. § 4311(a) (emphasis added). "Uniformed service" includes the Armed Forces and National Guard. 38 U.S.C. § 4303(16).

[5] 38 U.S.C. § 4303(2).

[6] 38 U.S.C. § 4311(c)(1).

[7] Hill v. Michelin N. Am., Inc., 252 F.3d 307, 312 (4th Cir. 2001)

[8] *See id.*

[9] Sheehan v. Dep't of the Navy, 240 F.3d 1009, 1014 (Fed. Cir. 2001).

his response, the second-step respondent appears to acknowledge a relationship between the denial of the grievant's requests and his military leave:

> [Grievant's immediate supervisor] denied that [the grievant was] being treated any differently than other pilots, stating that it was [the grievant's] choice to use [his] personal leave for military purposes when [he] had exceeded the maximum allowable amount. [The immediate supervisor] stated [grievant] had been granted seven weeks during 2009 (combination military and annual leave for military purposes), yet [the grievant] claim[s] discrimination against [his] military status when future leave is requested, and it is explained that other pilots need the opportunity to take some leave as well.

In light of all of the above, this Department concludes that the grievant has raised a sufficient question as to whether his military status was a motivating factor in the alleged denial of his leave requests. While the agency appears to assert that its actions were for the purpose of administering the leave policy more equitably, whether that is a permissible purpose under USERRA is to be determined by the hearing officer. This qualification ruling in no way determines that the agency's denial of leave was in fact motivated by the grievant's military status or would not have occurred in the absence of his military status, only that further exploration of the facts by a hearing officer is appropriate.

Alternative Theories and Additional Claims

The grievant also asserts that, in relation to the denial of his leave requests, management has made him feel "harshly treated and even threatened or disciplined for requesting leave." 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 and claims raised by the June 24, 2009 grievance for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

CONCLUSION

For the reasons set forth above, the grievant's June 24, 2009 grievance is qualified for hearing. Within five workdays of receipt of this ruling, the agency shall request the 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