Issues: Qualification – Compensation (Promotion), Discrimination (Race), and Retaliation (Grievance Activity); Ruling Date: December 9, 2009; Ruling #2010-2461; 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
Ruling No. 2010-2461
December 9, 2009

The grievant has requested a qualification ruling in his June 29, 2009 grievance with the Department of Health (the agency). For the reasons discussed below, this grievance does not qualify for a hearing.

## FACTS

Although the Grievance Form A, dated June 29, 2009, is somewhat vague, it appears that the grievant has challenged the agency's actions surrounding his "reinstatement" to a senior inspector position. The grievant was previously "demoted" from senior inspector in or around January 2007. The agency has recently "reinstated" the grievant to a senior inspector position with an upward adjustment in salary effective April 1, 2009. The grievant claims that the agency should have given him his senior inspector position back much earlier, based on previous requests, and that he should be entitled to additional back pay and "legal fees." In conjunction with being placed in the senior inspector position, the grievant was provided a new draft Employee Work Profile (EWP). This EWP included additional and slightly modified language to the performance plan, which the grievant disputes. The grievant appears to be challenging these issues as continuation of alleged past harassment, race-based discrimination and retaliation by a former supervisor. He also asserts that the agency has misapplied policy.

## DISCUSSION

*Senior Inspector Position*

The grievant claims that the agency should have "reinstated" him to his senior inspector position much earlier and provided him more back pay. Assuming for purposes of this ruling only that the grievant's allegations are true, there are still some cases when qualification is inappropriate even if policy has been violated or misapplied. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

It appears that this is a case in which the requested relief that has not been provided is not relief that a hearing officer could order. First, the agency has already restored the grievant to his senior inspector position. Further, under the *Rules for Conducting Grievance Hearings*, a hearing officer is limited in awarding back pay in a non-disciplinary action to the 30 calendar day period immediately preceding the initiation of the grievance.[1] Here, the grievant initiated his grievance on or about June 29, 2009. However, the agency has provided the grievant an adjustment to his salary retroactive for more than 30 days prior to June 29, 2009. As a result, even if the grievant were able to establish at hearing that he should have received this salary adjustment earlier, or that the agency's failure to act in this regard was discriminatory or retaliatory, the hearing officer could not order any portion of the back pay relief sought by the grievant. Lastly, the hearing officer has no authority to award "legal fees" in this type of case.[2] Consequently, effectual relief is unavailable to the grievant through the grievance procedure regarding these claims. In light of the foregoing, the grievance does not qualify for a hearing based on these claims.

*New EWP Additions*

The grievant alleges that the performance plan in a proposed EWP includes additional entries, such as timeframes for completing work assignments, and/or is different from other inspectors' performance plans. Although state employees with access to the grievance procedure may grieve anything related to their employment, only certain grievances qualify for a hearing.[3] By statute and under the grievance procedure, complaints relating solely to issues such as the methods, means, and personnel by which work activities are to be carried out "shall not proceed to hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.[4]

*Misapplication of Policy*

In this case, the grievant claims, in part, that the additions to his performance plan were a misapplication or unfair application of policy.[5] For this claim to qualify for a hearing, there must be evidence raising a sufficient question as to whether management violated a mandatory policy provision or whether the challenged action, in its totality, is so unfair as to amount to a disregard of the intent of the applicable policy. DHRM Policy 1.40, *Performance Planning and Evaluation*, appears to accord an agency much deference in preparing an employee's performance plan. However, even though agencies are afforded great flexibility in making decisions such as those at issue here, agency discretion is not without limitation. Rather, this Department has repeatedly held that even where an agency has significant discretion to make

[1] *Rules for Conducting Grievance Hearings* § VI(C)(1).
[2] "Attorneys' fees are not available under the grievance procedure, with one exception: an employee who is represented by an attorney and substantially prevails on the merits of a grievance challenging his discharge is entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." *Grievance Procedure Manual* § 7.2(e). Because this grievance does not concern "discharge," attorneys' fees would not be an available form of relief.
[3] *See Grievance Procedure Manual* § 4.1.
[4] Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).
[5] The grievant has also asserted claims of discrimination and retaliation, which are addressed below.

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 question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[6]

This Department can find no provision of DHRM Policy 1.40 or the accompanying Instructions for Completing Employee Work Profile that would prohibit an agency from including the types of requirements and performance standards listed in the grievant's performance plan. Rather, the content of the performance plan seems appropriately related to the grievant's duties. In addition, while the grievant may disagree with having these provisions included, it cannot be said that the agency lacked a reasoned basis for its action. The new language was being proposed by a new supervisor as an initial effort at revamping the EWPs for all employees in positions similar to the grievant. Because the grievant's position came up for EWP revision first, because of the "reinstatement" to his senior inspector position, the changes were proposed to the grievant first. Further, the agency states that the grievant has not been evaluated under these standards and the EWP was not finalized. Based on this evidence, it cannot be said that the grievant was singled out for inconsistent treatment, or treated in an arbitrary or capricious manner.

In summary, the evidence fails to raise a sufficient question of whether the agency misapplied or unfairly applied policy in developing the grievant's new performance plan. As such, this claim does not qualify for hearing.

*Harassment/Hostile Work Environment Based on Race*

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; (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.[7] "[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."[8]

However, the grievant must raise more than a mere allegation of harassment – 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. Although the grievant has disputed the agency's recent actions regarding his position and EWP and states that he has experienced potentially disparate conduct in the past from a previous supervisor, the grievant has not presented evidence that raises a sufficient question that this alleged discriminatory conduct

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[6] *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.
[7] *See* Gilliam v S.C. Dept. of Juvenile Justice, 474 F. 3d 134, 142 (4th Cir. 2007).
[8] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 114 S. Ct. 367, 371 (1993).

and harassment was based on his race or any other protected status. Consequently, this claim does not qualify for a hearing.[9]

*Retaliation*

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[10] (2) the employee suffered a materially adverse action;[11] and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[12] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[13]

As reflected in the Grievance Form A's management responses, it appears the grievant has engaged in a protected activity through the filing of a prior grievance.[14] However, the grievant has presented insufficient evidence of a causal link between the grievant's protected activity and any alleged retaliatory conduct. For instance, as stated above, the new language included in the grievant's EWP was proposed as an initial effort by a new supervisor at revamping the EWPs for all similarly situated employees. Indeed, the new EWP was provided by a different supervisor, rather than the supervisor whose actions the grievant challenged in a prior grievance and continues to allege has engaged in past discrimination and harassment. The grievant has not provided evidence that raises a sufficient question as to whether the agency's actions were based upon his prior protected activity or that the agency's explanation for the EWP changes was pretextual. This claim does not qualify for hearing.

*Mediation*

We note, however, that although this grievance does not qualify for a hearing, mediation may be a viable option for the parties to pursue. EDR's mediation program is a voluntary and confidential process in which one or more mediators, neutrals from outside the grievant's

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[9] This ruling does not mean that EDR deems the alleged behavior of the previous supervisor, if true, to be appropriate, only that the claim of harassment does not qualify for a hearing because the grievance presents no claim of protected status.

[10] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

[11] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); s*ee, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

[12] *See, e.g.*, EEOC v. Navy Fed Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).

[13] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

[14] *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work unit involved. For more information on this Department's Workplace Mediation program, the parties should call 888-232-3842 (toll free) or 804-786-7994.

## 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 this Department's 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 notifies the agency that she wishes to conclude the grievance.

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Claudia Farr
Director