Issues: Qualification – Benefits/Leave (Annual Leave) and Discrimination (Gender); Ruling Date: December 7, 2010; Ruling No. 2011-2835; Agency: Department of Social Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Social Services
EDR Ruling No. 2011-2835
December 7, 2010

The grievant has requested a ruling on whether his September 22, 2010, grievance with the Department of Social Services (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Support Enforcement Specialist with the agency. On August 18, 2010, the grievant requested annual leave for five days in September 2010. In response to his request, the grievant's supervisor met with the grievant on August 23, 2010. During this meeting, the grievant's supervisor allegedly questioned the grievant's use of leave and in particular, the impact it could have on his annual performance evaluation. As a result, the grievant's supervisor asked the grievant to reconsider his leave request, which the grievant declined to do. However, the grievant's supervisor ultimately approved the grievant's request for leave.

On September 22, 2010, the grievant initiated a grievance challenging his supervisor's actions with regard to his request for leave as harassing, unfair and threatening. The grievant further alleges that his supervisor has engaged in similar harassing behavior in the past. For instance, according to the grievant, his supervisor and others in management have told him more than once that "[t]his job is not for you."

The September 22nd grievance proceeded through the management resolution steps without resolution and was denied qualification by the agency head on November 1, 2010. The grievant now seeks a qualification determination from this Department.

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

[1] *See* Va. Code § 2.2-3004(B).

"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] In this case, the grievant claims that his supervisor's response to the grievant's request for leave was harassing and unfair.

Workplace Harassment

While grievable through the management resolution steps, claims of hostile work environment and harassment qualify for a hearing only if an employee presents sufficient evidence showing that the challenged actions are based on race, color, national origin, age, sex, religion, political affiliation, disability, marital status or pregnancy.[4] In this case, it does not appear that the grievant's complaint of workplace harassment is based on any membership in a protected class, but rather on a generalized claim of unequal treatment.[5] Accordingly, the grievant's workplace harassment issue does not qualify for a hearing.[6]

Misapplication and/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."[7] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.[8] An adverse employment action is defined as a "tangible employment

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[2] Va. Code § 2.2-3004(C).
[3] *Grievance Procedure Manual* § 4.1(c).
[4] *Grievance Procedure Manual* § 4.1(b)(2); *see also* DHRM Policy 2.30 Workplace Harassment (effective 05/01/02).
[5] More specifically, in the issues section of his grievance, the grievant states that he believes that he "was treated differently than [his] female coworkers, and was harassed by my supervisor for requesting leave." During the management resolution steps, management addressed the grievant's claim as one of harassment and/or discrimination based on gender. In response, the grievant states, "[t]he issue I have raised in this grievance is that my request for leave was handled improperly, which resulted in my being harassed. I never claimed that I was discriminated against due to my gender." In addition, during the second step meeting, the grievant allegedly stated that he is not alleging discrimination based on gender, but feels he is being treated differently than his co-workers, who happen to all be female.
[6] In addition, even if the grievant's claim were considered one of harassment based on gender, the grievant's allegations do not rise to the requisite severity so as to constitute workplace harassment. *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007). *See also* Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 114 S. Ct. 367, 371 (1993)("[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.")
[7] *See Grievance Procedure Manual* § 4.1(b).
[8] 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.

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."[9] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[10]

Although the denial of one day of leave might rise to the level of an adverse employment action in some cases,[11] in this case, while the grievant may have been questioned by his supervisor regarding the leave request and asked to reconsider his request, the leave request was ultimately approved, and as such, the supervisor's actions did not adversely affect the terms, conditions or benefits of the grievant's employment. Accordingly, because the supervisor's actions do not appear to rise to the level of an adverse employment action in this case, the the grievant's claim of unfair application of policy does not qualify for hearing.

Mediation

Finally, 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 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 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

[9] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[10] *See, e.g.*, Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[11] *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).