Issue: Qualification/Annual leave; Ruling Date: August 12, 2004; Ruling #2004-660; 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 Number 2004-660
August 12, 2004

The grievant has requested a ruling on whether his December 9, 2003 grievance with the Department of Corrections (DOC or the agency) qualifies for hearing. He alleges that the agency misapplied policy in failing to approve his requested vacation schedule. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed with DOC as a Corrections Officer Senior at Facility H (the facility). In late November 2003, he submitted a vacation request for calendar year 2004. In accordance with facility procedure, this request listed the grievant's fifteen desired vacation dates for 2004 in order of preference, with the dates categorized as his first, second or third choice. The grievant was subsequently notified that his vacation request had been approved in its entirety, with the exception of two of his third-choice dates. The grievant alleges that the agency misapplied facility policy by denying his request for these two vacation dates while approving vacation requests by employees with less seniority. The agency claims that the partial denial of the grievant's vacation request was in accordance with facility policy and that no misapplication occurred.

DISCUSSION

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. A mere misapplication of policy in itself, however, is insufficient to qualify for a hearing. The General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions."[1] The threshold question, therefore, is whether or not the grievant has suffered an adverse employment action.

An adverse employment action is defined as a "tangible employment act constituting a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant

[1] Va. Code § 2.2-3004(A).

change in benefits."[2] A misapplication of policy may constitute an adverse employment action if, but only if, the misapplication results in a significant adverse effect on the terms, conditions, or benefits of one's employment.[3]

In this case, the failure to grant the grievant his desired vacation schedule does not constitute an adverse employment action. It is apparently undisputed that of the fifteen dates for which the grievant requested vacation leave, he received approval for all but two of these dates. There is no allegation that the grievant suffered any loss of status or pay as a result of the partial denial of his vacation request or that, as a consequence of the agency's decision, he has been denied the opportunity either to use any remaining accrued vacation leave on dates other than those initially requested or to "carry over" any unused accrued vacation leave. Consequently, while the decision not to approve two of his fifteen requested vacation dates may be disappointing to the grievant, the decision does not rise to the level of an adverse employment action because it has no significant adverse effect on the grievant's employment status or benefits.[4] For this reason, this issue does not qualify 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. 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

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Gretchen M. White
EDR Consultant

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[2] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[3] Cf. Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).
[4] *See Cabral v. Philadelphia Coca Cola Bottling Co.*, 2003 U.S. Dist. LEXIS 4260, at *21 (E.D. Pa. March 18, 2003) (finding that the denial of vacation leave for particular requested dates was not an adverse employment action); *see also Wynn v. Paragon Sys., Inc.*, 301 F.Supp.2d 1343, 1354 (S.D. Ga. 2004) (same); *Hunter v. St. Francis Hospital*, 281 F. Supp. 2d 534, 544 (E.D.N.Y. 2003) (same); *Murphy v. McGraw-Hill Companies, Inc.*, 2003 U.S. Dist. LEXIS 13252, at ** 12-13 (S.D. Iowa July 30, 2003) (same); *Boyd v. Presbyterian Hospital*, 160 F. Supp. 2d 522, 537 (S.D.N.Y. 2001) ("The particular timing of a vacation is not so disruptive that it crosses the line from 'mere inconvenience' to 'materially adverse' employment action.")