

Issue: Qualification/Discrimination/Other, Work Conditions/Supervisor/Employee  
Conflict, Violence in the Workplace; Ruling Date: January 23, 2007; Ruling #2007-  
1528; Agency: Virginia Department of Transportation; Outcome: not qualified



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Transportation  
Ruling Number 2007-1528  
January 23, 2007

The grievant has requested a ruling on whether his September 27, 2006 grievance with the Department of Transportation (VDOT or the agency) qualifies for a hearing. The grievant asserts that he has been subjected to a hostile work environment by his supervisor and that his employment has been threatened. For the reasons discussed below, this grievance does not qualify for a hearing.

**FACTS**

The grievant was employed by the agency as a Facilities Assistant Manager.<sup>1</sup> The grievant alleges that during a meeting on August 29, 2006, an Assistant District Administrator made derogatory comments about Southerners.<sup>2</sup> He also alleges that the Assistant District Administrator stated that the grievant needed to decide whether he wanted to stay with the agency and to “grow up or look for options.” On September 27, 2006, the grievant initiated a grievance alleging that he had been subjected to “[m]anagement [c]onflict,” that his employment at VDOT had been threatened, and that the Assistant District Administrator had created a hostile work environment through his alleged conduct at the August 29<sup>th</sup> meeting.

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, through his designee, denied the grievant’s request, and the grievant has appealed to this Department.

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<sup>1</sup> The grievant has apparently resigned his employment with the agency since initiating his September 27<sup>th</sup> grievance.

<sup>2</sup> The grievant states that the purpose of the meeting was “to discuss a disgruntled employee in our department.”

## DISCUSSION

### *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 a protected status or class--race, color, national origin, age, sex, religion, political affiliation, disability, sexual orientation, veteran status<sup>3</sup>--or were taken in retaliation for the grievant's previous involvement in protected activity.<sup>4</sup> Here, the grievant has not alleged that management's purported actions were based on any of these factors.<sup>5</sup> Rather, the facts cited in support of the grievant's claim can best be summarized as describing general work-related conflict between the grievant and the Assistant District Administrator. Such claims of supervisory conflict are not among the issues identified by the General Assembly that may qualify for a hearing.<sup>6</sup>

### *Unfair Application of Policy*

The grievant also alleges that the Assistant District Administrator's statements during the August 29<sup>th</sup> meeting were in violation of the agency's Workplace Violence policy. For an allegation of misapplication 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 or unfair application of policy itself, however, is insufficient to qualify for a hearing. Rather, the General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions."<sup>7</sup> 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 constitute[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."<sup>8</sup> As a matter of law, adverse employment actions include

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<sup>3</sup> *Grievance Procedure Manual* § 4.1(b)(2); see also DHRM Policy 2.30 Workplace Harassment (effective 05/16/06).

<sup>4</sup> <sup>4</sup> See *Grievance Procedure Manual* §4.1(b)(4) see also EDR Ruling No. 2004-750 (discussing claim of retaliatory harassment).

<sup>5</sup> The grievant suggests that the Assistant District Administrator's alleged conduct may have been motivated by "the fact" that the grievant is "a southerner." However, an employee's regional identity or background is not a protected class or status under applicable law and policy.

<sup>6</sup> See Va. Code § 2.2-3004 (A).

<sup>7</sup> Va. Code § 2.2-3004(A).

<sup>8</sup> *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>9</sup>

Here, even if the truth of the grievant's allegations is assumed for the purposes of this ruling, the grieved conduct does not constitute an adverse employment action. While the grievant claims that he was threatened with termination, he has not shown that he in fact experienced a significant and tangible change in his employment status through the Assistant District Administrator's alleged actions at the August 29<sup>th</sup> meeting.<sup>10</sup> Accordingly, the grievant's claim of misapplication and/or unfair application of policy does not qualify for 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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<sup>9</sup> Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4<sup>th</sup> Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4<sup>th</sup> Cir. 1997)).

<sup>10</sup> The grievant asserts that as a result of his resignation from the agency, he has suffered an economic loss of nearly \$6,000. As the grievant apparently resigned after initiating his grievance, any claims relating to his resignation are not within the scope of his September 27<sup>th</sup> grievance. See *Grievance Procedure Manual* § 2.4 ("Once the grievance is initiated, additional claims may not be added.")