

Issues: Qualification – Management Actions (Misapplication of Policy), and  
Discrimination (Race); Ruling Date: July 14, 2016; Ruling No. 2016-4365; Agency:  
Virginia Community College System; Outcome: Not Qualified.



***COMMONWEALTH of VIRGINIA***  
***Department of Human Resource Management***  
***Office of Employment Dispute Resolution***

**QUALIFICATION RULING**

In the matter of the Virginia Community College System  
Ruling Number 2016-4365  
July 18, 2016

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether her April 7, 2016 grievance with the Virginia Community College System (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

**FACTS**

The grievant is employed as an Education Program Advisor at one of the agency’s community colleges. On March 2, 2016, a third-party vendor that recruits students from the college where the grievant works invited her to attend a conference held in another state. The invitation included an offer to pay for grievant’s travel and hotel expenses. The grievant received preliminary approval to attend the conference from agency management and notified the vendor of her plans. On or about March 25, agency management became concerned that the grievant’s attendance at the conference could be viewed as a gift in violation of state and/or agency policy because the grievant’s travel expenses were to be paid by the vendor. The agency ultimately decided not to approve the grievant’s request to attend the conference as a result of these concerns.

On or about April 7, 2016, the grievant filed a grievance disputing that agency’s decision and alleging that another agency employee was permitted to travel to another country for an event held by an educational institution, with the travel expenses paid for by the hosting institution. The grievant alleges that the other employee’s travel also violated the agency’s gift policy and, thus, that employee should not have been allowed to attend the event. She further claims that the agency “either knowingly or unknowingly engaged in an executive decision making process that clearly demonstrated preference [sic] treatment of one employee or another” that created “the appearance of an unequitable system of access based on racial/color bias.” After proceeding through the management resolution steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that decision to EDR.

**DISCUSSION**

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.<sup>1</sup>

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<sup>1</sup> See *Grievance Procedure Manual* § 4.1.

Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>2</sup> Thus, all claims relating to issues such as the means, methods, and personnel by which work activities are to be carried out do not qualify for a 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 or agency policy may have been misapplied or unfairly applied.<sup>3</sup>

### *Misapplication/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."<sup>4</sup> Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment 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."<sup>5</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>6</sup>

In her grievance, the grievant broadly disputes the agency's decision that her travel request was inconsistent with its gifts policy and that the conference was not sufficiently related to her job so as to justify her attendance. She questions why the agency determined that her attendance at the conference was "not necessarily critical for [her] to perform her duties" when it allowed another employee to attend an event held by an educational institution in another country. The grievant further argues that the other employee "is not a senior administrator and has no executive signing authority," whereas the grievant coordinates employer visits to the college as one of her core job responsibilities. In effect, the grievant asserts that the agency unfairly denied her request for travel because the other employee was permitted to travel to another country even though the hosting institution paid for that employee's travel expenses.

It appears the agency initially informed the grievant that, in whole or in part, its decision not to approve her travel request was based on a concern that allowing the vendor to pay for the grievant's travel could be considered a violation of policy and/or law regulating the acceptance of gifts.<sup>7</sup> The grievant essentially disputes whether the agency has appropriately exercised its discretion to manage the operations and affairs of state government.<sup>8</sup> That discretion would

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<sup>2</sup> See Va. Code § 2.2-3004(B).

<sup>3</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

<sup>4</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>5</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>6</sup> *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

<sup>7</sup> To the extent the grievant is alleging that the other employee's travel to another country was a violation of law, that matter is not one that can be resolved through the grievance procedure. See *Grievance Procedure Manual* § 2.4 (requiring a grievance to "[p]ertain[] directly and personally to the employee's own employment").

<sup>8</sup> See Va. Code § 2.2-3004(B).

include evaluating the grievant's request for travel to ensure that her attendance at the conference was beneficial to the agency and sufficiently related to her job so as to justify her attendance.<sup>9</sup>

Even assuming, for purposes of this ruling only, that the agency's denial of the grievant's travel request could be considered an adverse employment action, there is nothing in the grievance record to suggest that the agency has misapplied and/or unfairly applied policy. During the management resolution steps, the agency informed the grievant that it had denied her travel request because the conference was not sufficiently related to her job duties. For example, the second step-respondent, who was involved in the agency's decision to deny the grievant's request for travel, stated in her response that the grievant had "very limited interactions with [the vendor's] employees" and that there was "only one 90-minute workshop for college and university personnel" at the conference. She further indicated that the agency "[does] not have any special relationship with the [vendor]" and that the grievant "was not planning on having the college form a more involved relationship" beyond the vendor's current practice of recruiting students from the college. As a result, agency management determined that the conference was not sufficiently related to the grievant's job duties such that her attendance would be beneficial to the agency.

Having reviewed the information in the grievance record, EDR concludes that agency management's decision here was an appropriate exercise of discretion that was neither inconsistent with other similar decisions or otherwise arbitrary and capricious. Although the agency permitted another employee to travel to another country, there are significant differences in the nature and purpose of that employee's travel as compared to the grievant. For example, the grievant and the other employee work in different positions with different job duties; the grievant sought to attend a conference hosted by a third-party vendor, while the other employee attended an event hosted by an educational institution "as part of a college delegation"; the agency and the educational institution have a partnership agreement; and other, similar trips to the event attended by the other employee had been approved in the past. These factors all indicate that the grievant and the other employee are not similarly situated such that the agency's decision to deny the grievant's travel request and approve the other employee's travel to another country was an appropriate exercise of managerial discretion.

Agency management has significant discretion in the administration of its policies and standard facility operating procedures.<sup>10</sup> As stated above, management is reserved the exclusive right to manage the affairs and operations of state government, including employees' requests for travel.<sup>11</sup> EDR cannot second-guess management's decisions regarding the administration of its procedures absent evidence that the agency's actions are plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.<sup>12</sup> In this case, the grievant has not presented evidence to show that the agency's action was either inconsistent with other decisions or was otherwise arbitrary or capricious. For these reasons, we conclude that the

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<sup>9</sup> See also Commonwealth Accounting Policies and Procedures Manual for Cardinal, Topic No. 20335, *State Travel Regulations*, p.4 (Dec. 1, 2015) ("It is the policy of the Commonwealth of Virginia to limit travel costs to only those expenses that are necessary for providing essential services to the Commonwealth's citizens."). This section of the Manual is available at [http://www.doa.virginia.gov/Admin\\_Services/CAPP/CAPP\\_Topics\\_Cardinal/20335-2015-Dec.pdf](http://www.doa.virginia.gov/Admin_Services/CAPP/CAPP_Topics_Cardinal/20335-2015-Dec.pdf).

<sup>10</sup> See, e.g., EDR Ruling No. 2011-2903.

<sup>11</sup> See Va. Code § 2.2-3004(B).

<sup>12</sup> See, e.g., EDR Ruling No. 2009-2090.

grievant has not raised a question as to whether the agency violated a mandatory policy provision, or that it misapplied or unfairly applied policy in denying her travel request. Accordingly, the grievance does not qualify for a hearing on this basis.

*Discrimination*

In addition, the grievant argues that the agency has engaged in discrimination based on her race and/or color. Grievances that may be qualified for a hearing include actions that occurred due to discrimination on the grounds of race, sex, color, national origin, religion, sexual orientation, gender identity, age, political affiliation, genetics, disability, or veteran status.<sup>13</sup> For a claim of discrimination to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. Rather, 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. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.<sup>14</sup>

In this case, there are no facts to indicate that the agency's decision to disapprove the grievant's travel request had a discriminatory motive. As discussed above, the agency's decision-making process in this case was based on an assessment of the tangential connection between the grievant's job duties and the topics to be discussed at the conference, as well as its conclusion that the grievant's attendance would not advance the interests of the agency, and we have found no reason to dispute that decision. To qualify for a hearing, a grievance must present more than a mere allegation of discrimination – 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. There are no such facts here, and, accordingly, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.<sup>15</sup>



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Office of Employment Dispute Resolution

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<sup>13</sup> See, e.g., Executive Order 1, *Equal Opportunity* (2014); DHRM Policy 2.05, *Equal Employment Opportunity*.

<sup>14</sup> See, e.g., Holland, 487 F.3d at 214..

<sup>15</sup> Va. Code § 2.2-1202.1(5).