ssue:  Qualification – Work Conditions (Supervisor/Employee Conflict);   Ruling Date: August 10, 2012;   Ruling No. 2013-3398;   Agency:  Virginia Department of Health; Outcome:  Not Qualified.

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

# QUALIFICATION RULING

In the matter of the Virginia Department of Health
Ruling Number 2013-3398
August 10, 2012

The grievant has requested a ruling on whether her May 11, 2012 grievance with the Virginia Department of Health (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

## FACTS

The grievant was employed as a Business Manager for the agency. On May 8, 2012, the grievant's immediate supervisor requested the grievant extend one of her subordinate employee's probationary period for an additional six months. On May 10, 2012, the grievant sent a memo to her supervisor, informing him that she would not extend her subordinate employee's probationary period, and if her supervisor continued to push for the extension, the grievant stated that she would file a harassment complaint against him.

The grievant initiated her grievance on May 11, 2012, alleging that her supervisor "forced [her] to agree to" extend the probationary period of an employee she directly supervised. Specifically, the grievant alleges that her supervisor did not provide her with sufficient notice, nor with an adequate explanation, why her subordinate employee's probationary period should be extended. The grievant also challenges whether her supervisor had the authority to extend the subordinate employee's probationary period without her direct approval and whether his exercise of that authority was done in retaliation against her.

On May 14, 2012, the grievant's supervisor emailed the grievant, stating that he was "not asking or expecting [the grievant] to present or sign off on [named subordinate employee's] probationary progress review extension," and indicated that he would be the one to do so. Thereafter, the grievant's supervisor approved the probationary extension without the obtaining the grievant's approval. On May 28, 2012, the grievant voluntarily resigned from her position. On June 27, 2012, the grievant requested the agency to qualify her grievance for hearing. The agency head denied qualification for hearing, stating that the issues raised in the grievant's May 11, 2012 grievance were moot not only because the grievant's supervisor actually extended the subordinate employee's probationary period, but also because the grievant has subsequently resigned and can no longer be granted the relief she requested. Now, the grievant seeks a qualification determination from EDR.

## DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[1] Further, complaints relating solely to the hiring, promotion, transfer, assignment, and retention of employees within the agency as well as the methods, means, and personnel by which work activities are to be carried on "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 asserts claims of abuse of authority and retaliation by her immediate supervisor.

*Management's Alleged Abuse of Authority - Misapplication and/or Unfair Application of Policy*

Fairly read, the grievant's claim asserts in part a misapplication or unfair application of the probationary period policy by her immediate supervisor. For such a claim to qualify for 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."[4] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.[5] 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."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7]

In this case, the grievant's supervisor initially asked the grievant to extend the probationary period of one of her direct report employees. When the grievant refused to extend her subordinate's probationary period, her supervisor consulted with the agency's human resource office and determined that he had the authority to extend the employee's probationary period without the grievant's approval. It appears that the supervisor's action of extending the other employee's probationary period did not adversely affect the terms, conditions or benefits of the grievant's own employment. Moreover, even if that the supervisor's action rose to the level of an adverse employment action in this case, the Department of Human Resource Management

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[1] *See* Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(C).
[3] *Grievance Procedure Manual* § 4.1(c).
[4] *See Grievance Procedure Manual* § 4.1(b).
[5] 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, EDR substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. *See* EDR Ruling No. 2007-1538.
[6] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

Policy (DHRM) 1.45, expressly gives agency management the authority to extend an employee's probationary period up to an additional six months for performance reasons.[8] This policy states:

> "Probationary periods may be extended for up to 6 additional months for performance reasons. The reasons for the extensions must be documented on a Probationary Progress Review form or an alternate form designed by the agency. Reviewers must approve extensions of the probationary period for performance reasons."[9]

DHRM Policy 1.40 defines a reviewer as "[t]he supervisor of an employee's immediate supervisor, or another person designated to review an employee's work description, performance plan, performance rating and who responds to appeals of performance ratings."[10]

Here, pursuant to DHRM policies, the grievant's supervisor appears to have acted within his authority when he requested the grievant to extend her subordinate employee's probationary period based on his evaluation of the employee's purportedly poor performance. Moreover, it appears under DHRM policy that the grievant's supervisor had the authority as a reviewer to extend the employee's probationary period without the grievant's approval. In such a case, where there is no violation of a mandatory policy provision, EDR has held that qualification is warranted only where evidence presented by the grievant raises a sufficient question as to whether the management action was nevertheless plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[11]

In this case, the grievant has not presented sufficient evidence to show that the agency disregarded the intent of the applicable policies and treated other similarly situated employees differently. The grievance also does not show that the agency's decision to extend the grievant's subordinate employee's probationary period without the grievant's approval was arbitrary or capricious. Although the grievant provided a two-page opinion why she did not feel the probationary period extension was appropriate, this opinion is subjective and certainly subject to review by other agency management, including her supervisor, who was the designated reviewer in this case, as well as by the agency's human resource department. Thus, the grievant's opinion alone does not support a finding of arbitrariness nor raise a sufficient question as to whether a misapplication or unfair application of policy has occurred. For the above reasons, this grievance fails to raise a sufficient question as to whether the relevant probationary period policy has been either misapplied and/or unfairly applied or that management acted arbitrarily or capriciously.

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[8] DHRM Policy 1.45, Probationary Period. (Reference to Attachment A omitted)

[9] *Id*.

[10] DHRM Policy 1.40, Performance Planning and Evaluation.

[11] *See Grievance Procedure Manual* § 9 (defining arbitrary and capricious as a decision made "[i]n disregard of the facts or without a reasoned basis"); *see also, e.g.,* EDR Ruling No. 2008-1879.

*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;[12] (2) the employee suffered a materially adverse action;[13] and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the materially 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.[14] Evidence establishing a causal connection and inferences drawn there from may be considered on the issue of whether the agency's explanation was pretextual.[15]

In this case, the grievant challenges her supervisor's action of authorizing the probationary period extension without her approval as retaliatory. However the grievant does not allege that she engaged in a protected activity prior to the initiation of her May 11, 2012 grievance. Therefore, this claim fails to qualify for hearing as there is insufficient evidence to show the grievant engaged in a protected activity to support a claim of retaliation.

*No Effectual Relief*

Finally, to the extent the grievant is alleging a compromising position posed by her former supervisor, it appears that there is no effectual relief that a hearing officer could order in this case. The grievant voluntarily resigned on May 28, 2012. As a result, even if the grievant were able to establish such a compromising position at a hearing, a hearing officer could not order the relief sought by the grievant as she no longer is employed with the agency. The fact that there is no effectual relief that a hearing officer could order in this grievance is another reason that the grievant's request for qualification cannot be granted.[16]

## APPEAL RIGHTS AND OTHER INFORMATION

EDR's qualification rulings are final and nonappealable.[17] The nonappealability of such rulings became effective on July 1, 2012. Because the instant grievance was initiated prior to

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[12] *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 the 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).
[13] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); *see, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.
[14] *E.g.,* EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005); Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000).
[15] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).
[16] *See* EDR Ruling No. 2011-2698; EDR Ruling No. 2010-2461; EDR Ruling No. 2010-2513.
[17] Va. Code § 2.2-1202.1(5).

that date, it is not EDR's role to foreclose any appeal rights that may still exist for the grievant under prior law. If the grievant wishes to attempt 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 former Va. Code § 2.2-3004(E). EDR makes no representations as to whether such an appeal is proper or can be accepted by the circuit court. Such matters are for the circuit court to decide. 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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