

Issue: Hostile work environment; Hearing Date: 12/21/04; Decision Issued:  
01/18/05; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No.  
7917



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 7917

Hearing Date: December 21, 2004  
Decision Issued: January 18, 2005

**PROCEDURAL ISSUES**

Due to the unavailability of participants, the hearing could not be scheduled until the 41<sup>st</sup> day following appointment of the hearing officer. Subsequent to the hearing, the hearing officer was on leave, and then ill, which prevented issuance of a decision until January 18, 2005.<sup>1</sup>

Grievant requested as part of the relief she seeks that discipline be administered to other employees. A hearing officer does not have authority to take adverse action against any employee.<sup>2</sup> Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

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<sup>1</sup> § 5.1 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004, requires that a grievance hearing must be held and a written decision issued within 35 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

<sup>2</sup> § 5.9(b)6. *Ibid.*

## APPEARANCES

Grievant  
Representative for Grievant  
Three witnesses for Grievant  
Chief Nurse Executive  
Advocate for Agency  
One witness for Agency

## ISSUES

Was the grievant subjected to a hostile work environment? Was the grievant subjected to retaliation? Was there racial disparity in the workplace?

## FINDINGS OF FACT

The grievant filed a timely grievance asserting that she had endured a hostile work environment and that her complaints were met with retaliatory responses from management.<sup>3</sup> The agency declined to qualify the grievance for a hearing and grievant requested a compliance ruling from the Department of Employment Dispute Resolution (EDR). The EDR Director ruled that the grievance was qualified for hearing.<sup>4</sup> The Department of Mental Health, Mental Retardation, and Substance Abuse Services (Hereinafter referred to as agency) has employed grievant as a Registered Nurse for two years.

The Commonwealth's policy on workplace harassment defines that term to include conduct that creates an intimidating, hostile or offensive work environment; the policy specifically prohibits both harassment, and retaliation against an employee who complains about harassment.<sup>5</sup>

Within a few months after grievant was hired (September 2002), her supervisors began to document problems with grievant's conduct. Grievant was

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<sup>3</sup> Exhibit 3. Grievance Form A, filed March 23, 2004.

<sup>4</sup> Exhibit 3. *Qualification Ruling of Director* No. 2004-750, November 3, 2004.

<sup>5</sup> Department of Human Resource Management (DHRM) Policy 2.30, *Workplace Harassment*, effective May 1, 2002, defines Workplace Harassment as "Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status or pregnancy that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation." Retaliation is defined as "Overt or covert acts of reprisal, interference, restraint, penalty, discrimination, intimidation, or harassment against an individual or group exercising rights under this policy."

cited for refusing to perform assignments,<sup>6</sup> failure to adhere to patient behavioral plans,<sup>7</sup> being confrontational, argumentative, and unprofessional,<sup>8</sup> exhibiting paranoid behavior,<sup>9</sup> being insubordinate, unapproachable and negative,<sup>10</sup> and harassing subordinates.<sup>11</sup> In September 2003, grievant left a note addressed to a nurse manager on the nurse's station bulletin board; the note implied criticism of the manager and told her to correct what grievant perceived as the problem.<sup>12</sup> In November 2003, grievant was cited for cursing in the nurse's station.<sup>13</sup> In December 2003, a patient's brother complained that grievant was mean and rude when she came into the patient's room.<sup>14</sup>

During 2003, grievant met with one of the nurse managers on several occasions but was unable to get any satisfactory resolution to what she perceived to be attempts by her supervisors to falsely accuse her of wrongdoing. Grievant then met with the Assistant Director of Nursing (ADON) who told grievant that she had received much documentation regarding grievant's behavior. Grievant asked for, but was not given, copies of the documentation. The ADON reminded grievant that her probationary period (first year of employment) was not yet up and that grievant could be dismissed immediately for improper behavior. Subsequently, grievant met with the Director of Nursing who told grievant that she was going to extend grievant's probationary period beyond one year.<sup>15</sup>

In the beginning of 2004, grievant was again cited for insubordination.<sup>16</sup> On January 7, 2004, she had a confrontation with a nurse manager. Grievant approached the manager and, in front of other staff, spoke to the manager in a loud and angry manner. Grievant and other nurses had a dispute about whether a patient should be placed in restraints. The manager told grievant that such matters should be discussed privately rather than in front of staff. Grievant refused to meet privately and continued talking loudly and angrily. A complaint was made to management that grievant had improperly restrained a patient resulting in patient abuse. Primarily as a result of this incident, grievant was reassigned to a different floor.<sup>17</sup> At the same time, the hospital director assigned an investigator to review the allegation.<sup>18</sup> Subsequent to the January 7, 2004

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<sup>6</sup> Exhibit 1. Memoranda from supervisors to manager, March 3, 2003 and June 20, 2003.

<sup>7</sup> Exhibit 1. Memorandum from supervisor to manager, March 17, 2003.

<sup>8</sup> Exhibit 1. Memorandum from supervisor to manager, May 13, 2003.

<sup>9</sup> Exhibit 1. Memorandum from supervisor to manager, May 27, 2003.

<sup>10</sup> Exhibit 1. Memorandum from supervisor to manager, June 20, 2003.

<sup>11</sup> Exhibit 1. Memoranda from subordinates to managers, August 4 & 10, 2003.

<sup>12</sup> Exhibit 1. Memorandum from manager to grievant, September 8, 2003, and grievant's handwritten note of September 7, 2003.

<sup>13</sup> Exhibit 1. Memorandum from manager to manager, November 4, 2003.

<sup>14</sup> Exhibit 1. Letter from patient's brother, December 1, 2003.

<sup>15</sup> Exhibit 2. Letter from grievant to Human Resources Department, January 11, 2004.

<sup>16</sup> Exhibit 1. Memorandum from manager to manager, January 1, 2004.

<sup>17</sup> Exhibit 3. Memorandum from manager to grievant, January 23, 2004.

<sup>18</sup> Exhibit 3. Letter from hospital director to grievant, January 23, 2004. [NOTE: See Letter from hospital director to grievant, March 8, 2004 which advised that the investigation did not substantiate the allegation of improper restraint.]

incident, grievant submitted a lengthy written complaint to the Human Resources department requesting help in dealing with her concerns.<sup>19</sup> She disputed many of the allegations made against her by her supervisors.

Soon after reassignment to the different floor, the nurse manager advised all nurses that, in order to provide adequate staffing on all shifts, some day shift nurses might have to work evenings or nights.<sup>20</sup> Grievant notified the nurse manager that her physician had placed her on a medication regimen which required that grievant have a consistent sleep schedule and should not work later than 8:30 p.m. or for more than 12 hours per day.<sup>21</sup> The assistant director of nursing advised grievant that the agency would accommodate her restriction for a period of 45 days, to May 3, 2004.<sup>22</sup> After that date, the agency would require grievant to comply with the requirements of her Employee Work Description, which requires her to work as needed, including overtime as needed. Grievant rejected this and advised that she planned to file a workers' compensation claim because she felt her problems were work-related.

On March 17, 2004, grievant was disciplined for failure to follow policies, unauthorized use of state property, leaving the worksite without permission and failure to use the chain of command to resolve concerns.<sup>23</sup> However, one month later, the hospital director rescinded this disciplinary action for several reasons including the fact the alleged offenses were several months old and had previously been addressed by former supervisors.<sup>24</sup> Grievant then filed the grievance at issue herein. The hospital director also transferred grievant to a different building because grievant alleged a hostile work environment existed in the building where she was working.

By May 4, 2004, grievant had not complied with management instructions given to her 45 days earlier to have her physician complete a Physical Abilities Report and Ability to Perform Overtime form. Therefore, the assistant director of nursing advised grievant that the 45-day accommodation was at an end and that she would have to resume a regular work schedule.<sup>25</sup> At some point during the spring of 2004, grievant applied for short-term disability benefits. She was granted benefits for about four weeks after which the claim was closed.<sup>26</sup>

In April 2003, two black licensed practical nurses (LPN) were told by a black nurse and a black nurse manager not to associate with or trust grievant because she is white. Grievant complained to her supervisor but no action was taken. In May 2003, grievant complained to the ADON about continuing

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<sup>19</sup> Exhibit 2. Letter from grievant to Human Resources Department, January 11, 2004.

<sup>20</sup> Exhibit 3. Memorandum from nurse manager to nurses, February 20, 2004.

<sup>21</sup> Exhibit 3. Memorandum from grievant to nurse manager, February 27, 2004 and, letter from physician, March 1, 2004.

<sup>22</sup> Exhibit 3. Memorandum from assistant director of nursing to grievant, March 2, 2004.

<sup>23</sup> Exhibit 3. Group II Written Notice, March 17, 2004.

<sup>24</sup> Exhibit 3. Third step grievance response, April 23, 2004.

<sup>25</sup> Exhibit 3. Memorandum from assistant director of nursing to grievant, May 4, 2004.

<sup>26</sup> Exhibit 3. Detail Action Report, May 11, 2004.

harassment and demeaning attitudes by her shift leader. The ADON reminded grievant that she was still in her probationary period and that any improper behavior could result in termination of her employment. However, the ADON did address grievant's concerns with other nurses at two meetings. The ADON requested that grievant document instances of alleged harassment but grievant did not follow through on this request. In September 2003, grievant met with the Director of Nursing who told her that, if she had documented instances of alleged harassment as the ADON had requested in May, the Director would have been able to resolve some of her concerns. Despite grievant's continuing complaints about harassment, the agency did not conduct an investigation.

### APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of hostile work environment or retaliation, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.<sup>27</sup>

Grievant contends that her two supervisors<sup>28</sup> had made a number of false accusations. The evidence is insufficient to conclude that the accusations were

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<sup>27</sup> § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

<sup>28</sup> Depending upon the shift being worked, grievant reported to either of two possible supervisors.

totally false. At least some, if not all of the accusations were probably based in fact. However, given the friction that developed between grievant and certain black supervisors, it is possible that the supervisors' versions of events could have had some subjective viewpoints. She further claims that the Director of Nursing, Assistant Director of Nursing and a nurse manager were uncooperative because they did not allow grievant to look at supervisors' personal files. In this regard, grievant's expectations were unrealistic. An employee does not have a right to examine a supervisor's personal files. While an employee may examine her official personnel file maintained by the Human Resources Department, she cannot demand to see personal files kept by supervisory or management employees. On the other hand, if supervisors had documentation that substantiated their concerns about grievant, it would have been reasonable and appropriate to share that information with grievant in order to correct her inappropriate behavior.

Grievant suffers from a variety of problems (anxiety, paranoia, insomnia, reflux disease, hypertension, and nausea) which she maintains were all caused by her two supervisors. Grievant has presented no medical evidence to substantiate her claim that all of these conditions are directly attributable to her employment situation. It cannot be assumed that she did not have some or all of these problems to some degree before employment with the agency. Further, there is no evidence regarding grievant's personal situation outside the workplace and what role her home situation, or other factors may have played in the development or aggravation of her physical and mental problems. However, given the nature of the harassment, it is possible that some of the conditions might have been exacerbated by the work environment. In any case, determining the etiology of these conditions is beyond the scope of this decision.

#### Hostile work environment harassment

To establish a claim for racial harassment, grievant must prove that: (i) the conduct was unwelcome; (ii) the harassment was based on race; (iii) the harassment was sufficiently severe or pervasive to create an abusive work environment; and (iv) there is some basis for imposing liability on the employer. The evidence establishes that grievant was harassed by at least two of her black supervisors. It further establishes that the harassment was, in part, specifically based on grievant's race. Because this harassment affected grievant's relationships with coworkers and subordinates, it was sufficiently pervasive as to create an abusive work environment. Grievant brought this harassment to the attention of multiple levels of management including the ADON, the Director of Nursing, and the facility's medical director. Despite her complaints, no investigation was conducted. Accordingly, it must be concluded that grievant was subjected to hostile work environment harassment.

#### Retaliation

Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or

reported a violation of law to a proper authority.<sup>29</sup> To prove a claim of retaliation, grievant must prove that: (i) she engaged in a protected activity;<sup>30</sup> (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. In this case, grievant suffered an adverse employment action when a disciplinary action was issued to her in March 2004. However, prior to issuance of that action, grievant has not demonstrated that she engaged in a protected activity as that term is defined above. Accordingly, grievant has not met the test to show that the agency retaliated against her.

However, the evidence supports a conclusion that the issuance of the disciplinary action was, more likely than not, a form of retaliatory harassment. This is evidenced by the fact that the charges in the Written Notice were several months old, had already been addressed with grievant, and, in some cases, were nonspecific allegations. Because of these deficiencies, the Facility Director made an appropriate decision to rescind the unjustified disciplinary action. Nonetheless, the nurse who issued the discipline was one of those whom grievant alleged had been harassing her. Therefore, for the reasons just stated, the disciplinary action was a form of harassment.

### Summary

Providing the relief sought by grievant is problematical because she requests that an investigation be conducted and other employees be disciplined. As explained previously, a hearing officer may not take adverse action against any employee (see page 1). Conducting a thorough investigation of the matter has been made difficult due to the passage of time. First, of the five people grievant named in her grievance, three are no longer employed by the agency.<sup>31</sup> Second, grievant is not currently employed by the agency. In October 2004, grievant's physician suggested certain hours of work restrictions. In response, the agency suggested three possible schedule arrangements that met the restrictions. Grievant rejected all three work schedules and has not worked since November 1, 2004. Although the employment relationship has not been formally severed by either grievant or the agency, grievant remains in an unspecified limbo situation without any definite return-to-work date.<sup>32</sup> With three of the accused management employees no longer employed, and grievant unavailable

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<sup>29</sup> EDR *Grievance Procedure Manual*, p.24

<sup>30</sup> §4.1(b) EDR *Grievance Procedure Manual* defines protected activity as: "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 Congress or the General Assembly, reporting an incident of fraud, abuse, or gross mismanagement, or exercising any right protected by law.

<sup>31</sup> The Assistant Director of Nursing retired in 2004, one nurse manager resigned in the summer of 2004 to move out of state, and another nurse manager resigned when she married in the summer of 2004.

<sup>32</sup> Grievant filed a workers' compensation claim that was rejected by the Workers' Compensation Commission. Grievant also applied for disability benefits under the Virginia Sickness and Disability Plan but her claim has not been approved.



because she is not working, it is difficult for the agency to conduct a thorough investigation.

After carefully considering all available evidence, two conclusions may be drawn. First, at least some of grievant's problems are of her own making. The memoranda from supervisors documenting several problems with grievant's behavior and attitude during the first months of her employment appear to be generally thoughtful, carefully written, and consistent. Early on, grievant's supervisors recognized her paranoid behavior and cited her for being confrontational, insubordinate, negative, and harassing to subordinates. Based on the quantity and quality of the documentation about grievant's behavior, it is more likely than not that grievant's attitude and behavior were disconcerting and probably raised the hackles of some supervisors.

Second, even taking into account grievant's admitted paranoia, there is sufficient evidence and testimony to conclude that certain supervisors engaged in harassing behavior towards grievant. It is conceivable that some supervisors were so aggravated by grievant's obstinacy that they felt compelled to respond in a harassing manner. It appears that the situation escalated on both sides and eventually culminated with the issuance of an unjustified disciplinary action. It is particularly disturbing that at least two supervisors injected a racial aspect into the situation by telling subordinates not to trust or associate with grievant due to her race.

### DECISION

Grievant's request for relief is GRANTED in part.

The agency is directed to investigate, to the extent possible, the inappropriate behavior of supervisory and/or management personnel with regard to issuance of unjustified discipline, harassing behavior toward grievant, and racial harassment of grievant.

It is RECOMMENDED that the agency's human resources department determine whether certain supervisory and management personnel should be given formal training in diversity training, team building, dealing with difficult people, and harassment prevention techniques.

If grievant returns to work, it is RECOMMENDED that a determination be made as to whether she might benefit from utilizing the Employee Assistance Program to deal with her paranoia and other behavioral problems in the workplace.

## APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Address your request to:

Director  
Department of Human Resource Management  
101 N 14<sup>th</sup> St, 12<sup>th</sup> floor  
Richmond, VA 23219

3. If you believe the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Address your request to:

Director  
Department of Employment Dispute Resolution  
830 E Main St, Suite 400  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>33</sup> You must file a notice of appeal with the clerk of the circuit court in the

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<sup>33</sup> An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>34</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

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David J. Latham, Esq.  
Hearing Officer

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<sup>34</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.