Issues: Qualification – Work Conditions (employee/supervisor conflict and violence in the workplace); Ruling Date: April 17, 2014; Ruling No. 2014-3836; Agency: Department of Corrections; Outcome: Not Qualified.

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

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2014-3836
April 17, 2014

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 July 1, 2013 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

The grievant is employed by the agency as a Property Officer. On or about July 1, 2013, she initiated a grievance, alleging that her supervisor continually engages in "deliberate and willful" workplace harassment and workplace violence. The grievant claims that her supervisor yells at her and other employees, conducts personal business while at work, intentionally disarranges the grievant's work area and work materials, and otherwise behaves in a way that is designed to "degrade, demean and harass selected individuals." After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

DISCUSSION

Second Step Meeting

In her request for qualification, the grievant argues that the second step-respondent failed to hold a proper second step meeting. She claims that there was no second step meeting, as the second step-respondent allegedly only "called [her] into his office and asked [her] to tell him a little about [her] grievance." During this exchange, the grievant apparently offered to present additional written information related to her claims, which the second step-respondent declined to review. The grievant further states that she "was not permitted to question any of the witnesses" she had previously identified, "nor was [her] support person permitted in the meeting." The grievant later learned that the second step-respondent "called each witness . . . individually and questioned them by himself."

The grievance procedure provides that, if a grievant advances to the second step, there generally must be a face-to-face meeting with the second step-respondent.[1] "The purpose of the second-step meeting is fact finding and should include open discussion of the grievance issues to promote understanding of the other party's position and possible resolution of the workplace

[1] *Grievance Procedure Manual* § 3.2.

issues."[2] The grievant is entitled to have an individual present with him or her at the second step meeting as a "supporter and counselor."[3] At the meeting, "[e]ither party may call witnesses" and the parties "are encouraged to present information relevant to the grievance."[4]

It is unclear from the information presented whether her August 8 meeting with the second step-respondent was intended to be the second step meeting. After the second step response was issued, the grievant raised these issues in an attachment advancing her grievance to the third step. The third step-respondent held a meeting with the grievant and addressed her claims regarding the second step meeting in his response. Even assuming the grievant's allegations regarding the second step-respondent's conduct are true, she did not notify the agency that it was not in compliance with the grievance procedure as required in the Section 6.3 of the *Grievance Procedure Manual* or otherwise demand that the alleged noncompliance be corrected at any point during this process. The *Grievance Procedure Manual* states that "[a]ll claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one generally forfeits the right to challenge the noncompliance at a later time."[5] Based on these facts, EDR finds that any alleged noncompliance that occurred with the second step meeting has been waived by the grievant based on her continuation of the grievance beyond the second step.

Workplace Harassment

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[6] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[7] Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out generally 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 policy may have been misapplied or unfairly applied.[8]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[9] Thus, typically, the 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."[10] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[11]

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[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Grievance Procedure Manual* § 6.3.; *see also, e.g.*, EDR Ruling No. 2004-752; EDR Ruling No. 2003-042; EDR Ruling No. 2002-036.
[6] *See Grievance Procedure Manual* § 4.1.
[7] Va. Code § 2.2-3004(B).
[8] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[9] *See Grievance Procedure Manual* § 4.1(b).
[10] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[11] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

In this case, the grievant alleges that her supervisor has engaged in workplace harassment. For a claim of workplace harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[12] In the analysis of such a claim, the "adverse employment action" requirement is satisfied if the facts raise a sufficient question as to whether the conduct at issue was sufficiently severe or pervasive so as to alter the conditions of employment and to create and abusive or hostile work environment.[13] "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[14]

The grievant has provided numerous examples of her supervisor's allegedly harassing behavior. The grievant asserts that she was reprimanded by her supervisor for leaving a trainee under another employee's supervision while the grievant was on her lunch break. The grievant asserts that she attempted to improve her work unit's efficiency by creating printed labels for storage boxes, but her supervisor disagreed with this change and ordered the grievant to continue labeling boxes by hand. On one occasion, the grievant's supervisor gave apparently confusing or unclear instructions to the grievant's work group, and later expressed anger and frustration at the grievant's failure to carry out the work tasks as ordered.[15] The grievant further claims that she has observed her supervisor making personal phone calls and conducting other personal business at work "instead of doing her own self appointed duties" or assisting others in carrying out the work unit's assigned tasks.

On another occasion, the grievant's supervisor allegedly "stepped on a piece of tape" in the grievant's work area and then "proceeded to throw it on the table for someone else to pick up behind her." The grievant found this act "very unsanitary and degrading" and claims that it is "just another form of harassment." In addition to this incident, the grievant alleges that her supervisor routinely disarranges the work unit's office area by failing to clean up or put away papers and files in an orderly fashion. The grievant further asserts that her supervisor routinely takes an extended lunch break, claims that she uses the extra time to pick up the mail, and then "constantly mak[es] demeaning and degrading statements" that the grievant and another employee may only take a thirty minute lunch break. In sum, the grievant argues that her supervisor engages in harassing behavior that is intended to "degrade, demean and harass selected individuals and make their day miserable."

The grievant may be raising legitimate concerns about her employment and her supervisor's conduct. After reviewing the facts presented by the grievant, however, EDR cannot find that the grieved management actions rose to a sufficiently severe or pervasive level to create

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[12] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[13] *See generally id* at 142-43.
[14] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[15] The grievant seems to argue that her supervisor's conduct during this incident was retaliatory. The grievant does not allege retaliation anywhere else in her grievance, nor does it appear that she has engaged in any protected activity. *See Grievance Procedure Manual* § 4.1(b). As a result, the issue of retaliation will not be further addressed in this ruling.

an abusive or hostile work environment. The alleged workplace harassment challenged by the grievant essentially involves unprofessional conduct by a supervisor, which does not generally rise to the level of an adverse employment action or severe or pervasive conduct. Prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[16] Because the grievant has not raised a sufficient question as to the existence of a severe or pervasive hostile work environment, the grievance does not qualify for a hearing on this basis.

Workplace Violence

The grievant further asserts that her supervisor and, by extension, the agency, have violated state and agency policy prohibitions on workplace violence. 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. DHRM Policy 1.80, *Workplace Violence*, requires agencies to provide a safe working environment for their employees.[17] Federal and state laws also require employers to provide safe workplaces.[18] Thus, an act or omission by an employer resulting in actual or threatened workplace violence against an employee, or an unreasonably unsafe work environment for that employee, can reasonably be viewed as having an adverse effect on the terms, conditions, or benefits of her employment.[19]

"Workplace violence" is defined as "[a]ny physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties."[20] Prohibited conduct includes, but is not limited to engaging in behavior which subjects another individual to extreme emotional distress and includes shouting and "an intimidating presence."[21]

In this case, there is some evidence to suggest that the grievant's supervisor may have violated the workplace violence policy. For example, the grievant asserts that, in addition to the behavior discussed above, her supervisor regularly "shout[s] and scream[s] at [the employees] assigned to her supervision." She alleges that another employee has reported that her supervisor can be heard "shouting at the officers assigned to her area" in other parts of her facility. The grievant also submitted information that, on one occasion, her supervisor "verbally assaulted and

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[16] Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) ("[C]onduct must be extreme to amount to a change in the terms and conditions of employment . . . ."); *see* Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).

[17] *See* DHRM Policy No. 1.80, *Workplace Violence*.

[18] Under the Occupational Safety and Health Act of 1970, employers must establish "place[s] of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm" to employees. 29 U.S.C. § 654(a)(1). Virginia state employees are covered by the Virginia Occupational Safety and Health Program, which also requires "every employer to furnish to each of his employees safe employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious harm to his employees . . . ." Va. Code § 40.1-51.1(A); *see* 16 Va. Admin. Code § 25-60-30.

[19] *See* Herrnreiter v. Chi. Hous. Auth., 315 F.3d 742, 744 (7th Cir. 2002) (describing a "tangible employment action" as including circumstances where "the employee is not moved to a different job or the skill requirements of his present job altered, but the *conditions* in which he works are changed in a way that subjects him to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in his workplace environment . . . ." (emphasis in original)).

[20] DHRM Policy 1.80, *Workplace Violence*.

[21] *Id.*

cursed at" another employee, was "in a very close proximity" to the employee "pointing her right index finger" in his face, and "threw highlighters" at the employee. The information presented by the grievant appears to further indicate that her supervisor has spoken to the grievant with a raised voice or in an angry manner several times. The grievant further claims that, during one incident, her supervisor "approached the table" where the grievant was sitting "and proceeded to grab either side of the table with both hands . . . to look down upon [the grievant] in a very aggressive stance."

While EDR certainly does not condone the grievant's supervisor's alleged behavior, if it actually occurred as described by the grievant, there are some cases where qualification of a grievance is inappropriate even if policy has been violated or misapplied. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate where the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

In this case, the grievant seeks, as relief, to have her supervisor demoted "due to the fact that she willingly engages in . . . workplace violence when no other supervisor is around." Although the agency declined to take such action during the management resolution steps, the second step-respondent did indicate in his response that the he had identified "concerns in the manner on how instructions [were] communicated to" the grievant from her supervisor, as well as the supervisor's "overall interactions with [the grievant]," and stated that those issues would be "addressed accordingly." Additionally, the agency head noted in his qualification decision that agency management was "currently taking action to improve communications between" the grievant and her supervisor. The agency has provided further evidence to show that its response to the grievance included, in part, addressing the concerns with the grievant's supervisor. Furthermore, the agency has represented to EDR that it is unaware of any additional complaints alleging that the supervisor has engaged in workplace violence or other inappropriate behavior since the grievance was initiated and that management addressed the issues with the supervisor.

It appears, therefore, that this is a case where the agency has taken appropriate action to address the grievant's concerns. Furthermore, the relief requested by the grievant (that her supervisor be demoted and/or discipline) could not be ordered by a hearing officer.[22] Consequently, further effectual relief is unavailable to the grievant through the grievance procedure. When there has been a misapplication of policy, for example, a hearing officer could order that the agency reapply policy correctly. However, as a practical matter, "reapplying policy" would have little effect on a prior incident of alleged workplace violence where, as in this case, the incident has been properly investigated, measures have been taken to remedy such behavior, and there is no evidence that further incidents of workplace violence have occurred. Accordingly, the grievance does not qualify for a hearing on this basis.

This ruling does not mean that EDR deems the alleged behavior of the supervisor, if true, to be appropriate, only that the grievant's claims of workplace harassment and workplace

[22] Hearing officers cannot order agencies to take corrective action against employees. *See Grievance Procedure Manual* § 5.9(b) (stating that "[t]aking any adverse action against an employee" is not relief that is available at a grievance hearing).

violence do not qualify for a hearing. Moreover, this ruling in no way prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens.

EDR's qualification rulings are final and nonappealable.[23]

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[23] *See* Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).