Issue: Qualification – Work Conditions (co-worker conflict); Ruling Date: January 11, 2016; Ruling No. 2016-4284; 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 2016-4284
January 11, 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 September 4, 2015 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 Cognitive Counselor. On or about September 4, 2015, she initiated a grievance alleging "ongoing sexual harassment by [a] coworker." In support of this assertion, the grievant claims that the coworker "rubbed [her] arm" on several occasions in July and August of 2015. As relief, the grievant requests that the coworker "not be allowed to have any contact with [her] and be transferred to another [agency facility]."[1] After proceeding through the management steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination 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.[2] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] 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.[4]

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[1] After the grievance was initiated, the agency changed the grievant's and the coworker's hours of work so they would not have contact with one another. The grievant now attempts to challenge this change in her work schedule as part of the grievance. Because additional management actions or omissions cannot be added to a grievance after it is filed, this ruling will not address the grievant's claims regarding the change to her work hours. *Grievance Procedure Manual* § 2.4.

[2] *See Grievance Procedure Manual* § 4.1.

[3] Va. Code § 2.2-3004(B).

[4] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[5] 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."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7]

Here, the grievant alleges that a coworker has engaged in sexual harassment that has created a hostile work environment. 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.[8] 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.[9] "[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."[10]

There is some evidence in this case that could potentially support an argument that the grievant's coworker may have engaged in workplace harassment. Before initiating the grievance, the grievant complained to agency management that the coworker had touched her and she found his behavior unacceptable. The grievant attended several meetings with the coworker and agency management to address the issue. During one of these meetings, the coworker was directed to "refrain from any physical contact" with the grievant. After the coworker was given this instruction, several additional incidents occurred where he touched the grievant on the arm.

DHRM Policy 2.30, *Workplace Harassment*, states that hostile environment sexual harassment occurs "when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work."[11] Given that the unwanted behavior

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[5] *See Grievance Procedure Manual* § 4.1(b).
[6] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[8] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[9] *See generally id* at 142-43.
[10] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[11] DHRM Policy 2.30, *Workplace Harassment*. State policy also prohibits quid pro quo sexual harassment, which occurs "when a manager/supervisor or a person of authority gives or withholds a work-related benefit in exchange for sexual favors." *Id.* The facts in this case indicate that the grievant's claim is most appropriately considered to be one of hostile environment sexual harassment.

occurred repeatedly, even after the coworker was directed to have no physical contact with the grievant, and that the grievant perceived the touching to be unwanted, harassing in nature, and based on her sex, we will assume without deciding, for purposes of this ruling only, that the grievance raises a question as to whether the coworker engaged in behavior that was sufficiently severe or pervasive as to constitute a hostile work environment.

While EDR certainly does not condone the coworker'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, that the coworker "not be allowed to have any contact with [her]" and the agency transfer him to another facility. During the management resolution steps, the first step-respondent noted that the coworker had been directed by agency management to have no contact of any kind with the grievant. The third step-respondent further noted that the grievant's and the coworker's work schedules had been adjusted so there would be no possibility of work-related contact and explained that "appropriate corrective action was taken to address" the coworker's failure to comply with the instruction that he have no physical contact with the grievant after she initially complained to management. Based on EDR's review of the information submitted in this case, it appears that management has adequately addressed the issue by limiting the coworker from having contact with the grievant at work and taking steps to prevent further alleged harassment from occurring in the future. Indeed, EDR is unaware of any additional complaints from the grievant alleging that the coworker has engaged in unwelcome touching or other behavior since the grievance was initiated.

It appears, therefore, that this is a case where the agency has taken appropriate action to address the grievant's concerns of no longer having contact with the coworker. Furthermore, the remaining relief requested by the grievant (that the coworker be transferred to another facility) could not be ordered by a hearing officer.[12] 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 harassment 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 harassment have occurred. Accordingly, the grievance does not qualify for a hearing on this basis.

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[12] Hearing officers cannot order agencies to take "adverse action against an employee" except to uphold or reduce disciplinary action challenged in a grievance, nor can they direct "the methods, mean or personnel" by which agency work activities are carried out. *Grievance Procedure Manual* § 5.9(b).

This ruling does not mean that EDR deems the alleged behavior of the grievant's coworker, if true, to be appropriate, only that the grievant's claim of workplace harassment does 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.[13]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[13] *See* Va. Code §§ 2.2-1202.1(5).