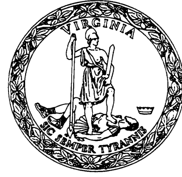
Issue: Qualification – Work Conditions (hostile work environment); Ruling Date: August 1, 2014; Ruling No. 2015-3950; Agency: Department of Juvenile Justice; Outcome: Not qualified.



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

# QUALIFICATION RULING

In the matter of the Department of Juvenile Justice
Ruling Number 2015-3950
August 1, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management on whether her January 21, 2014 grievance with the Department of Juvenile Justice (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 Housing Unit Manager/Correctional Sergeant. On or about January 21, 2014, she initiated a grievance, alleging that a supervisor at her facility (the "Supervisor") has engaged in behavior that is harassing and retaliatory and has otherwise created a hostile work environment. 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

### *Alleged Agency Noncompliance*

In her request for qualification, the grievant requests that EDR address an issue related to the agency's compliance with the grievance procedure that arose during the management resolution steps. The grievant claims she received the first step response on or about January 27, 2014, and that she verbally informed the agency of her desire to advance to the second step on or about January 28. The grievant contacted the second step-respondent on or about February 13 to inquire about the status of her grievance, and he informed her that it had been returned to the first step-respondent. The grievant received the grievance packet and first step response by mail on or about February 17, at which point she again requested to advance to the second step. After the grievant notified the agency of her confusion, the agency informed the grievant that there had been a delay in processing her grievance and that the delay had caused it to be out of compliance with the grievance procedure. The agency noted, however, that its actions in bringing the grievance back into compliance with the grievance process had rendered any claim of noncompliance moot. The grievance continued through the remainder of the management steps and the agency's head qualification decision. The grievant now requests relief from the agency's alleged noncompliance at the first and second steps.

The grievance procedure provides that the second step-respondent is required to schedule the second step meeting with five workdays of receiving the grievance.[1] Even assuming the grievant's allegations regarding the delay in advancing her grievance to the second step are true, there is no indication that she notified the agency that it was not in compliance with the grievance procedure as required by Section 6.3 of the *Grievance Procedure Manual* or otherwise demanded that the alleged noncompliance be corrected at any point during the grievance 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."[2] Based on these facts, EDR finds that any noncompliance that may have occurred with the agency's processing of the grievance at the first and second steps has been waived by the grievant based on her continuation of the grievance.

Furthermore, in cases where the agency has failed to comply with the grievance procedure by delaying the issuance of a step response or the scheduling of the second step meeting beyond five workdays, the grievant's notice of noncompliance must allow the agency five additional workdays to correct the noncompliance.[3] While in cases of substantial noncompliance with procedural rules the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party,[4] EDR favors having grievances decided on the merits rather than procedural violations. Thus, in compliance rulings addressing issues of this nature EDR will typically order the noncompliance corrected before rendering a decision against a noncompliant party.[5] The grievant has not present any information to suggest that a different result would have been appropriate in this case, and for that reason there is no basis for EDR to order any relief with regard to the grievant's claim of noncompliance.

*Hostile Work Environment*

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]

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[1] *Grievance Procedure Manual* § 3.2.
[2] *Id.* § 6.3; *see also*, *e.g.*, EDR Ruling No. 2004-752; EDR Ruling No. 2003-042; EDR Ruling No. 2002-036.
[3] *Grievance Procedure Manual* § 6.3.
[4] *See* Va. Code § 2.2-3003(G).
[5] *See*, *e.g.*, EDR Ruling No. 2010-2536; EDR Ruling Nos. 2009-2150, 2009-2178.
[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).

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]

In this case, the grievant alleges that the Supervisor has engaged in harassment and retaliation that has created a hostile work environment. For a claim of hostile work environment or 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 or prior protected activity;[12] (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.[13] 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.[14] "[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."[15]

The grievant has provided several examples of the Supervisor's allegedly harassing and retaliatory behavior. In general, the grievant argues that the Supervisor reassigns staff within the facility without communicating with her as a method of "manipulating staff so that [she] will have to perform the duties of an officer instead of maximizing [her] skills as a supervisor." For example, the grievant claims that the Supervisor has ordered her to stay at work after the end of her shift when other employees were available to provide necessary coverage or when no additional staff were needed. On one occasion, the Supervisor allegedly assigned staff in such a way that the grievant was required to perform work that would have normally been assigned to another person, such as "assisting with all staff breaks" and "[g]etting the meal cart . . . and then feeding the residents." At another time, the grievant asserts that the Supervisor ordered her to

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[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).
[12] The grievant alleges that she has "been complaining" about the Supervisor's behavior for several years using the grievance process. She apparently "stopped the grievance process" in the past "because [she] was assured that the situation would be handled," but her issues with the Supervisor have persisted. The grievant engaged in protected activity by using the grievance procedure to present her concerns about the Supervisor in the past. The grievant also appears to allege discrimination on the basis of age.
[13] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[14] *See generally id.* at 142-43.
[15] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

assist with transporting two residents. According to the grievant, work tasks of this nature would typically be carried out by an officer, not a supervisor.

The grievant may be raising legitimate concerns about her employment and the Supervisor's conduct.[16] Having reviewed 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 an abusive or retaliatory hostile work environment. The alleged workplace harassment challenged by the grievant essentially involves disparate work assignments among employees and potentially unprofessional conduct by the Supervisor, neither of which generally rise to the level of an adverse employment action or severe or pervasive conduct.[17] Prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[18] 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.

This ruling does not mean that EDR deems the alleged behavior of the supervisor, 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.

*Mediation*

Finally, although this grievance does not qualify for a hearing, mediation may be a viable option for the parties to pursue. EDR's Workplace Mediation Program is a voluntary and confidential process in which one or more mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work unit involved. The parties may contact EDR at 888-232-3842 for more information about EDR's Workplace Mediation Program.

EDR's qualification rulings are final and nonappealable.[19]

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[16] Indeed, it would appear that the third step-respondent considered the grievant's concerns and determined that corrective action was necessary. In her response, the third step-respondent informed the grievant that the agency would work to address her concerns with the Supervisor.
[17] *See generally* EDR Ruling No. 2012-3125 (and authorities cited therein).
[18] 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).
[19] *See* Va. Code § 2.2-1202.1(5).