Issue: Qualification/Retaliation/Other Protected Right; Ruling Date: January 27, 2003; Ruling #2002-190; Agency: Department of Corrections; Outcome: not qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections/ No. 2002-190
January 27, 2003

The grievant has requested a ruling on whether his June 16, 2002 grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that DOC violated his First Amendment right to freedom of speech when it questioned him about an Internet chat site. He further claims that he works in a hostile work environment and may experience retaliation in the future for exercising his right to free speech.[1] For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is a Correctional Officer with DOC. On May 22, 2002, the Assistant Warden of Operations (AWO) approached the grievant and questioned him about his nickname and informed him that his initials had been posted on an Internet chat site.[2] The grievant further claims that the AWO alleged that the grievant was responsible for posting comments on the Internet that were "downgrading the administration."[3]

On June 5, 2002, the grievant attended a meeting with the Major and two other employees. He claims that the Major accused him of posting comments on the Internet forum in question and that rumors had been circulating around the facility about the grievant's participation on the Website.[4] The grievant did not receive any kind of reprimand or disciplinary notice as a result of either of these meetings. However, he claims that the comments and questions posed by the AWO and the Major amount to harassment and a violation of his First Amendment right of freedom of speech. He

[1] The grievant also claimed on his Form A the issue of defamation of character. Although all complaints may proceed through the resolution steps set forth in the grievance statute, thereby allowing employees to bring their concerns to management's attention, only certain issues qualify for a hearing. For example, while grievable through the management resolution steps, the claim of defamation of character is not among the issues identified by the General Assembly as qualifying for a grievance hearing. Va. Code § 2.2-3004; *Grievance Procedure Manual* § 4.1), pages 10 and 11.

[2] The Internet site in question contains several postings from employees of the grievant's facility. Most of the comments are not favorable to the institution or to its leadership.

[3] *See* Grievance Form A.

[4] The Major and another employee present at the meeting claim that no accusations were made. Rather, they claim that they discussed the fact that the grievant's co-workers had "[dragged] him into some things." *See* First Step Response.

further expressed concern that he may suffer retaliation in the form of a shift change or transfer in the future. As relief, the grievant requests that discipline be taken against the administrators responsible for the harassment, a formal apology be issued, and that he be free from a hostile and retaliatory work environment.

DISCUSSION

Harassment/Hostile Work Environment

A claim of workplace harassment or hostile work environment qualifies for a grievance hearing only if an employee presents evidence raising a sufficient question as to whether the challenged actions are based on race, color, religion, political affiliation, age, disability, national origin, or sex.[5] The grievant does not assert, however, that the alleged harassment was based on any of these factors. Rather, his claim is essentially that management has harassed him by questioning whether he submitted comments to the Internet chat site. This Department has long held, however, that general supervisory hostility does not, in and of itself, qualify for a hearing.

Retaliation and Right to Free Speech

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;[6] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action *because* the employee engaged in the protected activity.

In this case, even assuming for purposes of this ruling only that the grievant had engaged in a protected activity associated with the Internet chat site,[7] the grievant has not suffered an adverse employment action.[8] An adverse employment action is defined as a

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[5] Va. Code § 2.2-3004 (A)(iii). *See also* Department of Human Resource Management (DHRM) Policy 2.30, which defines workplace harassment as conduct that "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."

[6] *See Grievance Procedure Manual* §4.1(b)(4), page 10. 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 a violation to the State Employee Fraud, Waste and Abuse Hotline, or exercising any right otherwise protected by law."

[7] A government employee does not have an absolute right to freedom of speech. Rather, "the speech must be on a matter of public concern, and the employee's interest in expressing [himself] on this matter must not be outweighed by an injury the speech could cause to "'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" Waters v. Churchill, 511 U.S. 661, 668 (1994).

[8] The General Assembly has limited those issues that may qualify for hearing to those that involve adverse employment actions. Va. Code § 2.2-3004(A). The statute states that "a grievance qualifying for a hearing

"tangible employment act constituting 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."[9]

As a matter of law, adverse employment actions include any agency action that results in an adverse effect *on the terms, conditions, or benefits* of one's employment.[10] In this case, the grievant has presented no evidence that he has suffered an adverse employment action. The administrators' comments had no significant detrimental effect on the grievant's employment status. Rather, the grievant essentially challenges the manner in which management questioned him about the Internet site. Accordingly, although the grievant disagrees with management's comments and questions, this grievance does not qualify for a hearing.

If, however, an adverse employment action (e.g., discipline, termination, or suspension) is taken in the future, which the grievant believes is the result of retaliation for an exercise of his First Amendment rights, he may challenge the adverse employment action through a subsequent grievance.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes 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. 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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Claudia T. Farr
Director

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shall involve a complaint or dispute by an employee relating to . . . adverse employment actions" (emphasis added).

[9] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

[10] Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).