Issue: Qualification/Retaliation/Other protected right; Ruling Date: January 3, 2003; Ruling #2002-204; Agency: Department of Military Affairs; Outcome: qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Military Affairs/ No. 2002-204
January 3, 2003

The grievant has requested a ruling on whether her September 9, 2002 grievance with the Department of Military Affairs (DMA) qualifies for a hearing. The grievant asserts that the agency retaliated against her after she made complaints regarding a co-worker's behavior which she claimed was intimidating and physically threatening. For the following reasons, this grievance qualifies for a hearing.

FACTS

The grievant is employed as a Law Enforcement Officer I with DMA. She was hired as the first police officer at the facility's police department on August 10, 2001, and "assisted in the development of the department" during her first fifteen months of employment.[1] The grievant claims that she was given several supervisory and administrative duties while she helped start the police department.[2] The agency acknowledged in the grievant's May 13, 2002 interim performance evaluation that the grievant was not performing assignments "normally required of an employee in this classification" and that she "assisted in the supervision of personnel in an outstanding manner."[3] The grievant claims that the agency was preparing her for a supervisory position, once one became available. As evidence, the grievant notes that in June 2002, the Chief planned to leave her in charge during his August 2002 absence and that in April 2002, the Chief approved a First Line Supervisor course for the grievant, which she completed the following August.

On June 18, 2002, the grievant expressed concern to the Chief that a coworker was causing problems in the department, intimidating other workers, and using abusive

[1] Third Step Response, dated October 2, 2002.
[2] The grievant claims that she was set up in her own office, reviewed and screened the department's job applications, conducted background investigations on applicants, coordinated job interviews, assumed scheduling for dispatchers, managed leave records, coordinated training, oversaw the department's payroll activities, and began development of departmental policies and procedures.
[3] Grievant's May 13, 2002 Performance Evaluation, Part VI, section D. The grievant was rated an "Extraordinary Contributor" in the Core Responsibility of "Conducts routine patrols." *See also* Grievant's Employee Work Profile, Part II, section D, dated August 10, 2001. The Performance Evaluation makes clear that the grievant was not, in fact, conducting routine patrols (55% of her core responsibilities) because she was, instead, assisting in the development of the facility's police department.

language.[4] On June 27, the grievant reported another incident involving the same coworker in which he purportedly threatened to "go postal" on the grievant.[5] The grievant claims that she felt physically threatened by the coworker's comments, but that the Chief concluded that the grievant was overreacting.

On August 5, 2002, upon returning to work following two weeks of annual military training, the grievant learned that the Chief was removing all of her administrative and supervisory duties (except for assistance in the development of agency policies) and would be transferring her from dayshift to a rotating shift.[6] The grievant claims that the removal of her administrative and supervisory responsibilities, as well as the reassignment to a rotating shift, were done in retaliation for her having reported her coworker's alleged threatening behavior. The agency essentially claims that the grievant was never in a supervisory position and therefore suffered no adverse employment action when she was "returned to the duties for which [she was] hired and as established by [her] current position description."[7] Moreover, the agency claims that her complaints against her coworker do not qualify as activities protected by law for purposes of a retaliation complaint.

DISCUSSION

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;[8] (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 had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation.[9] Evidence establishing a causal connection and inferences drawn

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[4] *See* Memorandum, dated June 18, 2002, from the Grievant to the Chief. In the memorandum, the grievant claims that her coworker, on occasion, threw objects across the room when upset, belittled other employees, slammed his fist on furniture, and cursed. She claimed that her coworker's actions were intimidating and caused others to be fearful of him.

[5] *See* Memorandum, dated June 27, 2002, from the Grievant to the Chief. The subject line of the Memorandum read "Threatening Environment."

[6] The grievant had been working only dayshift since beginning employment with DMA in August 2001. She learned of the change to a rotating shift after making a third complaint against her coworker for responding to call without his duty weapon. The grievant claims that in a meeting following her third complaint, her chief sai8 she was being "divisive" with respect to her coworker.

[7] Third Resolution Step, dated October 2, 2002.

[8] *See* Va. Code § 2.2-3004(A)(v). 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 Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[9] *See* Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000); Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 656 (4th Cir. 1998).

therefrom may be considered on the issue of whether the agency's explanation was pretextual.[10]

Reporting threats of workplace violence could be a protected activity.[11] Under the Occupational Safety and Health Act of 1970 (OSHA), an employer 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 his employees."[12] This "General Duty Clause" is "generally cited when no OSHA standard applies to the hazard."[13] While OSHA has not established specific standards or rules on workplace violence, employers may be cited under the General Duty Clause for any general failure to maintain a safe working environment.[14]

Furthermore, under OSHA, employees may ask their employers to correct general workplace hazards that are not violations of specific OSHA standards.[15] OSHA also protects from retaliation employees who report unsafe working conditions to their employers.[16] Moreover, the Commonwealth has recognized the potential danger of workplace violence and has established a policy that prohibits violence in the workplace.[17] That policy further prohibits agencies from "retaliating against any employee, who, in good faith, reports a violation of this policy."[18] Therefore, under OSHA and state policy, it would appear that the grievant engaged in a protected activity when she reported her concerns about the threat of workplace violence to her supervisor.[19]

The grievant may have also suffered an adverse employment action when the Chief removed several of her responsibilities.[20] An adverse employment action is defined as a "tangible employment act constituting a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different

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[10] *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n. 10, 101 S.Ct. 1089 (Title VII discrimination case).

[11] *See* Va. Code § 2.2-3004(A)(v) (reporting an incident of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law is protected from retaliation).

[12] 29 U.S.C. 654(a)(1).

[13] *See* http://www.osha.gov/as/opa/worker/index.html <visited December 12, 2002>.

[14] *See* "Workplace Violence, OSHA Fact Sheet," 2002; see also http://www.osha-slc.gov/oshinfo/priorities/violence.html <visited December 16, 2002>.

[15] *See* http://www.osha.gov/as/opa/worker/rights.html <visited December 12, 2002>.

[16] 29 U.S.C. 660 (c)(1). *See also* http://www.osha.gov/as/opa/worker/index.html <visited December 12, 2002>.

[17] Department of Human Resource Management (DHRM) Policy 1.80, "Workplace Violence." Workplace violence includes threatening behavior, verbal abuse, an intimidating presence, shouting and swearing, among other unacceptable conduct.

[18] *Id.*

[19] Even if the grievant's complaints are not activities "otherwise protected by law," the taking of an adverse action against the grievant for reporting a threat of violence would amount to a misapplication of policy because DHRM's Workplace Violence policy expressly prohibits retaliation against employees who report threats of violence at work.

[20] The grievant also claimed that DMA was planning on placing her on a rotating shift from daylight shift. However, she has not yet experienced a shift change because she has been on leave since October 3, 2002.

responsibilities, or a decision causing a significant change in benefits."[21] As a matter of law, adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[22]

In this case, the grievant, although not hired in a supervisory position, performed several duties generally reserved for supervisors such as coordinating staff, scheduling of other employees, and other administrative activities.[23] Those duties clearly had a favorable impact on the grievant's performance evaluation. Moreover, DMA sent the grievant to a First Line Supervisor course and noted that the grievant was an "ideal candidate" to perform those supervisory functions until budgetary constraints were lifted and they were able to hire someone to fill that supervisor role. While the grievant has suffered no loss of pay or position title, it appears that the grievant has experienced a decrease in her level of responsibility, which could have an affect on her promotional opportunities. Therefore, because DMA's action - taking away supervisory functions that the grievant had been performing – could be found to have some significant detrimental effect on the grievant's level of responsibility or opportunity for promotion, this grievance raises a sufficient question as to whether the grievant has suffered an adverse employment action.

In addition, this Department concludes, based on the totality of the circumstances, that a sufficient question remains as to the existence of a causal link between a protected act (reporting an alleged unsafe working environment to management) and an adverse employment action (the removal of the grievant's supervisory duties). The hearing officer, as a fact finder, is in a better position to determine the questions of fact and retaliatory intent presented in this grievance.[24]

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

[22] 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)).

[23] *See generally* http://www.dhrm.state.va.us/services/compens/careergroups/p.../LawEnforcement69070.ht <visited December 19, 2002> (discussing the Commonwealth's Law Enforcement Career Group, including descriptions of law enforcement officer and manager positions).

[24] *See* Ross v. Communications Satellite Corp., 759 F.2d 355, 364-65 (4th Cir. 1985), abrogated on other grounds, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), quoting Morrison v. Nissan Motor Co., Ltd., 601 F.2d 139, 141 (4th Cir. 1979) ("[r]esolution of questions of intent often depends upon the 'credibility of the witnesses, which can best be determined by the trier of facts after observation of the demeanor of the witnesses during direct and cross-examination'").

CONCLUSION

For the reasons discussed above, this Department qualifies the grievant's September 9, 2002 grievance. This qualification ruling in no way determines that the agency's actions were retaliatory, contrary to state policy, or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate. The agency is directed to request the appointment of a hearing officer within five workdays unless the grievant notifies them that she does not wish to proceed. For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet.

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Claudia T. Farr
Director

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