Issue: Qualification/Work Conditions/Co-worker conflict; Ruling Date: March 18, 2003; Ruling #2002-208, 209, 210, 211, 212; Agency: Department of General Services; Outcome: Not qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND COMPLIANCE RULING OF DIRECTOR

In the matter of Department of General Services
Ruling Nos. 2002-208, 2002-209, 2002-210, 2002-211, 2002-212
March 18, 2003

The grievant has requested rulings on whether her grievances, three initiated on May 22, 2002 and one on July 18, 2002, with the Department of General Services (DGS or the agency) qualify for hearing. Further, if qualified, the agency seeks consolidation of the four grievances for purposes of hearing.

In her first grievance (Grievance #1), the grievant alleges that harassment and intimidation based on race and gender has created a hostile work environment. The grievant's second grievance (Grievance #2) also asserts harassment and hostile work environment based on race and gender. The grievant's third grievance (Grievance #3) alleges defamation due to an alleged inaccurate and slanderous counseling memorandum. Her final grievance (Grievance #4), claims retaliation in the form of harassment and intimidation for initiating the three previous grievances.

For the reasons discussed below, this Department concludes that none of the grievances qualifies for hearing. As such, a consolidation ruling is unnecessary.

FACTS

The grievant is a laboratory specialist in the Division of Consolidated Laboratory Services (DCLS) at DGS. On May 6, 2002, following an approximate six-month cross training opportunity within another laboratory, the grievant returned to her previous work group within DCLS. Upon her return, the grievant and her supervisor engaged in a conversation, which, according to the grievant, triggered a pattern of harassment. Specifically, the grievant's supervisor stated, "I hope we can get along without killing each other." In response, the grievant purportedly stated, "I am not a violent person." To this, the supervisor allegedly replied, "It's the mental anguish I'm concerned about." The supervisor purportedly apologized and maintains that his comments were an attempt to ease tension and were not meant to intimidate or harass the grievant.

Additionally, the grievant alleges that her supervisor asked her inappropriate questions about her personal life, specifically, about the contract between the grievant's

husband, the grievant, and their child daycare provider. The supervisor maintains that his questions concerning her daycare were asked in an attempt to accommodate the grievant during her temporary work schedule.

On May 7, 2002, the grievant became involved in an altercation at the workplace with another DGS co-worker. During this altercation, the grievant's co-worker allegedly called her a "bad penny," threatened her job, and used vulgar language. The grievant maintains that referring to her as a "bad penny" is insulting based upon the color of the coin and because it implies she is a bad person.

On May 9, 2002, the grievant made repeated requests of a co-worker to provide her with certain work-related data. Due to the alleged pressure the employee felt from the repeated requests, he sought guidance from the senior scientist in the lab. Accordingly, the senior scientist advised the grievant to use an alternative method to obtain the data. Despite these instructions, the grievant, according to the agency, continued to seek the information from her co-worker, resulting in a counseling memorandum dated May 20, 2002. The grievant asserts that she asked for the data three times in three hours and did not disobey the senior scientist.

In June and July of 2002, the grievant and a co-worker with whom she shared a workspace were involved in several disagreements and alleged "chair-bumping" incidents. This co-worker complained of the grievant's behavior, and on June 18, 2002, the grievant was verbally advised by the senior scientist to stop the "chair-bumping." The following day, both employees met with their supervisor to discuss their conflicts.

On July 3, 2002, the grievant and her co-worker were advised that they were being separated due to their continued failure to get along. However, as a result of circumstances such as limited equipment, location of the weighing balances, and the frequent receipt of priority samples, the agency maintains that it was impossible to totally separate the two workers and maintain productivity. As such, there were times that the grievant and her co-worker were required to work in the same area. On July 10, 2002, the grievant's co-worker complained to management that the grievant allegedly bumped her chair seventy times within twenty-five minutes the previous day. On July 11, 2002, the grievant was formally counseled regarding her alleged inappropriate interactions with DCLS employees.

DISCUSSION

Grievance #1 and Grievance #2 – Hostile Work Environment/Harassment Based on Race and Gender

In Grievances #1 and #2, the grievant claims that she has been subjected to discriminatory harassment that created a "hostile work environment" through the May 6, 2002 verbal exchange between the grievant and her supervisor, her altercation with a co-worker on May 7, 2002, and her supervisor's alleged inappropriate personal questions

about child day care. In addition, the grievant asserts that when she hurt her back, her supervisor commented that she would have to get a "slave" to do her heavy lifting. The grievant alleges that her supervisor also told her that she did not understand the hierarchy of the agency. Further, the grievant maintains that when she asked her supervisor for a staff list in preparation for a baby shower for an African American male employee, he gave her the list on paper containing the image of three black crows. Moreover, the grievant alleges that she is the fourth person that has been subjected to her supervisor's alleged discriminatory actions. Finally, during this Department's investigation, the grievant presented extensive documentation detailing her daily conflicts and conversations with her supervisor and co-workers.

Although all complaints initiated in compliance with the grievance process may proceed through the three 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, claims of hostile work environment and harassment qualify for a hearing only if an employee presents sufficient evidence showing that the challenged actions are based on race, color, national origin, age, sex, religion, political affiliation, or disability.[1]

For the grievant's claim of a hostile work environment based on race and/or sex to qualify for hearing, she must come forward with evidence raising a sufficient question that: (1) she was subjected to unwelcome harassment; (2) the harassment was based on race and/or sex; (3) the harassment was sufficiently severe or pervasive to alter her conditions of employment and create an abusive atmosphere; and (4) there is some basis for imposing liability for the harassment on the employer.[2] Further, courts have uniformly held that while a statement may be insensitive and offensive, a mere offensive utterance that occurred once and did not unreasonably interfere with an employee's ability to work cannot be said to create a hostile work environment based on race or any other protected class.[3] Additionally, courts have repeatedly held that in a case of alleged co-worker harassment, an employer cannot be held liable for isolated remarks of a victim's nonsupervisory co-worker unless the employer "knew or should have known of the harassment, and took no effectual action to correct the situation."[4]

In this case, there is insufficient evidence that the supervisor and co-worker actions were based on the grievant's race and/or sex. While the grievant's supervisor even concedes that his comments about "getting along without killing each other" exhibited a "poor choice of words,"[5] they do not appear to be sex or race based. Nor do the comments regarding the grievant's child care arrangements seem to be linked to any civil rights based protected status. Further, while the supervisor's "slave" remark and

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[1] Grievance Procedure Manual § 4.1(b)(2), page 10; *see also* DHRM Policy 2.30 Workplace Harassment (effective 05/01/02).
[2] *See* Spriggs v. Diamond Autoglass, 242 F.3d 179, 183-84 (4th Cir. 2001).
[3] *See* Murphy v. Danzig, 64 F. Supp.2d 519, 522 (E.D.N.C. 1999).
[4] Mikels v. City of Durham, 183 F.3d 323, 331-332 (4th Cir. 1999).
[5] *See* June 25, 2003 Second Step Response.

choice of stationery may have been offensive to the grievant, this Department concludes that they were not race or sex based, much less sufficiently severe or pervasive such as to create, on the basis of race and/or gender, an abusive working environment that unreasonably interferes with the grievant's capacity to work. Regarding the co-worker's alleged statement likening the grievant to a "bad penny," the co-worker does not remember ever making such a comment. Furthermore, even if he had made the comment, there is no evidence that the statement is race based in origin or usage. As such, Grievances #1 and #2 do not qualify for hearing.

Grievance #3 – Defamation of Integrity through May 20, 2002 Counseling Memorandum

Grievance #3 was initiated in response to the May 20, 2002 counseling memorandum. The grievant alleges defamation of integrity and that the counseling memorandum was used as a means of scapegoating to cover up alleged inappropriate training methods by an unqualified probationary employee.

As a preliminary matter, claims such as false accusations, defamation and slander, though grievable through the management resolution steps, are not among the issues identified by the General Assembly as qualifying for a grievance hearing.[6] Accordingly, the grievant's defamation claim cannot be qualified for a hearing.

Moreover, a counseling memorandum does not qualify for hearing unless there is evidence raising a sufficient question as to whether, through the issuance of the memorandum, management took an "adverse employment action" against the grievant affecting the terms, conditions, or benefits of his employment.[7] 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 responsibilities, or a decision causing a significant change in benefits."

A counseling memorandum, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment, and thus cannot constitute an "adverse employment action."[8] Indeed, under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[9] Inherent in this authority is the responsibility and discretion to communicate to employees perceived behavior problems. The Department of Human Resource Management (DHRM) has sanctioned the issuance of counseling memoranda

[6] Va. Code § 2.1-116.06(A); *Grievance Procedure Manual §* 4.1, page 10.
[7] Va. Code 2.2-3004(A)(limiting certain issues that may qualify for hearing to those that involve "adverse employment actions"); *Grievance Procedure Manual* § 4.1, pages 10-11. Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998). Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001)(citing Munday v. Waste Mgmt. Of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).
[8] *See* Boone v. Golden, 178 F.3d 253 (4th Cir. 1999).
[9] *Grievance Procedure Manual*, § 4.1(c), page 11. *See also* Va. Code § 2.2-3004(B).

as an informal means of communicating what management notes as problems with behavior, conduct, or performance. Significantly, DHRM does not recognize such counseling as formal disciplinary action under the *Standards of Conduct*.[10]

In this case, the counseling memorandum did not, by itself, constitute an adverse employment action, because it had no effect on the terms and conditions of the grievant's employment. However, the parties should note that this Department has long held that counseling memoranda may always be offered as evidence in any subsequent grievance challenging an adverse employment action (e.g., demotion, termination, suspension, "Below Contributor" annual performance evaluation).[11]

Grievance #4 - Retaliation

In Grievance #4, the grievant asserts that her co-worker was coerced by management to participate in harassing behavior against the grievant in retaliation for the grievant's initiation of her three previous grievances. In support of her claim, the grievant asserts that management was fully aware in June of the problems between the co-worker and herself, yet made no attempts to separate them until July 8, 2002. The grievant further maintains that management, by failing to remove the co-worker from the same area as the grievant, intended to create a hostile work environment. Additionally, the grievant claims that her co-worker would intentionally provoke arguments and other encounters, including the "chair-bumping" incident on July 9, 2002. Finally, the grievant alleges that her co-worker verbally harassed her by stating that she was "childish," "immature," and "needed help."

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;[12] (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.[13]

In this case, it is undisputed that the grievant engaged in a protected activity by initiating three previous grievances. However, even if the grievant could show a causal

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[10] *See* DHRM Policy Number 1.60(VI)(C).
[11] *See* EDR Rulings # 2002-069, # 2002-109 and # 2002-219.
[12] *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 the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.
[13] *See* Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000).

link between her filing of the grievances and the alleged harassing and intimidating behavior she experienced while at work, her grievance would fail to qualify for a hearing for lack of an "adverse employment action." The alleged personal animus toward the grievant by her co-worker and supervisor, while serious, does not constitute an adverse employment action.[14] As such, this grievance does not qualify for hearing.

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 this 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 notifies the agency that she wishes to conclude the grievance.

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Claudia T. Farr
Director

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Jennifer S.C. Alger
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[14] *See* Matvia v. Bald Head Island Management, Inc., 259 F.3d 261, 272 (4th Cir. 2001)(citing Manning v. Metropolitan Life Ins. Co, 127 F.3d 686, 692 (8th Cir. 1997)(personal animus by employees and supervisors toward the plaintiff could not as a matter of law be considered an adverse employment action). *See also* Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997) ("in no case in this circuit have we found an adverse employment action to encompass a situation where the employer has instructed employees to ignore or spy on an employee who engaged in a protected activity.")