Issue: Qualification/Discrimination-Other; Methods/Means – Training; Retaliation/Other protected right/ Work Conditions; Ruling Date: March 27, 2003; Ruling #2002-225; 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
Ruling Number 2002-225
March 27, 2003

The grievant has requested a ruling on whether her July 8, 2002 grievance with the Department of Corrections (DOC) qualifies for a hearing. In her grievance, the grievant asserts that management has misapplied policy by denying her requests to attend training. In addition, she claims discrimination, harassment, retaliation, creation of a hostile work environment, and damage to her professional reputation by her supervisors and the agency's on-site consultant.

FACTS

The grievant is employed as a Clinical Social Worker Supervisor (CSWS). In this capacity, she asserts that she is required to maintain certification as a Certified Substance Abuse Counselor (CSAC) and Master Addiction Counselor (MAC). In January 2002, she submitted a request outlining 107 hours of training for the year, to include 67 hours of training needed to complete CSAC and MAC certification.[1] The facility requires only that the grievant attend 40 hours of in-service training annually,[2] and the request was denied by her supervisors as being excessive. In June 2002, the grievant's request to attend a three-day training course was denied because her supervisor and another employee were scheduled to attend the same training, and the agency indicated that the grievant was needed to cover for their absences.

In addition to the denial of training opportunities, the grievant asserts that her supervisors took a series of discriminatory, harassing, and retaliatory actions against her,

[1] CSAC certification requires 68 hours of specified training and MAC certification requires 72 hours. The grievant had already completed annual certification training requirements except for the 67 hours included in her training request.
[2] *See* Indian Creek Correctional Center Institutional Operating Procedure No. 403, *Staff Training,* 403-9.0 (B).

which created a hostile work environment and were designed to denigrate her skills and destroy her professional reputation.

DISCUSSION

Discrimination

The grievant asserts that her supervisor's action in denying her an opportunity to review a supplement to her Performance Plan prior to affixing her signature was discriminatory.

Under the grievance procedure, a claim of discrimination arising from membership in a protected class (in other words, on the basis of race, color, religion, political affiliation, age, disability, natural origin, or sex) may qualify for a hearing.[3] The grievant's complaint of discrimination, however, is not based on any membership in a protected class, but rather on a generalized claim of "unfair treatment." Accordingly, this issue does not qualify for a hearing.

Retaliation

The grievant claims that a series of discrete actions by her supervisor from August 1999 to June 2002, to include the previously discussed alleged denial of training opportunities, were retaliatory. 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; (2) the employee suffered an adverse employment action; and (3) a casual 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.[4]

Only the following activities are protected activities under the grievance procedure: (1) participating in the grievance process, (2) complying with any law or reporting a violation of such law to a governmental authority, (3) seeking to change any law before the Congress or the General Assembly, (4) reporting a violation to the State Employee Fraud, Waste and Abuse Hotline, or (5) exercising any right otherwise protected by law.[5] Here, the grievant has presented no evidence that she engaged in any of the protected activities above. Under the facts of this case, verbally challenging her supervisors' actions toward her, and their assessment of her professional competency, is not a protected activity.[6] Accordingly, the issue of retaliation does not qualify for a hearing.

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[3] Grievance Procedure Manual, page 10.
[4] *See* Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653 (4th Cir. 1998).
[5] Grievance Procedure Manual § 4.1(b), page 10.
[6] 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 [herself] on this matter must not be outweighed by an injury the speech could cause to "'the interest of the State, as an employer, in

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.[7] The grievant does not assert, however, that the alleged harassment was based on any of these factors. Rather, her claim is essentially that her supervisors have harassed her by taking a series of management actions intended to "denigrate [her] skills and destroy [her] reputation." This Department has long held, however, that general supervisory hostility or an employee's disagreement with her supervisors' management style does not, in and of itself, qualify for a hearing.

Misapplication of Policy

For a misapplication or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision or whether the challenged action, in its totality, was so unfair as to amount to a disregard of intent of the applicable policy.

Training Policy

The grievant asserts that in denying her requests for training, management jeopardized her ability to retain her certifications. The applicable policies are DHRM Policy 5.05, Employee Training and Development and DOC's IOP #403, Staff Training. DHRM Policy states that "[a]gencies shall provide, within reasonable resources, employee training necessary to assist the agency in achieving its mission and accomplishing its goals."[8] IOP #403 provides that non-custodial employees in designated positions complete 40 hours of approved in-service training annually. There is no mandate in the policy, however, to provide employees with the training they request or may need for certification.

Further, there is no policy mandating that the agency must allow the grievant to pursue certification training during work hours. Thus, it cannot be concluded that the agency misapplied or unfairly applied policy by not allowing the grievant to fulfill certification requirements by attending extended training far beyond the established 40 hour in-service annual training objective. DHRM Policy 5.05 clearly states that the

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promoting the efficiency of the public services it performs through its employees.'" Waters v. Churchill, 511 U.S. 661, 668 (1994). Here, the grievant's verbal challenges regarding the management of her work place were not a "matter of public concern" for purposes of constitutionally protected speech.

[7] 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."

[8] DHRM Policy No. 5.05 III.A, effective 9/16/93, page 2 of 5.

decision to send employees to training is within management's discretion. There is no evidence that management's denial of her requests were based on discrimination or retaliation; rather, the decision appears to be based on management's determination of the best use of training resources. Accordingly, this issue does not qualify for a hearing.

Workplace Violence Policy

The grievant also asserts that state policy has been violated because she was subjected to "workplace violence" in the form of "verbal abuse" by her supervisor and an on-site consultant. Under DHRM's Workplace Violence Policy, agencies are expected to create and maintain a workplace designed to prevent or deter workplace violence.[9] Workplace violence includes "verbal abuse" that could cause "psychological trauma, such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing."[10] Prohibited conduct includes "engaging in behavior that subjects another individual to extreme emotional distress."[11]

In this case, however, even if the grievant's factual examples of purported verbal abuse were proven, they would not appear to rise to the level of "verbal abuse" that constitutes "workplace violence" under the clear terms of DHRM policy. The grievant's examples of alleged "verbal abuse" (e.g., management's inaccurate assessments of her effectiveness and competency; improperly allowing her subordinates to circumvent her authority; lying to others about what was said or done regarding workplace issues; denial of requested training) describe unpleasant and/or unprofessional actions. While the grievant may have believed that her job and professional reputation were at stake, which undoubtedly can be stressful, the actions she describes do not appear to be of the type associated by policy with verbal workplace violence (e.g, obscene phone calls, threats, stalking, shouting or swearing).

Damage to Reputation

The grievant also claims that her supervisors' actions damaged her professional reputation. Although all complaints may proceed through the three resolution steps, thereby allowing employees to bring legitimate concerns to management's attention, only certain issues qualify for a hearing. Claims such as false accusations, defamation and slander are not among the issues identified by the General Assembly as qualifying for a grievance hearing.[12] Accordingly, this issue cannot be qualified for a hearing.

We wish to note that mediation may be a viable option to pursue. EDR's 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

[9] *See* DHRM Policy No. 1.80, *Agency Responsibilities*, page 2 of 3.
[10] DHRM Policy 1.80, *Definitions*, page 1 of 3.
[11] DHRM Policy 1.80, *Prohibited Actions*, page 1 of 3.
[12] Va. Code § 2.2-3004 (A); *Grievance Procedure Manual §* 4.1, page 10.

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.

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 wishes to conclude the grievance and notifies the agency of that desire.

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Claudia T. Farr
Director

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