Issue: Qualification/Work Conditions/Supervisory Conflict; Ruling date July 3, 2003; Ruling #2003-103; Agency: Department of Motor Vehicles; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Motor Vehicles
Ruling Number 2003-103
July 3, 2003

The grievant has requested a ruling on whether her October 26, 2002[1] grievance with the Department of Motor Vehicles (DMV or the agency) qualifies for a hearing. The grievant claims that her computer was used illegally by her supervisor and that such use was in retaliation for the grievant's complaints to the agency Commissioner about her supervisor's management style.[2] As relief, the grievant requests that her supervisor be prosecuted under Virginia law and be removed from her position. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed in a management capacity at DMV. On April 15, 2001, the grievant wrote a letter to the agency Commissioner detailing her frustrations with her supervisor's management style. Subsequently, allegedly at her supervisor's urging, the grievant took leave from work from September 24, 2002 through September 27, 2002. The grievant maintains that when she returned to work, she attempted to log onto the computer in her office and discovered that her supervisor had logged onto the computer while she was away.

DISCUSSION

Computer Use

The grievant claims that her supervisor's removal of the grievant's passcode from her computer was illegal under the Virginia Computer Crimes Act of 1984 and 1990 Amendment and that her supervisor should be appropriately disciplined. Although all complaints initiated in compliance with the grievance process may proceed through the

[1] Although the grievance is dated September 26, 2002, the grievant has confirmed that she inadvertently dated the grievance incorrectly and that the grievance should have been dated October 26, 2002.
[2] The grievant's claim of retaliation was not specifically raised on her Grievance Form A, but was raised in an attachment thereto at the time of initiation. This Department has long held that issues contained in any attachments to Grievance Form A at the time of initiation shall be viewed as part of the grievance.

three resolution steps set forth in the grievance statute, thereby allowing employees to bring their concerns to management's attention, the General Assembly has limited the issues that may be qualified for a hearing and the relief that may be awarded under the grievance procedure.[3] Allegations of criminal activity are not among the issues identified by the General Assembly that may qualify for a grievance hearing.[4] Moreover, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[5] Inherent in management's authority is the responsibility and discretion to discipline employees for unacceptable behavior and to determine the appropriate level of such disciplinary action. Accordingly, this issue does not qualify for a hearing.

Additionally, this Department deems it appropriate to note that the supervisor's actions do not rise to a level of misapplication or unfair application of state policy.[6] The applicable policy is the Department of Human Resource Management (DHRM) Policy No. 1.75; *Use of Internet and Electronic Communication Systems*. Policy 1.75 specifically provides that "[a]gency-provided computer systems that allow access to the Internet and electronic communication are the property of the Commonwealth and are provided to facilitate the effective and efficient conduct of State business."[7] Moreover, "[n]o user should have any expectation of privacy in any message, file or image or data created, sent, retrieved or received by use of the Commonwealth's equipment and/or access."[8] Further, agencies have the right to monitor any and all aspects of their computer systems.[9] Therefore, providing the grievant with a state owned computer created no expectation of privacy in the utilization of that computer. As such, this grievance would not qualify for hearing under a claim of misapplication or unfair application of policy.

Retaliation

The grievant claims that the alleged inappropriate use of her computer by her supervisor was in retaliation for reporting to the Commissioner her frustrations with her supervisor's management style. 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;[10] (2) the employee suffered an adverse employment action; and (3) a

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[3] *See* Va. Code § 2.2-3004(A) and Grievance Procedure Manual §4.1, pp. 10-11.
[4] *Id.*
[5] Va. Code § 2.2-3004(B)
[6] For a misapplication of policy or an unfair application of policy claim 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 the intent of the applicable policy.
[7] DHRM Policy No. 1.75, page 1 of 5.
[8] *Id.* at page 2.
[9] *Id.*
[10] *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,

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.[11] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[12]

It appears that the grievant did not engage in a protected activity by voicing her frustrations with her supervisor's management style to the agency Commissioner.[13] However, even assuming that she did engage in a protected activity for purposes of this ruling only, she has not suffered an adverse employment action.[14] 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."[15]

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.[16] In this case, the grievant has presented no evidence that she has suffered an adverse employment action. The supervisor's use of the grievant's computer, while displeasing to the grievant, had no significant detrimental effect on the grievant's employment status. Accordingly, the grievant's retaliation claim does not qualify 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

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reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[11] *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).

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

[13] 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), (internal quotation marks omitted). *See also* EDR Ruling #2002-225, March 27, 2003.

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

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

[16] 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)).

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, she 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 does not wish to proceed.

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Claudia Farr
Director

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