Issue: Compliance/Compliance/30-day rule; Qualification/misapplication and/or unfairly applied selection policies, failure to adhere to DJJ's sexual harassment policy, antiquated and offensive attitude toward female employees, subjected grievant to retaliation and ongoing harassment; Ruling Date: October 12, 2004; Ruling #2004-600; Agency: Department of Juvenile Justice; Outcome: Grievant out of compliance in the challenge to management's alleged actions concerning her non-selection or the existence of a hostile work environment; not qualified for hearing. Appealed in the Circuit Court of King George County; Decision: EDR Ruling Affirmed; entered on October 28, 2004.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE AND QUALIFICATION RULINGS OF DIRECTOR

In the matter of Department of Juvenile Justice
No. 2004-600
October 12, 2004

The grievant has requested a ruling on whether her December 1, 2003 grievance with the Department of Juvenile Justice (DJJ or the agency) qualifies for a hearing. The grievant claims that the agency (i) misapplied and/or unfairly applied selection policies, (ii) failed to adhere to DJJ's sexual harassment policy by allowing an alleged harasser to be part of a selection panel, (iii) has an antiquated and offensive attitude toward female employees and (iv) subjected her to retaliation and ongoing harassment.

The agency head asserts that the grievant's challenges to the selection process are out of compliance with the grievance procedure because her grievance was initiated after the 30 calendar day filing period. For the reasons discussed below, the agency head's challenge on timeliness is upheld. Furthermore, the grievance does not qualify for hearing.

FACTS

The grievant was employed with the agency as an Intake Probation and Parole Officer.[1] In February 2003, the grievant appied for a position as a Senior Probation Officer, a promotion. She learned that one of the panel members would be a male Senior Probation Officer who she claims made an improper sexual advance toward her in the past. Concerned that he would not treat her fairly, the grievant discussed the situation with a female panel member. This panel member was later replaced, and the Deputy Director of the District Court Service Unit served instead. Although the female panel member informed the Deputy Director of the grievant's allegations, the Senior Probation Officer remained on the panel, and the Deputy Director discussed the grievant's concerns with the alleged harasser. According to the grievant, the alleged harasser later raised the matter with her and his presence on the panel impacted her interview. Four months after the interview, management announced the selection of the successful candidate. In addition to challenging management's permitting the alleged harasser to remain on the panel, the grievant also claims that she is more qualified than the successful candidate.

[1] Since the initiation of this grievance, DJJ terminated the grievant's employment with the agency.

After learning of her non-selection, the grievant contacted the agency's Employee Relations Manager, and he requested the interview documentation from the district. Within 72 business hours of his request, the grievant asserts that management retaliated against her by initiating an investigation into her work performance. Additionally, she was removed from participating as a speaker at the Day of Discovery program where she was to have discussed new laws impacting the agency and changes to existing laws. Furthermore, she states her annual employee evaluation was negatively impacted because the results of the investigation were included. Also, she claims the harassment and retaliation continue because management constantly issues her unwarranted corrective memoranda regarding her work performance, and her supervisor checks her files on a weekly basis.

In response, the agency states the grievant did not timely challenge any perceived policy violations related to the selection process and, therefore, those issues are out of compliance with the grievance process and ineligible to proceed to hearing.[2] Additionally, management denies the grievant's claims of harassment and retaliation, asserting the investigation into the grievant's alleged misconduct and performance related issues was prompted by written allegations made by the county's Commonwealth's Attorney and, thus, the agency had a responsibility to investigate the veracity of the allegations. Likewise, DJJ claims the invitation to be a presenter at the Day of Discovery activities was withdrawn for good cause and not to harass. In recent years, a lawyer or a judge had given the presentation because the presenter could have to render legal opinions or interpretations**.** Therefore, management deemed it would be inappropriate for the grievant to be the presenter.

DISCUSSION

Compliance

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he knew or should have known of the event or action that is the basis of the grievance.[3] When an employee initiates a grievance beyond the 30 calendar day period without just cause, the grievance is not in compliance with the grievance procedure, and may be administratively closed.

In the present case, with respect to the grievant's claim that management should have removed her alleged harasser from the interview panel, the grievant knew at the

[2] *See* Qualification Decision, page 1. Prior to the agency head asserting the grievance was out of compliance, the second step respondent claimed the grievant's concerns about the panel composition had been investigated and that, in order to avoid the appearance of impropriety, the co-worker in question should have been replaced. However, he also noted the grievant was not harmed by the co-worker's presence on the panel because the panel advanced her for a second interview. The second interview was conducted by the respondent and the Regional Operations Manager, who both, according to the respondent, had no knowledge of the alleged advance by the co-employee or the grievant's concerns. *See* Second Resolution Step Written Response, dated December 23, 2003.

[3] Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4(1), page 6.

time of her interview that management had failed to grant her request. Additionally, she learned of her non-selection via email on July 16, 2003. It is undisputed that the grievant did not initiate a grievance challenging management's actions until December 1, 2003, well over 30 calendar days from either of these events. Consequently, the sole question remaining is whether there was just cause for the grievant's delay.

To support her claim of just cause, the grievant contends that she initially delayed initiation of her grievance because she was attempting to resolve her issues with management. This Department has long held, however, that waiting for the outcome of discussions with management does not constitute just cause for failure to initiate a grievance in a timely manner.[4] Accordingly, this Department cannot find that there was just cause for the grievant's delay in initiating her grievance challenging her non-selection.

For the reasons discussed above, the grievant is out of compliance with the grievance procedure. Therefore, she may not further pursue the issue of management's failure to remove the alleged sexual harasser from the interview panel or her non-selection through the grievance process.[5] This Department's rulings on matters of compliance are final and nonappealable.[6]

Qualification

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[7] Thus, claims relating to issues such as the method, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have influenced management's decision, or whether state policy may have been misapplied.[8] In this case, the grievant claims management retaliated against her and subjected her to harassment because she raised the issues of her non-selection and DJJ's alleged failure to adhere to the agency's sexual harassment policies.

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[4] *See* EDR Ruling #2002-159 and #2003-106.

[5] On her Grievance Form A, the grievant appears to state a claim that she has been subjected to a discriminatory hostile work environment. Specifically, she claims there is a "[l]ack of adherence to sexual harassment and equal employment opportunities and practice" by management. Additionally, she asserts the agency has an "[a]ntiquated and offensive attitude toward female employees." In cases where an employee timely challenges an alleged discriminatory hostile work environment, the employer may be liable for all acts that are part of the claim, even if they fall outside the statutory period, because the incidents comprising a hostile work environment are considered part of one unlawful employment practice. However, the employee must timely challenge at least one event or action that is part of the hostile work environment claim. *See* National Railroad Passenger Corporation v. Morgan, 122 S.Ct. 2061, 2075 (2002). Here, the grievant cited only management's handling of the interview process, which was not timely initiated. Nor was she able to provide another timely event/act in support of her hostile work environment claim during the investigation of this ruling.

[6] Va. Code § 2.2-1001(5).

[7] *See* Va. Code § 2.2-3004(B).

[8] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(C).

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 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 presents sufficient evidence that the agency' stated reason was a mere pretext or excuse for retaliation.[9] Here, the grievant asserts DJJ harassed and retaliated against her by (i) investigating her performance, (ii) citing the investigation in her annual performance evaluation, (iii) preventing her from speaking at the Day of Discovery activities and (iv) continually monitoring her performance and issuing counseling memoranda.

Even if the grievant can establish that she engaged in a protected activity, the issue of retaliation does not qualify for hearing because the incidents cited by the grievant as retaliatory acts are not "adverse employment actions." An "adverse employment action" includes any retaliatory act or harassment if, but only if, that act or harassment results in an adverse effect on the "terms, conditions, or benefits" of employment.[10] This would encompass any tangible employment action by management that has some significant detrimental effect on factors such as an employee's hiring, firing, compensation, job title, level of responsibility, or opportunity for promotion.[11]

While the grievant may view management's actions as harassing, the investigation into her conduct/performance and the continual review of her work do not rise to the level of adverse employment actions.[12] Likewise, the issuance of counseling memoranda is not an adverse employment action. The Department of Human Resource Management (DHRM) sanctions their usage as an *informal* means of communicating what management notes as problems with behavior, conduct or performance, rather than categorizing the memoranda as formal disciplinary action under the *Standards of Conduct*.[13] Nor is her removal as a Day of Discovery speaker an adverse employment action, because her failure to participate did not adversely impact the terms, conditions or benefits of her employment. Also, although the grievant disagrees with some of management's statements in her 2003 annual performance evaluation and feels that it

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[9] *See* Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653 (4th Cir. 1998).
[10] *See* Von Gunten v. Maryland Dept. 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)).
[11] *See* Boone v. Golden, 178 F. 3d. 253 (4th Cir. 1999).
[12] *See* Von Gunten at 869 (employer's investigation into a citizen's complaint lodged against the employee and "hyper-scrutinizing" her work were not adverse employment actions).
[13] *See* DHRM Policy Number 1.60(VI)(C). 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). *See* EDR Rulings #2002-069, -109, and –219.

portrayed her as a poor employee, she received a Contributor performance rating. The evaluation was generally positive, consistent with other recent annual evaluations, and she received a pay raise.[14] Such a rating is not deemed an adverse employment action because it did not have a tangible effect on the terms or conditions of her employment.[15]

In sum, the grievant did not timely challenge management's alleged actions concerning her non-selection or the existence of a hostile work environment. Additionally, she failed to present evidence raising a sufficient question as to whether she has been subjected to retaliation. Accordingly, this grievance does not qualify for a hearing. However, the parties should note that the grievant's employment was terminated after the initiation of this grievance and the grievant plans to proceed to hearing to challenge her termination. Therefore, if the hearing officer determines the issues raised in the December 1, 2003 grievance have some bearing on the issue of whether her Written Notices and termination were warranted and appropriate, the grievant may present evidence concerning her December 1, 2003 claims as background evidence in support of her challenge to her termination.

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 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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Susan L. Curtis
EDR Consultant

[14] The grievant received a Contributor performance rating for both her 2001 and 2002 annual performance evaluations.

[15] *See* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371 (4th Cir. 2004)("a poor performance evaluation 'is actionable only where the employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient's employment'")(citing Spears v. Missouri Dep't of Corr. & Human Res., 210 F.3d 850, 854 (8th Cir. 2000). Additionally, in the agency head's Qualification Decision, the agency head states that the grievant's evaluation has been reviewed and revised as the grievant requested. While the grievant claims the evaluation was not revised to her satisfaction, the performance evaluation did not result in any detrimental effect on the terms and conditions of her employment.