Issue: Qualification/race discrimination/retaliation for grievance procedure participation and other protected right; Ruling Date: November 3, 2004; Ruling #2004-750; Outcome: Race discrimination claim qualifies for hearing; other issues not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Mental Health,
Mental Retardation, and Substance Abuse Services
Ruling No. 2004-750
November 3, 2004

The grievant has requested a ruling on whether her two March 23, 2004 grievances with the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency) qualify for hearing. In the first of these grievances, the grievant challenges a Group II Written Notice, alleging that the agency misapplied and/or unfairly applied policy and retaliated against her. In the second grievance, the grievant alleges that she has been subjected to a hostile work environment because of her race and her previous protected activity. For the reasons discussed below, the second grievance qualifies for hearing, while the first does not.

FACTS

The grievant is employed by the agency as an RN II. Early in the spring of 2003, the grievant began complaining to the agency about difficulties she was experiencing with her supervisors and co-workers. On April 28, 2003, the grievant wrote to her immediate supervisor about these problems. Among the concerns raised by the grievant in her letter were that her shift leader (Nurse A) and another supervisor (Nurse B), both of whom are African-American, had consistently humiliated, demeaned and undermined her in front of staff and the patients; that other co-workers had been allowed to scream at her without any intervention by the shift leader; and that the shift leader had told one of her African-American co-workers that he should not trust the grievant because she was white. The grievant alleges that her supervisor first told her it was merely a "hazing" process, that she was later told that she needed to be more "aggressive" and then that she needed to be more "passive," and that she was finally advised that she should simply accept the personalities of the other employees. The agency did not conduct an investigation of the grievant's complaints, and the situation between her and her supervisors and co-workers continued to deteriorate, with both sides making complaints about the other.

On May 24, 2003, the grievant again wrote to her immediate supervisor, complaining, in part, that the shift leader had "consistently displayed a hostile and demeaning attitude when dealing with [the grievant]." The grievant also alleged that the shift leader had made "inappropriate and offensive sexual comments" and "document[ed] untruths to cover for her inappropriate and ineffective behavior." In her May 24th letter, the grievant asked for a

meeting with her supervisor and the Assistant Director of Nursing to discuss her concerns. She also contacted the Assistant Director of Nursing directly.

The grievant subsequently had two discussions with the Assistant Director of Nursing regarding her concerns. The grievant alleges that the Assistant Director of Nursing informed her that she had been the subject of a number of complaints from her co-workers, and that she should be careful because she was still in her probationary period and any improper behavior on her part could result in termination. The grievant further alleges that the Assistant Director of Nursing told her to prepare and file documentation regarding the other nurses' actions. The grievant claims that the only action taken in response to her meeting with the Assistant Director of Nursing was that her immediate supervisor addressed her concerns with other nurses at two monthly meetings, during which Nurse B accused her of "conspiring to set her up."

On September 2, 2003, the grievant wrote to the Director of Nurses to complain about the conduct of Nurse A and Nurse B, as well as about the conduct of three other employees, toward herself and three LPNs with whom she was friends. In this letter, the grievant specifically alleged that Nurse A suggested to one of these LPNs, who is African-American, that the grievant and another white nurse could not be trusted because they are white. She also alleged that the second of the three LPNs was advised that she could not be trusted because she was taking breaks with the grievant and another white nurse. In addition, the grievant complained about a counseling memorandum she had recently received for leaving the grounds during her break, on the basis that other employees regularly violated this policy without penalty, and she asked the Director of Nurses to investigate her complaints and "put an end to this harassment."

In addition to her letter, the grievant also met with the Director of Nurses to discuss her concerns. She claims that the Director told her that if she had adequately documented the actions of the other nurses, her problems "would be long gone." The grievant also alleges that the Director told her she would recommend that the grievant's probationary period be extended to ensure that the grievant prepared and submitted documentation regarding her co-workers.

Following this meeting, the conflict between the grievant and her supervisors and co-workers continued. After an incident occurring on January 7, 2004, the grievant spoke with Human Resources about her concerns regarding her treatment by her supervisors and co-workers. On January 11, 2004, the grievant wrote to the Human Resources Department to reiterate these concerns. In her letter, the grievant stated that she would be filing a grievance regarding the conduct she had experienced. She also made specific reference to her belief that she was being subjected to "racial prejudice" and to her allegation that other staff had been told not to trust her because of her race.

Despite these allegations, the agency still did not conduct an investigation of the grievant's complaints. On January 22, 2004, the grievant met with the facility's medical director to review "the many issues [the grievant] had submitted to Human Resources as well

as to the Nursing Department." In response to the grievant's complaints, the medical director made the following recommendations:

1. The grievant's nursing assignment should be clarified and given to her in writing.
2. The name of the grievant's immediate supervisor and the chain of nursing command should be clarified to the grievant verbally and in writing.

The medical director also advised the grievant that he had "advised Nursing and Human Resources that [they had] discussed many of [the grievant's] issues, but [he] cannot carry them any further."

On January 23, 2004, the grievant was notified that a formal charge of patient abuse had been made against her. The grievant alleges that this charge was the result of false allegations against her by Nurse B.[1] During the investigation, the grievant was reassigned to another ward.[2]

The same day that the grievant was notified of the charge against her, she was also advised that disciplinary action would be "forthcoming" for policy and procedure infractions, but that no final action would be taken until after the alleged patient abuse investigation was completed. Although the letter advising the grievant of the contemplated disciplinary action specifically mentioned two policies which the grievant had purportedly violated,[3] the letter also advised the grievant that she would be disciplined for other, unspecified "behaviors."

In February 2004, the grievant advised management that she was under treatment for anxiety and insomnia, and on a medication regimen for these conditions which limited her ability to work at night. The grievant subsequently provided medical verification of her need for accommodation. In response, the agency advised the grievant through a memorandum entitled "Non-Work Related Job Restrictions" that she would be accommodated for a forty-five day period. The grievant apparently refused to sign this memorandum, as she considers the conditions giving rise to her restrictions to be work-related, and she advised the agency that she would be seeking workers' compensation. The agency responded by informing the grievant that she had failed to produce adequate documentation to support her workers' compensation claim and that she would only be accommodated for a forty-five day period.

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[1] The agency states that the charge was made by the Assistant Director of Nursing. Nurse B, however, had previously issued the grievant several counseling memoranda regarding the January 7, 2004 incident which set forth the same alleged conduct on which the patient abuse charge was based. Both the Assistant Director of Nursing and Nurse B have since voluntarily resigned their employment with the agency.

[2] At the time this reassignment was made, the grievant was notified that the reassignment was being taken in response to the patient abuse charge. During the course of this Department's investigation, the agency stated that the reassignment was made because the grievant had alleged problems in her assigned work area and because the closing of 43 beds over a several month period resulted in the reassignment of some staff.

[3] The policies identified were Policy No. 280P, "Scheduling and Staffing," and LD050-72, "Telephones/Fax Machines/Pagers."

By letter dated March 8, 2004, the grievant was notified that the patient abuse charge against her could not be substantiated. No disciplinary action was taken against the grievant or Nurse B as a result of this incident.

On or about March 19, 2004, the grievant was issued a Group II Written Notice for the following alleged conduct: "(1) consistent failure to follow established written policies, procedures or departmental standard operating procedures; (2) unauthorized use/misuse of state property or records; (3) leaving the worksite without permission; and (4) consistent failure to utilize the chain of command to resolve perceived problems or issues."[4] The Written Notice did not identify any specific policy or procedure violated by the grievant. The grievant refused to sign the Written Notice and subsequently initiated a grievance challenging the notice on March 23, 2004. On the same day, the grievant initiated a second grievance charging that she had been subjected to a hostile work environment in violation of the Virginia Personnel Act and federal law.

Because the grievant alleges discrimination and retaliation by her immediate supervisor, she presented both grievances to the second-step respondent, who denied the grievant's request for relief. At the third resolution step, the facility director agreed to remove the Group II Written Notice, after concluding that, while the grievant had violated agency policy, the allegations used to support the notice were several months old, the conduct had already been addressed with the grievant, and the remaining allegations were insufficiently specific.[5] The grievant declined this proposed resolution as she rejected the conclusion that she had in fact previously violated policy. However, despite the grievant's decision not to accept the proposed resolution, the Written Notice was removed from her file.

In response to the grievant's second grievance, which alleges a hostile work environment, the third-step respondent proposed the following relief: an investigation of the grievant's claims of retaliation, "racial disparity," and "unprofessional treatment," and a temporary transfer, for sixty days, to another building. The grievant declined the proposed investigation because she believed the director had already indicated, through his response to her first grievance, an unwillingness to believe her claims, coupled with a willingness to exonerate her supervisors. The grievant also declined the proposed transfer, as she had already been transferred after the patient abuse charge, she believed the proposed transfer would only create additional stress and vulnerability, and she would remain under the supervision of the Director and Assistant Director of Nursing in the new assignment. The agency states that because the grievant turned down its offer of an investigation, it did not conduct an investigation of her claims of racial harassment and retaliation. However, despite

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[4] The grievant was notified of the agency's intent to issue this written notice by memorandum dated March 12, 2004.

[5] In the course of this Department's investigation, the third-step respondent indicated that he was never able to obtain a satisfactory answer regarding why the Group II Written Notice had been issued to the grievant. He noted, however, that the Written Notice came shortly after a disagreement between the grievant and Nurse B.

the grievant's refusal of the proposed transfer, the agency nevertheless transferred her to another building.[6] The agency states that this transfer was necessary to protect the grievant.

After the grievant declined the agency's proposed resolution of her grievances, she requested that the agency head qualify the grievances for hearing. Following denial of this request, the grievant appealed the agency head's determination to this Department.

DISCUSSION

Grievance 1 (Group II Written Notice)

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[7] Thus, all claims relating to issues such as the means, methods, and personnel by which work activities are to be carried out generally do not qualify for hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied, resulting in an "adverse employment action."[8]

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."[9] In this case, it is clear that Grievance 1 does not now involve an adverse employment action. While formal written discipline generally constitutes an adverse employment action, the Group II Written Notice challenged in Grievance 1 was rescinded by the agency and removed from the grievant's personnel file. A written notice that has been rescinded and removed from the grievant's record cannot be considered an adverse employment action. Accordingly, Grievance 1 does not qualify for hearing.[10]

Grievance 2 (Hostile Work Environment)

The grievant also claims she was subjected to a hostile work environment because of her race and her previous protected activity. This protected activity includes making complaints of racial discrimination, participating in the grievance process, and requesting an accommodation for a claimed disability.[11]

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[6] Although this transfer was described in the third-step response as temporary in nature, the grievant was permanently transferred to this new assignment effective June 24, 2004.
[7] Va. Code § 2.2-3004(B).
[8] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1.
[9] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[10] While Grievance 1 does not state a claim for which relief can be granted, the alleged facts underlying the grievance may be used to support the claims qualified for hearing in Grievance 2.
[11] For purposes of the grievance procedure, protected activity includes "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 a violation to the State Employee Fraud, Waste and Abuse Hotline, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

For a claim of racial harassment to be qualified for hearing, the grievant must present evidence raising a sufficient question as to whether the conduct in question was (1) unwelcome; (2) based on her race; (3) sufficiently severe or pervasive so as to alter her conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[12] Similarly, for a claim of retaliatory harassment to be qualified, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on her prior protected activity; (3) sufficiently severe or pervasive so as to alter her conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[13]

In this case, the grievant has presented evidence showing that the conduct she experienced was unwelcome, thus satisfying the first element of both her racial and retaliatory harassment claims. She has also presented evidence that the conduct she experienced was sufficiently severe or pervasive so as to alter her conditions of employment and create an abusive or hostile work environment. Specifically, the grievant has presented evidence that she was subjected to repeated verbal abuse and humiliation; that this conduct occurred in front of patients at the inpatient mental health care facility at which she works, creating a heightened risk of harm to her; that she was accused of patient neglect under circumstances raising questions about the motivation behind the accusation; that her African-American co-workers were cautioned not to trust her and that actions were taken against those who were friendly with her; and that she was transferred to an arguably less desirable assignment against her wishes and in direct response to her complaints of disparate treatment and harassment. While none of these assertions, if proven, in and of themselves would necessarily rise to the level of a hostile work environment, in the aggregate, they raise a sufficient question as to whether such an environment existed.

In addition, the grievant has presented evidence showing that the cited conduct creating the alleged hostile work environment was imputable to the agency. The majority of the conduct claimed by the grievant was purportedly committed by employees in supervisory roles. Where harassment is committed by supervisory employees, "[e]mployers are generally presumed to be liable."[14] However, because the alleged harassment did not lead to a tangible employment action,[15] the agency may avoid liability if it can establish that (i) it exercised

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[12] White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).
[13] *See generally* Von Gunten v. State of Maryland, 243 F.3d 858, 865, 869-70 (4th Cir. 2001); Morris v. Oldham County Fiscal Court, 201 F.3d 784, 791-92 (6th Cir. 2000); Ray v. Henderson, 217 F.3d 1234, 1245-46 (9th Cir. 2000); Gunnell v. Utah Valley State College, 152 F.3d, 1253, 1264 (10th Cir. 1998).
[14] White v. BFI Waste Services, LLC, 375 F.3d at 299 (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998)).
[15] A tangible employment action "constitutes 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." *See* Ellerth, 524 U.S. at 761. In this case, the grievant has not presented any evidence of a tangible employment action by the agency. We note that in harassment cases, it is not necessary for a grievant to establish the existence of a tangible employment action to state a claim. Instead, a showing of a hostile work environment is sufficient to satisfy the requirement that a grievant demonstrate that he or she has been subjected

reasonable care to prevent and promptly correct any harassment by the supervisor, and (ii) the employee unreasonably failed to avail herself of any corrective or preventative opportunities provided by the agency or to avoid harm otherwise.[16] In this case, the agency appears unlikely to be able to make this showing, as there appears to be little evidence that the agency took reasonable care to prevent and promptly correct the alleged harassment in response to the grievant's repeated complaints.[17] To the contrary, the agency has admitted to this Department that there was *no* specific investigation of the grievant's complaints of harassment and retaliation.[18]

Finally, the grievant has raised a sufficient question as to whether the alleged harassment was based on her race and/or previous protected activity. The grievant has presented evidence that her shift leader counseled African-American co-workers not to interact with or trust the grievant or another white nurse because of their race, and that she was treated less favorably than African-American employees. In addition, the grievant has presented evidence that following her complaints of harassment and her announcement to management that she intended to file a grievance, she was falsely accused of patient neglect; disciplined for conduct she had committed, if at all, months earlier, and for "consistent failure to utilize the chain of command to resolve perceived problems or issues"; and transferred to an arguably less desirable assignment against her will and in direct response to her complaints. We also note the agency's admitted failure to investigate the grievant's complaints of harassment and retaliation, even after the patient abuse charges against the grievant were found to be unsubstantiated and the third-step respondent concluded that there was no satisfactory explanation for the Group II Written Notice issued to the grievant.

The agency contends that the grievant has failed to meet her burden of showing that she was subjected to racial and retaliatory harassment, and that any difficulties she experienced were related to her disappointment with the elimination of the "Baylor nurse" program and her desire to hold other nurses who had a sense of being "entitled" accountable in a "laid-back" atmosphere. After careful review of the evidence, this Department concludes that, based on the totality of the circumstances, the grievant has demonstrated that sufficient questions exist with respect to her claims to qualify Grievance 2 for hearing. We note, however, that this qualification ruling in no way determines that the agency's actions with respect to the grievant were racially motivated, retaliatory or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate.

APPEAL RIGHTS AND OTHER INFORMATION

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to an adverse employment action. However, this showing does not preclude an agency from avoiding liability under the affirmative defense, where the hostile work environment does not also constitute a tangible job action.

[16] *Id.* at 765; Faragher, 524 U.S. at 807.

[17] The grievant has also raised a sufficient question as to whether the alleged conduct by her co-workers may be imputed to the agency. To establish agency liability for co-worker conduct, a grievant must show that the agency failed to take prompt and adequate action to stop the alleged harassment. *See* Church v. State of Maryland, 2002 U.S. App. LEXIS 25909 (4th Cir. Dec. 17, 2002). In this case, the grievant has presented evidence that she repeatedly complained to the agency about the purported harassment, but that the agency failed to take prompt, remedial action.

For additional 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 denial of qualification of Grievance 1, to 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. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear Grievance 2, using the Grievance Form B.

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Claudia T. Farr
Director

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Gretchen M. White
EDR Consultant