Issue: Qualification/discrimination because of mental illness/retaliation for previous protected activity/misapplication of policy; Ruling Date: March 15, 2005; Ruling #2005-933; Agency: Department of Mental Health, Mental Retardation, and Substance Abuse Services; Outcome: 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. 2004-933
March 15, 2005

The grievant has requested a ruling on whether her November 4, 2004 grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency) qualifies for hearing. The grievant alleges that the agency misapplied agency policy, discriminated against her because of a mental illness, and retaliated against her for previous protected activity. For the reasons set forth below, this grievance qualifies for hearing.

FACTS

The grievant is employed by the agency as an RN II at Facility H. On March 23, 2004, the grievant initiated two grievances against the agency. The first of these two grievances challenged a written notice issued to the grievant; the second alleged that the grievant had been subjected to a racially and retaliatory hostile work environment. This Department denied qualification of the first grievance because the agency rescinded the written notice during the management resolution steps. The second grievance was qualified for hearing; and on January 18, 2005, one of this Department's Hearing Officers issued a decision in favor of the grievant with respect to her claims of racial and retaliatory harassment.

On November 4, 2004, the grievant initiated the present grievance, in which she alleges that the agency misapplied and/or unfairly applied state policy, discriminated against her because of a mental illness, and retaliated against her by failing to accommodate medical work restrictions. Because the alleged refusal to accommodate her restrictions resulted in lost wages for the grievant, she elected to utilize the expedited grievance process.

The grievant had initially requested accommodation from the agency in February 2004. The grievant worked with restrictions from March 2, 2004 until April 27, 2004. She then was out of work on short-term disability from April 27, 2004 until May 27, 2004. The grievant again worked with restrictions from May 27, 2004 until September 3, 2004, followed by another period out of work on short-term disability from September 3, 2004 until September 27, 2004. The grievant returned to work with restrictions on September 27, 2004.

Under facility Policy 280-ss, a non-work-related injury (*i.e.*, an injury which does not qualify for workers' compensation benefits) will be accommodated for no longer than 45 days, at which point accommodation will be made only if deemed necessary under the Americans with Disabilities Act by the facility's Human Resources Department. On October 19, 2004, the grievant's supervisor prepared a notice advising the grievant that her 45 days of accommodation had expired and informing her that she needed either to submit a note from her doctor releasing her to work or, in the event she could not be released, report to Human Resources "for resolution." The grievant states that she did not receive this letter from her supervisor.

The agency subsequently provided the grievant with her schedule for November, which the grievant claims did not meet her medical restrictions. By letter dated October 23, 2004, the grievant complained to the Director of Nursing[1] about her November schedule. In her letter, the grievant explained that several days before, she and her supervisor had discussed the grievant's restrictions being changed to accommodate the agency's scheduling needs. The grievant indicated that she believed that she and her supervisor had reached an agreement about her November schedule, but that the November schedule she had received from the agency did not reflect this agreement or her existing restrictions. The grievant noted that it was the third month in a row in which the schedule she initially received was not in accordance with her restrictions, and that it was becoming "increasingly hard" for her to believe that the agency's actions were "without considered intent to harass [her] and cause detriment to [her] health."

The grievant met with the facility's Director of Nursing and a representative from the facility's Human Resources Department on October 29, 2004. The grievant states that the Director of Nursing presented her with a copy of Policy 280-ss and directed that she go to Human Resources for reassignment. The grievant also states that she was presented with a copy of the letter written by her supervisor on October 19, 2004, which she had not previously received. The grievant claims that she tried to explain to the Director of Nurses that the building was critically short on nurses and it was therefore possible for them to accommodate her restrictions, but that the Director continued to insist that the grievant could not be accommodated and refused to consider changing the schedule.

In accordance with the Director of Nurse's instructions, the grievant met with two representatives of the facility's Human Resources Department on November 1, 2004. The grievant states that she explained that her restrictions could be accommodated by having her work two 16-hour shifts, with the shifts separated by a day. The grievant says that she was then asked to wait while the facility's Human Resources Manager conferred with the Director of Nursing and another member of management. The grievant states that the Human Resources Manager returned and informed her that the Director of Nursing was adamant that the grievant's medical restrictions could not be accommodated. The grievant asserts that she was then advised to have her doctor submit her new restrictions, which would allow her to

[1] The Director of Nursing is also known as the "Chief Nurse Executive." The grievant had named the Director of Nursing in her previous successful grievance against the agency.

work two 16-hour shifts, separated by a day. The grievant indicates that she promptly complied with this request.

The grievant states that she called the facility on November 2, 2004, but her offer to work in accordance with her restrictions was rejected. On November 3, 2004, the Human Resources Manager wrote to the grievant to acknowledge receipt of her new restrictions and to advise the grievant that the Director of Nursing had determined that the grievant's restrictions could not be accommodated. The Human Resources Manager also advised the grievant that if her physician "advises that the restrictions are permanent and fall under the ADA," the agency would review its available vacancies.

On November 4, 2004, the grievant initiated the present grievance challenging the agency's failure to accommodate her medical restrictions. On November 5, 2004, the Human Resources Manager again wrote to the grievant requesting that the grievant complete a consent form allowing her physician to release medical information to the agency.[2] The grievant was advised that once she completed the consent form, the agency would send that form with the grievant's current Employee Work Profile (EWP) to her physician. The agency's stated purpose for seeking this release was to have the grievant's physician review the EWP and then advise the agency "if the restrictions are temporary or permanent."

The parties met for the second-step meeting on November 12, 2004. That same day, the second-step respondent denied the grievant's request for relief.[3] In his response, the second-step respondent wrote that the Nursing Department had advised him that they could not continue to accommodate the grievant's desired schedule and that Human Resources had "spell[ed] out" the grievant's options. The second-step respondent also noted, without further explanation, that the grievant "has a discrimination hearing pending." After receiving the agency's second-step response, the grievant requested that the agency head qualify her grievance for hearing.

On November 15, 2004, the grievant responded to the Human Resource Manager's letter of November 5th and advised the agency that she considered the requested consent form to be overly intrusive. The grievant noted that the agency had indicated that it sought the consent form so that her physician could review her EWP and then advise the agency if her restrictions were temporary or permanent. The grievant questioned why, given this limited scope, the consent form would seemingly give the agency unlimited access to her medical records.[4] The grievant also alleged that the agency had violated the Americans with Disabilities Act ("ADA") in failing to accommodate her medical restrictions and in requesting her medical information.

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[2] A copy of the form to be completed was enclosed with the November 5th letter.

[3] The grievant received the agency's second-step response on November 16, 2004.

[4] The consent form enclosed with the agency's November 5th letter would have given the grievant's physician "consent to release medical information." A subsequent "HIPAA" release requested by the agency would have expressly authorized disclosure of the grievant's medical "history and physical," her physician's progress notes, consultations and orders, and a list of her physical limitations.

On November 19, 2004, the agency offered the grievant three alternative schedules—working two 12-hour shifts (10:30 am to 11:00 pm) and two 8-hour shifts (8:00 am to 3:30 pm) a week; working four 10-hour shifts per week (12:30 pm to 11:00 pm); or working five 8-hour shifts per week (2:30 pm to 11:00 pm).[5] That same day, the grievant wrote to the Human Resources Director to explain that the proposed alternative schedules were not in compliance with her work restrictions, which provided that the grievant could work up to 48 hours a week in up to 16-hour shift increments, that the shifts should be 7 am to 3:30 pm or 7 am to 11:30 pm, and that any shift ending at 11:30 pm must be followed by a 24-hour period of time off. In particular, the grievant objected to the failure of the agency to provide a day off between scheduled late shifts. The grievant also proposed three other scheduling options: returning her to work under the schedule she believed she agreed upon with her supervisor, which included working 7:00 am to 11:30 pm shifts on Tuesday or Wednesday and Sunday and a 7:00 am to 3:30 pm shift on Friday; working three 16-hour shifts separated by a day; or returning her to five 7:00 am to 3:30 pm shifts.

Also on November 19th, the Human Resources Director wrote to the grievant's physician to ask him to review the three proposed schedules. Several days later, the Human Resources Director wrote to the grievant in response to her rejection of the proposed schedules. She denied the grievant's accusation that the agency was acting in bad faith and questioned the medical reason for the restrictions imposed by the grievant's physician. The Human Resources Director also repeated her request that the grievant execute forms allowing the release of the grievant's medical information to the agency—including her physician's progress notes and her medical history—and reiterated that the purpose of this request was to determine whether the grievant's restrictions were temporary or permanent and the ability of the grievant to perform her job duties.

On November 24, 2004, the grievant's physician advised the agency in writing that none of the schedules offered to the grievant on November 19, 2004 were in accordance with her work restrictions. The facility's Human Resources Director subsequently wrote to the grievant's physician on November 30, 2004, asking him to "[p]lease point out to [her], in specifics, what is not in compliance with the shifts which have been offered to accommodate her…."

On December 2, 2004, the agency head denied the grievant's request for qualification of her grievance for hearing. That same day, the Human Resources Director responded to the grievant's letter of November 15, 2004. She denied the grievant's allegation that the agency had violated the ADA and advised the grievant that the agency was unable to determine whether the grievant was a qualified individual with a disability under that statute because the grievant had failed to comply with the agency's request for the release of medical information. The Human Resources Director again asserted that the agency sought the release to determine whether the grievant could perform the job duties specified on her EWP and if her restrictions were temporary or permanent.

[5] The agency states that the grievant was offered the alternative schedules on November 18, 2004.

On December 9, 2004, the grievant's physician faxed to the facility executed copies of two facility forms—an "Ability to Perform Overtime" form and a "Physical Abilities Report." The Physical Abilities Report asks that a physician review an employee's EWP and indicate whether the employee can perform certain physical activities; it also asks the physician to indicate whether the restrictions are temporary in nature (30, 45, 60 or 90 days) or permanent. The grievant's physician indicated that she could perform the specified physical activities without limitation, but that it was unknown how long the grievant's restrictions (regarding work hours) would last. The facility's Human Resources Manager claims that the facility's Human Resources Department never received these forms, although she admits that she does not know if other members of management may have received the forms.

Two days later, by letter dated December 11, 2004, the grievant's physician responded to the Human Resources Director's letter of November 30, 2004. Although he concurred that "technically speaking" the schedule options were in accordance with the grievant's restrictions, the grievant's physician noted that the options "do not seem to [] represent a good faith effort at accommodating her." He further accused the agency of attempting to circumvent the restrictions associated with shifts ending at 11:30 pm by implementing shifts ending at 11:00 pm.

The grievant has not returned to work since November 1, 2004, and she has not been paid by the agency during this period. The grievant asserts that the medical conditions giving rise to her restrictions—specifically, insomnia and anxiety—are work-related and has sought workers' compensation benefits for these conditions. Her claim for benefits has been denied on the basis that her alleged injuries did not arise from a single identifiable incident, as required under the applicable law.

DISCUSSION

Retaliation

In her November 4, 2004 grievance, the grievant claims that the agency's refusal to accommodate her medical restrictions after November 1, 2004 was part of a continuing course of retaliation by the agency for her prior grievance activity. 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;[6] (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

[6] *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.

pretext or excuse for retaliation.[7] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[8]

It is undisputed that the grievant engaged in a protected activity by participating in the grievance process.[9] In addition, the grievant suffered an adverse employment action as a result of the management actions alleged in her November 4, 2004 grievance, as she has been out of work without pay since November 1, 2004. Although we note that the agency ultimately offered the grievant a choice of schedules which technically complied with her medical restrictions, this offer was made on November 19, 2004, after the grievant had been out of work for more than two weeks.[10] Thus, the only question remaining is whether a causal link exists between the agency's refusal to accommodate the grievant's medical restrictions and the grievant's previous protected activity. While the agency has provided non-retaliatory reasons for its actions, this Department concludes that, based on the totality of the circumstances, most notably the Hearing Officer's finding that the agency had recently engaged in retaliatory harassment against the grievant, a sufficient question remains as to the existence of a causal link between the agency conduct alleged in the November 4, 2004 grievance and the grievant's exercise of her grievance rights by filing her March 23, 2004 grievances. The hearing officer, as a fact finder, is in a better position to determine whether retaliatory intent contributed to the agency's refusal to accommodate the grievant's medical restrictions.[11] As such, the issue of retaliation is qualified for hearing.

Alternative Theories

The grievant has advanced alternative theories related to the agency's alleged refusal to accommodate her medical restrictions, including allegations that the agency misapplied or unfairly applied state and agency policy and discriminated against the grievant because of a mental disability. Because the issue of retaliation qualifies for a hearing, this Department deems it appropriate to send all alternative theories for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

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[7] *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).

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

[9] *See* Va. Code § 2.2-3004(A)(v) and *Grievance Procedure Manual* § 4.1(b)(4).

[10] *See* Boone v. Goldin, 178 F.3d 253, 256-257 (4th Cir. 1999) (under Title VII, "adverse employment action" typically requires discharge, demotion, or reduction in grade, salary, benefits, level of responsibility, title, or opportunities for future reassignments or promotions).

[11] *See* Ross v. Communications Satellite Corp., 759 F.2d 355, 364-365 (4th Cir. 1985), abrogated on other grounds, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) quoting Morrison v. Nissan Motor Co., Ltd., 601 F.2d 139, 141 (4th Cir. 1979) ("[r]esolution of questions of intent often depends upon the 'credibility of the witnesses, which can best be determined by the trier of facts after observation of the demeanor of the witnesses during direct and cross-examination.'")

CONCLUSION

For the reasons discussed above, this Department qualifies this grievance for hearing. This qualification ruling in no way determines that the agency's action was retaliatory or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

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Claudia T. Farr
Director

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