Issue: Qualification/overtime work; Ruling Date: June 8, 2005; Ruling #2005-984 and 2005-985; Agency: Virginia Department of Transportation; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling Numbers 2005-984 and 2005-985
June 8, 2005

The grievant has requested a ruling on whether her December 21, 2004 and January 18, 2005 grievances with the Department of Transportation (VDOT or the agency) qualify for hearing. Both grievances challenge the agency's failure to call the grievant to work overtime during adverse weather conditions on December 19, 2004 and January 17, 2005. For the reasons discussed below, these grievances do not qualify for hearing.

FACTS

The grievant is employed as an Administrative Office Specialist III with VDOT. The grievant works the day shift at an area headquarters and has been in her current job for approximately 26 years. In June 2003, the grievant began working for her current supervisor. The grievant asserts that soon after his taking charge, her supervisor came to her and stated that his supervisor had been checking the grievant's leave records and had noticed she had been off a lot. The grievant asserts that she later found out that her supervisor's supervisor had not been checking her leave records as indicated and the story had been fabricated. On November 25, 2003, the grievant initiated a grievance challenging a comment on her 2003 performance evaluation and written by her current supervisor.[1] The third step respondent granted the grievant the relief she sought (i.e., to have the comment removed from the performance evaluation) and as a result, the grievant concluded her grievance on February 24, 2004.

On May 7, 2004, the grievant noticed that her designated parking sign had been removed.[2] According to the grievant, her supervisor told her that he removed the sign because it was "getting old and ragged." The grievant disagrees with her supervisor's assessment of the sign and believes her supervisor removed the sign in retaliation for her November 25, 2003 grievance. The grievant's parking sign has since been replaced with

[1] Section D of the grievant's 2003 performance evaluation stated, in part, that the grievant "needs to learn the chain of command." The comment allegedly originated from the grievant's diligence in getting a contract flagger paid when her supervisor failed to take action on the matter.
[2] The parking spot had been designated for the grievant by her former supervisor to keep the hired equipment from parking there. According to the grievant, employees in her position at other locations also have a designated parking spot.

a new parking sign.[3] In addition to the parking sign, the grievant claims that her supervisor removed her personal items from the ladies restroom and placed them in the fuel station. Specifically, the grievant alleges that her supervisor removed her hairspray from the ladies restroom, would comment on the smell and slam the ladies restroom door shut after the grievant had gone in there and sprayed her hair.

Over the course of her 26 years with VDOT, the grievant claims that she has always been expected to work weekends and holidays during adverse weather conditions and has come to rely financially upon such overtime opportunities; however, her overtime hours have recently significantly decreased.[4] More specifically, on December 19, 2004, the grievant claims that she was the only day shift employee not called to work overtime during a snow event. The agency asserts that due to road conditions, the concern of overspending the annual snow allocation, and in an effort to keep overtime at a minimum, only 4 crew members and one emergency hourly worker from the day shift were called in to work on December 19th.[5] When the grievant questioned management as to why she was not called in to work, the grievant claims that her supervisor told her she was not needed.[6]

On January 17, 2005, the entire day shift crew, with the exception of one, was called to work 4 hours of overtime due to adverse weather conditions. The grievant again was not called to work because she was allegedly not needed. The agency asserts that the grievant's job is administrative in nature[7] and she is not always needed to work even if weather conditions necessitate that the crew members in her area come to work.

On March 1, 2005, the day shift worked until 8:00 p.m. due to inclement weather. The grievant on the other hand was told to go home at 6:00 p.m. The grievant believes that her supervisor performed the grievant's duties during the days when she was not called in to work.

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[3] According to the grievant, authorization for the new parking sign occurred during the absence of the grievant's supervisor and that such authorization came from a temporary supervisor.

[4] For example, in 2003, the grievant worked a total of 128 hours of overtime during adverse weather conditions, while she only worked a total of 74.5 hours in 2004. The grievant admits that the decrease in hours is due in part to the mild 2004 snow season.

[5] According to the grievant, 4 crew members were all that were left of the day shift staff as one was on vacation and the other out on worker's compensation.

[6] The grievant claims that under the circumstances, it is highly unlikely that she was not needed to work. More specifically, the day shift allegedly worked a 12-hour shift on December 19th while the night shift had been called in to work at 11:00 p.m. the previous night and was required to work a 12-hour shift on December 20th as well. Further, the grievant alleges that all but one of the employees in her position at nearby area headquarters were called to work during the inclement weather on December 19th and 20th. Finally, the grievant claims that on several occasions prior to December 19th, her supervisor told her that due to staffing shortages, everyone was needed to work and it created a problem if she was not there to answer the phone.

[7] During adverse weather conditions, the grievant's role is to answer the telephone and radio, relay messages to crew members, report equipment problems and give road reports.

Additionally, the grievant claims that her supervisor has a bias towards women. In support of her discrimination claim, the grievant offers the foregoing alleged acts and events. In addition, the grievant alleges that her supervisor has stated on numerous occasions that "maintenance is no place for a woman." During this Department's investigation, two witnesses confirmed that they have heard the grievant's supervisor comment that women should not work in the maintenance field. The witnesses further opined that the grievant's supervisor gives the grievant a "hard time," "picks on her" and appears to be trying to get rid of her.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[8] 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 or unfairly applied.[9] In both grievances at issue here, the grievant claims retaliatory harassment and hostile work environment based on gender.

For a claim of retaliatory harassment to be qualified for hearing, 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.[10] Likewise, for a claim of a hostile work environment based on gender to qualify for hearing, an employee must come forward with evidence raising a sufficient question that: (1) she was subjected to unwelcome harassment; (2) the harassment was based on gender; (3) the harassment was sufficiently severe or pervasive to alter her conditions of employment and create an abusive atmosphere; and (4) there is some basis for imposing liability for the harassment on the employer.[11] "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[12]

In this case, the supervisor's alleged "hostile or abusive" actions are as follows: (1) denial of overtime to the grievant on two days; (2) removal of the grievant's

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[8] *See* Va. Code § 2.2-3004(B).
[9] Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (c).
[10] *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).
[11] *See* Spriggs v. Diamond Autoglass, 242 F.3d 179 (4th Cir. 2001).
[12] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 114 S.Ct. 367 (1993).

designated parking sign; (3) removal of the grievant's hairspray from the ladies restroom; and (4) discriminatory comments regarding women working in the maintenance field. Construing the facts in a light most favorable to the grievant, this Department concludes that although the alleged actions taken by her supervisor may describe boorish behavior, even if proven, they are not "sufficiently severe or pervasive to alter her conditions of employment."[13] In particular, the conduct complained of by the grievant appears to be relatively infrequent and lacks the requisite severity and intimidation to meet the high legal standard for "hostile or abusive."[14] Moreover, while the grievant was completely denied overtime on two days, since her supervisor took charge in June 2003, the grievant was requested to and did work overtime on fifteen other occasions.[15] Further, the grievant's designated parking sign was replaced shortly after it was removed and based on the grievant's own statements during this Department's investigation, the removal of her hairspray from the ladies restroom could just be a result of her supervisor's hypersensitivity to smells and not motivated by retaliatory animus or discriminatory bias. Moreover, while co-workers have opined that the grievant is "picked on" by her supervisor, one of these co-workers, a male himself, transferred to another office to avoid alleged adverse treatment by the same supervisor. As such, it would appear that the supervisor's alleged behavior affected men and women alike. Finally, the grievant has failed to present sufficient evidence that her supervisor's actions unreasonably interfered with her work performance. Accordingly, the grievant's December 21st and January 18th grievances fail to raise a sufficient question of retaliatory or gender-based harassment or hostile work environment and thus do not qualify for hearing.

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[13] *See* Von Gunten v. State of Maryland, 243 F.3d 858 (4th Cir. 2001) citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S.Ct. 367 (1993) ("[f]or a hostile work environment claim to lie there must be evidence of conduct 'severe or pervasive enough' to create 'an environment that a reasonable person would find hostile or abusive'.")

[14] While each decision must be made on a case-by-case basis, courts generally require an employee to be subjected to frequent and significantly severe behavior in order to find a hostile or abusive work environment. For instance, in EEOC v. R&R Ventures, the court held that a manager's sexual jokes on a daily basis, discussion of sexual positions and experiences, close examination of and comments on female employees' bodies as well as inquiries about their pant size and calling women stupid was sufficiently severe or pervasive so as to create an abusive working environment. EEOC v. R&R Ventures, 244 F.3d 334 (4th Cir. 2001). Likewise, in McGinist v. GTE Service Corp., the court found that management's alleged unwillingness to ensure that the employee's automobile received necessary maintenance, forcing the employee to work in dangerous situations, constant racial insults directed at the employee and preventing the employee from collecting overtime pay was enough to raise a genuine issue of material fact with regard to the existence of a racially hostile workplace. McGinist v. GTE Service Corp., 360 F.3d 1103 (9th Cir. 2004). Conversely, in Clark v. UPS, the court held that even if true, telling vulgar jokes, twice placing a vibrating pager on the employee's thigh and pulling at the employee's overalls after she stated that she was wearing a thong is insufficiently severe or pervasive to support a hostile work environment claim. Clark v. UPS, 400 F.3d 341 (6th Cir. 2005). Likewise, in Adusumilli v. City of Chicago, the Seventh Circuit found that the alleged harassment lacked severity where a male supervisor and co-workers made sexual jokes about the female employee, commented on how she should eat a banana, told her not to wave at squad cars because people would think she was a prostitute, stared at her breasts, and touched her on the arms, fingers, and may have once poked at her buttocks. Adusumilli v. City of Chicago, 164 F.3d 353, 357 (7th Cir. 1998).

[15] It should also be noted that all of the fifteen overtime opportunities came after the grievant filed her November 25, 2003 grievance, which does not lend support to the grievant's retaliation claim.

We note that although the grievance does not qualify for a hearing, mediation may be a viable option for the parties 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 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. For more information on this Department's Workplace Mediation program, call 804-786-7994.

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 T. Farr
Director

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