Issue: Compliance/grievance initiated after 30 days of written notice issuance; Qualification/workplace harassment, retaliatory harassment; Ruling Date: June 10, 2005; Ruling #2005-986; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: grievant non-compliance, not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation and Substance Abuse Services
Ruling Number 2005-986
June 10, 2005

The grievant has requested a ruling on whether her December 22, 2004 grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency) qualifies for hearing. The grievance challenges management's alleged mistreatment of the grievant. For the reasons discussed below, the grievance does not qualify for hearing.

FACTS

The grievant is employed as a Psychologist II. In April of 2004, the grievant was accused by the current Director of Psychology of incompetent clinical practice and violation of patients' rights. On June 3, 2004, following an investigation by two agency directors, she was presented with a Group II Written Notice for violations of patients' rights, inadequate work performance, violations of policies, and the undermining of the reputation of the facility where the grievant worked. The grievant states, on her Grievance Form A, that she did not grieve the Group II Notice because she "hoped that by cooperating with the investigation and accepting the written disciplinary action despite the fact that the charges were false and the investigation biased, that the harassment and punishment would end and [she] would be able to go back to doing [her] job."

The grievant asserts that the harassment did not stop but continued with her supervisor purportedly making new false allegations regarding her patient care. On December 1, 2004, the grievant lodged a complaint with the Hospital Medical Director[1] against the Director of Psychology, citing to the Department of Human Resource Management (DHRM) Workplace Harassment Policy. The grievant asserts that despite assurances from the Hospital Medical Director that he would assure the grievant's "safety and well-being," he retaliated against her for filing the complaint and used it to make further allegations against her regarding her treatment of patients.

On December 22, 2004, the grievant initiated the instant grievance in which she asserts that her supervisor harassed her and that management retaliated against her when she lodged the hostile workplace complaint against the Director of Psychology. In addition, the

[1] The complaint was originally presented jointly to the Program Medical Director and Psychology Supervisor. It was forwarded to the Hospital Medical Director for response.

grievance seeks to have the Director of Psychology "have no further role in any aspect of [the grievant's] clinical or administrative supervision" and "no further involvement in the review of [the grievant's] treatment plans or behavior plans." The grievant also wants written statements from the agency declaring that management's charges of ethics violations and incompetence were false.

DISCUSSION

Qualification

Workplace Harassment

The grievant claims that she has been subjected to harassment in the workplace by various members of management. While grievable through the management resolution steps, claims of hostile work environment qualify for a hearing only if an employee presents sufficient evidence showing that the challenged actions are based on race, color, national origin, age, sex, religion, political affiliation, disability, marital status or pregnancy.[2] Here, the grievant has not alleged that management's actions were based on any of these factors. Accordingly, this issue does not qualify for hearing.

Retaliatory Harassment

The grievant also claims that the Hospital Medical Director has retaliated against her for initiating a workplace harassment complaint against the Director of Psychology under DHRM Policy 2.30. 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.[3]

In this case, the grievant has not presented evidence linking the alleged mistreatment by the Hospital Medical Director to her protected activity of filing a workplace harassment complaint. The grievant asserts that she has been subjected to harassment by the Director of Psychology since April of 2004. She filed her complaint against the Director of Psychology with the Hospital Medical Director on December of 2004, months after the harassment by the Director of Psychology purportedly began. The only evidence presented by the grievant to support her retaliation claim is that the Hospital Medical Director instructed the Program Medical Director to review 5 cases and report back with her findings. However, even assuming for purposes of this ruling that the request to review 5 cases was prompted by the protected activity of the December complaint, without more, a fact-finder could not reasonably conclude that the Hospital Medical Director's request was so sufficiently severe or

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[2] *Grievance Procedure Manual* § 4.1(b)(2); *see also* DHRM Policy 2.30 Workplace Harassment (effective 05/01/02).

[3] *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).

pervasive so as to alter the grievant's conditions of employment and to create an abusive or hostile work environment. Accordingly, this issue is not qualified.

Compliance

Group Written Notice

The grievant has requested the removal of the Group II Notice. The agency has noted that this grievance was initiated more than 30 days after the issuance of the Written Notice.

The grievance procedure provides that an employee must initiate a written grievance within 30-calendar days of the date she knew or should have known of the event or action that is the basis of the grievance.[4] 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 this case, the event that forms the basis of the grievance is the agency's issuance of a Group II Written Notice to the grievant. This Department has long held that in a grievance challenging a disciplinary action, the 30 calendar day timeframe begins on the date that management presents or delivers the Written Notice to the employee.[5] The grievant received the Group II Notice on June 3, 2004 and thus should have initiated her grievance within 30 days of June 3rd. The grievant did not initiate her grievance until December 22, 2004, which was untimely. Thus, the only remaining issue is whether there was just cause for the delay.

On the Form A the grievant asserts that she "hoped that by cooperating with the investigation and accepting the written disciplinary action despite the fact that the charges were false and the investigation biased, that the harassment and punishment would end and [she] I would be able to go back to doing [her] job." However, in support of her claim of just cause, the grievant now contends that she did not grieve the Written Notice earlier because of the manner in which the agency previously dealt with a research colleague with whom the grievant has a close relationship.

On May 28, 2005, several days prior to when the grievant was issued her Group II Notice, the agency informed the colleague that it intended to take disciplinary action against him which would result in his separation from employment. He was given the option, however, of resigning in lieu of being terminated. In addition, the colleague was told that if he attempted to grieve the discipline, "everything will come out." The colleague states that he does not know what was meant by this statement. The colleague elected to resign and did not grieve the discipline. The grievant viewed the agency's actions toward the colleague as threatening to her, and although she does not assert that the agency attempted to interfere with her grievance rights, she nevertheless asserts that she felt that she would not receive a fair hearing.

[4] Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4(1).
[5] *See* EDR Rulings 2000-003; 2000-082; 2002-001; 2002-118; 2003-147.

As an initial point, this Department notes that it is unlawful to retaliate against an employee for participating in the grievance process. However, under the facts of this case, this Department cannot conclude that the agency's alleged actions constituted threatening or retaliatory acts. First, the colleague concedes that he does not know what was meant by the statement "everything will come out." Furthermore, when viewed as a whole, the circumstances surrounding the colleague's resignation appear to be more fairly characterized as a negotiated settlement rather than retaliation. The colleague essentially elected to accept the agency's offer to exchange the right to grieve the proposed discipline for the protection of his employment record. Finally, we note that the grievant herself was never threatened in any manner regarding her right to grieve. Thus, we cannot say, under the circumstances of this case, that just cause exists to excuse the grievant's delay in challenging her Group II Notice.

APPEAL RIGHTS AND OTHER INFORMATION

For all of the reasons set forth above, this grievance is not qualified for hearing.[6] 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.

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.

Claudia T. Farr
Director

William G. Anderson, Jr.
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[6] While this ruling does not expressly address each point raised in the grievance, all have been carefully considered.