Issue: Qualification/grievant claims wrongful omission from a meeting, threats by warden, no explanation for alleged performance problems, shown disrespect; Ruling Date: January 3, 2006; Ruling #2006-1206; Agency: Department of Corrections; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2006-1206
January 3, 2006

The grievant has requested a ruling on whether her August 15, 2005 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing.[1] The grievant alleges that she was wrongfully omitted from a meeting, her continued employed was threatened by her facility's warden, she was not given any previous warning of or explanation for alleged performance problems, and she was shown "disrespect." For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant was employed by the agency as a Registered Nurse Clinician B. She alleges that on July 20, 2005, she was omitted from a meeting regarding medical staffing, which she contends she should have been allowed to attend (or been given an explanation why she was not permitted to attend). She further alleges that during a meeting on July 25, 2005, the warden criticized the grievant's job performance and advised her that if she intended to stay at the facility, she would have to "comply with him." She also claims that during the meeting, the warden said that he would love to be her neighbor but would not work for her, a statement she considered harassing. She charges that prior to the July 25th meeting, she had not been advised that her performance was unsatisfactory, and that she has not received an adequate explanation of her alleged performance problems. The grievant subsequently gave the agency a "30-day notice" of her resignation, with her last day of employment to be August 31, 2005.

[1] In her request to this Department, the grievant alleges that the agency head failed to timely respond to her request for qualification. However, any challenge to the timeliness of the agency head's response is moot as the grievant's request for a qualification ruling from this Department indicates that the grievant has now received the agency head's response.

On or about August 15, 2005, the grievant completed the Grievance Form A. In attachments to the Form A, she identifies as the issues being grieved as follows: (1) that she was omitted from the July 20th meeting; (2) that during the July 25th meeting, the warden made statements that she perceived as threats to her continued employment—specifically, his alleged comment that the grievant had to "comply with him and do what he says" if she intended to stay at the facility; (3) that she had not received any "previous acknowledgement" of the alleged performance problems; (4) that she had not received an explanation regarding the alleged performance problems; and (5) that she had been shown disrespect by the assistant warden, whom she alleges treated her on one occasion as if she was no longer employed at the facility.[2]

After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. The agency head denied the grievant's request, and she has appealed to this Department.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[3] 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.[4]

In addition, to advance to a hearing, the grievant must demonstrate that the action being grieved constitutes an "adverse employment action."[5] 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."[6]

In this case, the grievant has failed to present evidence that the grieved conduct—her omission from a meeting, the warden's alleged threats to her continued

[2] The incident with the assistant warden is alleged to have occurred on August 17, 2005, although the Form A is dated August 15, 2005. The first-step respondent appears to have received the Form A on August 22, 2005.
[3] *See* Va. Code § 2.2-3004(B).
[4] Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (c).
[5] Va. Code § 2.2-3004(A).
[6] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

employment if she did not follow his directives, no prior notice of her alleged performance problems, an inadequate explanation of the nature of those problems, and disrespect—constituted an adverse employment action.[7] Assuming, for purposes of this ruling only, the truth of the grievant's allegations, the grievant has not shown that she experienced a significant change in employment status or benefits because of the grieved conduct. Moreover, while the grievant argues that she resigned as a result of the agency's actions, the alleged conduct was not so extreme as to make the grievant's working conditions objectively intolerable, and thus cannot support a claim of constructive discharge.[8] Accordingly, as the grievant has failed to make the threshold showing of an adverse employment action, her grievance does not qualify for hearing.[9]

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 the qualification determination to the circuit court, the grievant 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

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[7] *See* Williams v. Giant Food Inc., 370 F.3d 423, 434 (4th Cir. 2004) (allegations that the supervisors yelled at the plaintiff, "told her she was a poor manager and gave her poor evaluations, chastised her in front of customers, and once required her to work with an injured back" are "simply insufficient to establish an adverse employment action."). *See also* EDR Ruling 2005-1065, 1070 (threats of disciplinary action not adverse employment action). Cf. Mark v. The Brookdale University Hospital and Medical Center, et al, 2005 U.S. Dist. LEXIS 12584 at *52 (E.D. N.Y. 2005) ("[s]cheduling inconveniences, disciplinary notices, threats of disciplinary action and excessive scrutiny generally do not constitute adverse employment actions as a matter of law"); Boyer et al. v. Johnson Mathey, Inc. and United Steelworkers of America, Local 1165-02, 2005 U.S. Dist. LEXIS 171 at *15 n. 5 (E.D. Pa. 2005) ("the threat of discipline does not constitute an adverse employment action because it does not constitute a real change in the employee's terms and conditions of employment.")

[8] *See* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 378 (4th Cir. 2004) ("mere 'dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign.'" (citations omitted)); Matvia v. Bald Head Island Management, Inc., 259 F.3d 261, 272 (4th Cir. 2001).

[9] We have previously held that where a grievant alleges harassment, a showing of a hostile work environment will satisfy the requirement of an adverse employment action. *See* EDR Ruling 2004-750. In this case, even if we were to construe the grievant's claim as one of race- or gender-based harassment, her grievance would nevertheless fail to qualify for hearing, as there is no evidence that the grieved conduct was based on the grievant's race or gender or was sufficiently severe or pervasive so as to alter her conditions of employment and create an abusive or hostile work environment. *See generally* Von Gunten v. Maryland, 243 F.3d 858, 870 (4th Cir. 2001). Moreover, to the extent the grievant claims that she was harassed because of her "professional background," this claim fails because claims of supervisory harassment and/or a "hostile work environment" must involve either retaliation for a protected activity or "hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status, or pregnancy" to qualify for hearing. *See* EDR Ruling No. 2004-837; *see also Grievance Procedure Manual* § 4; Department of Human Resource Policy No. 2.30, "Workplace Harassment."

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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Gretchen M. White
EDR Consultant