Issue: Qualification/work conditions/supervisor-employee conflict; violence in the workplace; Ruling Date: March 7, 2006; Ruling #'s 2006-1248, 2006-1249, 2006-1278; 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 Nos. 2006-1248, 1249, 1278
March 7, 2006

The grievant has requested a ruling on whether her October 10, 2005, October 24, 2005, and November 7, 2005 grievances with the Department of Corrections (DOC or the agency) qualify for a hearing. The grievant claims that the agency has subjected her to harassment, a hostile work environment, bullying, false allegations, and threats. For the reasons set forth below, these grievances do not qualify for hearing.

FACTS

The grievant is employed with DOC as a Food Operator Manager B. On October 10, 2005, she initiated a grievance alleging that her supervisor had created a hostile work environment, had made false allegations against her, harassed her, and bullied and threatened her. In particular, she asserted that her supervisor had engaged in unwarranted or invalid criticism, nit-picking, fault-finding; that he had excluded and isolated her and treated her differently; that he had shouted at, humiliated and excessively monitored her; and that he had given her verbal and written warnings. On October 24, 2005, the grievant initiated a second grievance, in which she alleged the assistant warden "aid[ed] and abett[ed]" her supervisor's harassment by refusing to take action against the supervisor in response to her complaints. The grievant subsequently initiated a third grievance on November 7, 2005, in which she alleged that her supervisor harassed her by contacting her at home about a work issue.

After the parties failed to resolve the grievances during the management resolution steps, the grievant requested qualification of her grievances for hearing. The agency head denied the grievant's requests, 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.[1] 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.[2] Further, the General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions."[3] 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."[4]

In this case, the grievant alleges that her supervisor harassed her and created a hostile work environment. In addition, her grievance, fairly read, asserts that the agency has misapplied and/or unfairly applied Department of Human Resource Management (DHRM) Policy 1.80, "Workplace Violence." Each of these claims will be addressed below.

Hostile Work Environment

While all grievances may proceed through the management resolution steps, to qualify for a hearing, claims of supervisory harassment and/or a "hostile work environment" must involve "hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status, or pregnancy."[5] Here, the grievant has not alleged that management's actions were based on any of these factors.[6] Rather, the facts cited in support of the grievant's claim can best be summarized

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[1] *See* Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (c).
[3] Va. Code § 2.2-3004(A).
[4] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[5] DHRM Policy 2.30, "Workplace Harassment" (effective 5/1/02).
[6] During the course of this Department's investigation, the grievant suggested that her supervisor's conduct may be motivated by her gender. However, the grievant did not raise any allegations of gender harassment or discrimination in her grievances, and she admitted, in relation to her October grievances, that she never alleged in the management resolution steps that she had been subjected to gender discrimination or harassment. As additional claims may not be added to a grievance once it has been initiated, the grievant's claims of gender-based discrimination and/or harassment are not addressed in this ruling. *Grievance Procedure Manual* § 2.4 ("Once the grievance is initiated, additional claims may not be added.") We note, however, that the grievant may initiate a subsequent grievance challenging any asserted gender discrimination and/or harassment, provided the grievance is initiated within 30 days of the most recent incident of alleged gender discrimination and/or harassment.

as describing general work-related conflict between the grievant and her supervisor. Such claims of supervisory conflict are not among the issues identified by the General Assembly that may qualify for a hearing.[7]

Workplace Violence

Although the grievant does not expressly allege that the agency has misapplied and/or unfairly applied DHRM Policy 1.80, "Workplace Violence," her grievances may be fairly read to include such a claim. Policy 1.80 prohibits conduct which subjects another individual to extreme emotional distress and includes, within its definition of "workplace violence," shouting and "an intimidating presence."[8] During the course of this Department's investigation, we requested informal guidance from DHRM regarding the applicability of the Workplace Violence policy to claims of supervisor-subordinate conflict. DHRM subsequently advised this Department that shouting and threats of job loss by a supervisor may constitute a violation of Policy 1.80, where the employee subjectively experiences the supervisor's conduct as threatening or intimidating.

However, this Department has repeatedly held that in order for a claim of misapplication and/or unfair application of policy to qualify for a grievance hearing, the grievant must demonstrate, as a threshold matter, that the alleged agency conduct resulted in an adverse employment action. Here, the grievant has failed to make this showing, as she has not shown that she experienced a significant change in employment status, such as termination, non-promotion, reassignment with significantly different responsibilities, or a significant change in benefits, as a result of the grieved conduct.[9] To the contrary, the grievant admits that to her knowledge, she has never received formal written discipline[10]; and she does not allege that her employment status, pay or benefits have been affected by the grieved conduct.[11] Accordingly, we conclude that the grievant's

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[7] *See* Va. Code § 2.2-3004 (A).

[8] DHRM Policy No. 1.80, "Workplace Violence" (effective 5/1/02).

[9] *See* Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997) (finding that a supervisor's yelling at an employee and directing other employees to ignore and spy on her did not constitute an adverse employment action); Webb v. Cardiothoracic Surgery Associates of North Texas, P.A., 139 F.3d 532, 539 (5th Cir. 1998) (shouting at employee and throwing magazine at employee's feet did not constitute a tangible job detriment); *see also* Von Gunten v. Maryland Dept. of the Environment, 243 F.3d 858, 866 (4th Cir. 2001).

[10] The agency has confirmed that the grievant has no written disciplinary actions in her personnel file.

[11] Even if this Department were to require the grievant only to prove that she had been subjected to a hostile work environment (as required in harassment claims), rather than an adverse employment action, she would nevertheless not make this threshold showing. In order to demonstrate the existence of a hostile work environment, a grievant must show that she was subjected to conduct sufficiently severe or pervasive so as to alter her conditions of employment and create an abusive or hostile work environment. *See, e.g.*, EDR Ruling No. 2003-041. While we understand that the grievant may have experienced the grieved conduct as hostile or abusive, the alleged conduct by the supervisor and the agency do not, as a matter of law and policy, rise to the level of a hostile work environment. *See* Hottenroth v. Village of Slinger, 388 F.3d 1015,

October 10, 2005, October 24, 2005, and November 7, 2005 grievances do not qualify for hearing.

We note, however, that although the grievances do not qualify for a hearing, mediation or group facilitation 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 and/or facilitation have 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, the parties should call 888-232-3842 (toll free) or 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 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 these grievances, 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 wishes to conclude the grievances.

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Claudia T. Farr
Director

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Gretchen M. White
EDR Consultant

1035 (7th Cir. 2004);Langadinos v. Appalachian School of Law, 2005 U.S. Dist. LEXIS 20958, at 29 (W.D. Va. Sept. 25, 2005); *see also* Von Gunten, 243 F.3d at 870.