Issue: Qualification – Miscellaneous (required Fitness for Duty exam); Ruling Date: September 11, 2007; Ruling #2007-1724; 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 Number 2007-1724
September 11, 2007

The grievant has requested a ruling on whether his January 14, 2007 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. The grievant claims that he has been the victim of harassment and retaliation, and that state and agency policy have been misapplied and/or unfairly applied.[1] For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Corrections Lieutenant with DOC. On December 14, 2006, while the grievant was out on short-term disability (STD), the Warden at the grievant's facility sent the grievant a letter advising him that he would be required to participate in a fitness for duty exam prior to his return to work on December 28, 2006. The Warden enclosed with the letter an "Authorization for Release of Medical Records"

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[1] The grievant also asserts that the agency has violated the Health Insurance Portability and Accountability Act ("HIPAA"). Because HIPPA is a statute not incorporated by any state or agency personnel policy, this Department has no authority to assess the applicability of HIPAA to this case, nor enforce the provisions of that Act. *See* Va. Code § 2.2-3004. Thus, while this issue appropriately proceeded through the management resolution steps for a possible resolution, it does not qualify for a hearing.

In addition, in an attachment to his grievance, the grievant claims that the state workplace harassment policy has been violated because he was required to file his harassment complaint with the alleged harasser. Department of Human Resource Management (DHRM) Policy 2.30, *Workplace Harassment*, states, "[e]mployees and applicants for employment seeking to remedy workplace harassment may file a complaint with the agency human resource director, the agency head, their supervisor(s), or any individual(s) designated by the agency to receive such reports. **Under no circumstances shall the individual alleging harassment be required to file a complaint with the alleged harasser**." (emphasis in original). According to the grievance procedure, if the grievant alleges discrimination/harassment against the designated second step-respondent, as was the case here, the grievant can ask the agency to designate another second step-respondent or he can waive the face-to-face meeting with the designated second step-respondent and receive only a written response from that person. *See Grievance Procedure Manual* § 3.2. The grievant does not appear to have pursued either of these options in this case.

to be signed by the grievant and returned to the human resources office no later than December 18, 2006.

On December 15, 2006, the grievant signed Authorizations for Release of Medical Records ("the Authorizations") of "pertinent providers."[2] According to the grievant, he sent the Authorizations to human resources at his facility on December 18, 2006. However, after speaking with a member of human resources in the DOC central office on December 18, 2006 and being allegedly told by that person that the Warden could not require him to submit to a fitness for duty exam and that he could revoke the medical releases he provided, on December 19, 2006, the grievant contacted human resources at his facility and revoked all previously-signed medical releases. The grievant was not required to participate in a fitness for duty exam prior to his return to work from STD on December 28, 2006.

DISCUSSION

The grievant claims that (1) he has been harassed by his supervisor on the basis of disability; (2) he has been retaliated against for his numerous absences from work and utilization of the Virginia Sickness and Disability Program (VSDP); and (3) state and agency policy have been misapplied and/or unfairly applied. To qualify any of these issues for a hearing, the grievant must demonstrate, as a threshold matter, that he has suffered a non-trivial harm.[3] In particular, to qualify for hearing a claim of workplace harassment and/or hostile work environment based on disability an employee must come forward with evidence raising a sufficient question that the harassment was sufficiently severe or pervasive to alter a term, condition or privilege of employment.[4] Similarly, for an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether the grievant has suffered an adverse employment action. An adverse employment action is a "tangible employment action constitut[ing] 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."[5] Finally, for a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient

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[2] Although the agency requested the grievant's authorization for release of medical requests and a list of contact information for <u>any and all</u> of the grievant's prior and current medical services providers, the grievant, citing to DOC policy on fitness for duty exams, only provided the agency with a list of those prior and current medical service providers relevant to the fitness for duty exam and his current presenting issues.

[3] *See e.g.,* EDR Ruling No. 2004-932.

[4] "[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." Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 114 S.Ct. 367 (1993).

[5] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998). Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment. Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

question as to whether the employee suffered a materially adverse action.[6] A materially adverse action is one that might dissuade a reasonable employee in the grievant's position from participating in protected conduct.[7]

In this case, the grievant has failed to demonstrate that the Warden's *attempt* to require him to submit to a fitness for duty examination and alleged inappropriate actions with regard to his signing of the Authorizations, were sufficiently severe or pervasive so as to alter the conditions of his employment and as such, his workplace harassment claim does not qualify for a hearing.[8] Likewise, with regard to the grievant's claim of misapplication and/or unfair application of policy, the grievant has presented no evidence that the Warden's actions had a significant detrimental effect on his employment status and thus, has failed to make a threshold showing of an adverse employment action.[9]

Finally, with regard to the grievant's retaliation claim, as stated above, the Warden merely *attempted* to require the grievant to submit to a fitness for duty exam prior to his return to work; the grievant never actually participated in such an exam.[10] Moreover, even though he signed and submitted the Authorizations, the grievant rescinded the Authorizations one day later. Furthermore, since the agency's alleged retaliatory acts in December 2006, the grievant has sought, and has been approved for, additional STD leave under the VSDP program. This evidence, taken as a whole, does

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[6] *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414-15 (2006).
[7] In *Burlington Northern*, the Court noted that "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." 126 S. Ct. at 2415. "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children." *Id.* The Court determined that "plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).
[8] *Cf. e.g.,* Rozier-Thompson v. Burlington Coat Factory Warehouse of Pocono Crossing, Inc., 2006 U.S. Dist. LEXIS 46179, *18-20, Civil Action Number 3:05CV456-JRS (E.D. Va. 2006).
[9] Also, to the extent that the grievant is claiming that the agency has violated those provisions of the Americans with Disabilities Act (ADA) that prohibit an employer from asking disability related questions and/or require the employee to undergo a medical examination, it appears that the grievant would have to, at a minimum, demonstrate that he has suffered some sort of harm as a result of the agency's alleged improper actions. For example, in both Tice v. Ctr. Area Transportation Authority, 247 F.3d 506, 519 (3rd Cir. 2001) and Green v. Joy Cone Company, 278 F.Supp. 2d 526, 543-544 (W.D. Pa. 2003), the court held that the plaintiff must demonstrate the existence of an injury-in-fact in order to have standing to bring a cause of action for an employer's violation of those provisions of the ADA that prohibit disability related inquires and/or medical examinations. *See also* McDonald v. Potter, 2007 U.S. Dist. LEXIS 57983, *129-139 (E.D. Tenn. 2007) (the court held that the plaintiff could not prevail on her claim that the fitness for duty exam she was required to undergo constituted disability discrimination because she could not demonstrate that the exam affected the terms and conditions of her employment and as such, the fitness for duty exam did not constitute an adverse employment action).
[10] In contrast, requiring an employee to actually undergo a fitness for duty exam could be a "materially adverse action" depending upon all the facts and circumstances surrounding the exam. *See* Murray v. Gonzales, 2006 U.S. Dist. LEXIS 60935, *32 (M.D. Fla. 2006).

not raise a sufficient question that management took a materially adverse action against the grievant.[11] Accordingly, this grievance does not qualify for a hearing.[12]

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, 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 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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[11] *See generally,* Washington v. Norton, 2007 U.S. Dist. LEXIS 35167, *11-12, Civil Action No. 3:04CV104 (N.D.W.Va. 2007) (the court found that letters of reprimand that were later stricken from the plaintiff's personnel file did not cause any injury or harm, alter the employee's daily work environment and were not likely to dissuade reasonable workers from filing or supporting EEO complaints. In addition, the court pointed out that the plaintiff actually did proceed to file additional EEO complaints after the alleged retaliatory acts against her.)

[12] Again, to the extent the grievant is claiming that the allegedly wrongly acquired medical releases violate those provisions of the ADA that expressly prohibit employers from making disability-related inquiries, this Department concludes that the facts of this case fail to present a sufficient question that these provisions of the ADA have been violated. More specifically, the medical release form presented to the grievant for signature did not ask the grievant about his medical history or limitations nor did it force him to identify a disability. Moreover, as stated above, the grievant rescinded the signed Authorizations one day after presenting them to the agency thereby preventing the agency from seeking any of the grievant's medical records. *See* Green, 278 F.Supp. 2d at 540 (a medical release that does not ask an employee about her medical history or limitations and does not force the employee to identify a disability is not a prohibited medical inquiry under the ADA, however, the employer could possibly violate the ADA if and when the employer uses the medical release(s) to request the employee's medical records).