Issues: Qualification – Work Conditions (Harassment – supervisory conflict) and Retaliation (whistleblowing); Ruling Date: October 30, 2007; Ruling #2008-1813; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation
and Substance Abuse Services
Ruling No. 2008-1813
October 30, 2007

The grievant has requested a ruling on whether her June 1, 2007 grievance with the Department of Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency) qualifies for a hearing. The grievant claims that she has been the victim of harassment and retaliation. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Therapist III with DMHMRSAS. In July 2005, the grievant began supervising Ms. N. According to the grievant, in August 2006 Ms. N asked the grievant if she could fill in for a co-worker in another position during that co-worker's absence. The grievant claims that she told Ms. N that she could fill in for the co-worker half-days only as Ms. N's services were needed by the grievant. The grievant's refusal to allow Ms. N to perform the duties of her co-worker allegedly upset Ms. N.

Ms. N allegedly went to Supervisor P, the Director of Rehabilitative Services at the DMHMRSAS facility in which the grievant works, with complaints about the grievant. As a result of an apparent strained relationship between Ms. N and the grievant, the grievant requested that Ms. N be temporarily removed from under her supervision to "help [Ms. N and the grievant] to put things in perspective." The grievant expected that Ms. N would be returned to her ward and supervision at a later date when some of the supervisory issues had been resolved. However, according to the grievant, in January 2007 she was notified that she would not be supervising Ms. N as she had expected.

Thereafter, the grievant began to question management as to why Ms. N would not be returning to the grievant's supervision. In an e-mail dated March 15, 2007, Supervisor P questioned the grievant's supervisory skills as a possible reason for not

returning Ms. N to the grievant's ward. The grievant raised her concerns about Supervisor P's comments and actions with the director of the human resources department and also told the director of the human resources office that Supervisor P had essentially "created" a position for Ms. N elsewhere in the facility. A meeting was then held between the grievant, Supervisor S (the grievant's former immediate supervisor), Supervisor P, and the director of human resources. At this meeting, the grievant claims that Supervisor P apologized for questioning her supervisory skills and stated that he would send the grievant a written apology. Supervisor P never sent such an apology in writing and claims that he did not apologize for questioning her supervisory skills, but rather apologized for having possibly offended the grievant.

As a result of the above actions and events, the grievant initiated a grievance on June 1, 2007. The grievant claims that management and Ms. N are retaliating and harassing her which has created a hostile work environment.[1] As relief, the grievant seeks to have her "record cleared with a simple written apology from [Supervisor P]" and to be assigned a new assistant.[2]

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 this case, the grievant alleges that management and Ms. N have harassed her, creating a hostile work environment, and retaliated against her. Each of these claims will be addressed below.

Harassment/Hostile Work Environment

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[1] The grievant also claims that she has been "slandered" and her reputation has been damaged as a result of Ms. N's and Supervisor P's actions. Although all complaints may proceed through the three resolution steps, thereby allowing employees to bring legitimate concerns to management's attention, only certain issues qualify for a hearing. Claims such as false accusations, defamation, slander and/or any other claims based solely on legal concepts, such as contract, tort, or constitutional violations, are not among the issues identified by the General Assembly as qualifying for a grievance hearing. *See* Va. Code § 2.2-3004 (A); *Grievance Procedure Manual* § 4.1. Accordingly, this issue cannot be qualified for a hearing.

[2] In addition, the grievant asks that Ms. N "be reassigned to another ward or treatment mall." However, based on this Department's investigation, it appears that Ms. N is currently assigned to another ward and will not be returning to the grievant's supervision at this time.

[3] *See* Va. Code § 2.2-3004(B).

[4] *See Grievance Procedure Manual* § 4.1(c).

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 her co-worker's or management's actions were based on any of these factors. As such, her claim of harassment resulting in a hostile work environment does not qualify for hearing.

Retaliation

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[6] (2) the employee suffered a materially adverse action;[7] and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[8] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[9]

Assuming, for the purposes of this Ruling only, that the grievant engaged in a protected activity and suffered a materially adverse action,[10] her retaliation claim nevertheless fails to qualify for hearing because she has not presented sufficient evidence

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[5] DHRM Policy 2.30, "Workplace Harassment." DHRM Policy 2.30 defines workplace harassment as "[a]ny unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability."

[6] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

[7] *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414-15 (2006); s*ee, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

[8] *See* EEOC v. Navy Fed Credit Union, 424 F.3d 397, 405 (4th Cir. 2005); Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000).

[9] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

[10] A materially adverse action is one that might dissuade a reasonable employee in the grievant's position from participating in protected conduct. 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)).

of a causal link between the alleged protected activity and materially adverse action. More specifically, the alleged protected activity in this case is the grievant's report to human resources that Supervisor P essentially "created" a position for Ms. N without regard to recruitment and hiring policies. The alleged materially adverse acts in this case are: (1) the grievant's supervisory skills were called into questioned as a result of false and malicious allegations by Ms. N; and (2) the grievant's supervisory responsibilities were eliminated when Ms. N was removed from the grievant's supervision.[11] Both of these alleged materially adverse acts occurred prior to the grievant's complaints to human resources about potential violations of the hiring policy.[12] Thus, even if the grievant's statements to human resources were a protected activity, and even if the grievant suffered a materially adverse action by having her supervisory skills questioned and her supervisory responsibilities eliminated, the grievant cannot prevail on this retaliation claim because the alleged materially adverse acts in this case predated the alleged protected activity and thus, there can be no causal link.[13] Accordingly, the grievant's June 1, 2007 grievance does not qualify for a hearing.

We note, however, that although this 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, the parties should call 888-232-3842 (toll free) or 804-786-7994.

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[11] Additionally, the grievant asserts that she was told by her current supervisor in May 2007 that she was "under advisement" and believes that this means she is "on probation." The grievant's current supervisor has no recollection of making such a statement. However, even if such a statement was made and all other elements of a retaliation claim could be demonstrated, this statement alone would not constitute a materially adverse action and as such, a hearing on this issue could not be justified.

[12] It appears that the latest point at which the grievant's supervisory skills were allegedly called into question was March 15, 2007 in an e-mail from Supervisor P to the grievant. Moreover, it appears that, based on the grievant's written "Timeline" of events in this case, the grievant's supervisory responsibilities over Ms. N ended sometime in either November or December 2006. In addition, the agency refused to return Ms. N to the grievant's supervision sometime in January of 2007. During this Department's investigation, the grievant admitted that she went to human resources regarding Supervisor P's alleged disregard for recruitment and hiring polices after receiving the March 15, 2007 e-mail.

[13] The adverse action(s) must follow the protected act, rather than predate it, in order to create an inference of retaliation. *See* Durkin v. City of Chicago, 341 F.3d 606, 615 (7th Cir. 2003) ("An employer cannot retaliate if there is nothing for it to retaliate against."); Duncan v. Washington Metropolitan Area Transit Authority, 425 F.Supp.2d 121, 127-28 (D.D.C. 2006) ("[T]he employer decided on a course of action before it could possibly have known about the employee's protected activities. Consequently….the employee cannot establish a causal link between the end result of that decision and the protected activities in which he engaged in the interim."); s*ee also* Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1234-35 (10th Cir. 2000) (finding that employer's decision to discharge truck driver not retaliatory because employer's decision pre-dated truck driver's filing of a union grievance).

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 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