Issues: Compliance – Grievance Procedure (30-Day Rule), Qualification – Discrimination (Race), and Consolidation of Grievances for purpose of hearing; Ruling Date: April 2, 2009; Ruling #2009-2196, 2009-2197; Agency: Department of Corrections; Outcome: Grievant Not in Compliance, Qualified for Hearing, Consolidation Granted.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE, QUALIFICATION AND CONSOLIDATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2009-2196, 2009-2197
April 2, 2009

The grievant has requested a ruling on whether her September 14, 2007 and December 20, 2007 grievances with the Department of Corrections (the agency) qualify for a hearing. The agency also asserts that the December 20, 2007 grievance is untimely with respect to a challenged Written Notice issued on February 17, 2007. For the reasons discussed below, the challenge to the Written Notice is untimely, but the two grievances otherwise qualify for a hearing and are consolidated.

FACTS

The grievant initiated her September 14, 2007 grievance (Grievance #1) to challenge an "Intimidating, Hostile/Offensive Work Environment" and "Retaliatory harassing actions." Three months later, the grievant initiated her December 20, 2007 grievance (Grievance #2) challenging a similar course of alleged retaliatory actions, but also listing the "Below Contributor" rating in her November 2007 performance evaluation and a February 17, 2007 Written Notice among the issues grieved. Taking both grievances together, the grievant's alleged course of improper managerial actions includes the following: 1) her supervisor and co-workers withheld important work-related information from her, 2) her supervisor would regularly meet and have discussions with co-workers, but not with her, 3) her supervisor gained access to her computer to, for instance, view her notes about workplace incidents, 4) her supervisor failed to remedy certain extreme and insensitive political/social discussions that regularly occurred in the workplace, 5) her supervisor alienated the entire work unit from her, and 6) she was treated unfavorably compared to other co-workers in relation to, for instance, hours at work, work assignments, ability to utilize e-mail, and internet usage.[1]

The grievant alleges that the issues began arising in the workplace after she questioned a superior and raised an issue to her supervisor about the way in which she was told by the superior to do a particular task. She asserts that she was assigned additional work, and as a result, requested a role change and raise, which she did not

[1] The grievant also alleged she had received a second Written Notice. However, it appears that there was only a draft Written Notice in her file, which was never issued to the grievant. The third-step respondent ordered that the draft Written Notice be removed from her file.

receive.[2] The grievant states that she was labeled as a "combative" employee and a "troublemaker" or "complainer." The grievant also alleges that her race and/or gender played a role in the way she was treated. She states she was only one of two women in the work unit and the only African-American employee.

It appears the agency attempted to resolve these issues at length, without success, and also investigated the issues she raised about the workplace. The third-step respondent found that the grievant was not a "victim" but an "active participant in an unpleasant work environment." The agency's investigation of the work environment found it to be "uncomfortable" for everyone involved. The third-step respondent notes "disturbingly curt and insulting" e-mails by both the grievant and her co-workers, as well as a "tense" work environment and "unproductive interpersonal interactions." Additionally, it appears that the third-step respondent found that the grievant and her co-workers had not been held accountable to the same standards.

Since filing her grievances, the grievant has taken another job with another state agency. She still, however, pursues these grievances and now requests that they be qualified for hearing.

DISCUSSION

Compliance

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he or she knew or should have known of the event or action that is the basis of the grievance.[3] 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. Further, the employee bears the burden of establishing that the grievance was timely initiated.[4]

Written Notice

In this case, the agency asserts that Grievance #2 is untimely with respect to its challenge to the agency's issuance of a Written Notice. 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] According to the agency, the grievant received the Written Notice on the day it was issued, February 17, 2007, and, thus, should have initiated this grievance within 30 calendar days, i.e., no later than March 19, 2007. The grievant has presented no persuasive evidence to refute this fact. The Grievance Form A was not received by the

[2] The third-step response also indicates that the relationship between the grievant and her supervisor "deteriorated" after the disagreement regarding her role and duties arose.
[3] Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4.
[4] *Grievance Procedure Manual* § 2.4.
[5] *E.g.,* EDR Ruling No. 2005-986; EDR Ruling No. 2003-147; EDR Ruling No. 2002-118.

agency until December 20, 2007, which was ten months after the Written Notice was issued and, thus, untimely.

This Department has long held that it is incumbent upon each employee to know his or her responsibilities under the grievance procedure.[6] A grievant's lack of knowledge about the grievance procedure and its requirements does not constitute just cause for failure to act in a timely manner. This Department, therefore, concludes that the grievant has failed to demonstrate timeliness or just cause for her delay. As such, Grievance #2 was untimely to challenge the February 17, 2007 Written Notice.[7]

Performance Evaluation

An additional point about the grievant's challenge to her 2007 performance evaluation in Grievance #2 must also be made. The first-step respondent noted that Grievance #2 might have been filed 31 days after the grievant received the performance evaluation. However, the first-step respondent stated that due to certain issues, including the fact the grievant may have only been one day late, he "bypass[ed] the compliance issue" and responded. At no other point is the issue of potential noncompliance with the grievance procedure raised in the grievance record. Further, at the qualification stage, while the agency head asserted for the first time a 30-day issue regarding the grievant's challenge to the Written Notice, he did not raise any similar concern with the performance evaluation challenge, which would have been addressed in the same memo. As such, it appears the agency has waived any timeliness challenge to the performance evaluation claim in Grievance #2.[8] That claim may therefore proceed.

This Department's rulings on matters of compliance are final and nonappealable.[9]

Qualification

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[10] 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

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[6] *See, e.g.*, EDR Ruling No. 2009-2079; EDR Ruling No. 2002-159; EDR Ruling No. 2002-057.

[7] It must be noted, however, that though Grievance #2 is untimely to challenge the Written Notice, that disciplinary action may still be offered by either or both parties as background evidence with respect to the claims in this grievance that do qualify for hearing. Thus, while a hearing officer will not be able to uphold or provide relief for the Written Notice (such as affirming, overturning, or modifying it), a hearing officer may consider, in his or her sole discretion, whether and to what extent the facts and circumstances surrounding the Written Notice are probative of the merits of the grievant's qualified claims. *See, e.g.*, EDR Ruling No. 2008-1984; EDR Ruling No. 2003-098 & 2003-112.

[8] *See Grievance Procedure Manual* § 4.2 (stating that the agency head's qualification response is "the last opportunity to resolve the grievance within the agency").

[9] *See* Va. Code § 2.2-1001(5).

[10] Va. Code § 2.2-3004(B).

discipline may have influenced management's decision, or whether state policy may have been misapplied or unfairly applied. The grievant has asserted various claims, including discrimination (specifically, hostile work environment) and retaliation.

Hostile Work Environment

For a claim of hostile work environment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[11] "[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."[12]

The grievant's allegations raise a sufficient question as to whether the first, third, and fourth elements of a hostile work environment claim exist. The alleged conduct, as described by the grievant, would appear to be unwelcome and imputable to the agency. Additionally, the alleged conduct appears to have been pervasive in that it appears to have occurred over a prolonged period of time and consumed the grievant's work environment. Further, certain of the alleged acts within the course of conduct described by the grievant could potentially be viewed as severe, such as the Written Notice or the "Below Contributor" performance evaluation. Therefore, based on the totality of the circumstances, the grievant's allegations have raised a sufficient question as to whether the alleged conduct was severe or pervasive. The more difficult issue is does a sufficient question exist as to whether the alleged conduct was based on a protected status.

The grievant claims that the alleged hostile work environment was related to her race and/or gender, and asserts a number of ways in which she was treated differently than other members of her work unit, such as her hours at work, assignments, and ability to use the internet and e-mail. Further, the agency appears to acknowledge that, at least in some ways, the grievant was subject to different standards. The agency, however, does not ascribe any discriminatory or retaliatory motive to these actions, but rather appears to have concluded, based on its investigations, that the grievant was an active participant in an unpleasant work environment, not a victim.

This Department cannot conclude at the qualification stage that this grievance fails to raise a sufficient question as to whether a hostile work environment existed due to grievant's race or gender. It appears, and the agency acknowledges, that the grievant may have been subject to different standards. While, as the agency asserts, there may

[11] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[12] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

have been no discriminatory or retaliatory motive behind the issues raised in these grievances, it remains unclear on what basis the grievant was treated differently. The grievant was reportedly the only African-American employee and only one of two women in the work unit. If the grievant's descriptions of the workplace are accurate, the conduct could potentially be viewed as based, at least in part, on her race and/or gender. This Department cannot conclude at this early stage that the grievant's claim of a discriminatory hostile work environment is wholly meritless.

In sum, this claim presents disputed issues of material fact that are more properly decided by a hearing officer rather than through a qualification investigation. As such, the grievant's claim of hostile work environment must be qualified for hearing.[13]

Alternative Theories and Claims

Because the grievant's claim of hostile work environment qualifies for hearing, this Department deems it appropriate to send all alternative theories and claims raised by her grievances for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues. As such, the grievant's other claims asserted on the Form A's, with the exception of her challenge to the February 17, 2007 Written Notice, also qualify for hearing.

Consolidation

This Department has long held that it may consolidate grievances with or without a request from either party whenever more than one grievance is pending involving the same parties, legal issues, and/or factual background.[14] EDR strongly favors consolidation and will grant consolidation unless there is a persuasive reason to process the grievances individually.[15]

Grievance #1 and Grievance #2 share common allegations, involve the same parties, potentially many of the same witnesses, and a common factual background. Accordingly, this Department deems it appropriate to send both grievances together for adjudication by a hearing officer to help ensure a full exploration of what could be interrelated facts and issues.

CONCLUSION

For the reasons set forth above, with the exception of the February 17, 2007 Written Notice, the grievant's September 14, 2007 and December 20, 2007 grievances

[13] The grievant's claim of retaliation would similarly be analyzed, in effect, as a claim of retaliatory harassment. *See* EDR Ruling Nos. 2007-1577, 2008-1957; EDR Ruling No. 2007-1669. The alleged differential treatment could suggest a retaliatory motive due to protected conduct, i.e., raising workplace concerns with her supervisor. *See, e.g.*, Va. Code § 2.2-3000(A).
[14] *Grievance Procedure Manual* § 8.5.
[15] *Id.*

are qualified and consolidated for hearing. This qualification ruling in no way determines that the agency's actions or inactions resulted in a hostile work environment, were retaliatory, or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

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Claudia T. Farr
Director