Issues: Qualification – Discipline (Verbal Counseling), Discrimination (Other), Work Conditions (Violence in the Workplace); Ruling Date: May 5, 2009; Ruling #2009-2282; Agency: Virginia Department of Health; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Health
Ruling No. 2009-2282
May 5, 2009

The grievant has requested a qualification ruling in his February 18, 2009 grievance with the Department of Health (the agency). For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant initiated his February 18, 2009 grievance to raise issues of alleged harassment, discrimination, intimidation, and workplace violence involving his immediate supervisor (Supervisor W), and his immediate supervisor's supervisor (Supervisor H). Some of the conflict between these parties appears to have arisen out of the grievant's interest in expanding a particular program on which the grievant worked. The grievant appears to have had a perception that Supervisor W and Supervisor H did not support or would not move forward on his expansion efforts.

The grievant sought to raise the concern above Supervisor H to a higher level Manager. On January 21, 2009, when the grievant sought to deliver a draft letter to the Manager, he encountered Supervisor H who allegedly "grabbed" him by the wrist, prevented him from proceeding to the Manager's office, "ripped" the letter he was holding from his hand, and directed him to Supervisor H's office. According to the grievant, Supervisor H proceeded to meet with him and in a "condescending manner" addressed his alleged failure to follow the chain of command by going to the Manager. During this meeting, the grievant states that he raised the fact that he felt Supervisor H had committed "assault and battery" in the hallway. In response, according to the grievant, Supervisor H threatened to write him up for violating the chain of command, rather than informally counseling him. Reportedly, Supervisor H later apologized for mishandling the matter.

The grievant alleges a separate incident occurred in a meeting with Supervisor W on January 26, 2009. This meeting was again about the grievant's alleged violation of the chain of command. According to the grievant, Supervisor W stated that she had commented to another employee in late 2005 that she was surprised the grievant made it through his first year with the agency. After this meeting, Supervisor W and Supervisor H met with the grievant on the same day to provide a written counseling memo regarding his alleged violation of the chain of

command.[1] The grievant states that meeting with both Supervisor W and Supervisor H was continued harassment and intimidation because he had requested not to meet with them alone unless another person could be present.

The final incident the grievant cites occurred on February 10, 2009. The grievant had a scheduled conference call that he was running. Supervisor W and Supervisor H arrived late to the meeting room, which was very small, so they were the only three in the room again. The grievant alleges that their presence was intimidating and distracting. He states that Supervisor W and Supervisor H whispered to each other during the teleconference.

The grievant alleges violations of Department of Human Resource Management (DHRM) Policies 1.80 (Workplace Violence) and 2.30 (Workplace Harassment). The grievant alleges discrimination on the basis of race, sex, sexual orientation, and age. The agency found no support for the grievant's allegations and declined to award relief. Though a separate agency investigation into the grievant's complaint of workplace violence was unable to substantiate the grievant's allegations, various recommendations were made for the parties to address the occurrences on January 21, 2009, prevent a recurrence of such incidents, and improve communication.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] 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. The grievant has alleged that he has been subject to discrimination, harassment, intimidation, and workplace violence. Those claims are discussed below.

Discrimination - Harassment/Intimidation

For a claim of discrimination based on harassment 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.[3] "[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."[4]

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[1] The grievant has disputed the basis for this counseling memo, in part, by stating that he has communicated directly with the Manager regarding elements of the program since he was hired in December 2004 without disciplinary action until now.
[2] *See* Va. Code § 2.2-3004(B).
[3] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[4] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

Importantly, the grievant must raise more than a mere allegation of harassment – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. Although the grievant has demonstrated that tension exists with his supervisors and that he has experienced potentially inappropriate conduct, the grievant has not presented evidence that the alleged harassment and intimidation was based on a protected status. Consequently, this claim does not qualify for a hearing.

As courts have noted, prohibitions against harassment, such as those in Title VII, do not provide a "general civility code"[5] or remedy all offensive or insensitive conduct in the workplace.[6] This Department is further persuaded and encouraged by the fact that the agency has made recommendations to improve the grievant's work environment. As such, the evidence presented in this case does not raise a sufficient question of harassment and therefore does not qualify for hearing. This ruling does not mean that EDR deems the alleged behavior of the supervisors, if true, to be appropriate, only that the claim of harassment on the basis of a protected status does not qualify for a hearing. Moreover, this ruling in no way prevents the grievant from raising the matter again at a later time if the alleged conduct resumes or worsens.

Counseling Memo

The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[7] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.[8] An adverse employment action is defined as 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."[9] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[10]

In this case, the counseling memo does not constitute an adverse employment action, because such a document, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[11] For this reason, the grievant's claim relating to the counseling memo does not qualify for a hearing.[12]

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[5] Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).
[6] *See, e.g.*, Beall v. Abbott Labs., 130 F.3d 614, 620-21 (4th Cir. 1997); Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).
[7] *See Grievance Procedure Manual* § 4.1(b).
[8] While evidence suggesting that the grievant suffered an "adverse employment action" is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an "adverse employment action." For example, consistent with recent developments in Title VII law, this Department substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. *See* EDR Ruling No. 2007-1538.
[9] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[10] *See, e.g.*, Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[11] *See* Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999).
[12] Although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the Act). Under the Act, if the grievant gives notice that he wishes to challenge, correct or explain information contained in his personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to

We note, however, that while this counseling memo does not have an adverse impact on the grievant's employment, it could be used later to support an adverse employment action against the grievant. Therefore, should the counseling memo in this case later serve to support an adverse employment action against the grievant, such as a formal Written Notice or a "Below Contributor" annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits of the counseling memo through a subsequent grievance challenging the related adverse employment action.

Workplace Violence

The grievant has also alleged a violation of Department of Human Resource Management (DHRM) Policy 1.80, *Workplace Violence*.[13] That policy requires that the grievant's employing agency provide a safe working environment for its employees.[14] Federal and state laws also require employers to provide safe workplaces.[15] Thus, an act or omission by an employer resulting in actual or threatened workplace violence against an employee, or an unreasonably unsafe work environment for that employee, can reasonably be viewed as having an adverse effect on the terms, conditions, or benefits of his or her employment.[16]

Assuming for purposes of this ruling only that the grievant's allegations are true, there are still some cases when qualification is inappropriate even if policy has been violated or misapplied. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

In this case, the requested relief that has not been provided is not relief that a hearing officer could order. Hearing officers cannot order agencies to take corrective action against employees, and a hearing officer could not order the transfer the grievant requests.[17]

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file a statement of not more than 200 words setting forth his position regarding the information. Va. Code § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. Va. Code § 2.2-3806(A)(5).

[13] "Workplace violence" is defined as "[a]ny physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties." DHRM Policy 1.80. This definition appears to be identical to language included in the agency's workplace violence policy.

[14] DHRM Policy 1.80.

[15] Under the Occupational Safety and Health Act of 1970 (OSHA), an employer must establish "place[s] of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). Virginia state employees are covered by the Virginia Occupational Safety and Health Program (VOSH) which also requires "every employer to furnish to each of his employees safe employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." Va. Code § 40.1-51.1 (A); 16 Va. Admin. Code § 25-60-30 (2006).

[16] *See* Herrnreiter v. Chi. Hous. Auth., 315 F.3d 742, 744 (7th Cir. 2002) (describing a "materially adverse employment action" or "tangible employment action" as including the circumstance where "the employee is not moved to a different job or the skill requirements of his present job altered, but the *conditions* in which he works are changed in a way that subjects him to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in his workplace environment….") (emphasis in original).

[17] *See Grievance Procedure Manual* § 5.9(b).

Consequently, effectual relief is unavailable to the grievant through the grievance procedure regarding the workplace violence claim. When there has been a misapplication of policy, a hearing officer could order that the agency reapply policy correctly. However, as a practical matter, "reapplying policy" would have little effect on a prior incident of alleged workplace violence. Further, it appears the agency investigated the incident and has made recommendations to prevent inappropriate occurrences in the future. In light of the foregoing, the grievance does not qualify for a hearing.

Mediation

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.

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 Department's qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). 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 notifies the agency that he wishes to conclude the grievance.

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Claudia Farr
Director