Issue: Qualification – Work Conditions (Supervisor/Employee Conflict); Ruling Date: May 25, 2010; Ruling #2010-2460; 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 No. 2010-2460
May 25, 2010

The grievant has requested a qualification ruling in her July 9, 2009 grievance with the Department of Corrections (DOC or the agency). For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On July 9, 2009, the grievant initiated a grievance in which she alleges that she has endured harassment by her supervisor and that her supervisor has created a hostile work environment. Specifically, the grievant asserts that her supervisor has failed to provide her with needed assistance, required her to work unpaid overtime,[1] and treated her in an unprofessional manner. In addition, she alleges that her supervisor improperly removed a picture from the grievant's office because the supervisor had a "racist" and "stereotypical" reaction to the picture. As relief, the grievant asks that the harassment cease.[2]

[1] In her grievance, the grievant seeks to be compensated for the overtime hours she worked during the months of June and July 2008. However, as correctly noted by the second step respondent, the grievant failed to challenge this issue within the 30 calendar day time period mandated by the grievance procedure. *See Grievance Procedure Manual* § 2.4. That is, the grievant knew or should have known in June of 2008 that she was not going to be compensated for the extra hours worked as she was made aware at this time that she was considered to be an "exempt" employee and thus, not entitled to overtime compensation. As such, the grievant should have initiated her grievance within 30 calendar days of this date. The grievant argues that she discovered in June of 2009 that she may have actually been a "non-exempt" employee during the months of June and July 2008 and as such, her July 2009 grievance is timely. However, as evidenced by the May 30, 2008 letter that detailed the terms of the grievant's June 10, 2008 promotion, the grievant was considered to be an "exempt" employee during the months of June and July 2008 and as such, not entitled to overtime compensation. *See* DHRM Policies 1.25 and 3.15 and DOC Operating Procedure 5-35. It should be noted that the grievant's position was first designated as a "non-exempt" position effective November 25, 2008. Based on the foregoing, this Department concludes that the grievant failed to timely challenge the issue of nonpayment for overtime hours worked in June and July 2008 and as such, this issue will not be addressed further in this ruling. This Department's rulings on matters of compliance are final and nonappealable. *See* Va. Code § 2.2-1001(5), 2.2-3003(G).

[2] The grievant seeks to have her supervisor disciplined and required to attend training courses as a result of her alleged harassing behavior. The grievant also would like a written statement "acknowledging corrective actions have been taken" and to be supervised by someone else. Even if there were sufficient evidence that the grievant's

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. The grievant has alleged that she has been subjected to harassment and a hostile work environment.[4]

For a claim of harassment or 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.[5] "[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."[6]

However, 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.[7] Although the grievant alleges that she was forced to work overtime, was not given appropriate assistance, and was

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supervisor engaged in harassing behavior such that this issue qualified for a hearing, ordering an agency to take corrective action against an employee is not relief that a hearing officer could provide. *Grievance Procedure Manual* § 5.9 (b). Likewise, a hearing officer could not order that the grievant be supervised by someone else. *Id.* Moreover, while the grievant's interest in action taken against her supervisor is understandable, if such action were taken, the agency would not be required to provide this identifiable personal information to the grievant: in fact, state policy mandates that an agency may not disclose personal information of an employee, such as corrective measures, without the employee's consent of the disciplined employee. *See* DHRM Policy No. 6.05, *Personnel Records Disclosure*.

[3] *See* Va. Code § 2.2-3004(B).

[4] In addition, the grievant also raises the issue of retaliation. In particular, the grievant appears to be concerned about future retaliation. Claims of possible future retaliation cannot qualify for a hearing due to the absence of a management action alleged to be retaliatory. Moreover, even if the grievant had alleged such an action subsequent to the initiation of her July 9th grievance, the grievant could not challenge any such action by adding the issue to her July 9th grievance. The grievant would have to file a separate grievance challenging the action as retaliatory. *See Grievance Procedure Manual* § 2.4 ("once the grievance is initiated, additional claims may not be added"). As such, the grievant's assertion that her 2009 performance evaluation was downgraded out of retaliation for her grievance activity cannot be addressed in this ruling because the performance evaluation was received after the filing of her July 9th grievance. However, should management take action the grievant believes to be retaliatory, nothing precludes the grievant from challenging that action through a subsequent timely grievance.

[5] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).

[6] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

[7] *See also, e.g.,* DHRM Policy 2.30, *Workplace Harassment* (defining "Workplace Harassment" as conduct that is based upon, among other protected classes, race, color, and national origin.

treated in an unprofessional manner, the grievant has not alleged or presented evidence that this conduct was based on a protected status. While the grievant does point to an alleged racial motive in the removal of the picture from her office, that action alone does not create a hostile work environment.[8] Tellingly, the grievant asserts that "[e]veryone [the supervisor] has ever supervised…has had to file a complaint against her for the way she treats staff under her supervison and for the way in which she talks to them." While the allegation of universal mistreatment of all staff, if true, would be troubling and certainly not be condoned by this Department, it nevertheless cannot serve as a basis for qualification for hearing. As courts have noted, prohibitions against harassment, such as those in Title VII of the Civil Rights Act, do not provide a "general civility code" or a remedy for all offensive or insensitive conduct in the workplace.[9]

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 she wishes to conclude the grievance.

Claudia Farr
Director

[8] The supervisor had removed a picture of "an African-American male with low-riding pants."
[9] *See, e.g.,* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998); 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).