

Issues: Qualification – Work Conditions (Supervisor/Employee Conflict and Hours of Work), and Retaliation (Grievance Activity Participation); Ruling Date: June 11, 2010; Ruling #2010-2585, 2010-2605, 2010-2606; Agency: Department of Juvenile Justice; Outcome: Not Qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**QUALIFICATION RULINGS OF DIRECTOR**

In the matter of Department of Juvenile Justice  
Ruling Numbers 2010-2585, 2010-2605 and 2010-2606  
June 11, 2010

The grievant has requested that this Department qualify for hearing his three November 30, 2009 grievances with the Department of Juvenile Justice (DJJ or the agency). For the reasons discussed below, these grievances do not qualify for hearing.

FACTS

The grievant is employed as a Corrections Lieutenant with DJJ and serves as a shift commander and supervisor. On or about November 30, 2009, one of the grievant's subordinates, Employee T, complained that the grievant was harassing her. The grievant's first November 30, 2009 grievance (Grievance 1) challenges Employee T's complaint. In Grievance 1, the grievant essentially asserts that Employee T filed the complaint of harassment against him simply because he denied her request to be transferred to a different post and also denied her one day of annual leave. As relief the grievant seeks to have the allegations of harassment abolished and for Employee T to be transferred to another shift.

The grievant believes that Employee T and another subordinate, Employee M, were encouraged by Sergeant S to make the alleged false complaint of harassment against the grievant. According to the grievant, Sergeant S did so in an effort to retaliate against the grievant because the grievant had disciplined Sergeant S in the past. In addition, the grievant alleges that Sergeant S engaged in similar behavior in the past and the grievant had previously filed a grievance against Sergeant S in response.<sup>1</sup> The grievant's second November 30, 2009 grievance (Grievance 2) challenges Sergeant S's alleged actions as retaliatory and harassing.

As a result of the complaints, an internal investigation ensued and while the investigation was ongoing, the grievant was transferred from the day shift to night shift. The grievant challenged his change in shift by filing a third grievance on November 30, 2009 (Grievance 3).

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<sup>1</sup> According to the grievant, he filed a previous grievance in response to Sergeant S doing "an internal investigation against [the grievant] in which he was questioning staff." The grievance was concluded in April 2008 because the grievant was assured by agency management that Sergeant S would not engage in this type of behavior again and personnel action would be taken against Sergeant S.

Grievance 1, 2 and 3 proceeded through the management resolution steps without resolution and a hearing was denied by the agency head. The grievant now asks this Department to qualify all three of his grievances for a hearing.

### DISCUSSION

#### *Actions by Employee T and Sergeant S*

Only those grievances that contest agency/management action (or inaction in some cases), or that claim that the agency/management played a significant role in the action or inaction of another, can be grieved.<sup>2</sup> In both Grievance 1 and Grievance 2, the grievant challenges actions allegedly taken by subordinate employees, Employee T and Sergeant S. Namely, in Grievance 1, the grievant challenges the filing of a harassment complaint by Employee T as retaliatory on the part of Employee T. Moreover, in Grievance 2, the grievant challenges Sergeant S's alleged retaliatory acts of asking staff questions about the grievant and encouraging Employee T and Employee M to make "false accusations" against the grievant. These actions were not management actions nor has the grievant presented sufficient evidence that management played a role in the actions grieved. Accordingly, this Department concludes that the grievant's challenges to actions by Employee T and Sergeant S cannot qualify for a hearing. However, this Department will address the apparent claim in both Grievance 1 and Grievance 2 that agency/management failed to protect the grievant from alleged inappropriate actions by his subordinates as this involves a claim that management has failed to take appropriate action.<sup>3</sup>

#### *Management Actions*

In this case, the following management actions are at issue: management's alleged retaliatory transfer of the grievant to the night shift, and management's alleged failure to protect the grievant from alleged harassing and retaliatory behavior at the hands of his subordinates.

#### 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;<sup>4</sup> (2) the

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<sup>2</sup> See Va. Code § 2.2 – 3000(A) ("...the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes that may arise between *state agencies* and those employees who have access to the procedure.") (emphasis added). See also *Rules for Conducting Grievance Hearings*, § IV(A) ("[t]he parties to the grievance are the employee and the agency.")

<sup>3</sup> In the relief section of Grievance 1, the grievant seeks to have Employee T moved to another shift. Fairly read, this can be construed as a claim that management is failing to protect the grievant from alleged retaliatory behavior by Employee T. In Grievance 2, the grievant asserts that as he had done in the past, Sergeant S was "going around asking different staff questions about [him]." According to the grievant, when Sergeant S had engaged in similar behavior in the past, the grievant was assured by agency management that they would address the situation such that he would not be subjected to this type of conduct by Sergeant S in the future. However, the grievant claims that Sergeant S has again engaged in the behavior that was to be stopped by management and as such, management has failed to take appropriate action against Sergeant S to protect the grievant.

<sup>4</sup> 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

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employee suffered a materially adverse action;<sup>5</sup> 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.<sup>6</sup> Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.<sup>7</sup>

In this case, the grievant has alleged that management retaliated against him because of his past grievance activity. The initiation of a grievance is clearly a protected activity. In addition, the grievant's transfer to the night shift could be "materially adverse" such that it could dissuade a reasonable employee from participating in protected conduct.<sup>8</sup> The only remaining question is whether the grievant has presented sufficient evidence that the materially adverse action in this case, i.e., his transfer to the night shift, was causally linked to his earlier grievance activity.

In support of his assertion that his transfer to the night shift was causally linked to his filing a grievance, the grievant states that he was he was told by at least three people that upper management was going to retaliate against him for his past grievance activity. During the resolution steps of the grievance process, management denied that the grievant's transfer was effectuated in response to the grievant's past grievance activity. Rather, as discussed in more detail below, management transferred the grievant as a result of the harassment complaint filed against him by Employee T. The agency's action in this regard was not only appropriate, but potentially required given the nature of the allegations.<sup>9</sup> The grievant also asserts that this is not the first time upper management has wanted to transfer him to the night shift and that he was issued a Group II Written Notice shortly after he concluded his grievance in April 2008.<sup>10</sup>

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incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

<sup>5</sup> *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); *see, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

<sup>6</sup> *See, e.g.*, *EEOC v. Navy Fed Credit Union*, 424 F.3d 397, 405 (4<sup>th</sup> Cir. 2005).

<sup>7</sup> *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

<sup>8</sup> *See Burlington Northern and Santa Fe Ry. v. White*, 548 U.S. 53, at 68-69. While this standard is objective, it may also take into account the particular circumstances of the employee. *See also e.g.*, *Fitzgerald v. Ennis Business Forms, Inc.* No. 7:05CV00782, 2007 U.S. Dist. Lexis 875, at \*20-21 (W. D. Va., January 8, 2007) (a transfer from first shift to third shift may constitute a materially adverse action for purposes of a retaliation claim).

<sup>9</sup> *Cf. Swenson v. Potter*, 2001 U.S. App. LEXIS 25902 (9<sup>th</sup> Cir. 2001). ("[t]he most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified"). An investigation is a key step in the employer's response. *See Swentek v. USAIR, Inc.*, 830 F.2d 552, 558 (4<sup>th</sup> Cir. 1987) (employer obliged to investigate complaint and to present a reasonable basis for its subsequent action). *See also Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). If the employer fails to take corrective action after learning of an employee's sexually harassing conduct, or takes inadequate action that emboldens the harasser to continue his misconduct, the employer can be deemed to have "adopted the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy." *Faragher* at 789.

<sup>10</sup> To the extent the grievant is attempting to challenge the Group II Written Notice in Grievance 3, this Department concludes that he is untimely to do so. 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. Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4. Accordingly, while the grievant may use the June 2008 written notice as evidence in support of his claim that his transfer to the night shift

Management apparently did discuss transferring the grievant to the night shift in the past due to staffing issues and because the grievant “was better equipped [than the only other Lieutenant] to run the night shift by himself.” The transfer however, while discussed, was never actually implemented.

Moreover, the agency has presented a business reason that the interests of the institution were best served by separating the grievant and Employee T pending the investigation into Employee T’s harassment complaint. The grievant has stated that the agency’s business reason is actually an excuse for retaliation. In particular, the grievant alleges that other employees have been accused of engaging in worse actions than himself, but were not “immediately moved” from the area. The grievant cites two examples in support of his claim that he has been treated unfairly. The first example involved two correctional officers that were having “personal problems” and one of them felt “threatened” by the other, yet according to the grievant, management took no action when one of the correctional officers expressed concern that the other may “attack her with his gun.” The other example cited by the grievant allegedly involved a correctional officer filing a complaint of harassment against a sergeant not in her direct chain of command, yet according to the grievant these two continued to work together after the complaint was initiated.

In his qualification determination, the agency head asserts that the two examples cited by the grievant were substantially different than the grievant’s case and the “severity of the allegations justified transferring [the grievant] to a different shift pending completion of an internal investigation.” The agency head further stated that the transfer was necessitated because “allegations of serious sexual misconduct were made against [the grievant] by a female officer in [the grievant’s] direct chain of command.” Agency management further asserted during the management resolution steps that in cases of alleged supervisory harassment, the agency attempts to eliminate or minimize the potential contact between the supervisor and the employee and that is exactly what they did in this case.

In responding to the grievant’s assertion that the agency’s stated business reason is an excuse for retaliation, the agency appears to be making a distinction between a harassment complaint filed by a subordinate against his or her direct supervisor and a harassment complaint filed against a co-worker or other individual not in the complainant’s direct chain of command. By statute and under the grievance procedure, management has the exclusive right to manage the affairs and operations of state government.<sup>11</sup> Inherent in this authority is the responsibility and discretion to transfer employees within the workplace when there has been a complaint of harassment. Accordingly, implementing a practice of transferring or otherwise separating a supervisor and the employee in his chain of command that has made a harassment complaint is within the discretion of the agency.<sup>12</sup> Based on the totality of the circumstances, this Department therefore concludes that the grievant has failed to present sufficient evidence as to

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was also retaliatory, because the written notice was issued more than 30 calendar days prior to his initiation of Grievance 3, any challenge to the merits of the June 2008 written notice in Grievance 3 is untimely.

<sup>11</sup> Va. Code § 2.2-3004(B).

<sup>12</sup> Moreover, it should be noted that according to DHRM Policy 2.30, agency managers and supervisors are required to, among other things, to “[t]ake immediate action to eliminate any hostile work environment where there has been a complaint of workplace harassment” DHRM Policy 2.30. Accordingly, the agency appears to have been acting in accord with policy when it transferred the grievant to the night shift pending investigation of Employee T’s complaint.

whether his temporary reassignment to night shift was motivated by retaliation or that the business reason given was pretextual. Accordingly, the issue of retaliation does not qualify for a hearing.

### Management's Failure to Act

In Grievances 1 and 2, the grievant claims that management has failed to protect the grievant from harassing behavior at the hands of his subordinates. While management has a duty to stop workplace harassment,<sup>13</sup> because the grievant has failed to provide sufficient evidence that Employee T or Sergeant S even took harassing actions, it does not appear that the agency has neglected its duties in this regard.<sup>14</sup>

In particular, during this Department's investigation, the grievant told the investigating EDR consultant that he did not have any specific evidence to support his assertion that Sergeant S encouraged Employee T and Employee M to file harassment complaints, but, rather, he "felt" Sergeant S encouraged the complaints given Sergeant S's past behavior and animosity for the grievant. In contrast, during the management resolution steps, various employees, including Employee T and Employee M, were questioned by agency management about Sergeant S's alleged behavior. During the agency's investigation, both Employee T and Employee M denied that Sergeant S had any involvement in the harassment complaints they filed or had asked them questions about the grievant. Likewise, during this Department's investigation for this qualification ruling, Employee M denied that Sergeant S had any involvement in the harassment complaint that was filed against the grievant stating that the decision to file the complaint was "100 percent" his decision.<sup>15</sup> In addition, according to the agency, another member of management, Sergeant J, confirmed that Sergeant S did not ask questions about the grievant when Employee T and Employee M approached him and Sergeant S about the grievant's alleged harassing behavior.

Based on the foregoing, this Department concludes that there is insufficient evidence that Employee T and Sergeant S engaged in the behavior described by the grievant in Grievance 2 and as such, the grievant's claim that management has failed to protect him from harassing behavior by these subordinates does not qualify for a hearing. Similarly, the grievant has presented insufficient evidence that the complaint filed by Employee T was harassing or otherwise initiated for improper purposes. As such, the grievant's assertion in Grievance 1 that management has failed to protect him from harassing behavior by Employee T does not qualify for a hearing.

### *Other Issues and Mediation*

In attachments to Grievances 1, 2, and 3, the grievant asserts that it is "unfair" that a DJJ human resources manager was accepting the grievances, advising management and was involved

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<sup>13</sup> See DHRM Policy 2.30.

<sup>14</sup> This ruling does not mean that EDR deems the alleged workplace behavior, if true, to be appropriate, only that the claim of workplace 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 either the retaliation or workplace harassment matters again at a later time if the alleged conduct continues or worsens.

<sup>15</sup> This Department attempted to reach Employee T as well, but was unsuccessful.

in the internal investigation into Employee T's harassment complaint.<sup>16</sup> This Department finds no policy violation or non compliance with the grievance procedure in human resources serving multiple roles in this case. Human resource managers are often required to assist both management and the grievant during a grievance process as well as provide advice to management on how to proceed when faced with a workplace issue or concern. Likewise, it is not unusual for a member of human resources to investigate a complaint of workplace harassment within his or her agency. More importantly, however, the grievant has failed to identify how the human resource manager's multiple roles in this case adversely affected him. Accordingly, there is no basis to qualify this issue for a hearing.

Finally, although these grievances do 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.

#### CONCLUSION, APPEAL RIGHTS AND OTHER INFORMATION

For the reasons discussed above, this Department concludes that Grievances 1, 2, and 3 do not qualify for a hearing. 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 determinations to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling and appeal to the circuit court in the jurisdiction in which the grievance arose pursuant to Va. Code § 2.2-3004(E). If the court should qualify either some or all of these grievances, 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 grievances and notifies the agency of that desire.

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Claudia T. Farr  
Director

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<sup>16</sup> This Department notes that this issue was not raised on the Form A in Grievance 1, 2 or 3 when initiated, but rather was brought forth during the management resolution steps of the grievance process. Under the grievance procedure, once a grievance is initiated, additional claims may not be added. *Grievance Procedure Manual* § 2.4. However, because the agency has not expressly challenged this claim as being out of compliance with the grievance process, this Department will address the grievant's argument that the various roles of the human resources manager in his case was generally unfair.