Issue: Qualification – Work Conditions (Supervisor/Employee Conflict and Teleworking); Ruling Date: April 13, 2010; Ruling #2010-2587; Agency: Department of Social Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling No. 2010-2587
April 13, 2010

The grievant has requested a qualification ruling in her November 5, 2009 grievance with the Department of Social Services (the agency). For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In or around August 2008, the grievant's division undertook organizational changes that altered supervisory and work structures. In essence, instead of reporting to an on-site supervisor, the grievant had an off-site supervisor. Further, it appears that employees in similar positions to the grievant in her same office had different supervisors. In her grievance, the grievant raises concerns stemming from these changes and the workplace environment that has resulted. She alleges that inequitable treatment, subjective reviews of work by different supervisors, undue stress, micro-management, hostile work environment, and workplace violence have occurred. The environment also allegedly caused the grievant certain health-related problems. Further, the grievant argues that the workplace has resulted in decreases in performance. The grievant received a Below Contributor rating on one factor in her 2009 performance evaluation.[1] As a result of that rating, the agency terminated the grievant's telework privileges.[2] The grievant argues that revoking her ability to telework will not help her improve performance because she has no greater access to supervision in her regional office than if she was teleworking from home. As the parties have failed to resolve these matters during the resolution steps, the grievant now seeks qualification of her grievance for a hearing.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[3] Additionally, the grievance statutes and procedure reserve to management the exclusive right to

[1] The grievant challenged this rating in her grievance, but has since waived that argument during the management steps. As such, that claim will not be addressed in this ruling.
[2] The grievant was previously teleworking two days per week.
[3] *See Grievance Procedure Manual* § 4.1 (a) and (b).

manage the affairs and operations of state government.[4] 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 raised various issues regarding her work environment, including inequitable treatment, micro-management, undue stress, hostile work environment,[5] and workplace violence. Because the grievant has not provided evidence to support a claim of discrimination, nor claimed that any management actions were retaliatory or disciplinary, the only way in which these claims could qualify for hearing is under a misapplication and/or unfair application of policy theory. The grievant also challenges the revocation of her telework privileges. Both of these issues will be analyzed as misapplication and/or unfair application of policy claims separately below.

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[6] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.[7] 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."[8] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[9] While it is in

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[4] *See* Va. Code § 2.2-3004(B).

[5] While the grievant used the term "hostile work environment" in her grievance, it appears that this claim has developed into a claim of workplace violence and will be addressed as such. In any event, for a claim of prohibited workplace harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was based on a protected status. *See, e.g.*, DHRM Policy 2.30, *Workplace Harassment* (defining "Workplace Harassment" as conduct that is based on "race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability"). The grievant has not presented evidence that the alleged inequitable treatment or hostile work environment was based on a protected status. The grievant has stated that the lone male employee in her office did not have to go through the same supervisory structure as the rest of the female employees in the office, including the grievant. However, the agency states that the reason this male employee was treated in this manner was because of his impending departure from the agency. These allegations are not sufficient to raise a question that the supervisory structure was based on a protected status, much less that the grievant's allegations as a whole, were related to prohibited discrimination.

[6] *See Grievance Procedure Manual* § 4.1(b).

[7] 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.

[8] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

[9] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

no way clear that there has been an adverse employment action in this case, for purposes of this ruling only, it will be assumed the grievant has experienced an adverse employment action.

Inequitable Treatment/Work Environment

As stated, by statute and under the grievance procedure, complaints relating solely to the methods, means, and personnel by which work activities are to be carried out "shall not proceed to hearing"[10] unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. There is no indication that the issues described by the grievant regarding her work environment and the stresses caused and/or involved are so extreme or arbitrary to rise to the level of a misapplication or unfair application of policy to qualify for a hearing. This Department has found no policy provision violated, in this case, by the supervisory structure and work environment described. Further, there does not appear to be any indication of conduct that is prohibited by DHRM's workplace violence policy.[11] As such, there is no basis to qualify this claim for a hearing.

Telework Privileges

The applicable telework policies clearly state that the agency can terminate a telework agreement at its discretion.[12] However, even though agencies are afforded great flexibility in making such decisions, agency discretion is not without limitation. Rather, this Department has repeatedly held that even where an agency has significant discretion to make decisions (for example, an agency's assessment of a position's job duties), qualification is warranted where evidence presented by the grievant raises a sufficient question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[13]

Because the applicable policies provide the agency great discretion in choosing to terminate a telework agreement, this Department can find no violation of any mandatory provision of policy in the revocation of her telework privileges. Indeed, both the agency's sample telework agreement and a protocol issued by the grievant's division specifically state that one of the bases for revocation of a telework agreement can be work performance deficiencies. The grievant received a Below Contributor rating on one factor of her performance evaluation, which was the stated reason for the removal of the grievant's telework privileges.

Further, the grievant has not presented evidence raising a sufficient question as to whether the agency unfairly applied policy in this case. It appears the only other employee in the grievant's office who received a Below Contributor rating on at least one performance factor also lost her telework privileges. Consequently, there is no indication that the grievant was subject to

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[10] Va. Code § 2.2-3004(C).
[11] *See* DHRM Policy 1.80, *Workplace Violence*. There is no doubt that the grievant has described a stressful job. However, there has been no evidence presented that suggests a violation of this policy.
[12] *E.g.*, DHRM Policy 1.61, *Administrative Procedures, Telework.*
[13] *See Grievance Procedure Manual* § 9 (defining arbitrary or capricious as a decision made "[i]n disregard of the facts or without a reasoned basis"); *see also, e.g.*, EDR Ruling 2008-1879.

inconsistent treatment. As such, because this Department cannot find that there is a sufficient question as to whether the agency has misapplied or unfairly applied policy, the grievance does not qualify for hearing.

Mediation

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 wishes to conclude the grievance and notifies the agency of that desire.

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Claudia Farr
Director