Issues: Qualification – Work Conditions (Violence in the Workplace), and Discrimination (Gender); Ruling Date: August 1, 2011; Ruling Number: 2011-2890; Agency: Department of Behavioral Health and Developmental Services; Outcome. Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Behavioral Health and Developmental Services
Ruling No. 2011-2890
August 1, 2011

The grievant has requested a ruling on whether her August 12, 2010 grievance with the Department of Behavioral Health and Developmental Services (the agency) qualifies for a hearing. The grievant alleges harassment and violation of the workplace violence policy. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Direct Services Associate (DSA) III with the agency and works the night shift. As the grievant's shift was ending on July 13, 2010, the grievant was involved in a verbal confrontation with an employee of the oncoming day shift. During this confrontation, the grievant, and others on her shift, were allegedly accused of allowing patients to lie in wet beds. The grievant claims that on the following day, the RN Manager, Manager R, contacted her via telephone and accused her of allowing patients to lie in urine all night long and demanded that she attend a meeting on the morning of July 16, 2010 to discuss the incident on July 13th. The grievant informed Manager R that she could not attend the July 16th meeting because she would be on leave and out of the state on that date. The grievant states that Manager R was very hostile and she felt threatened during their conversation. The grievant asserts that she spoke to Manager R later on that same day and that his tone was still hostile and threatening, but he agreed to change the meeting from the morning of the July 16th to the morning of July 19th due to the grievant's scheduled leave.

At the meeting on July 19th, the grievant claims that Manager R was yelling at her and again falsely accused her of allowing a patient to lie in urine all night on the morning of July 13th. The grievant states that she felt intimidated and threatened by Manager R's behavior at this meeting. Subsequently, on July 27, 2010, Manager R sent an e-mail to staff regarding bed check procedures on the grievant's unit. The grievant asserts that the e-mail was sent to "humiliate" the grievant and the night shift staff.

The grievant challenged these events by initiating a grievance on August 12, 2010. After the parties failed to resolve the grievance during the management resolution steps, the grievant requested qualification of her grievance for hearing. The agency head denied the grievant's request, and she has appealed to this Department.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[1] 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.

In this case, the grievant alleges that Manager R has falsely accused her of neglect, engaged in intimidating and threatening behavior, harassed her and damaged her reputation with his slanderous statements.

Intimidating and Threatening Behavior

The grievant's claim that Manager R has engaged in intimidating behavior and threatening behavior implicates a misapplication and/or unfair application of Department of Human Resource Management (DHRM) Policy 1.80, "Workplace Violence." For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that show that the grievant was subjected to an adverse employment action[2] and 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.

Policy 1.80 requires an agency to provide a safe working environment for its employees.[3] Federal and state laws also require employers to provide safe workplaces.[4] 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 employment.[5]

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[1] *See* Va. Code § 2.2-3004(B).

[2] Va. Code § 2.2-3004(A). An adverse employment action is defined as a "tangible employment act constituting 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." Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

[3] DHRM Policy No. 1.80.

[4] 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 harm to his employees." Va. Code § 40.1-51.1(A); 16 Va. Admin. Code § 25-60-30.

[5] *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).

"Workplace violence" is defined as "[a]ny physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties."[6] Prohibited conduct includes, but is not limited to the following: engaging in behavior which subjects another individual to extreme emotional distress and includes shouting and "an intimidating presence."[7] This Department has previously sought informal guidance from DHRM regarding the applicability of the Workplace Violence policy to claims of supervisor-subordinate conflict. DHRM subsequently advised this Department that Policy 1.80 may be violated if the employee subjectively experiences the supervisor's conduct as threatening or intimidating.[8]

In this case, there is evidence to indicate that Manager R may have violated the workplace violence policy. But while this Department certainly does not condone Manager R's alleged behavior, there are some cases where 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 where the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

In the present case, the grievant seeks, as relief, to have no further incidents of "workplace harassment" and/or intimidating behavior, corrective action taken against Manager R for his behavior and his "slanderous" statements, a written apology from Manager R and no retaliation. The agency has provided evidence that it has investigated the grievant's allegations, taken appropriate corrective action against Manager R, had Manager R apologize in writing to the grievant for his actions, required Manager R to attend training on workplace violence and harassment, and has assured the grievant that she will not be subjected to retaliation. According to the agency, since the initiation of her grievance, the grievant has made one complaint related to Manager R. That is, the grievant complained that Manager R was on her unit "checking up on her." The agency asserts that it checked Manager R's security door card-scans on the grievant's unit during her shift and could not confirm the grievant's allegation. The agency asserts that no other complaints have been received from the grievant regarding Manager R. During this Department's investigation, the grievant stated that there have been other incidents with Manager R, but these incidents were "mostly minor." She stated that there was one event on March 8, 2011 in which she and two of her co-workers felt "uncomfortable" but the grievant provided no details of this event. The grievant further stated that "for the most part, [Manager R] has kept his distance from [her]" and she has been able to "move past" the events of July 2010.

It therefore appears that this is a case where much of the requested relief has been provided, and the requested relief that has not been provided is not relief that a hearing officer could order, as hearing officers cannot order agencies to take corrective action against employees.[9] Consequently, further effectual relief is unavailable to the grievant through the

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[6] DHRM Policy 1.80.
[7] *Id.*
[8] *See* EDR Ruling Nos. 2006-1248, 1249, 1278.
[9] *See Grievance Procedure Manual* § 5.9(b) (providing that the taking of an adverse action against an employee is not relief available through a grievance hearing.)

grievance procedure. 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 where, as in this case, the incident has been properly investigated, measures have been taken to remedy such behavior, and the grievant has provided insufficient evidence that further incidents of workplace violence have occurred.

In light of the foregoing, the grievant's misapplication of policy claim does not qualify for a hearing.

Harassment

The grievant claims that she has been harassed by Manager R. For a claim of hostile work environment or 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.[10] "[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."[11]

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. Although the grievant asserts that the treatment she has experienced is based on her gender, there has been no evidence presented to support these allegations. Because the grievant has not raised a sufficient question as to the elements of a claim of harassment based on gender, her claim of harassment does not qualify for a hearing.

This ruling does not mean that EDR deems the alleged actions by Manager R, if true, to be appropriate; only that the claim of harassment or hostile work environment on the basis of gender does not qualify for a hearing based on the evidence presented to this Department. This ruling in no way prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens.

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

[10] *See* Gilliam v. S.C. Department of Juvenile Justice, 474 F.3d 134, 142(4th Cir. 2007).
[11] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

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 T. Farr
Director