Issue: Qualification – Discrimination (disability); Ruling Date: June 17, 2011; Ruling No. 2011-3011; Agency: Department of Juvenile Justice; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Juvenile Justice
Ruling No. 2011-3011
June 17, 2011

The grievant has requested a qualification ruling in his April 4, 2011 grievance with the Department of Juvenile Justice (the agency). For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant initiated his April 4, 2011 grievance to challenge an alleged discriminatory and/or retaliatory hostile work environment and harassment by the agency. The grievant has alleged violations of the Americans with Disabilities Act (ADA) and the Health Insurance Portability and Accessibility Act (HIPAA).[1] As relief, the grievant seeks reinstatement of leave taken from March 18, 2011 to April 29, 2011, full retirement with full benefits, and letters of reprimand against particular members of agency management. The grievant has also identified damages and potential losses he has allegedly incurred as a result of the agency's actions. The grievant retired from the agency effective May 1, 2011.

DISCUSSION

Although state employees with access to the grievance procedure may grieve anything related to their employment, only certain grievances qualify for a hearing.[2] Furthermore, this Department has recognized that even if a grievant's allegations are true there are still some cases when qualification is inappropriate even if law and/or policy may have 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.

[1] Generally speaking, the grievance procedure is not a proper forum to address a cause of action the grievant might have under HIPAA, if any. *See, e.g.*, EDR Ruling No. 2007-1724. As such, the grievant's HIPAA claim in this case does not qualify for a hearing.
[2] *See Grievance Procedure Manual* § 4.1.

It appears that this is a case in which the requested relief (and indeed any relief) that might be available is not relief that a hearing officer has the authority to order. For instance, hearing officers cannot order agencies to take corrective action against employees.[3] A hearing officer also has no authority to award compensatory damages.[4] Further, the grievant's claim for reinstatement of leave would not be an appropriate remedy that a hearing officer could award. The grievant was out of work during this time period and, as such, there is no indication of any potential claim for which the reinstatement of that leave could be ordered by a hearing officer. In addition, the grievant's request for full retirement credit with full benefits is not appropriate relief under the grievance procedure.[5]

While upon any finding of past harassment, a hearing officer could order an agency to cease the harassment and comply with policy and applicable law going forward, such an order is ineffectual in this case because the grievant no longer works with the agency; further, there is no way to go back and undo the allegedly harassing conduct in and related to the work environment. Similarly, 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 no effect on the incidents at issue in this grievance because the grievant has left the agency.[6]

Because a hearing officer would be unable to provide any remedy to the grievant under the facts of this case, the grievance does not qualify for a hearing. This ruling does not mean that EDR deems the alleged conduct at issue, if true, to be appropriate, only that the grievance does not qualify for a hearing because the grievance procedure cannot provide this grievant any relief. Accordingly, this ruling does not address the underlying merits of the grievant's claims.

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

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[3] *See Grievance Procedure Manual* § 5.9(b).
[4] *Id.*
[5] *See Grievance Procedure Manual* § 5.9(a) – (b).
[6] To the extent the grievance is alleging a claim of involuntary retirement, i.e., constructive discharge, which is not expressly couched as such on the Grievance Form A, this claim would not qualify for a hearing. To prove constructive discharge, an employee must at the outset show that the employer "deliberately made her working conditions intolerable in an effort to induce her to quit."[6] The employee must therefore demonstrate: (1) that the employer's actions were deliberate, and (2) that working conditions were intolerable. *See, e.g.*, Honor v. Booz-Allen & Hamilton, Inc., 383 F.3d 180, 186-87 (4th Cir. 2004). An employer's actions are deliberate only if they "were intended by the employer as an effort to force the [employee] to quit." Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 272 (4th Cir. 2001). Whether an employment environment is intolerable is determined from the objective perspective of a reasonable person. *See* Williams v. Giant Food Inc., 370 F.3d 423, 434 (4th Cir. 2004). The grievant has not provided sufficient evidence to show that the agency deliberately made his working conditions intolerable in an effort to induce him to quit. Moreover, the conduct described in this case does not appear to be so extreme as to make the grievant's working conditions objectively intolerable.

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.

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Claudia Farr
Director