Issues: Qualification – Management Actions (non-disciplinary transfer), Discrimination (Gender), and Retaliation (Other Protected Right); Ruling Date: July 21, 2011; Ruling No. 2011-3024; Agency: Department of Corrections; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2011-3024
July 21, 2011

The grievant has requested a ruling on whether her April 25, 2011 grievance with the Department of Corrections (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On April 8, 2011, the grievant was informed that her position was being restructured and moved to a different location. The grievant was previously a Program Development and Evaluation Unit Manager who was responsible for designing and implementing training and systems for evidence based practices (EBP) for a part of the agency. As a result of the April 8, 2011 move, the grievant was assigned to work at a different location as the EBP Consultant to implement EBP for the entire agency. The grievant submitted her April 25, 2011 grievance to challenge this transfer, which she describes as a demotion, on the basis of misapplication of policy, retaliation, and discrimination. Her grievance also includes other allegations of retaliation and hostile work environment created by her former supervisor.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[1] Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out and the reassignment or transfer of employees within the agency 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 improperly influenced management's decision, or whether policy may have been misapplied or unfairly applied.[2]

[1] *See* Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

Misapplication of Policy

The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[3] For example, in claims of policy misapplication, the threshold question is whether the grievant has suffered an adverse employment action.[4] 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."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6]

A transfer or reassignment may constitute an adverse employment action if a grievant can show that the transfer/reassignment had some significant detrimental effect on the terms, conditions, or benefits of her employment.[7] A reassignment or transfer with significantly different responsibilities, or one providing reduced opportunities for promotion can constitute an adverse employment action, depending on all the facts and circumstances.[8]

Based on a review of the grievant's previous Employee Work Profile (EWP) and her new EWP, the grievant's position was reconfigured and relocated, but the subject of her duties remained largely the same concerning the agency's EBP training. Instead of developing the agency's plan for EBP in a limited scope, she is now responsible for implementing the plan for the entire agency. The only other change cited by the grievant is that she no longer supervises a staff. However, both her old position and new position were considered to be at the "manager" level. Thus, considering the entirety of the new position, with its expanded scope of responsibility, we cannot conclude that the transfer was a demotion. The agency's actions do not appear to have had a significant detrimental effect on the grievant or caused her a significant change in employment status such as reduced duties or a decrease in salary or benefits. Therefore, the actions challenged by the grievant concerning her reconfigured position are not adverse employment actions.[9] Accordingly, the grievant's claim of misapplication and/or unfair application of policy cannot qualify for a hearing.

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

[4] 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. The grievant's retaliation allegations are discussed below.

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

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

[7] *See id.*

[8] *See* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371 (4th Cir. 2004); Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999); *see also* Edmonson v. Potter, 118 F. App'x 726 (4th Cir. 2004) (unpublished opinion).

[9] An allegation that the transfer has increased the grievant's commuting distance would not appear to be an adverse employment action. *See* Byers v. HSBC Fin. Corp., 416 F. Supp. 2d 424, 439 (E.D. Va. 2006) (citing *Boone*, 178 F.3d at 256-57).

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;[10] (2) the employee suffered a materially adverse action;[11] 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.[12] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[13]

The grievant alleges that her former supervisor has retaliated against her (primarily by restructuring her position) in relation to alleged sexual harassment by her former supervisor.[14] Filing a complaint of sexual harassment is protected activity. However, the grievant did not report any alleged sexual harassment until April 11, 2011, after she was notified about the restructuring of her position on April 8, 2011. Consequently, her protected activity of filing a complaint of sexual harassment could not have caused the restructuring and transfer. Thus, the retaliation claim is without merit as it relates to reports of sexual harassment.

It does appear that the grievant engaged in discussions with her former supervisor in late 2010 and/or early 2011 about the alleged "hostile work environment" he was creating through his behavior as her supervisor. Attempting to address workplace concerns with a supervisor is also protected conduct.[15] However, even if the grievant is alleging that her former supervisor restructured her position and transferred her in retaliation for her having raised these workplace concerns, such a claim is also unsupported. The restructuring of the grievant's position was not the decision of her former supervisor, but rather an agency-wide plan put into effect by upper level management. Because the individual who allegedly had a retaliatory intent (the grievant's former supervisor) was not the source of the transfer, it cannot be inferred that retaliation played any role in the restructuring of the grievant's position.[16] As the grievance does not raise a sufficient question as to the elements of a claim of retaliation, it does not qualify for a hearing.

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

[11] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); s*ee, e.g*., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

[12] *See, e.g.*, EEOC v. Navy Fed Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).

[13] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

[14] The grievant's claims regarding harassment are discussed further below.

[15] Va. Code § 2.2-3000.

[16] We note as well that to the extent the grievant is challenging other acts by her former supervisor as retaliatory and/or creating a retaliatory hostile work environment, this Department has reviewed no information to suggest that

Sexual Harassment/Hostile Work Environment

For a claim of sexual 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 his or her sex; (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.[17] "[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."[18]

The grievant's allegations of harassment appear to stem from an incident involving a hug between her and her former supervisor in November 2010. However, there is no indication that the grievant's other allegations regarding her former supervisor's creation of a hostile work environment bear any relation to this one alleged incident. In addition, the single hugging incident, though likely not appropriate, does not appear to be so severe as to create a hostile work environment based on the facts as described by the grievant.

A grievance must raise more than a mere allegation of sexual 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 sex.[19] Here, the grievant has not presented evidence raising a sufficient question that the work-related conduct by her former supervisor was based on sex or any other protected status. More importantly, it does not appear that these issues, which are largely disagreements over the conduct and use of subordinate staff, rose to a "sufficiently severe or pervasive" level such that an unlawfully abusive or hostile work environment was created.[20] As courts have noted, prohibitions against harassment, such as those in Title VII, do not provide a "general civility code"[21] or remedy all offensive or insensitive conduct in the workplace.[22] As the grievance does not raise a sufficient question of harassment/hostile work environment, it does not qualify for hearing.

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any of the conduct described in her grievance, except possibly the transfer, would amount, even collectively, to a materially adverse action.

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

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

[19] *See also, e.g.,* DHRM Policy 2.30, *Workplace Harassment* (defining "Workplace Harassment" as conduct that is based on "race, sex, color, national origin, religion, age, veteran status, political affiliation, or disability").

[20] Although the grievant's transfer was not insignificant, there is no indication that the decision to do so was based on a protected status or the result of any discriminatory intent allegedly harbored by the grievant's former supervisor. As stated above, the decision was not made by the grievant's former supervisor, but by higher level management. There is not even a suggestion that anyone other than the grievant's former supervisor possessed any kind of discriminatory intent.

[21] Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

[22] *See, e.g.*, 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).

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 the 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