Issue: Qualification/Retaliation/other protected right/ Compensation/Leave; Ruling Date: December 1, 2003; Ruling #2003-153; Agency: Virginia Department of Health; Outcome: not qualified (keywords = leave slips)

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Health
Ruling Number 2003-153
December 1, 2003

The grievant has requested a ruling on whether her April 21, 2003 grievance with the Virginia Department of Health (VDH or the agency) qualifies for a hearing. The grievant claims retaliation by the agency and that she is being set up to be fired. Additionally, the grievant challenges her current salary, leave taken for four days in February and March 2003, and the removal of "M.D." from behind her name on her business cards.[1] For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as an Educational Support Specialist III with the Department of Health. In early fall of 2002, and again in approximately February 2003, the grievant questioned management regarding her salary. In February 2003, the grievant claims she highlighted discrepancies between money allocated for her salary in the Memorandum of Agreement (MOA) renewal for the program she heads and money allocated for her salary in the budget created by her district. The grievant claims that she is being paid less money than was allocated in the MOA for her salary.[2]

On February 24, 2003, February 28, 2003, March 14, 2003 and March 17, 2003, the grievant called in to work requesting family sick leave. The leave slips submitted by the grievant for these days indicate that she arrived at work later each day and did not take a full day of leave (i.e. 8 hours) on any of the four days in question. On March 21, 2003, the grievant was given a memorandum by her supervisor questioning the leave slips submitted for the four days. The memorandum states that because the supervisor could not verify the grievant's arrival time on any of the four days in February and March 2003, the grievant would be required to take eight hours of leave for all four days.

[1] While the grievant does not specifically state these as issues on her Form A, as relief, the grievant seeks an adjustment to her current salary, that her time be accurately reflected, and clarification of Virginia Code on what constitutes the practice of medicine. As such, each of these issues will be addressed specifically below.
[2] The MOA indicates that the anticipated salary and benefits package for the grievant's position was $49,368. The grievant's salary is $34,354 and she also receives benefits worth approximately $10,306 for a total compensation package of $44,660.

On March 25, 2003, the grievant was given a second memorandum from her supervisor advising her that she could no longer use the initials "M.D." behind her name on her business cards. The agency claims that the use of "M.D." behind the grievant's name could be construed as a readiness to practice the healing arts, which is not a part of the grievant's duties with VDH.[3] Additionally, the agency claims that the grievant's use of the letters "M.D." violates Virginia Code §54.1-2903.[4]

DISCUSSION

Counseling Memoranda

The grievant claims that the two memoranda she received in March 2003 were in retaliation for her questioning her salary. 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; (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an 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's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation.[5]

Under the grievance procedure, "protected activities" are limited to (1) the use or participation in the grievance procedure; (2) complying with any law of the United States or the Commonwealth; (3) reporting any violation of a law to a governmental authority; (4) seeking to change a law before Congress or the General Assembly; (5) reporting an incident of fraud, abuse, or gross mismanagement; or (6) exercising any right otherwise protected by law.[6] Here, the grievant has presented no evidence that she engaged in any of the protected activities above. Under the facts of this case, advocating for a salary increase and challenging alleged discrepancies between the MOA and the district budget do not appear to be protected activities.[7] Moreover, as discussed below, the grievant did not

---

[3] Although the grievant is a graduate of a foreign medical school, she is not licensed to practice medicine in Virginia or the United States.

[4] Virginia Code § 54.1-2903 states, "Any person shall be regarded as practicing the healing arts who actually engages in such practice as defined in this chapter, or who opens an office for such purpose, or who advertises or announces to the public in any manner a readiness to practice or who uses in connection with his name the words or letters "Doctor," "Dr.," "M.D.," "D.O.," "D.P.M.," "D.C.," "Healer," or any other title, word, letter or designation intending to designate or imply that he is a practitioner of the healing arts or that he is able to heal, cure or relieve those suffering from any injury, deformity or disease."

[5] *See* Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000).

[6] *See* Va. Code § 2.2-3004(A)(v) and (vi).

[7] Clearly, speech is protected by law (the United States Constitution). However, a government employee does not have an absolute right to freedom of speech. Rather, "the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by an injury the speech could cause to the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Waters v. Churchill, 511 U.S. 661, 668 (1994)(internal quotation marks and citations omitted). "Because almost anything that occurs within a public agency could

suffer an adverse employment action as a result of management issuing the grievant the two counseling memoranda.

The General Assembly has limited issues that may be qualified for a hearing to those that involve "adverse employment actions."[8] 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."[9] Thus, for a claim of discrimination or retaliation to qualify for a hearing, the action taken against the grievant must result in an adverse effect on the terms, conditions, or benefits of one's employment.[10] In this case, the grievant has presented no evidence that she has suffered an adverse employment action, because the informal counseling memoranda had no significant detrimental effect on the grievant's employment status.[11]

Salary

The April 21, 2003 grievance also challenges the grievant's current salary. In his qualification decision, the agency head alleges that the grievant has failed to comply with the 30 calendar day requirement of the grievance procedure with regard to the issue of salary. In this case, even if this Department were to assume without deciding that the grievant timely initiated her grievance on the issue of salary, this issue would not qualify for hearing for the reasons discussed below.

---

be of concern to the public, [courts] do not focus on the inherent interest or importance of the matters discussed by the employee. Rather, [the court's] task is to decide whether the speech at issue in a particular case was made *primarily* in the plaintiff's role as citizen or *primarily* in his role as employee. In making this determination, the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment." Harris v. City of Virginia Beach, 1995 U.S. App. LEXIS 30912 (4th Cir. 1995) at 14-15 (unpublished opinion, citations omitted, emphasis added). Whether the speech fairly relates to an issue of public concern turns on the content, form, and context of the speech. Harris, 1995 U.S. App. LEXIS at 15. The inquiry should determine "whether the 'public' or the 'community' is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a 'private' matter between employer and employee." Harris, 1995 U.S. App. LEXIS at 16. In this case, it would appear that although the grievant has essentially charged the agency with allocating funds in a manner inconsistent with the MOA, [her] concern appears to be *primarily* 'private' and *primarily* focused on her alleged salary shortfall as opposed to a charge of fraud, abuse, or gross mismanagement, which could be viewed as public concerns. For instance, the grievant has never reported the apparent discrepancy between the MOA and division budget to the Fraud Waste and Abuse Hotline or any other investigative body as a misuse of state funds.

[8] Va. Code § 2.2-3004(A).

[9] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

[10] Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

[11] This Department recognizes the distinction between the counseling memoranda (as they relate to alleged problems with the grievant's performance) and the actions taken *as a result* of the memoranda (the required use of leave time in February and March 2003 and the removal of the grievant's "M.D." designation on her business cards). The resulting actions of the counseling memoranda are discussed in turn below. However, this Department has long held that counseling memoranda *themselves*, which merely communicate management concerns to employees, are not adverse employment actions. *See, e.g.* EDR Ruling 2003-169.

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[12] Although all complaints initiated in compliance with the grievance process may proceed through the three resolution steps set forth in the grievance statute, thereby allowing employees to bring their concerns to management's attention, only certain issues qualify for a hearing. Claims relating to such issues as the establishment and revision of wages (including salaries) 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 state policy may have been misapplied.[13] In this case, the grievant claims that the agency has failed to provide her a salary commensurate with the MOA. However, the grievant does not claim, nor has this Department found any evidence, that her alleged inappropriate salary is the result of discrimination, retaliation, discipline or misapplication of policy.[14] As such, this issue does not qualify for hearing.

Leave Time

As relief, the grievant requests that her leave time for the four days in February and March 2003 be accurately reflected. On all four days, the grievant called in to work requesting family sick leave and stated that she would possibly arrive at work later during the day. The grievant claims she did in fact arrive at work later during each of the four days in question.[15] The grievant turned in leave slips for the four days on March 14th and March 17th.

Because the grievant's supervisor could not confirm the grievant's late arrival at work on the days in question, she directed the grievant to alter her leave slips to reflect that the grievant was out for the entire day on each of the four days in February and March 2003. Additionally, because the supervisor claims to have previously discussed with the grievant the need to know the grievant's whereabouts at all times, the supervisor further required the grievant to immediately notify her supervisor of her arrival at work in the

---

[12] Va. Code § 2.2-3004 (B).

[13] *See* Va. Code §2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (c) page 11.

[14] While one might expect the funding set forth in the MOA to correspond with the district budget, the grievant has not identified nor is this Department aware of any state policy that addresses this issue.

[15] Specifically, the grievant claims that she arrived at work on February 24, 2003 at 3:00 p.m., but did not see her supervisor after her arrival. In support of her claim that she arrived to work on the afternoon of February 24th, the grievant presented two e-mail messages she sent at 4:37 p.m. and 4:56 p.m. on that day. The grievant claims that she arrived at work at 11:45 a.m. on February 28, 2003, despite her plans to be in Richmond that day for a meeting. In support of this claim, the grievant presented an e-mail verifying that the grievant had numerous contacts with another VDH employee on February 28th and her monthly schedule confirming her meeting in Richmond on that day. The grievant claims she arrived at work at 11:00 a.m. on March 14, 2003 and presented three VDH employee statements verifying that the grievant communicated with them about, and they provided assistance to the grievant for, a class the grievant was teaching that afternoon. One of these employees reported that the class ended around 4:40 p.m. The grievant further claims she arrived at work at 3:00 p.m. on March 17, 2003. In support of her claim, the grievant presented an e-mail from another VDH employee verifying that she spoke with the grievant on the afternoon of March 17th.

future, to come into the office first before going anywhere else on business, to turn in and maintain accurate monthly schedules, and to inform her supervisor immediately if she works beyond 4:30 p.m. 10 p.m. to 4:30 p.m. on February 24th; from 11:45 a.m. to 4:30 p.m. on February 28th; and from 2:00 p.m. to 4:30 p.m. on March 14th. The grievant was not given any credit for March 17th. The agency only credited the grievant for time it could verify she was at work during her normal working hours (i.e. 8:00 a.m. to 4:30 p.m.).

The grievant claims that the agency's failure to credit her for all her time worked on February 24th, February 28th, March 14th, and March 17th is retaliatory. As discussed above, it does not appear that the grievant has engaged in a protected activity by challenging apparent discrepancies between the MOA and the district budget. Moreover, the grievant has not provided any evidence to rebut the agency's stated business reason for docking her pay: that it could not conclusively establish that the grievant actually worked the hours she claimed. Significantly, despite the grievant's apparent failure to comply with agency policy requiring the submission of leave slips within 24 hours of returning to work (discussed in more detail below), the agency nevertheless considered evidence presented by the grievant to support the hours she claimed she worked. Based on this evidence and information gathered as a result of the agency's investigation into the matter, the grievant was credited for having worked on three of four of the disputed days. Thus, it would appear that the agency's docking of pay was based on its inability to conclusively determine whether the grievant was at work during the remaining disputed hours rather than a desire to retaliate.

It should be noted that the grievant has not identified any state or agency policy that may have been misapplied by the agency requiring her to alter her leave slips. However, during this Department's investigation, the Department of Human Resource Management (DHRM), the agency charged with creating and interpreting state policy, confirmed that the agency's refusal to credit the grievant with leave time because it could not confirm the grievant's presence at work could possibly implicate DHRM Policy No. 1.25; *Hours of Work*. Under DHRM Policy 1.25, "Employees are expected to notify management as soon as possible if they are unable to adhere to their schedules, such as by arriving late to work."[16] Additionally, VDH has a policy that requires its employees, upon return from sick leave, to forward a leave slip to human resources no later than close of business the following day.[17]

On all four days in question, the grievant called in to work to inform them that she would be taking family sick leave for that day. The grievant further stated that she may be arriving at work later in the day; however she gave no definite time of arrival or indication that she would be coming to work at all. The grievant appropriately altered her schedule under DHRM Policy 1.25 for the days in question by notifying management of her need to take family sick leave. However, it can be argued that the grievant had a duty under DHRM Policy 1.25 to further notify management of her additional need to alter her already

[16] DHRM Policy 1.25; *Hours of Work*, page 3 of 4.
[17] *See* VDH Administrative Policy; *Leave Requests; approval of, (Calling In, Deadlines for Submission of Leave Slips)*, October 10, 2001.

modified schedule by informing management that she had arrived at work and did not need the entire day for family sick leave. Additionally, had the grievant submitted all her leave slips according to timelines established by VDH policy, it may have been possible for the agency to more accurately determine when the grievant arrived at work on the four days in question. As such, it appears that the grievant, not the agency, has potentially violated state and agency policies. Therefore, the grievant's claim that her time has been inaccurately reflected cannot qualify for hearing on the basis that the agency failed to comply with policy.

Use of "M.D." Designation

The grievant claims that she should be able to use "M.D." behind her name on her business cards and seeks clarification of Virginia Code § 54.1-2903 by management. All claims relating to issues such as the means, methods, 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 improperly influenced management's decision, or whether state policy may have been misapplied.[18] The grievant claims that the agency's prohibition of her use of the initials "M.D." behind her name is retaliatory. As discussed above, the grievant does not appear to have engaged in a protected activity. Moreover, the agency's refusal to allow her to use "M.D." behind her name on her business cards does not appear to be an adverse employment action. Finally, there is no state or agency policy that requires an agency to provide an employee with clarification of a statutory provision. As such, this issue does not qualify for hearing.

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 determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling. 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.

Claudia T. Farr
Director

Jennifer S.C. Alger
EDR Consultant

[18] Va. Code § 2.2-3004(A) and (C); Grievance Procedure Manual § 4.1(b) and (c), pages 10-11.