Issue: Qualification/claim of retaliation for grievance procedure participation; consolidation for purposes of hearing; Ruling Date: January 31, 2005; Ruling #2004-761, 2004-917, 2004-918; Agency: Department of Corrections; Outcome: qualified and consolidated for purposes of hearing

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections/ No. 2004-761, 2004-917, & 2004-918
January 31, 2005

The grievant has requested qualification of his March 8 and May 15, 2004 grievances, and has asked that this Department grant him the relief requested in his July 16, 2004 grievance due to the agency's purported non-compliance with the grievance process. For the reasons set forth below, this Department declines to award the relief requested in the July 16, 2004 grievance but qualifies it for hearing along with the March 8th and May 15th grievances. In addition, the three grievances are consolidated for a single hearing.

FACTS

In September of 2002, the grievant timely filed a grievance alleging that the agency misapplied policy and retaliated against him. On September 3, 2003, the EDR Director qualified the grievance for a hearing. On October 6, 2003, a hearing was held at the agency's regional office, and in an October 20, 2003 hearing decision, the hearing officer ruled that the agency had misapplied policy.

The grievant had claimed that the agency's preferential treatment of a particular inmate (Inmate E) had undermined his authority with other inmates and created a hazardous work environment. The hearing officer found "that because Inmate E was given special consideration when facing disciplinary action, the agency emboldened Inmate E and made him feel protected when making direct or indirect threats against Grievant."[1] He further found that, the "grievant was placed in reasonable fear of injury by Inmate E."[2] The hearing officer concluded that by "failing to apply IOP [internal operating procedure] 861 the agency failed to properly protect Grievant from workplace

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[1] In particular, the hearing officer determined that the Inmate Hearing Officer (IHO) had violated policy because he "(1) dissuaded Grievant from filing charges against Inmate E, (2) arbitrarily dismissed charges against Inmate E while Inmate E "was working for" the IHO, and (3) shredded a stack of charges pending against Facility inmates." October 20, 2003, Hearing Decision, page 6. The hearing officer held that the "IHO's actions made Inmate E believe he could abuse his relationship with Grievant and made Grievant unnecessarily fear injury by Inmate E and by inmates within Inmate E's immediate circle of friends." October 20, 2003, Hearing Decision, Case No. 5813, pages 6-7.

[2] October 20, 2003, Hearing Decision, Case No. 5813, page 7.

violence" and that the "agency's actions were contrary to the DHRM Policy 1.80, *Workplace Violence*."[3] The hearing officer ordered the agency to "comply with IOP 861 and thereby protect Grievant from workplace violence."[4]

During the December 2003/January 2004 timeframe, the grievant complained that he was being subjected to retaliation and harassment as a result of his September 2002 grievance regarding preferential treatment of certain prisoners. A Captain at his facility concurred, stating that he too believed that the grievant had been subjected to retaliation.

On February 6, 2004, the grievant claims that he received a threatening call from an individual implicated in the September 2002 grievance, the facility's Inmate Hearing Officer (IHO). The grievant reported the call to his Lieutenant two days later. The grievant asserts that the Lieutenant took the threat seriously and reported the threat to the Warden the same day.

On or about February 12, 2004, the grievant and Captain met with the agency's Deputy Director. At this meeting, the grievant informed the Deputy Director that the practice which he had earlier grieved, preferential treatment of certain inmates, still continued and that those who complained of the practice were the victims of retaliation.

On or about February 15, 2004, the grievant asked the Lieutenant about the status of his complaint of the threatening phone call. The Lieutenant replied that he had reported the call to the Warden. According to the grievant, however, in a follow-up conversation with the Lieutenant on or about March 2nd, the Lieutenant purportedly stated that he thought that the grievant was merely blowing off steam. The grievant concluded that his concerns about the threatening phone call had not been properly addressed and thus on March 8, 2004 he initiated a grievance regarding the matter.

On or about May 5, 2004, the grievant asserts that he was improperly counseled by a Major at a meeting in the presence of others for the alleged use of obscene language. On May 15, 2004, the grievant challenged the Major's actions by initiating a grievance.

On June 17, 2004, the grievant was transferred to another facility. While the grievant was initially not given a reason for the transfer,[5] the Deputy Director later informed him that "the Department believed it was in your best interest to move you so that a thorough investigation into this situation could occur and it would remove you from the [hostile] environment that was such a concern to you." The Deputy added that management at the facility where the grievant had worked was increasingly concerned about the operation of the facility and the safety of the staff, public, and inmates. He

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[3] *Id.*
[4] *Id.*, page 8.
[5] The grievant was simply informed that he was being temporarily assigned and that a special agent from the Inspector General's Office would be contacting him in the near future to discuss his issues and concerns. *See* June 17, 2004 letter from the Warden to the grievant.

explained that "[t]heir concern was that your daily activities there were possibly distracting other staff from performing their responsibilities."[6]

On July 16, 2004 the grievant initiated a grievance in which he challenged his transfer to another facility. In his grievance, he also asserted that the facility from which he had been transferred continues its practice of negating a significant number of inmate charges written by enforcement officers against inmates.

On August 30, 2004, the grievant faxed the DOC agency head, asserting that he could not continue his grievance until he received the following statements:

> I request that I am provided the statement from the staff members that [the Regional Director] stated that the statements for the witnesses in the [May 5th] meeting indicate this is true.[7]
>
> I also request that I be provided the statements from the management to [the Regional Director and Deputy Director] that is relevant to me being transferred. Also statements from officers that have claimed that my activities distracted them from doing their jobs.

In response to this request, the grievant was provided on September 9, 2004 with six redacted e-mail statements relating to the May 5th meeting. As to documents regarding the reasons for the grievant's transfer and his purported distracting activities, the agency responded that "[t]he other documents that you have requested do not relate to this grievance." The grievant then requested a ruling from this Department regarding the documents he was not provided.

On November 9, 2004, this Department held that contrary to the agency's contention, the documents regarding the reasons for the grievant's transfer and his purported distracting activities appeared to be relevant to his July 16th grievance.[8] As such, this Department ordered that:

> "statements from the management to [the Regional Director and Deputy Director] . . . relevant to [the grievant] being transferred" appear to be relevant to the grievant's July 16th grievance and must be provided to the grievant within 5-workdays of receipt of this ruling unless 'just cause' exists for withholding such documents.

This Department further held that because the grievant had been informed that he had been transferred due to his disruptive activities, statements from officers who claimed

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[6] During the time period prior to his transfer, the grievant asserts that he was not allowed full access to agency computers and was the only corrections officer denied such access.
[7] The grievant asserts that by this he meant that the agency should not have redacted the names of the individuals who had provided e-mail summaries of the May 5th meeting.
[8] EDR Ruling 2004-878.

that the grievant's activities "distracted them from doing their jobs" also appeared to be relevant. Accordingly, the November 9th ruling held that "the agency shall provide (absent just cause) any existing written statements from officers who claim that the grievant's activities have 'distracted them from doing their jobs,' within 5-workdays of receipt of this ruling."

On November 1, 2004, the grievant was informed that his temporary transfer would be permanent. The agency asserted that its decision was based on its determination that the grievant's "daily activities were distracting other staff from performing their responsibilities" and his "belief that [the facility from which the grievant was transferred] is an unsafe environment in which to work."[9]

On December 1, 2004, the grievant requested that this Department rule in his favor because the agency had not provided him with the documents that this Department ordered produced.

DISCUSSION

I. Qualification

Retaliation:

The March 8th, May 15th, and July 16th 2004 grievances each essentially assert that management actions (or inactions) were retaliatory in nature and stem from the grievant's successful prosecution of his 2002 grievance which resulted in the October 20, 2003 hearing decision in his favor.

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 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.[11] 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.[12] Evidence establishing a causal connection and

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[9] November 1, 2004 letter from the Warden to the grievant.
[10] *See* Va. Code § 2.2-3004 (A)(v). 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 the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.
[11] Dowe v. Total Action Against Poverty, 145 F.3d 653, 656 (4th Cir. 1998).
[12] *See* Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000); Dowe, 145 F.3d at 656.

inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[13]

The March 8th Grievance

The grievant claims that the agency's failure to promptly address his complaint regarding the IHO's threatening phone call was an act of retaliation. Certainly the grievant's prior participation in the grievance process is a protected activity.[14] Furthermore, as this Department recognized in Ruling #2002-232, agency action or inaction that allows an employee to be subject to threatening behavior and/or a heightened risk of physical violence may constitute an adverse employment action. The final question is whether there is a causal link between the agency's inaction and the protected activity.

There remain questions of fact surrounding the reporting of the February 6th phone call from the IHO and the agency's subsequent response that are best answered by a hearing officer. The grievant points out that the agency did not take any action until 127 days after he first reported the allegedly threatening phone call. Furthermore, while the grievant was initially not given a reason for his transfer,[15] he was later informed by the agency's Deputy Director that "the Department believed it was in your best interest to move you so that a thorough investigation into this situation could occur and it would remove you from the [hostile] environment that was such a concern to you." The grievant argues that if the agency were genuinely concerned with removing him from an environment that he perceived as hostile it should not have taken 127 days to effectuate the transfer.

In addition, the agency has justified making the transfer permanent because of the grievant's belief that his former facility was "an unsafe environment in which to work." But given the Warden's observation that "the investigation of the facility by the Office of the Inspector General found that it was a safe environment and the other employees felt safe," any justification for making the temporary transfer permanent based on *actual* threat of harm or retaliation might reasonably be called into question. Likewise, any justification based on purportedly accommodating the grievant's *perception* of a hostile workplace might also be called into question given the grievant's clear indication that he did not want to be moved but only wanted the retaliation against him to cease.

Other possible evidence of retaliation consists of statements made by other DOC employees. Several corrections officers have stated that they believe that the grievant

[13] *See* Texas Dept. of Community Affairs v. Burdine, 450

has been subjected to retaliation. In addition, when the grievant formally complained that he was being subjected to retaliation and harassment during the December 2003 to January 2004 timeframe, a Captain at his facility concurred, stating that he too believed that the grievant was being retaliated against. Like the grievant, the Captain was also transferred to another facility.

The May 15th and July 16th Grievances

In his July 16th grievance, the Grievant asserts that management transferred him to another facility in retaliation for his prior grievance activity. This Department has long held that a transfer alone does not constitute an adverse employment.[16] Likewise, we have also long held that informal counseling such as the one that formed the basis of the May 15th grievance does not, by itself, constitute an adverse employment action. However, we have recognized that retaliation may also take the form of a hostile work environment. For a claim of retaliatory harassment to be qualified, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on his prior protected activity; (3) sufficiently severe or pervasive so as to alter the grievant's conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[17] This Department has recognized that in certain circumstances a collection of actions, which individually would not rise to the level of hostile work environment, can collectively raise a question as to whether such an environment existed.[18]

Viewed in the aggregate, management's alleged failure to timely respond to the report of the purportedly threatening phone call; the belated temporary transfer to another facility (later made permanent); and the May 5th verbal counseling, coupled with the grievant's claim that he was denied full access to agency computers (and was the only person so denied), raise a sufficient question as to whether the grievant has been subjected to a hostile workplace because of his prior grievance activity.

II. Compliance

Relief for Non-compliance:

The grievant has requested that the EDR Director rule in his favor due to the agency's alleged non-compliance with this Department's November 9, 2004 ruling. The grievant notes that the ruling stated that within 5-workdays of receipt of the ruling that the agency must provide certain documents or state with particularity the "just cause" for any non-disclosure. The grievant points to the agency's purported delay in providing him with the requested documents as non-compliance warranting a ruling in his favor.

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[16] *See* EDR Rulings Nos. 2003-102, 2003-174, and 2004-768.
[17] *See generally* Von Gunten v. State of Maryland, 243 F.3d 858, 865, 869-70 (4th Cir. 2001); Morris v. Oldham County Fiscal Court, 201 F.3d 784, 791-92 (6th Cir. 2000); Ray v. Henderson, 217 F.3d 1234, 1245-46 (9th Cir. 2000); Gunnell v. Utah Valley State College, 152 F.3d, 1253, 1264 (10th Cir. 1998).
[18] *See* EDR Ruling 2004-750.

Under the grievance statutes and procedure, should this Department find that the agency violated a substantial procedural requirement and that the grievance presents a qualifiable issue, this Department may resolve the grievance in the grievant's favor unless the agency can establish just cause for its noncompliance.[19] In this case, the agency has provided this Department with a chronology of events surrounding its provision of the requested documents. The ruling was placed in inter-agency mail on Tuesday, November 9th and was addressed to the central office grievance coordinator. The agency has provided a date-stamped copy of the ruling showing that it was received on November 17, 2004. The central office grievance coordinator was on annual leave on November 18th and 19th. On her return on Monday the 22nd the ruling was faxed to the facility from which the grievant was transferred. The Warden was on annual leave the week of the 22nd through the 26th (the week of Thanksgiving). On November 30th, the agency mailed out its response.

While the delay in getting the documents to the grievant was unfortunate, it does not appear as though it was based on bad faith. Inter-office mail, which was presumably designed to save the Commonwealth mailing expenses, is not always as prompt as first class mail. Furthermore, the several key players were on vacation during this period, and Thanksgiving intervened.[20] Thus, while there was admittedly somewhat of a delay in the grievant's receiving the requested documents, he has not asserted nor shown that he was prejudiced by this delay. EDR has the authority to and the inclination to rule against a party that intentionally flouts its directive. However, the acts complained of here do not appear to present such a case. Accordingly, we will not rule in the grievant's favor. Rather, the hearing officer will resolve this case on the merits.

Consolidation:

EDR strongly favors consolidation of grievances for hearing and will grant consolidation when grievances involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.[21]

This Department finds that consolidation of these three grievances appropriate. The grievances involve the same parties, potential witnesses, claims of retaliation, and share a common factual background. Furthermore consolidation is not impracticable in this instance.

This Department's rulings on compliance are final and nonappealable.[22]

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[19] *Grievance Procedure Manual* § 6. EDR would generally consider such an action only where the party in substantial noncompliance had engaged in bad faith or significantly prejudiced the other party through noncompliance. *See, e.g.,* EDR Ruling 2003-026.
[20] State offices were closed 2 and ½ days during the Thanksgiving week.
[21] *Grievance Procedure Manual,* § 8.5.
[22] Va. Code § 2.2-1001 (5).

Enforcement of the October 20, 2003 Hearing Officer's Order:

Finally, as we noted in the November 9th ruling, in his October 20, 2003 Hearing Decision the hearing officer ordered the agency to "comply with IOP 861 and thereby protect Grievant from workplace violence." The July 16, 2004 grievance asserts that the agency (1) continues to negate a significant number of charges which has undermined the authority of corrections officers and (2) retaliates against those who oppose this purported agency practice. The negation of disciplinary charges and the purported undermining of correction officer authority is the very subject of the September 2002 grievance and more importantly, the October 20, 2003 Hearing Officer's Decision. As such, if the grievant wishes to enforce the hearing officer's order, the grievant must petition the circuit court in the jurisdiction in which the grievance arose for an order implementing the hearing officer's decision.[23]

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Claudia T. Farr
Director

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William G. Anderson, Jr.
EDR Consultant, Sr.

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[23] *See* Va. Code § 2.2-3006(D).