Issues: Qualification – Misapplication of VSDP Policy, and Retaliation; Ruling Date: October 1, 2007; Ruling #2006-1352; Agency: Department of Veterans' Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Veterans' Services
Ruling No. 2006-1352
October 1, 2007

The grievant has requested a ruling on whether her February 20, 2006 grievance with the Department of Veterans' Services (DVS or the agency) qualifies for a hearing. The grievant claims that the agency has retaliated against her for previous protected activity and misapplied and/or unfairly applied the Virginia Sickness and Disability Program (VSDP) policy.[1] For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

Prior to her demotion/reassignment, the grievant was employed as the Director of Transportation at DVS. On June 20, 2005, the grievant initiated a grievance challenging her supervisor's requirement that she clock in upon her arrival and clock out when leaving. The third step-respondent found management's actions to be inconsistent "with the documented infractions" and an "excessive remedy to an alleged problem." As such, the grievant was granted her requested relief and concluded her grievance on July 20, 2005.

On September 21, 2005, the grievant began receiving short-term disability (STD) benefits. On January 4, 2006, the grievant was approved by her health care provider to return to work part-time. The grievant's supervisor determined that the grievant's request to work part-time could not be accommodated. On January 23, 2006, the grievant was released to return to work full-time full duty with no restrictions. Shortly after her arrival at work on the morning of January 23rd, the grievant was advised by her immediate supervisor that she was being demoted/reassigned from her position as Director of Transportation to the position of Transportation Aide. Although the grievant's salary was not changed as a result of the demotion/reassignment, she did go from a Pay Band 3

[1] Although the grievant does not expressly allege that the agency has misapplied and/or unfairly applied Department of Human Resource Management (DHRM) Policy 4.57, her grievance may be fairly read to include such a claim.

position to a Pay Band 2 position and lost all of her supervisory responsibilities. Upset by her demotion/reassignment, the grievant left work early on that day. The grievant worked a full 8 hour shift the following day, January 24th, but only worked 2 hours and 45 minutes on January 25th. The grievant did not return to work thereafter.

On February 20, 2006, the grievant challenged her demotion/reassignment and other numerous alleged retaliatory acts by her supervisor by initiating a grievance. 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 reserves the exclusive right to manage the affairs and operations of state government.[2] Thus, all claims relating to issues such as the methods, means, and personnel by which work activities are to be carried out generally do not qualify for 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 or applied unfairly.[3] In this case, the grievant claims that her supervisor has retaliated against her for her previous grievance activity and the agency has misapplied and/or unfairly applied policy.

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;[4] (2) the employee suffered a materially adverse action;[5] and (3) a causal link exists between the

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[2] Va. Code § 2.2-3004(B).

[3] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(b) and (c).

[4] *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 the 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)(4).

[5] *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414-15 (2006). Based on this Department's construction of the grievance statutes, a grievance must involve a non-trivial harm to qualify for hearing. *E.g.*, EDR Ruling No. 2004-932. Frequently, the non-trivial harm constitutes an "adverse employment action," (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"). However, we have recognized that in some circumstances it is appropriate to send grievances to hearing when the grievant may not have suffered an "adverse employment action." For example, this Department qualified a grievance involving a purported violation of the state's military leave policy (DHRM Policy 4.50). The agency had allegedly failed to reinstate an Army National Guard member to his former position and duties upon his return from active military duty. In EDR Ruling Nos. 2006-1182 and 2006-1197, we noted that Virginia law served as the underpinning for the state's policy and that the Virginia statute requires that an employee must be returned to the position he held when

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.[6] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[7]

The grievant's participation in the grievance process is a protected activity. Moreover, by being demoted, the grievant has raised a sufficient question that she suffered a materially adverse employment action.[8] At issue, then, is whether there is sufficient evidence that management demoted/reassigned the grievant in retaliation for her prior grievance activity.

This Department concludes that the grievant has failed to raise a sufficient question of a causal link between her grievance activity and her subsequent demotion/reassignment. More specifically, due to the regulations associated with operating an ambulance, the agency had difficulty for many years keeping its ambulance (which was used to transport veterans to and from the Veteran's Care Center as needed) running, and had attempted on numerous occasions to obtain an exemption to operate the ambulance as a "stretcher transport vehicle" rather than its current classification as an "emergency ground transport vehicle." As early as June of 2004, the agency proposed selling the ambulance given the difficulties faced by the agency with its operation. As the Director of Transportation and an Emergency Medical Technician (EMT), the grievant's primary responsibility was to

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ordered to duty unless such position has been abolished or otherwise ceases to exist. Moreover, we noted that there is no adverse employment action requirement under the state statute (or pertinent provisions of federal law). Thus, we concluded that "if there is a state or federal law that forms the basis of the policy at issue and that state or federal law does not require the presence of an 'adverse employment action' for an actionable claim, this Department will defer to the standard set forth by that state or federal law." Thus, consistent with developments in Title VII law (*Burlington Northern*), on July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, this Department adopted the "materially adverse" standard for qualification decisions based on retaliation. We note that in the *Burlington Northern* decision the Court observed that the requirement of "materiality" is critical to "separate significant from trivial harms." *Burlington N.*, 126 S. Ct. at 2415. The latter, including normally petty slights, minor annoyances, snubbing, and simple lack of good manners, do not deter protected activity and are therefore not actionable. For the same reason, in the context of the grievance process, a retaliation grievance based on a trivial harm will not be qualified for hearing by this Department. Moreover, to establish a consistent standard for retaliation cases, this Department has construed the grievance statutes and the *Grievance Procedure Manual* and adopted the materially adverse action standard for all claims of retaliation, whether they arise under a Title VII analog or not.

[6] *See* EEOC v. Navy Fed Credit Union, 424 F.3d 397, 405 (4th Cir. 2005); Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000).

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

[8] *See generally Burlington N.*, 126 S. Ct. 2405 (2006). *See also* EDR Ruling #2007-1547 ("In this case, the grievant was transferred to another office and effectively demoted by having her docket of cases removed and assigned to work in a file room pulling files. Such facts would be sufficient to raise a question that the grievant endured a materially adverse action.")

operate and take care of the ambulance.[9] Accordingly, the grievant's demotion/reassignment came about as a direct result of the agency's decision to decommission the ambulance. The plan to decommission the ambulance if an exemption could not be obtained to run it as a "stretcher transport vehicle" predated the grievant's protected activity (filing her first grievance). Accordingly, there is insufficient evidence to support a causal link between her grievance and her ultimate demotion/reassignment.[10]

The grievant raises a number of other alleged retaliatory acts by her supervisor in the months following her June 20, 2005 grievance. While not every instance of alleged retaliatory behavior will be discussed in this ruling, all of the grievant's claims have been investigated and considered by this Department. As an initial point, we note that none of these other acts of alleged retaliation occurred within the previous 30 calendar days prior to the filing of her February 20, 2006 grievance. More importantly, however, the grievant has failed to raise a sufficient question that these alleged acts of retaliation were causally linked to her previous grievance activity.[11] Accordingly, the issue of retaliation does not qualify for a hearing.[12]

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[9] There had to be two EMT's on board the ambulance for it to operate.

[10] The adverse action(s) must follow the protected act, rather than predate it, in order to create an inference of retaliation. *See* Duncan v. Washington Metropolitan Area Transit Authority, 2006 U.S. Dist. LEXIS 15335, *14-15 (D.C. Cir. 2006) ("the employer decided on a course of action before it could possibly have known about the employee's protected activities. Consequently….the employee cannot establish a causal link between the end result of that decision and the protected activities in which he engaged in the interim."); and Durkin v. City of Chicago, 341 F.3d 606, 615 (7th Cir. 2003) ("An employer cannot retaliate if there is nothing for it to retaliate against."). *See also* Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1234-35 (10th Cir. 2000) (employer's decision to discharge truck driver not retaliatory because employer's decision pre-dated truck driver's filing of a union grievance).

[11] For instance, the grievant claims that she was retaliated against when her department was the only department subject to a random drug test in August 2005. However, the grievant admits that the entire transportation department, not just the grievant, was subject to the random drug test. Additionally, the grievant contends that her supervisor stated to a co-worker that the grievant "acted stupid" at a co-worker's going away party. According to the grievant's supervisor, he and a co-worker that was not present at the going away party were later discussing the grievant's behavior at that party and the party as a whole. The supervisor contends that the grievant gave "inappropriate" gifts, such as a bottle of a "take-off of Viagra," to the co-worker, made inappropriate comments about her relationship with the co-worker and "draped herself" over this co-worker causing him much embarrassment. The grievant admits that there was one inappropriate gift in the bag, but advised her co-worker to wait until he got home to open it. The grievant also asserts that her supervisor refused to allow her to work part-time out of retaliation. In response to this assertion, the grievant's supervisor states the following: in January 2006, the grievant's doctor released her to return to work for four hours a day for a month. The grievant's supervisor determined that the agency could not accommodate the grievant's request to return to work part-time because of the nature of the grievant's job (i.e., transporting residents to and from the hospital and doctor's appointments in the ambulance) and in particular, the unpredictability of when she may be needed to perform such duties on any given day. The agency claims that the grievant was one of two EMT's needed to operate the ambulance and as such, without her, the residents could not be transported. For example, if the grievant were to work four hours in the morning and she and the other EMT were to take a resident to the hospital or a doctor's appointment during that four hour period, but the resident was not ready to return prior to the grievant's departure for the day, the agency would have no way to return that resident to the facility.

[12] Moreover, fairly read, the grievant's assertion that the agency refused to accommodate her request to return to work four hours per day could be viewed as a claim that the agency violated the Americans with Disabilities Act (ADA). This claim, however, will not be addressed in this ruling because even if this

Misapplication of Policy/Unfair Application of Policy

The grievant claims that she was told by human resources at DVS that she would be credited with her annual allotment of sick leave and family personal leave upon her return to work from STD. The grievant was later told however that despite her return to work on January 23, 2006, she would not be credited with this leave because she did not work 20 hours upon her return. The grievant challenges the agency's refusal to credit her with her yearly allotment of leave as a misapplication and/or unfair application of policy.

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts 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.

The applicable policy in this case is DHRM Policy 4.57, *Virginia Sickness and Disability Program* (VSDP).[13] The VSDP policy states that "[c]urrent employees enrolled in VSDP receive [sick leave] and [family personal] leave on January 10 each year, based on their total months of State service…"[14] However, "[e]mployees receiving a [short term disability] or [long term disability] disability benefit on January 10 will not receive [sick leave] or [family personal] leave credits until they are released by their [licensed treating professional] and return to 'active employment'."[15] Policy defines "active employment" as "[t]he employee is released to return to work (RTW) full time without restrictions for at least 20 hours or more per week."[16] Additionally, if an employee is released to return to her pre-disability position on a full-duty basis, but becomes disabled due to the same condition and works fewer than 14 consecutive calendar days, the employee will be considered to be in a continuation of the prior disability.[17]

In this case, the grievant was receiving a short term disability (STD) benefit on January 10, 2006 and thus, could not be credited with sick leave and family personal leave at that time. The grievant was released to return to work full time with no restrictions on January 23, 2006. The grievant worked one hour and fifteen minutes on January 23rd, a full shift of at least eight hours on January 24th, and two hours and forty-five minutes on

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Department were to conclude that the grievant's ADA claim warranted a hearing and the hearing officer subsequently determined that the grievant had been discriminated against on the basis of disability, the hearing officer would be unable to order relief because the alleged failure to accommodate took place more than 30 calendar days prior to the initiation of the grievant's February 20, 2006 grievance. Only the events that occurred 30 days prior to the initiation of grievance can form the basis of relief from a hearing officer. Events that occurred outside of the timeframe may not serve as a basis for relief due to the grievance procedure's 30-day initiation rule, but they may nevertheless be introduced as background evidence as was the case here. *See e.g.*, EDR Ruling #2004-624 and 2004-628.

[13] DHRM Policy 4.57 (effective date 01/01/99, revised date 11/25/05).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

January 25th. The grievant was taken out of work for the same condition on January 26th and as such, her previous STD claim was continued by the VSDP administrator. Once her STD was approved for continuation, the grievant was retroactively credited with STD benefits for January 23rd and January 25th.

According to DHRM, the agency charged with promulgation and interpretation of state policy, the grievant in this case was not entitled to sick leave and family personal leave upon her return to work on January 23, 2006 because she did not return to "active employment." More specifically, DHRM has advised this Department that although the grievant was released to return to work full time with no restrictions (satisfying the definition of "active employment" for purposes of DHRM Policy 4.57), this release was technically negated when the VSDP administrator continued her prior disability claim on January 26th, because the grievant worked for less than 14 consecutive days before going back out on disability leave for the same condition that led to her earlier STD benefits. Based upon the foregoing, the grievant's claim that the agency misapplied and/or unfairly applied the VSDP policy when it failed to credit her with sick and family personal leave does not qualify for a hearing.[18]

APPEAL RIGHTS AND OTHER INFORMATION

[18] Further, to the extent that the grievant is claiming that the agency's refusal to allow her to return to work with restrictions was a misapplication and/or unfair application of the VSDP policy, this Department concludes that the grievant has failed to raise a sufficient question that the agency either misapplied or unfairly applied the applicable policies. More specifically, according to the Virginia Sickness and Disability Program, "[A]gencies may allow employees to [return to work] with restrictions if the employee presents a doctor's note with [return to work] indicated and restrictions designated…..If the doctor's note indicates restrictions, the agency must review the request to determine if the restrictions can be accommodated." DHRM Policy 4.57. Policy 4.57 goes on to state that "….if the agency can accommodate the restrictions, then the employee may [return to work] immediately." Based on the foregoing, failure to return the grievant to work with the restriction that she only work 4 hours a day for a month does not appear to be a misapplication and/or unfair application of policy because the agency determined that the grievant's request could not be accommodated. Further, it does not appear that the denial was based on any improper purpose. In addition, to the extent that the grievance can be read to include a claim that the agency violated the grievant's rights under the Family Medical Leave Act (FMLA) by not crediting her with 12 weeks of unpaid leave for the 2006 calendar year as required by policy and consequently holding her job for her during this time period, this Department concludes that even if a violation of the FMLA could be established, this issue would not otherwise qualify for a hearing because there is no meaningful relief a hearing officer could order in this case. Under the *Rules for Conducting Grievance Hearings*, in a misapplication of policy case, a hearing officer is limited to ordering the agency to reapply the policy at the point at which it became tainted. This would mean that the hearing officer would be limited in this case to ordering the agency to credit the grievant with her FMLA leave and allow her to apply it to her absence from work due to illness in the 2006 calendar year. However, even if the grievant were credited with FMLA leave thereby guaranteeing her job upon the conclusion of the 12 week period, the grievant transitioned into long-term disability (LTD) and never returned to employment with the Commonwealth. Accordingly, crediting the grievant with her FMLA leave for the 2006 calendar year would be meaningless as she could not have returned to work at the conclusion of the 12 weeks.

For more information regarding 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. 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