Issues: Qualification/Performance Evaluation/Arbitrary & Capricious; Performance Evaluation/Other; Retaliation/Grievance Activity Participation; Retaliation/Other Protected Right; Discrimination/Political Affiliation; Ruling Date: April 5, 2007; Ruling #2007-1538; Agency: Department of State Police; Outcome: Discrimination issue not qualified. All other issues qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia State Police
Ruling No. 2007-1538
April 5, 2007

The grievant has requested a ruling on whether his October 19, 2006 grievance with the Virginia State Police (VSP or the agency) qualifies for a hearing. In his October 19th grievance, the grievant alleges that his 2006 performance evaluation is arbitrary and capricious and the most recent example of discriminatory and retaliatory behavior by his supervisor. The grievant further alleges VSP has misapplied policy. For the reasons discussed below, with the exception of the grievant's discrimination claim, the October 19th grievance qualifies for a hearing.

FACTS

The grievant is employed as a Trooper with the VSP. On January 1, 2006, the grievant co-founded, and currently serves as President of, the Virginia Troopers Union (VTU), a local of the International Union of Police Associations, AFL-CIO.[1] The grievant claims that since becoming affiliated with the VTU, he has endured significant and frequent acts of discrimination and/or retaliation by VSP.[2]

The most recent alleged act of discrimination and/or retaliation, and the subject of the grievant's October 19, 2006 grievance at issue here, involves the grievant's 2006

[1] On August 25, 2006, the VTU was renamed the Virginia Troopers Alliance.

[2] For instance, the grievant was issued a Group I Written Notice for unsatisfactory job performance and relieved from the Explosives Detection Canine Program. The grievant challenged the Group I Written Notice and his removal from the canine program on April 4, 2006 and April 6, 2006 respectively. Both grievances alleged discrimination and retaliation on the basis of his union involvement. Additionally, the grievant received a Group III Written Notice with 5 day suspension for "insubordination or serious breach of discipline" in violation of agency policy. On July 6, 2006, the grievant initiated a grievance challenging the Group III Written Notice. The July 6th grievance was subsequently qualified for a hearing and the hearing was held on September 19, 2006. In an October 3, 2006 decision, the hearing officer reduced the Group III Written Notice to a Group II Written Notice for failure to follow supervisor's instructions and upheld the suspension. *See* Decision of Hearing Officer, Case No. 8415, issued October 3, 2006, at 7. The agency was further ordered to reverse the grievant's transfer and reinstate him to his former position or, if occupied, to an objectively similar position. *Id.*

annual performance evaluation. The grievant received an overall "Contributor" rating on his 2006 performance evaluation.[3] The grievant challenged his performance evaluation by initiating a grievance on October 19, 2006.

DISCUSSION

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 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 a labor organization/association and his prior grievance activity and filing of complaints of discrimination and retaliation[8] all constitute protected activity.[9] Moreover, in this case, the grievant's overall "Contributor" rating on his 2006 annual performance evaluation raises a sufficient question as to whether the grievant has suffered a materially adverse employment action[10] as the grievant has

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[3] The VSP rating system has 5 rating categories: "Extraordinary Contributor," "Major Contributor," "Contributor," "Marginal Contributor," and "Below Contributor."

[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).

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

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

[8] In July 2006 the grievant filed several complaints of discrimination and retaliation with DHRM's Office of Equal Employment Services (OEES). In addition, the grievant filed a complaint of discrimination with the Equal Employment Opportunity Commission (EEOC) which, on December 7, 2006, was rejected for lack of jurisdiction.

[9] Executive Order 1 (2006); DHRM Policy 2.05, *Equal Employment Opportunity*, p. 1 of 4; *see also* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4) and Va. Code § 40.1-57.3("Nothing in this article shall be construed to prevent employees of the Commonwealth, its political subdivisions, or of any governmental agency of any of them from forming associations for the purpose of promoting their interests before the employing agency.").

[10] In Burlington N. & Santa Fe Ry. Co., the Court noted that "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." 126 S.Ct. at 2415. "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children." *Id.* The Court determined that "plaintiff must

presented evidence that a "Contributor" rating on his annual performance evaluation could affect his opportunity for promotion.[11] Thus, the only question remaining is whether a causal link exists between the grievant's prior protected acts and his 2006 performance evaluation.

The agency denies that the grievant has been retaliated against and has articulated a legitimate, non-retaliatory reason for the materially adverse action (i.e., a decline in activity levels from the previous year of performance and the disciplinary action against the grievant during the performance cycle). However, based on a totality of the circumstances, including, but not limited to, (1) the ongoing antagonism between the grievant and members of agency management;[12] (2) the proximity in time between the grievant's protected acts and his overall performance rating;[13] and (3) the significantly lower overall performance rating in 2006 compared to the previous two years,[14] this Department concludes that the grievant has presented evidence that raises a sufficient question as to (1) whether a causal connection exists between his past protected acts and his 2006 performance evaluation; and (2) whether the agency's stated reason for the grievant's performance rating was an excuse for retaliation.

Therefore, after careful review of the evidence, this Department concludes that, based on the totality of the circumstances, the grievant has demonstrated that sufficient questions of fact exist with respect to his retaliation claim. The hearing officer, as a fact finder, is in a better position to determine whether retaliatory intent contributed to the

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show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (DC Cir. 2006)).
In adopting the "materially adverse" standard the Court noted that the requirement of "materiality" is critical to "separate significant from trivial harms." *Id*. 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.

[11] According to VSP General Order No. 74, *Career Progression Program*, whether or not an employee is promoted to senior trooper, master trooper, or senior special agent depends on several factors, including the employee's yearly performance evaluation. More specifically, in determining who gets promoted, an employee is assigned points for experience, performance, whether or not they have an active disciplinary action, weight control and educational achievement. In the event of a tie in accumulated points, the performance evaluations and education will be considered to rank sworn employees involved in the tie, with the performance evaluation being the first criterion considered. In such a case, an employee with an overall "Contributor" rating would receive 6 points while employees with an overall "Major Contributor" or "Extraordinary Contributor" rating would receive 9 and 12 points respectively.

[12] Certainly, this Department recognizes that while evidence of conflict between the grievant and his supervisors could be probative of a retaliatory intent, any conflict between them may also exist for a myriad of non-retaliatory reasons.

[13] *See* Tinsley v. First Union National Bank, 155 F.3d 435,443 (4th Cir. 1998) (noting that merely the closeness in time between a protected act and an adverse employment action is sufficient to make a prima facie case of causality). *See also* Jaudon v. Elder Health, Inc., 125 F. Supp. 2d 153, 165 (D. Md. 2000) (indicating that temporal proximity and ongoing antagonism can be a sufficient basis to establish a causal link.)

[14] The grievant received an overall rating of "Extraordinary Contributor" in both 2004 and 2005.

grievant's 2006 performance rating. As such, this issue qualifies for hearing. We note, however, that this qualification ruling in no way determines that the agency's actions with respect to the grievant were retaliatory or otherwise improper. Rather, we merely recognize that, in light of the evidence presented, further exploration of the facts by a hearing officer is appropriate, as a hearing officer is in a better position to determine questions of motive and credibility.

Alternative Theories

The grievant also claims the agency misapplied or unfairly applied policy and that his 2006 performance evaluation is arbitrary and capricious. Because the issue of retaliation qualifies for a hearing, this Department deems it appropriate to send these alternative theories for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

Discrimination – Political Affiliation

The Governor's Executive Order 1, incorporated by Department of Human Resource Management (DHRM) Policy 2.05, prohibits "discrimination on the basis of race, sex, color, national origin, religion, sexual orientation, age, political affiliation, or against otherwise qualified persons with disabilities."[15] Accordingly, the grievant's allegation of discrimination based on political affiliation is, in essence, a claim that the state's EEO policy has been misapplied and/or unfairly applied.

DHRM, the agency charged with promulgating and interpreting DHRM Policy 2.05[16] and for ensuring compliance with Executive Order 1 by "[i]nvestigat[ing] and resolv[ing] charges of unlawful discrimination or other violations of the Executive Order" through its Office of Equal Employment Services (OEES),[17] has made a determination in this case that the grievant's claims of discrimination based on political affiliation are not actionable because "the Virginia Troopers Union does not constitute a major political party in the Commonwealth."[18] Based on DHRM's interpretation and findings, this Department concludes that the grievant has failed to present a sufficient question that the Commonwealth's EEO policy has been misapplied and/or unfairly applied. Accordingly, the grievant's claim of discrimination based on political affiliation does not qualify for a hearing.

CONCLUSION

For the reasons discussed above, this Department concludes that all claims except the grievant's claim of discrimination are qualified for hearing. By copy of this ruling, the

[15] Executive Order 1 (2006); DHRM Policy 2.05, *Equal Employment Opportunity*, p. 1 of 4.
[16] Va. Code § 2.2-1201(13).
[17] Executive Order 1 (2006); DHRM Policy 2.05, *Equal Employment Opportunity*, p. 3 of 4.
[18] August 3, 2006 letter to grievant from DHRM Director.

grievant and the agency are advised that the agency has five workdays from receipt of this ruling to request the appointment of a hearing officer.

APPEAL RIGHTS – DISCRIMINATION CLAIM

For further information regarding the actions the grievant may take as a result of this ruling regarding his discrimination claim, please refer to the enclosed sheet. If the grievant wishes to appeal the qualification determination regarding his discrimination claim 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 the grievant's discrimination issue for hearing, 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