Issue: Grievance Procedure/Consolidation of grievances for hearing; Qualification/Retaliation/ Grievance activity participation; Ruling Date: March 2, 2007; Ruling No. 2007-1547; Agency: Department of Social Services; Outcome: Grievances consolidated for hearing; retaliation issue qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION and CONSOLIDATION
RULING OF DIRECTOR

In the matter of the Department of Social Services
Ruling No. 2007-1547
March 2, 2007

The grievant has requested qualification of a grievance she filed on September 18, 2006 with the Department of Social Services ("the agency"). For the reasons set forth below, the grievance is qualified and consolidated for hearing with another grievance previously qualified by this Department in EDR Ruling No. 2006-1364.

FACTS

The grievant initiated her September 18, 2006 grievance after being transferred to another office. She alleges that this transfer was in retaliation for an e-mail she sent related to a grievance she previously filed in April 2006 ("underlying grievance"). The underlying grievance involved allegations of workplace violence. The grievant asserted that a co-worker had committed acts of workplace violence and that the grievant did not feel safe in the workplace. That underlying grievance was qualified by this Department in EDR Ruling No. 2006-1364.

After initiating the underlying grievance, she met with two members of agency management who were allegedly upset that the grievant had taken the grievance to the agency head. One of these members of management, an Assistant Director, also met with the grievant in June 2006 and, according to the grievant, told her "I can move you up in this organization or I can move you out."

In September 2006, the co-worker who had allegedly engaged in acts of workplace violence against the grievant returned to work following a two-month absence. The grievant states that this co-worker engaged in additional unwarranted behavior as before. On Friday, September 15, 2006, the grievant allegedly e-mailed the details of this behavior to the agency head, the agency Employee Relations Manager, and an EDR consultant.[1] The following Monday morning, on September 18, 2006, the Assistant Director met with the grievant and asked her why she had sent the e-mail. The grievant reportedly told him that she was providing additional information for the underlying grievance. The grievant states that the Assistant Director asked

[1] At that time in mid-September, this Department was investigating the underlying grievance on a request for qualification for hearing.

what the new events had to do with the underlying grievance. The grievant said that it was because the workplace violence behavior was continuing. The Assistant Director then told the grievant that she was being transferred to another agency office. According to the grievant, he allegedly stated, "The commissioner is tired of this and so am I. I can not [sic] have an associate in the office that does not feel safe. Effective immediately you will be assigned to [another district office]." The grievant states that she asked the Assistant Director why she was being transferred, but he did not provide an explanation, allegedly stating, "It shouldn't matter."

The grievant was transferred from her duties as a case worker with a caseload of 600 cases to working in a file room pulling files for other employees to take to court. The grievant has also stated that she indicated to agency management that there was a vacancy at a different office closer to where she lived. Agency management refused to transfer her to that location, however. In addition, on September 13, 2006, the grievant resigned. Her last day of work with the agency was September 26, 2006.

DISCUSSION

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] (2) the employee suffered a materially adverse action;[3] and (3) a causal link exists between the materially adverse 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 materially 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.[4] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[5]

The grievant alleges that approximately five months after initiating a grievance, and one workday following her report of additional instances of possible workplace violence,[6] she was transferred to another agency office. Participating in the grievance process and reporting

[2] *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)(4).

[3] Burlington N. & Santa Fe Ry. Co. v. White, 126 S.Ct. 2405, 2414-15 (2006). For a grievance to qualify for hearing, the action taken against the grievant must have been materially adverse to a reasonable employee, such that a reasonable employee might be dissuaded from participating in protected conduct. *Id.* at 2415.

[4] *E.g.*, 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).

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

[6] The report of additional incidents of workplace violence was also sent to this Department as further information to support the grievant's underlying grievance that was before this Department on the issue of qualification for hearing. Consequently, her September 15, 2006 e-mail was also participation in the grievance process.

instances of possible workplace violence are clearly protected activities.[7] In addition, the alleged temporal proximity between the grievant's report of additional incidents of alleged workplace violence and her transfer raises a sufficient question of a causal relationship. The Assistant Director's alleged comments at the time would appear to suggest that the decision to transfer the grievant was directly related to the e-mail she sent on September 15, 2006. The grievant also argues that the first step-respondent's suggestion that the grievant was transferred because she did not feel safe is pretextual. The grievant states in her grievance that if the agency believed that the grievant had been subject to workplace violence and her workplace was not safe, the agency's internal investigation would not have concluded, as was stated in the underlying grievance, that no workplace violence occurred.

For a grievance alleging retaliation to qualify for hearing, the action taken against the grievant also must have been materially adverse to a reasonable employee, such that a reasonable employee in the grievant's position might be dissuaded from participating in protected conduct.[8] 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. Because the grievant had already resigned from her position with the agency and was scheduled to work only about one more week, the issue could be more debatable. However, in a case like this, where the grievant will be afforded a hearing on her underlying grievance, it simply makes sense to send this grievance challenging retaliation related to the workplace violence alleged in the underlying grievance to hearing as well.[9] First, this grievance arises from the grievant's participation in the underlying grievance. In addition, the two grievances share common factual questions relating to her treatment by management regarding her allegations of workplace violence. Finally, sending these related claims to a single hearing (see consolidation discussion below) will provide an opportunity for the fullest development of what may be interrelated facts and issues.

Accordingly, the September 18, 2006 grievance is qualified 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, only that 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.

Consolidation

This Department has long held that it may consolidate grievances with or without a request from either party whenever more than one grievance is pending involving the same parties, legal issues, and/or factual background.[10] EDR strongly favors consolidation and will grant consolidation unless there is a persuasive reason to process the grievances individually.[11]

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[7] *See* Va. Code 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4); DHRM Policy 1.80, *Workplace Violence*, p. 1 of 3.
[8] *See Burlington N.*, 126 S.Ct. at 2415.
[9] *See* EDR Ruling No. 2006-1291, 2006-1353; EDR Ruling No. 2005-957.
[10] *Grievance Procedure Manual* § 8.5.
[11] *Id.*

The underlying grievance, which has already been qualified for hearing, and the September 18, 2006 grievance share a common factual basis. Because the grievances additionally involve the same parties, potentially many of the same witnesses, and are essentially inextricably intertwined, this Department deems it appropriate to send the underlying grievance and the September 18, 2006 grievance for adjudication by a common hearing officer to help ensure a full exploration of what could be interrelated facts and issues.

CONCLUSION

For the reasons discussed above, this Department concludes that the September 18, 2006 grievance is qualified and shall be consolidated for hearing with the grievant's underlying grievance (originally initiated on April 5, 2006) to be heard by a single hearing officer. By copy of this ruling, the 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.

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Claudia T. Farr
Director