Issues: Compliance: Grievance Procedure – Other Issue, and Qualification: Discipline – Counseling Memorandum, Discrimination -- Disability, Retaliation – Other Protected Right; EDR Ruling #2007-1561, 2007-1587; Ruling Date: June 22, 2007; Agency: Virginia Department of Health; Outcome: Grievant in compliance, Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Health
Ruling Number 2007-1561 and 2007-1587
June 25, 2007

The grievant has requested a ruling on whether his October 12, 2006 grievance with the Department of Health (VDH or the agency) qualifies for a hearing. The grievant challenges his receipt of a September 13, 2006 counseling memorandum as a misapplication and/or unfair application of policy, discriminatory, retaliatory and a violation of federal privacy laws. The agency asserts that the grievant's claim of retaliation was not included as part of the grievance when he initiated it and as such, the grievant has violated the grievance procedure by adding a retaliation claim to his October 12th grievance. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as an Environmental Health Specialist Senior with VDH. On August 11, 2006, the grievant received a counseling memorandum for excessive tardiness, unauthorized absenteeism and poor performance. The August 11th counseling memorandum advised the grievant that effective August 14, 2006, he would need to provide a note from his physician if he needed to take leave for medical reasons and that he must contact his supervisor to request time off from work.

According to the agency, from August 14th through September 12, 2006, the grievant missed 26.6 hours of work, but failed to submit a proper note from his physician indicating his inability to work. As a result, on September 13, 2006, the grievant was issued another counseling memorandum for his failure to comply with the instructions set forth in the August 11, 2006 counseling memorandum. The September 13th counseling memorandum also reiterated the agency's requirement that the grievant provide verification of his need to use sick leave for any absences due to medical reasons.

DISCUSSION

Compliance

The agency claims that the grievant has violated the grievance procedure by adding a claim of retaliation to his grievance after the agency head denied his request for qualification.[1]

In this case, the management action challenged is the September 13, 2006 counseling memorandum. In response to the agency head's conclusions that there was no misapplication of policy, violation of federal privacy laws or evidence that the grievant was discriminated against, the grievant challenged the management actions as retaliatory in an attachment to his Form A. While the theory of retaliation was not expressly stated on the Form A as filed, the management action being grieved (the September 13th counseling memorandum) was. For that reason the grievant's theories as to *why* that management action is improper will be addressed in this ruling.[2] Accordingly, this Department concludes that the grievant's retaliation claim is not a "new" claim added in violation of the grievance procedure.

This Department's rulings on matters of compliance are final and nonappealable.[3]

Qualification

Misapplication of Policy/Disability Discrimination

The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] Moreover, claims of disability discrimination require that the grievant suffer an adverse employment action.[5] Thus, typically, the threshold question is whether or not the grievant has suffered an adverse employment action.[6] An adverse employment action is 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."[7] Adverse

---

[1] *See Grievance Procedure Manual* § 2.4 ("Once the grievance is initiated, additional claims may not be added.")

[2] *See* EDR Ruling ## 2007-1457 and 2007-1444.

[3] Va. Code § 2.2-1001(5).

[4] *See Grievance Procedure Manual* § 4.1(b).

[5] *See* Serrano v. County of Arlington, 986 F. Supp. 992, 996 (E.D. Va. 1997) citing Doe v. University of Maryland Medical System Corp., 50 F.3d 1261, 1264-1265 (4th Cir. 1995) (To establish a prima facie case of discrimination under the ADA, plaintiff must prove that he (i) has a disability, (ii) is otherwise qualified for the job, and (iii) has experienced some adverse employment action as a result of his disability.)

[6] While evidence suggesting that the grievant suffered an "adverse employment action" is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an "adverse employment action." For example, consistent with recent developments in Title VII law, this Department substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. *See* EDR Ruling No. 2007-1538.

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

employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8]

In this case, the grievant has presented no evidence that the September 13th counseling memorandum had a significant detrimental effect on his employment status. Likewise, requiring the grievant to provide verification of his need for sick leave is not an adverse employment action.[9] Because the grievant has failed to make the threshold showing of an adverse employment action, he is not entitled to a hearing on his misapplication and/or unfair application of policy or his disability discrimination claims.

We note, however, that while informal counseling does not have an adverse impact on the grievant's employment, it could be used later to support an adverse employment action against the grievant. According to DHRM Policy 1.60, Standards of Conduct, repeated misconduct may result in *formal* disciplinary action, which would have a detrimental effect on the grievant's employment and automatically qualifies for a hearing under the grievance procedure.[10] Moreover, according to DHRM Policy 1.40, Performance Planning and Evaluation, a supervisor may consider documentation of perceived performance problems when completing an employee's performance evaluation.[11] Therefore, should the informal counseling in this case later serve to support an adverse employment action against the grievant, such as a Written Notice or a "Below Contributor" annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits of the performance counseling through a subsequent grievance challenging the related adverse employment action.[12]

Retaliation

As stated above, the September 13th counseling memorandum was issued as a result of the grievant's alleged failure to follow the instructions set forth by his supervisor in the earlier August 11th counseling memorandum. In addition, the September 13th counseling memorandum reiterated the agency's requirement that the grievant provide verification of his need to use sick leave for any future medical absences. The grievant

---

[8] 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)).
[9] *See* Von Gunten at 869.
[10] *See generally* DHRM Policy 1.60, Standards of Conduct; *see also Grievance Procedure Manual* § 4.1(a).
[11] DHRM Policy 1.40, Performance Planning and Evaluation, "Documentation During the Performance Cycle."
[12] Although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the Act). Under the Act, if the grievant gives notice that he wishes to challenge, correct or explain information contained in his personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth her position regarding the information. Va. Code § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. Va. Code § 2.2-3806(A)(5).

argues that the September 13, 2006 counseling memorandum and its requirements are in retaliation for his having opposed the August 11th verification of sick leave requirement.

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;[13] (2) the employee suffered a materially adverse action;[14] 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.[15] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[16]

---

[13] *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).

[14] *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 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.

[15] *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).

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

In this case, the alleged protected activity is the grievant's opposition to the agency's requirement that he provide verification of his need to use sick leave.[17] However, even if his opposition constituted protected activity,[18] the grievant has failed to raise a sufficient question as to whether the September 13th counseling memorandum for failure to follow his supervisor's instructions was "materially adverse." The September 13th memorandum seems to have been warranted and the grievant has presented insufficient evidence that a reasonable employee might have been dissuaded from participating in protected conduct as a result of the September 13th counseling.[19] In particular, the grievant was told by his supervisor on August 11, 2006 that he needed to provide verification of his need for sick leave. The grievant apparently refused to do so and as such, was given the September 13, 2006 counseling memorandum for failure to follow his supervisor's instructions.

Moreover, with regard to the grievant's assertion that the requirement to provide verification of sick leave is retaliatory, the grievant has failed to raise a sufficient question of a causal link between the alleged protected activity and materially adverse action. More specifically, even though the agency stated in the September 13th memorandum that the grievant must provide verification of his need for sick leave, that requirement had been originally established in the August 11, 2006 counseling memorandum, prior to his alleged protected act. The September 13th memorandum was just a reiteration of that earlier requirement. As such, even if the grievant's opposition to providing verification of sick leave were a protected activity, and even if the requirement

---

[17] The grievant opposed the agency's requirement that he provide verification of his need to use sick leave by simply refusing to provide the appropriate documentation after the issuance of the August 11, 2006 counseling memorandum.

[18] *See* Peters v. Jenney, 327 F.3d 307, 320 (4th Cir. 2003) (a plaintiff need not demonstrate that the employer has actually violated Title VII; rather, the plaintiff must show that "he opposed an unlawful employment practice which he reasonably believed had occurred or was occurring") (internal quotation marks omitted)

[19] *See* Martin v. Merck & Co., Inc., 446 F. Supp. 2d 615, 638 (W.D. Va. 2006) (a written warning for violating policy by wearing safety goggles on the head is "mild discipline" and "would not dissuade a reasonable employee from engaging in a protected activity."); Gordon v. Gutierrez, Case No. 1:06cv861, 2007 U.S. Dist. LEXIS 253 (E.D. Va. 2007) (a verbal counseling that is deserved, properly conducted, and resulted in no further disciplinary action against the plaintiff is not a materially adverse action); Allen, et.al. v. National Railroad Passenger Corporation (AMTRAK), 2007 U.S. App. LEXIS 2216, *11-12 (3rd Cir. 2007) (a written reprimand for improperly communicating with a co-worker during a rest period was not materially adverse as it the plaintiff did not deny its allegations and the reprimand did not appear to affect the plaintiff's employment in any material way.); Breech v. Scioto County Regional Water District # 1, 2006 U.S. Dist. LEXIS 58545, *24 (S.D. Oh. 2006) ("a reasonable person would not be dissuaded by a reprimand given for not completing an assigned task."); Philips-Clark v. Philadelphia Housing Authority, 2007 U.S. Dist. LEXIS 12710, *29 (E.D. Pa. 2007) (charging the plaintiff with being absent without leave is not a materially adverse action as the plaintiff conceded that she had an unexcused absence and failed to follow instructions to call); and Dehart v. Baker Hughes Oilfield Operations, Inc., 2007 U.S. App. LEXIS 1362, *11 (5th Cir. 2007) (unpublished opinion) (a written warning for insubordination, for being argumentative and for excessive absenteeism is not a materially adverse action as there were "colorable grounds for the warning and a reasonable employee would have understood a warning under these circumstances was not necessarily indicative of a retaliatory mind-set.").

to provide such verification constituted a materially adverse action, the grievant cannot prevail on this retaliation claim because the alleged materially adverse act predates the alleged protected activity. [20]

Violation of Privacy Act

The grievant claims that management's request for verification of his need for sick leave violates his rights of privacy under the federal Privacy Act. This Department has no authority to assess the applicability of the federal privacy act to this case, nor enforce the provisions of that act. Thus, while this issue appropriately proceeded through the management resolution steps for a possible resolution,[21] it does not qualify for a hearing.[22]

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 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.

_____
Claudia T. Farr
Director

[20] 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).

[21] Va. Code § 2.2-3004 (A).

[22] Moreover, to the extent that the grievant's claim can be viewed as a misapplication of DHRM Policy 6.05, *Personnel Records Disclosure*, which incorporates the Virginia Government Data Collection and Dissemination Practices Act and the Freedom of Information Acts, this Department finds that such a claim would not qualify for hearing as the grievant has failed to demonstrate that he has suffered an adverse employment action, nor indicated that the agency has violated that policy by wrongly disclosing his medical information to others.