Issues: Qualification – Discipline (Counseling Memorandum) and Retaliation (Grievance Activity), and Consolidation of Grievances for Purpose of Hearing; Ruling Date: April 11, 2008; Ruling #2007-1577, 2008-1957; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Qualified and Consolidated for Hearing.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND CONSOLIDATION RULING OF DIRECTOR

In the matter of the Department of Mental Health,
Mental Retardation, and Substance Abuse Services
Ruling Numbers 2007-1577, 2008-1957
April 11, 2008

The grievant has requested a ruling on whether his June 5, 2006 and June 18, 2007 grievances with the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency) qualify for hearing. For the reasons discussed below, these grievances are qualified and consolidated for hearing.

FACTS

On June 5, 2006, the grievant initiated a grievance asserting that, in retaliation for his previous grievance activity, he had been subjected "to a harsh[,] hostile and unsafe work environment through unequal and unfair application of State policy." In particular, the grievant alleged that he had been assigned less experienced security staff, therefore "setting him up" for failure, and had been denied adequate staff and equipment. After the parties failed to resolve this grievance through the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. The agency head denied the grievant's request, and the grievant appealed to this Department.

While the grievant's appeal was pending with this Department, the grievant initiated a second grievance on June 18, 2007.[1] This grievance alleges that the agency continued to retaliate against the grievant for his past grievance activity by issuing the grievant two Notices of Improvement Needed/Substandard Performance. In addition, the June 18, 2007 grievance asserts that the grievant's supervisor had created a hostile work environment by going "behind [the grievant's] back and mak[ing] false allegations about [the grievant] to [his] subordinates." Although one of the two Notices was "expunged" by the second-step respondent, the grievance was otherwise not resolved during the management resolution steps. The grievant asked the agency head to qualify the June 18th grievance for hearing, and the agency head denied the grievant's request. The grievant appealed the agency head's decision to this Department on or about February 5, 2008.

[1] The grievant's appeal was received by this Department on March 1, 2007.

DISCUSSION

By statute and under the grievance procedure, complaints relating solely to issues such as the methods, means, and personnel by which work activities are to be carried out, as well as hiring, promotion, transfer, assignment, and retention of employees within the agency "shall not proceed to a hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.[2] In this case, the grievant alleges that he has been retaliated against and subjected to a hostile work environment because of his previous grievance activity. He also alleges that the agency misapplied and/or unfairly applied policy.

Retaliatory Harassment/Hostile Work Environment

For a claim of retaliatory harassment/hostile work environment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a prior protected activity[3]; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment[4]; and (4) imputable on some factual basis to the agency.[5] "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[6]

In this case, there is no question that the alleged management actions were unwelcome, as they form the basis of his two grievances. The grievant has also presented evidence of prior protected activity—specifically, the initiation of earlier grievances. Moreover, the grievant has presented evidence showing that the conduct allegedly creating the hostile work environment could be imputed to the agency.[7]

---

[2] Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

[3] For purposes of the grievance procedure, protected activity includes "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] Under *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414-15 (2006), a lesser showing of harm is required in cases of retaliation than in cases of gender or racial discrimination: retaliation claimants need only show the existence of a "materially adverse" action, rather than an "adverse employment action." At least one court has applied the holding of *Burlington Northern* to find that a lesser showing of severity and/or pervasiveness is required in cases of retaliatory harassment, as compared to cases of gender or racial harassment. *See* Hare v. Potter, No. 05-5238, 2007 U.S. App. LEXIS 6731, at *28-33 (3d Cir. Mar. 21, 2007) (altering analysis of traditional "severe and pervasive" element of a claim of retaliatory harassment to apply the materially adverse standard following *Burlington Northern*); Moore v. City of Philadelphia, 461 F.3d 331, 341 (3d Cir. 2006) (same).

[5] *See generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).

[6] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

[7] Where harassment is committed by supervisory employees, "[e]mployers are generally presumed to be liable." White v. BFI Waste Services, LLC, 375 F.3d at 299 (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998)). However, because the alleged harassment did not lead to a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a

Although it is a much closer call, we also find grievant has shown sufficient evidence of an abusive or hostile work environment to warrant hearing. While the two Notices of Improvement Needed/Substandard Performance do not in themselves necessarily give rise to a hostile environment, the grievant has also presented evidence that his immediate supervisor advised one of the grievant's subordinates that the grievant had difficulties with her sexual orientation, allegedly for the purpose of creating dissension between the grievant and his staff. In addition, the grievant has presented evidence (including the statements of other employees) of a significant ongoing conflict between himself and his supervisor, which has allegedly resulted in the grievant and his subordinates being treated more harshly by the supervisor. Finally, the grievant has presented evidence that could be interpreted to suggest possible agency hostility to the grievant's use of the grievance procedure. Specifically, he has pointed to a May 21, 2007 memorandum from a member of the facility's human resources department which includes this paragraph:

> After reviewing your employment history, it looks as if you have had an ongoing conflict with every supervisor you have had since employed at Western State Hospital. I ask that you reflect upon that fact and determine if there is anything that you might do differently to improve your working relationships with management. If you wish I would be happy to research training for you.

He has also provided a copy of an e-mail sent to him, apparently in error, by another member of the facility's human resources staff. This e-mail, which seems to have been intended for the facility's director, asks whether the facility "wan[ts] to be ruled out of compliance" on the grievant's request for a response on his June 2007 grievance, to "give [human resources] some time to figure out what he is looking for and how he [sic] can respond."

Based on the totality of these circumstances, this Department concludes that the grievant has demonstrated that sufficient questions of fact exist with respect to his claim of retaliatory harassment to warrant additional consideration by a hearing officer. A hearing officer, as a fact finder, is in a better position to determine questions of fact, motive and credibility. 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.

Alternative Theories and Claims

Because the issue of retaliatory harassment/hostile work environment qualifies for a hearing, this Department deems it appropriate to send the grievant's claims of retaliation[8] and

---

significant change in benefits," *(see* Ellerth, 524 U.S. at 761), the agency may avoid liability if it can establish that (i) it exercised reasonable care to prevent and promptly correct any harassment by the supervisor, and (ii) the employee unreasonably failed to avail himself of any corrective or preventative opportunities provided by the agency or to avoid harm otherwise. *Id.* at 765.

[8] To the extent the grievant's allegations involve retaliation rather than retaliatory harassment/hostile work environment, those claims are qualified as well and should be analyzed under the *McDonnell Douglas* burden-

misapplication and/or unfair application of policy for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.[9]

Consolidation

Written approval by the Director of this Department or her designee in the form of a compliance ruling is required before two or more grievances are permitted to be consolidated in a single hearing. EDR strongly favors consolidation and will generally consolidate grievances involving the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.[10]

This Department finds that consolidation of the June 5, 2006 and June 18, 2007 grievances is appropriate. The grievances involve the same parties, potential witnesses, and share common themes. Furthermore, consolidation is not impracticable in this instance. This Department's rulings on compliance are final and nonappealable.[11]

CONCLUSION

The grievant's June 5, 2006 and June 18, 2007 grievances are qualified and consolidated for hearing. We again note that this ruling in no way determines that the agency's actions were retaliatory or otherwise improper, but rather only that further exploration of the facts by a hearing officer is appropriate. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

Claudia T. Farr
Director

---

shifting model. *See, e.g.*, Smith v. International Paper Co., 2008 U.S. App LEXIS 7157 at **8-9 (8th Cir. Apr. 4, 2008); Ajao v. Bed, Bath and Beyond, 2008 U.S. App. LEXIS 2866, at **15-17 (5th Cir. Feb. 8, 2008).

[9] We note, however, that while the hearing officer may determine that the agency's actions were not consistent with law or otherwise violated policy, the hearing officer does not have the authority to award relief for violations under the Freedom of Information Act (FOIA), a claim alleged by the grievant in his June 18, 2007 grievance.

[10] *Grievance Procedure Manual*, § 8.5.

[11] Va. Code § 2.2-1001 (5).