Issues: Qualification: Performance Evaluation – Other, and Work Conditions – Supervisory Conflict; Ruling Date: June 22, 2007; Ruling #2007-1633; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Taxation
Ruling No. 2007-1633
June 22, 2007

The grievant has requested qualification of his January 2, 2007 grievance with the Department of Taxation ("the agency").[1] For the reasons set forth below, the grievance is not qualified for hearing.

FACTS

The grievant is employed by the agency as a State Tax Auditor. He alleges that on December 7, 2006, his supervisor, Mr. A, asked the grievant to meet with him and his supervisor, Mr. R, at the conclusion of a staff luncheon scheduled for that day. The grievant asserts that Mr. R began the meeting by criticizing him for pursuing a request for a salary review with several successive agency Commissioners. The grievant states that Mr. R told him that he should cease his activity related to his salary and that he should leave the agency if he was not satisfied. The grievant further asserts that Mr. R stated that he could express his disapproval with the grievant's actions through his review authority. The grievant charges that after he reminded Mr. R of his recent favorable evaluation, Mr. A observed that he could have been critical of his performance in at least two areas, one or more of which the grievant claims were also areas of deficiency for other employees.

On January 2, 2007, the grievant initiated a grievance challenging management's alleged conduct at the December 7th meeting. He asserts, in effect, that this alleged conduct was taken in retaliation for his efforts to address what he believes is a salary inequity. After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify his grievance for hearing. The agency head denied the grievant's request, and the grievant has appealed to this Department.

DISCUSSION

[1] The grievant signed and dated the Form A on January 2, 2007. However, the agency did not date stamp the grievance until January 8, 2007, and the first step respondent indicated that he received the Form A on January 11, 2007. As the timeliness of the grievance is apparently not in dispute, it is unnecessary to determine the actual date of initiation.

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 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.[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]

Assuming, for the purposes of this Ruling only, that the grievant engaged in a protected activity prior to the December 7th meeting, his retaliation claim nevertheless fails to qualify for hearing because he has not presented sufficient evidence that he suffered a materially adverse action. A materially adverse action is one that might dissuade a reasonable employee in the

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[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 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).

[3] *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.

[4] *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).

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

grievant's position from participating in protected conduct. [6] Here, the grievant has presented disputed evidence that his supervisors threatened to evaluate his performance at a future date (a threat which had apparently not come to fruition at the time of the grievance) if he did not cease his salary-related activities, that they criticized him for failing to perform activities which other employees failed to perform without note, and that they made these statements in a quasi-public place. This evidence, taken as a whole, does not raise a sufficient question that management took a materially adverse action, i.e., an action that would have dissuaded a reasonable employee from engaging in protected activity.[7] For this reason, the grievant's January 2, 2007 grievance does not qualify for hearing.

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 this 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

[6] In *Burlington Northern*, 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 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 (D.C. Cir. 2006)).

[7] *See generally* Parsons. V. Wynne, 2007 U.S. App. LEXIS 5657, at **3-4 (4th Cir. March 9, 2007) ("Neither [the plaintiff's] May 2002 performance evaluation nor her removal from the alternate work schedule would have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"); Shannon v. Virginia Department of Juvenile Justice, 2007 U.S. Dist. LEXIS 25170 (E.D. Va. Apr. 4, 2007).