Issues: Qualification – Discrimination (race and gender), Retaliation (other protected right), Work Conditions (supervisory conflict), Management Actions (assignment of duties and confidentiality); Ruling Date: February 8, 2008; Ruling #2007-1661, 2008-1774, 2008-1886; Agency: Department of Juvenile Justice; Outcome: Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULINGS OF DIRECTOR

In the matter of the Department of Juvenile Justice
Ruling Nos. 2007-1661, 2008-1774 and 2008-1886
February 8, 2008

The grievant has requested a ruling on whether her October 10, 2006, April 20, 2007 and May 29, 2007 grievances with the Department of Juvenile Justice (DJJ or the agency) qualify for hearing. She asserts that she has been subjected to retaliation and discrimination based on her gender and race.[1] For the reasons discussed below, these grievances qualify for hearing.

FACTS

The grievant is employed as a Correctional Sergeant with DJJ. In a May 23, 2006 meeting, the grievant claims that she and the others were being reprimanded by upper management for failing to report a broken radio. At the meeting, the grievant claims she asked when they would be receiving the new radios that they have been talking about getting for the past two years. Apparently, the new radios had already been received, but those in charge of distributing the new radios (i.e, the Assistant Superintendent and Captain B) had not done so yet. The grievant's question regarding when new radios would be received apparently alerted the Superintendent of the failure of management in distributing the radios. From this point on, the grievant claims that she was subjected to repeated retaliatory and harassing behavior by management.

The first incident of alleged retaliatory behavior occurred on June 9, 2006 when Lieutenant D, the shift commander of the shift in which grievant works, allegedly approached the grievant and told her that she better keep her mouth shut at the sergeant's meetings or she would find herself at another facility. The grievant claims that she verbally notified the Superintendent of Lieutenant D's statement shortly thereafter and notified him again in writing on October 13, 2006. On September 11, 2006, Lieutenant D gave the grievant a counseling letter for failing to report to work as scheduled on August 23, 2006, not calling to inform the shift commander of her status on that day, and securing coverage for that day without her immediate supervisor's authorization.

[1] Although not specifically stated on Form A, during this Department's investigation, the grievant stated that she believed her supervisor would never treat a male the way she has been treated and that she believes she is being treated in this manner because she is a black female and "questions things."

Additionally, on October 9, 2006, the grievant was given another written counseling for failing to follow her supervisor's instruction.

While at work on October 1, 2006, the grievant informed Lieutenant D that she was ill and needed to leave to see her doctor. The grievant claims that Lieutenant D asked her repeatedly what was wrong,[2] but the grievant refused to tell Lieutenant D. According to the grievant, Lieutenant D then insisted on someone driving the grievant to the doctor, but she declined. Lieutenant D then allegedly instructed another officer, Officer W, to walk the grievant to her car and instructed Officer B to follow the grievant to the doctor's office. As a result of this incident, the grievant filed a grievance on October 10, 2006 (Grievance #1). Grievance #1 alleges harassment and intimidation. In addition, during this Department's investigation of Grievance #1, the grievant asserted that she felt Lieutenant D's behavior was retaliatory in nature for the grievant's comments at the May 23, 2006 meeting.

On January 22, 2007, the grievant wrote a letter to agency management advising them of the alleged harassment by Lieutenant D. In this letter, the grievant states:

> [Lieutenant D's] actions are extremely intimidating and distracting. As a result of this intolerable treatment, my work performance has suffered tremendously….[Lieutenant D] has subjected me to consequences more dangerous than that of any circumstances I've ever encountered in my years in the field. For that very reason, I'm afraid of my lieutenant on many levels including physically, professionally, and most of all, physiologically. When [Lieutenant D] is in close proximity to me, I'm afraid of any unforeseeable physical attacks. His actions have proven unpredictable and irrational. Also, I am currently under a doctor's care due to this ongoing harassment….When [Lieutenant D] gives me an assignment, I often second-guess myself because his reaction to my performance displays that of a non-satisfactory status. This act has resulted in the decrease in my confidence level as a qualified, proficient employee and has caused a lack of focus on my professional obligations.

In his third management resolution step response to Grievance #1, the third step respondent stated that following the grievant to the doctor's office was inappropriate and directed the Superintendent to discuss with Lieutenant D the grievant's concerns of harassment. The third step respondent goes on to state, "I fully expect your concerns to be addressed and this situation corrected immediately."

On April 20, 2007, the grievant filed another grievance (Grievance #2) challenging further alleged retaliatory and harassing behavior by DJJ management. In Grievance #2, the grievant asserts that she has been "approached several times with due process," "falsely accused of not allowing [Lieutenant D] to review her [disciplinary

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[2] Lieutenant D admits that he asked the grievant what was wrong and she declined to answer.

reports]," and excessively assigned to supervise the wards thereby interfering with her ability to perform her duties as a supervisor. A second step meeting with the facility Superintendent was held on May 2, 2007 regarding the April 20, 2007 grievance. The following day, May 3, 2007, the grievant's supervisor, Lieutenant M, issued the grievant a Group II Written Notice for "[f]ailure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written [p]olicy."

The grievant subsequently filed a grievance on May 29, 2007 (Grievance #3) challenging the Group II Written Notice received on May 3, 2007 as retaliatory and harassing. In addition, the grievant claims in Grievance #3 that the agency breached her confidentiality and degraded her by allowing someone outside her chain of command to attend the meeting in which the grievant was presented with the written notice. The Group II Written Notice was later rescinded by the third step respondent. According to the grievant, the Group II Written Notice was rescinded because too much time had passed between the date of the offense (February 28, 2007) and the issuance of the Written Notice (May 3, 2007).

The grievant now seeks qualification of Grievance #1, Grievance #2 and Grievance #3.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[3] Thus, claims relating to issues such as the method, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[4] In all three grievances at issue here, the grievant claims she has been subjected to retaliation.

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;[5] (2) the employee suffered a materially adverse action[6]; and (3) a causal link exists between

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[3] *See* Va. Code § 2.2-3004(B).
[4] Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (c).
[5] *See Grievance Procedure Manual* §4.1(b)(4). 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."
[6] Burlington Northern and Santa Fe Railway Co. v. White, 2006 U.S. LEXIS 4895, at ** 26-27 (June 22, 2006). In previous rulings, this Department has described this element of the grievant's burden as requiring the grievant to show an "adverse employment action." *See, e.g.*, EDR Ruling No. 2006-1284. However, in

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 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.[7] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[8]

Here, because the grievant is employed in a juvenile correctional facility and properly functioning radios are essential to her safety and the safety of others, her questions and comments at the May 23, 2006 meeting regarding when new radios would be issued could reasonably be viewed as a protected activity.[9]

The grievant has also raised a sufficient question as to whether she experienced a materially adverse action. An action is materially adverse where "it well might have 'dissuaded a reasonable worker from [engaging in a protected activity].'"[10] Here, the grievant has presented undisputed evidence that in the months following her May 23, 2006 statement regarding radios, she was given two counseling memoranda, questioned regarding her illness, escorted out of the building and followed to the doctor's office, and issued a Group II Written Notice, which was later rescinded by the third resolution step-respondent.[11] While none of these actions in and of themselves would necessarily rise to the level of a materially adverse action, when considered in the aggregate, they raise a sufficient question warranting a hearing officer's review as to whether they would to be sufficient to dissuade a reasonable employee from engaging in protected activity.

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its recent *Burlington Northern* decision, the United States Supreme Court held that in a Title VII retaliation case, a plaintiff was not required to show the existence of an adverse employment action, but rather only that he or she had been subjected to a materially adverse action. Accordingly, in keeping with this Department's previous reliance on Title VII precedent, we adopt the materially adverse standard for all claims of retaliation.

[7] *See* Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000); Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 656 (4th Cir. 1998).

[8] *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n. 10, 101 S. Ct. 1089 (Title VII discrimination case).

[9] Under the Occupational Safety and Health Act of 1970 (OSHA), an employer must establish "place[s] of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. 654(a)(1). Virginia state employees are covered by the Virginia Occupational Safety and Health Program (VOSH) which also requires "every employer to furnish to each of his employees safe employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious harm to his employees." VA. Code 40.1-51.1 (A); 16 VAC 25-60-30. Moreover, Virginia law affords employees that make complaints related to the safety and health provisions of VOSH with protection from retaliation and/or discrimination as a result of any such complaint. *See* Va. Code § 40.1-51.2:1 and 16VAC25-60-110.

[10] Burlington Northern and Santa Fe Railway Co., 2006 U.S. LEXIS 4895, at ** 26-27.

[11] Moreover, as stated above, the grievant further alleges that she was frequently assigned to supervise the wards which took her away from performing her supervisory duties, approached with "due process" on several occasions, falsely accused of not allowing Lieutenant D to review her disciplinary reports, improperly given a Written Notice in the presence of someone not in her chain of command, and humiliated at a meeting in front of others.

Finally, the grievant has raised a sufficient question of causation to warrant qualification of the grievant's claims of retaliation for hearing before a neutral factfinder. In particular, the grievant has alleged that shortly after the May 23, 2006 meeting, Lieutenant D approached her and allegedly told her that she better keep her mouth shut at meetings or she would find herself working at another facility. This statement, if true, could certainly be probative of retaliatory intent. A hearing officer, as a fact finder, is in a better position to determine whether such a statement was made, to assess motive and credibility and decide whether retaliatory intent contributed to the actions taken against the grievant in this case.

Accordingly, the grievant's claims of retaliation are 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. While the grievant's evidence could be probative of retaliatory intent, the chain of events questioned by the grievant could also be explained by a myriad of non-retaliatory reasons. Accordingly, by qualifying the grievant's claims for hearing, 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 and Claims

The grievant also asserts claims of harassment, sex discrimination and race discrimination. Because the grievant's claims of retaliation qualify for a hearing, this Department deems it appropriate to send all alternative theories and claims for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

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.[12]

This Department finds that consolidation of the October 10, 2006, April 20, 2007 and May 29, 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.[13]

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[12] *Grievance Procedure Manual*, § 8.5.
[13] Va. Code § 2.2-1001 (5).

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's October 10, 2006, April 20, 2007 and May 29, 2007 grievances are qualified and consolidated for hearing. 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 Farr
Director