Issue: Qualification: Retaliation – Grievance Activity Participation; Ruling Date: July 2, 2007; Ruling #2007-1669; Agency: State Board of Elections; Outcome: Qualified for hearing.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the State Board of Elections
Ruling No. 2007-1669
July 2, 2007

The grievant has requested a ruling on whether her April 9, 2007 grievance qualifies for hearing. She asserts that she has been subjected to retaliation for previously instituting a grievance with the State Board of Elections ("the agency"). For the reasons discussed below, this grievance qualifies for hearing

FACTS

The grievant is a manager with the agency. She initiated this grievance on April 9, 2007 to challenge a number of agency actions and alleged poor treatment from a member of senior management ("Senior Manager").[1] She alleges that these acts were the result of retaliation for her previous grievance activity. The grievant had filed an earlier grievance in December 2005 alleging race discrimination, the failure to receive the same opportunities to provide input as other employees, preferential treatment for certain employees, and a request that the agency's organizational structure be reviewed by an outside entity. The grievant states that the Senior Manager commented "on [her] previous grievance and [stated] in several staff meetings that the reason [the] agency is undergoing certain hardships is the result of a grievance that [the grievant] filed."[2] In connection with the grievant's request for outside review of the agency's organizational structure, the Senior Manager's alleged attempt to make the at-will position of her friend permanent purportedly came under scrutiny. Another member of agency management (Manager A) stated during the investigation for this ruling that the outside review resulted in the Senior Manager being instructed by a superior that the position could not be made permanent. This, according to Manager A, resulted in bad feelings between the Senior Manager and the grievant.

In addition, the grievant alleges that the Senior Manager influenced other agency staff to deal with the grievant in an unfair and harsh manner. For example, the grievant states that she was approached by co-workers who told her that they were told to stay away from the grievant

[1] The Senior Manager is no longer with the agency.
[2] One of the grievant's co-workers has corroborated the claim that such statements were made by the Senior Manager regarding the grievant's request for outside review of the agency's organizational structure.

and not to ask her questions. Further, in February 2007, an individual working under the grievant was transferred to another department. This transfer was allegedly made without the grievant's input. The grievant states that other managers are generally permitted to be heard before such decisions are made. The alleged result of this transfer was that the grievant had to perform the former employee's duties in addition to her own. The grievant has allegedly been working long hours and weekends to cover this extra workload.

On March 23, 2007, the grievant was reportedly told that she was being moved to another office. This order was allegedly given to the grievant two days before the planned move. The grievant states that she had to pack over thirty boxes of files to be moved. In addition, the grievant asserts there was no consideration given to the location to where she was being moved. She alleges that there was not enough room for her files in her new office. The grievant asserts that the Senior Manager stated at the time that the reason for the move was so that the grievant could be closer to her supervisor, and that the grievant works better when she is closely supervised. Manager A has questioned this statement, asserting that it is not supported by the grievant's work performance and that the grievant "can perform with little or no supervision." However, Manager A also stated that the decision to move the grievant's office, and others at the same time, was necessitated by new staff being hired and an attempt to place supervisors closer to the employees they supervise. She also stated that this was not always possible because of the configuration of the agency on two floors. The grievant states that she was moved away from the floor where the team she works with resides. The grievant maintains that one reason for the move was to allow a friend of the Senior Manager to have a better office.

The grievant also asserts that, in addition to the changes discussed above, agency management has continued to make changes to her position and department without her input. For instance, a new employee was placed under her. The grievant also states that employees not in her reporting line are making decisions as to the organizational structure of her department and the duties for which she is responsible. She now requests qualification for hearing from this Department.

DISCUSSION

Retaliation

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[3] Thus, all claims relating to issues such as the methods, means, and personnel by which work activities are to be carried out generally do not qualify for hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or applied unfairly.[4] In this case, the grievant alleges that the agency retaliated against her for having filed a grievance.

[3] Va. Code § 2.2-3004(B).
[4] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(b)-(c).

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 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.[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]

The initiation of the December 2005 grievance is clearly a protected activity.[9] For the April 9, 2007 grievance to qualify for hearing, however, the action taken against the grievant also must have been materially adverse, such that a reasonable employee might be dissuaded from

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[5] *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).

[6] *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 act constitute[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.

[7] *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).

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

[9] *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).

participating in protected conduct.[10] The grievant's allegations include 1) she has been dealt with harshly by members of agency management, allegedly at the direction of the Senior Manager; 2) co-workers were told to stay away from her and not ask her questions; 3) agency management has not sought her input on decisions affecting her department and work, whereas other managers are given such opportunities; 4) she has been given additional duties; and 5) on two days' notice, she was moved to an office that was not large enough for her files and on a different floor from the team with which she works. While the individual agency actions the grievant alleges may not be enough on their own to rise to the materially adverse action level, the aggregate of the grievant's allegations do raise a sufficient question as to whether she has experienced materially adverse action by agency management.[11]

In addition, the grievant's evidence raises a sufficient question as to whether her protected activity, the December 2005 grievance, was the reason that these alleged management actions were taken. The grievant has presented evidence that the Senior Manager allegedly spoke on certain occasions in a disparaging manner about the subject of the grievant's December 2005 grievance. In addition, the factual basis of the Senior Manager's explanation for moving the grievant to a different office and floor was contradicted by another member of management, which could suggest that the Senior Manager's stated reason was pretextual. The grievant's evidence does not necessarily indicate that the decision to move her was specifically motivated by the grievant's prior grievance activity,[12] but the combination of the Senior Manager's alleged dissatisfaction with the prior grievance and the contradicted rationale for moving the grievant raises a sufficient question as to whether retaliation could have been a motivating factor. In light of all the above, further review by a hearing officer is warranted. This qualification ruling in no way determines that the agency's actions were retaliatory or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate.

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[10] *See Burlington N.*, 126 S. Ct. at 2415. 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)).

[11] It is appropriate to consider the totality of the circumstances when assessing whether the agency's actions might well have dissuaded a reasonable employee from participating in protected conduct. *Cf.* Rizzo v. Niagara Mohawk Power Corp., No. 1:04-c-1507, 2006 U.S. Dist. LEXIS 41987, at *18-20 (N.D.N.Y. June 22, 2006) (applying the materially adverse standard and noting that "a jury could consider the evidence in its totality and conclude that Defendants were engaged in a pattern of retaliation against Plaintiff"). Moreover, such an approach is consistent with an analysis of a claim of retaliatory harassment, which focuses not on individual incidents, but the overall scenario, in light of the new standard provided in the *Burlington Northern* decision. *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).

[12] For instance, the grievant indicated that one of the motivating factors behind the office move was an attempt by the Senior Manager to get a better office for her friend. Although this alleged motive might be improper, it alone would not be evidence of retaliation because it had nothing to do with the prior grievance activity. However, if the grievant was chosen as the individual to give up her office for this friend, because of her prior grievance activity, causation would exist. The facts could also show no improper motivation at all, which would support a finding that causation and retaliation did not exist.

Alternative Theories and Claims

The grievant has also asserted additional claims, principally general misapplication of policy arguments over the way she has been treated and her employment affected. Because the grievant's claim of retaliation qualifies for hearing, this Department deems it appropriate to send all alternative theories and claims raised by the grievance for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

CONCLUSION

For the reasons set forth above, the grievant's April 9, 2007 grievance is qualified for hearing. 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.

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Claudia T. Farr
Director