Issue: Qualification/discipline (counseling memorandum); discrimination (religion, sexual harassment); retaliation (complying with any law); consolidation of grievances for purposes of hearing; Ruling Date: July 19, 2006; Ruling #'s 2006-1064, 2006-1169, 2006-1283; Outcome: qualified and consolidated for hearing

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND CONSOLIDATION RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling Numbers 2005-1064, 2006-1169, 2006-1283
July 19, 2006

The grievant has requested qualification of her March 10, 2005, April 25, 2005, and June 3, 2005 grievances for hearing. For the reasons set forth below, these grievances qualify and are consolidated for hearing.

FACTS

The grievant was employed by the Department of Social Services (DSS or the agency) as a Fiscal Technician Senior in the Division of Child Support Enforcement.[1] On or about March 8, 2005, the grievant was apparently asked by Mr. S, the acting accountant senior to reduce a client's debt. The grievant states that when she asked Mr. S for supporting documentation for the change, he allegedly refused to give her the documentation and told her that if she could not complete her job, she would be dealt with accordingly.

On March 8 or 9, 2005, the grievant met with Mr. S, Mr. N (the District Manager), and Mr. H (the Regional Administrator) to discuss the incident with Mr. S.[2] During this meeting, the grievant allegedly indicated she would reduce the debt, but she that needed documentation for the file.[3] The grievant was advised that if she were given a verbal instruction, she was expected to do it, and that insubordination would not be tolerated. The grievant claims that because there were three men present in the meeting with her, and she was the only woman, she felt intimidated and felt that "possibly" her livelihood and personal safety were in jeopardy.[4]

On March 10, 2005, Mr. H issued a counseling memorandum to the grievant regarding her alleged refusal to follow her supervisor's verbal instruction. The memorandum advised

[1] The grievant left employment with the agency on July 19, 2005.
[2] The agency's documentation gives the date of this meeting as March 9th, while the grievant states that the meeting occured on March 8th.
[3] Mr. H denies that the grievant stated during the meeting that she wanted documentation to support the request.
[4] The grievant also states that on March 9, 2005, Mr. S refused to meet with her in her cubicle to discuss her EWP, instead demanding that they meet in his office. Mr. S advised the grievant that the meeting would take place in his office because they needed to discuss matters which he viewed as being confidential.

the grievant to consider the March 9th meeting a verbal reprimand and informed the grievant that a copy of the memorandum would be placed in her personnel file.

The grievant states that prior to the March 8, 2005 incident, Mr. H had called a staff meeting at the district office and indicated he would fire everyone if the "rumors, gossip and the foolishness" did not stop. She further alleges that on another previous occasion, Mr. N had placed a pamphlet on gossip citing the Ten Commandments and Bible quotations in every staff member's mailbox. The grievant asserts that after she complained about Mr. N's conduct, he had ignored her, refused to look at her in the face, dismissed her, and hindered her from performing certain duties as a supervisor by not providing necessary reports.[5]

After the March 8, 2005 incident, the grievant met with the agency's human resources department to discuss initiating a grievance or complaint. On or about March 10, 2005, the grievant initiated a grievance alleging "workplace harassment, job bullying, and sexual discrimination."[6] In the attachments to her Form A, the grievant also charged that she had been subjected to religious discrimination. In addition, she initiated an EEO Complaint against Mr. S, Mr. N, and Mr. H.

On March 11, 2005, the grievant complained to the agency's human resources department about an incident involving Mr. S that had allegedly occurred on March 10th. [7] Specifically, the grievant charged that she overheard Mr. S making inappropriate comments about a female employee during a going-away party for that employee. The grievant advised the human resources department that she believed Mr. S's conduct showed that he "does not have any regard for women," especially the grievant.[8]

On April 20, 2005, the agency's human resources department issued its report on its investigation into her complaints. That investigation concluded that the grievant had been insubordinate in refusing to follow Mr. S's instruction, as she has not shown that the directive was illegal or immoral, but that the meeting with Mr. H, Mr. S, and Mr. N was "inappropriate" and if repeated, "would result in a hostile work environment and job bullying." The investigation also concluded that Mr. S's behavior at the going-away party was inappropriate and had been addressed by management.

Subsequently, on or about April 22, 2005, the second-step respondent provided the grievant with his response to her grievance. He stated that in response to her complaints, he

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[5] The grievant also alleges that Mr. N had instructed staff to remove debt owed to the Commonwealth, but that under policy, only the Commissioner, Governor "and possibly the Director" can forgive such debt. The grievant asserts that "[w]hen employees do not follow these instructions by [Mr. N], they are made to believe they are being insubordinate." A subsequent investigation by human resources concluded that the grievant had failed to substantiate these charges.

[6] The Grievance Form A is dated March 10, 2005. The grievant states that the grievance was signed on this date, but actually initiated on or after March 11, 2005. As the date of the grievance is not material to this ruling, we will refer to this grievance as the March 10, 2005 grievance.

[7] The grievant states that this complaint was included with her March 10, 2005 grievance.

[8] The grievant also asserts that Mr. S had previously sexually harassed another female employee.

had initiated an inquiry by human resources and an audit of several case records. The second-step respondent noted that the inquiry found that she was clearly insubordinate in not carrying out her supervisor's instructions, and that she could have completed the requested work and noted that it was being done at the direction of her supervisor. However, he agreed with the grievant that the handling of the matter "was problematic" and that the supervisor's behavior, while it did not rise to the level of sexual harassment, was "inappropriate." He also directed that the March 10, 2005 counseling memorandum not be retained in her personnel records, but rather be retained during the rating period in her supervisory file.

On April 25, 2005, the grievant initiated a grievance alleging that Mr. S had retaliated against her for her March 10th grievance and its subsequent outcome by giving her a poor interim evaluation. That evaluation identified four performance areas as substandard or needing improvement. The four areas included needing "to develop a greater cognitive awareness of her interaction with fellow staff members in fostering a 'team' atmosphere" and needing "to foster a more supportive working relationship with the senior management team of the [district office]." Approximately six months earlier, on October 13, 2004, the grievant had received an overall performance evaluation rating of "Contributor," with "Extraordinary Contributor" ratings in the areas of "Provides technical guidance, expertise and assistance," "Delivers Quality Customer Service to External and Internal Customers," and "Communications."[9]

The grievant initiated a third grievance on June 3, 2005, in which she challenges a Notice of Improvement Needed/Substandard Performance issued to her on June 2, 2005. The grievant alleges that she received the Notice in a "continuation of the Harassment and Obliteration of [her] Professional Character," and as part of a personal vendetta against her by a portion of senior management.[10]

After the parties failed to resolve the grievances during the management resolution steps, the grievant asked the agency head to qualify the grievances for hearing. The agency head denied the grievant's requests, and she has appealed to this Department.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[11] 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

[9] Mr. N, who was the reviewer for the grievant's 2004 evaluation, added this comment: "Thanks for a job well done. Please keep up the good work."
[10] The grievant initiated a fourth grievance on June 10, 2005. That grievance was resolved in the management resolution steps and is not addressed in this ruling.
[11] *See* Va. Code § 2.2-3004(B).

applied.[12] Here, the grievant alleges that she has been subjected to a continuing course of retaliation, harassment, sex discrimination, and religious discrimination.

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;[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 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.[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]

Here, because the alteration of child support obligations is governed by a legal and regulatory framework,[17] the grievant's alleged refusal to alter records could reasonably be viewed as the protected activity of "complying with any law."[18]

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].'"[19] Here, the grievant has presented evidence that within a three month period, after she questioned her supervisor's instruction on March 8, 2005, she was given a counseling memorandum, a poor interim

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

[13] *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."

[14] 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 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.

[15] *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).]

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

[17] *See, e.g.*, Va. Code § 20-74; § 63.2-1903.

[18] In addition, the grievant has asserted that she previously complained to her supervisors about the alleged dissemination of religious materials, that she engaged in protected grievance activity, and that she initiated an EEO complaint within the agency.

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

evaluation, and a Notice of Improvement Needed. 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.

Finally, the grievant has raised a sufficient question of a causal relationship between the agency's actions and her alleged protected activity. She has presented evidence that after she allegedly objected to her supervisor's instruction regarding the child support documentation, she was compelled to attend a meeting she considered threatening (and the agency subsequently deemed "inappropriate") and was issued a counseling memorandum.[20] She has also presented evidence that after she initiated a grievance challenging the meeting, counseling memorandum, and alleged inappropriate comments by her immediate supervisor, she received a critical interim evaluation and a Notice of Improvement Needed, despite having received favorable evaluations for the preceding two years. In particular, we note that the interim evaluation specifically identified as an area for improvement a need for the grievant "to foster a more supportive working relationship with the senior management team" of the district office. This evidence, while certainly not dispositive, raises a sufficient question of causation to warrant qualification of the grievant's claims of retaliation for hearing before a neutral factfinder.

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 religious 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

[20] She has also presented evidence that this conduct occurred several months after she allegedly complained about the District Manager disseminating religious materials.

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.[21]

This Department finds that consolidation of the March 10, 2005, April 25, 2005, and June 3, 2005 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.[22]

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's March 10, 2005, April 25, 2005, and June 3, 2005 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 T. Farr
Director

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