Issue: Qualification/retaliation/grievance activity participation; Ruling Date: September 14, 2006; Ruling #2007-1423; Agency: University of Virginia; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the University of Virginia
Ruling No. 2007-1423
September 14, 2006

The grievant has requested a ruling on whether her July 6, 2006 grievance qualifies for hearing. She asserts that she has been subjected to retaliation for an earlier grievance filed against the University of Virginia.

FACTS

The grievant initiated this grievance to challenge and have removed from her file two informal counseling letters dated April 3, 2006 and June 7, 2006, for alleged failure to follow her supervisors' instructions.[1] The grievant alleges that these letters were the result of retaliation because she had previously filed a grievance related to her salary in early January 2006 ("the first grievance"). The grievant has also provided a timeline of other alleged retaliatory conduct, which began the day after she filed the first grievance. Specifically, the grievant asserts that she has received repeated direct and indirect inquiries regarding her conduct at work with respect to such things as vacation time, her time sheet, answering phone calls, and making phone calls.[2] She has also challenged her supervisor's decision to deny extended vacation time to staff while classes are in session. The grievant received "extraordinary contributor" ratings in her performance evaluations for at least the previous two years.

DISCUSSION

Retaliation

[1] The first incident occurred when the grievant allegedly declined to unlock one of her supervisor's offices. The April 3, 2006 letter was placed in the grievant's file shortly after the incident, which identified the grievant's failure to follow her supervisor's instructions on different occasions. The second incident involved an assignment that the grievant performed to near completion, but had failed to finish entirely in the amount of time her supervisor had assumed it would be done. The grievant received the June 7, 2006 letter following this assignment and a meeting regarding her conduct.

[2] In various instances, the grievant asserts that her supervisor has a) questioned certain vacation time the grievant scheduled, though she was permitted to take the time; b) questioned the number of hours the grievant had entered on her time sheet for a particular day in which the grievant may have been out for part of the day; c) questioned the grievant's alleged failure to answer her supervisor's phone line and transfer a particular call; and d) interrupted or glared at the grievant when her supervisor believed she was on personal phone calls.

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 after filing the first grievance in January 2006 she was subjected to a course of retaliatory conduct, two counseling letters, and repeated inquiries about her work.

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 a grievance is clearly a protected activity.[9] However, this Department has no basis to qualify the grievance because there is insufficient evidence of a materially adverse action. For the grievance to qualify for hearing, the action taken against the grievant must have been materially adverse to a reasonable worker, such that a reasonable employee might be dissuaded from making or supporting a grievance against the employer.[10] While this determination will depend on the particular circumstances of each case, placing two informal counseling letters in an employee's file does not generally rise to the level of being materially adverse.[11] The grievant has presented no additional facts as to why these informal letters were

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[3] Va. Code § 2.2-3004(B).
[4] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(b)-(c).
[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). 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, 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, 145 F.3d 653, 656 (4th Cir. 1998).
[8] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (Title VII discrimination case).
[9] *See* Va. Code 2.2-3004(A) and *Grievance Procedure Manual* §4.1(b)(4).
[10] *See* Burlington N., 126 S.Ct. at 2415.
[11] Though not the same legal standard applicable here, it is instructive to note that a counseling letter, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment and thus,

materially adverse in this case. Moreover, the alleged repeated questioning of the grievant's work and conduct in the workplace by her supervisor, even if proven, does not constitute materially adverse treatment for purposes of the anti-retaliation provisions of the grievance procedure in this case.

As discussed in the *Burlington Northern* decision, the anti-retaliation provisions of Title VII, which are comparable with those under the grievance procedure, address significant, not trivial, harms, and are not meant to "immunize [an] employee from those petty slights or minor annoyances that often take place at work and that all employees experience."[12] Rather, the goal is "to prevent employer interference with 'unfettered access'" to remedial measures, which is accomplished by "prohibiting employer actions that are likely 'to deter'" employees from making complaints to the appropriate authorities.[13] "[N]ormally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence."[14] While the grievant's claims describe slights, annoyances, and poor manners, she has not presented sufficient facts to raise a question that this alleged course of conduct or the informal counseling letters were materially adverse. Accordingly, this grievance is not qualified for hearing.[15]

Furthermore, while all grievances may proceed through the management resolution steps, to qualify for a hearing, claims of supervisory harassment and/or a "hostile work environment" must involve "hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability."[16] Here, the grievant has not alleged that management's actions were based on any of these factors. Rather, the facts cited in support of the grievant's claim can best be summarized as describing general work-related conflict between the grievant and her supervisor. Such claims of supervisory conflict are not among the issues identified by the General Assembly that may qualify for a hearing.[17]

We note, however, that while the informal counseling letters do not have a material impact on the grievant's employment, they could be used later to support an adverse employment action against the grievant. According to DHRM Policy 1.60, Standards of Conduct, repeated misconduct may result in *formal* disciplinary action, which would have a detrimental effect on the grievant's employment and automatically qualifies for a hearing under the grievance procedure.[18] Moreover, according to DHRM Policy 1.40, Performance Planning and Evaluation, a supervisor may consider informal documentation of perceived performance problems when

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does not constitute an adverse employment action. *See, e.g.*, EDR Ruling 2003-425.; *see also* Boone v. Goldin, 178 F. 3d 253 (4th Cir. 1999).

[12] Burlington N., 126 S.Ct. at 2415.

[13] *Id.* (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)).

[14] *Id.*

[15] The grievant's challenge to her supervisor's decision to deny extended vacation time to staff while classes are in session does not appear relevant to her claims of retaliation. The new policy was addressed to all of the supervisor's staff and not directed at the grievant specifically. Therefore, there is no basis to conclude that the decision was retaliation against the grievant.

[16] DHRM Policy 2.30, "Workplace Harassment."

[17] *See* Va. Code § 2.2-3004(A).

[18] *See generally* DHRM Policy 1.60, Standards of Conduct; *see also Grievance Procedure Manual* § 4.1(a).

completing an employee's performance evaluation.[19] Therefore, should the Notice of Improvement Needed in this case later serve to support an adverse employment action against the grievant, such as a formal Written Notice or a "Below Contributor" annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits of the informal disciplinary action through a subsequent grievance challenging the related adverse employment action.[20]

We note further that although the grievance does not qualify for a hearing, mediation or group facilitation may be a viable option for the parties to pursue. EDR's mediation program is a voluntary and confidential process in which one or more mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation and/or facilitation have the potential to effect positive, long-term changes of great benefit to the parties and work unit involved. For more information on this Department's Workplace Mediation program, the parties should call 888-232-3842 (toll free) or 804-786-7994.

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 the qualification 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

[19] DHRM Policy 1.40, Performance Planning and Evaluation, "Documentation During the Performance Cycle," page 4 of 16.

[20] Although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the Act). Under the Act, if the grievant gives notice that she wishes to challenge, correct or explain information contained in her personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth her position regarding the information. Va. Code § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. Va. Code § 2.2-3806(A)(5).