Issue: Qualification/Retaliation/grievance activity participation; Ruling Date: October 16, 2006; Ruling #2007-1436; Agency: Department of Juvenile Justice; Outcome: qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Juvenile Justice
Ruling No. 2007-1436
October 16, 2006

The grievant has requested a ruling on whether his March 15, 2006 grievance qualifies for hearing. He asserts that he has been subjected to retaliation for previously instituting grievances with the Department of Juvenile Justice ("the agency").

FACTS

The grievant alleges that the agency has retaliated against him for previously filing grievances in November 2003 and March 2005. For approximately two and one-half years prior to February 2006, the grievant had worked at a post in the vehicle sally port. In January 2006, one of the grievant's supervisors purportedly told the grievant that he was going to be brought "back inside" the facility from his usual post. The grievant asserts that his supervisor stated, "I'm tired of you on that radio." The following day, another supervisor informed the grievant that he was being reassigned from the vehicle sally port to work inside the facility as a "floater." According to the grievant, a floater performs various tasks such as laundry, delivering ward food trays, searches, and giving staff breaks.

On February 1, 2006, the grievant gave two letters to his superiors. The first described alleged unprofessional and harassing conduct that the grievant felt he had been subjected to, which had culminated in the reassignment. The second letter set out various issues that the grievant believed were "breaches of security" at the vehicle sally port. On Friday, February 3rd, the grievant's supervisor allegedly informed him that he would no longer be working 8-hour shifts Monday through Friday, but would instead be on 12-hour shifts on a particular break schedule. The 12-hour days were set to begin the following Monday, February 6th.

The grievant met with the facility's assistant superintendent on February 10, 2006, and, according to the grievant, discussed the "financial hardship" he had incurred because of the schedule changes. Over the next few weeks, the grievant worked at the vehicle sally port a number of days. The rest of the time, the grievant worked inside the facility. During this period, the grievant allegedly worked 12-hour days. The grievant asserts that he last worked at the vehicle sally port on March 1, 2006. The following day, the grievant states he received DHRM's ruling on his prior grievance in the mail. The grievant was allegedly assigned to work inside the facility permanently on the same day.

On March 15, 2006, the grievant gave another letter to a higher-level supervisor discussing his concerns with the reassignment. The grievant reportedly had a meeting that day to discuss various issues, including the reassignment, a recent written notice made against the grievant, and the facts giving rise to this grievance. During the meeting, the grievant's supervisors allegedly questioned him about a discussion they believed the grievant had with members of the human resources staff concerning fraternization at the facility.[1] According to the grievant, his "report" of fraternization was the main topic of the meeting. The grievant's supervisors allegedly questioned him about why he made the "report."

The grievant initiated this grievance on March 15, 2006. He alleges that because of the schedule changes, he experienced hardships outside of work. He had to quit his second job, in which he was making an additional $7,000 to $10,000 annually. He also stopped attending night classes. The change in schedule also created problems with arranging babysitters for his daughter, and difficulties in caring for an ill parent. Due to the short notice of the schedule change, the grievant also asserts that he had to take at least three days of annual leave on weekend days due to prior commitments.

The grievant alleges that the changes to his schedule were the result of retaliation for his prior grievance activity. However, the agency stated at the second resolution step that other similarly situated employees had their schedules and locations of work changed like the grievant. The grievant disputes that he has been treated consistently with other similarly situated employees and indicates that he has received disparate treatment. The grievant has also identified purported statements of various members of agency management, which may be relevant to the issue of retaliatory intent, such as management's alleged attempts to "get [the grievant]"[2] and that of another administrator who stated to the grievant "you know they do not like any one challenging them."

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

[1] According to the grievant, a member of the human resources office had asked the grievant about another employee at the facility. The human resources employee allegedly asked the grievant if he thought this other agency employee was assigned to her post because of a purported relationship with a supervisor. The grievant apparently stated that he did not know.
[2] A non-security staff member who purportedly has "direct knowledge," advised the grievant that administration was attempting to "get [the grievant]."
[3] Va. Code § 2.2-3004(B).

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 past grievances the agency has retaliated against him for this protected conduct. 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 an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the materially 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] In addition, the grievance raises a sufficient question as to whether management's actions were "materially adverse," such that a reasonable employee might be dissuaded from participating in protected conduct.[10] While this standard is objective, it may also take into account the particular circumstances of the employee.[11] "An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace."[12] The United States Supreme Court held in the *Burlington Northern* decision that the anti-retaliation provisions of Title VII, which are comparable with those under the grievance procedure and state policy, are "not limited to discriminatory actions that affect the terms and conditions of employment."[13] Therefore, in assessing whether a grievant alleging retaliation has been the subject of a materially adverse action, the extent to which the agency's conduct has affected

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[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.

[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 (1981) (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] *Id.* at 2415.

[12] *Id.* at 2412 (emphasis in original).

[13] *Id.* at 2412-13.

the particular employee outside the workplace is relevant. The Supreme Court noted that "an act that would be immaterial in some situations is material in others."[14]

In this case, the grievant has presented evidence that the changes in his position, especially the changes in hours, have caused him a number of problems at home. He has allegedly had issues with scheduling babysitters and problems with caring for an ill parent and child.[15] The grievant also asserts that the change in hours forced him to quit a second job, resulting in a substantial loss in family income, and classes he was taking after work. The short notice the agency gave the grievant also allegedly caused him to use annual leave, which would not have been necessary if the changes to the grievant's schedule were avoided or given with sufficient lead time or flexibility.

Finally, the grievance raises a sufficient question as to whether the actions taken by the agency had a nexus with the protected conduct. Although the agency states that it has treated other similarly situated employees the same by ordering transfers and changing their hours, the grievant's evidence has disputed these statements, and the agency has offered no proof to support its claims. The grievant has, moreover, presented evidence raising a question as to whether the transfer of the grievant may have been the result of some sort of personal animus. Purported statements, such as management is out to "get" the grievant and management does "not like anyone challenging them," raise a question of improper intent directed at the grievant specifically. The manner in which the grievant's supervisors allegedly reacted to a perceived report of fraternization could also support the grievant's retaliation argument in that management allegedly acted disfavorably toward the grievant because they believed he had reported a supervisor's apparent misconduct.

Because the grievant has raised a sufficient question as to his claim of retaliation, the grievance qualifies for hearing. However, 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.

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the grievant's March 15, 2006 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

[14] *Id.* at 2416 (internal quotation omitted).
[15] "A schedule change in an employee's work schedule may make little different to many workers, but may matter enormously to a [parent] with school age children." *Id.* at 2415.