Issue: Administrative Review Ruling/Hearing Decision Appeal; Ruling Date: February 2, 2007; Ruling #2007-1530; Agency: Department of Juvenile Justice; Outcome: hearing officer in compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW RULING OF DIRECTOR

In the matter of the Department of Juvenile Justice
Ruling Number 2007-1530
February 2, 2007

The agency has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8460. The Department of Juvenile Justice (the agency) has appealed the decision on several bases, including that the hearing officer used an incorrect standard for determining whether the grievant was retaliated against. The agency also asserts that the hearing officer's order returning the grievant to his former position "interferes with the agency's ability to establish staffing and operating procedures."

FACTS

The facts, as set forth in the December 21, 2006 Hearing Decision in Case 8460, are listed below:

> The Department of Juvenile Justice employs Grievant as Juvenile Corrections Officer at one of its Facilities. The purpose of his position is to, "ensure the protection of the citizens of the Commonwealth by providing supervision and security to juvenile offenders and implement treatment programs that offer opportunities for reform." He has been employed by the Agency for several years and has worked at the Facility longer than approximately 95% of other security staff. The Facility employs at least 200 security staff.
>
> Grievant filed grievances with the Agency in November 2003 and March 2005.
>
> The Agency's practice is to staff posts based on staff seniority. In other words, the longer an employee has worked at the Facility, the greater discretion that employee is given to select among security posts. Facility Security staff perceived some posts as being significantly more appealing than other posts. For example, security staff working in the Behavior Management Unit have to work with the most difficult wards in the Facility. Many of these wards have a propensity towards violence and security staff must sometimes use force to control them. Security staff working at the sally port do not have to work with wards and are not often at risk of physical injury. Most security staff perceive the sally port as

being a much better post to work than the Behavior Management Unit post.

For over two years, Grievant was working the sally port post. He worked eight hours per day from approximately 5 a.m. until 2 p.m., Monday through Friday. On January 17, 2006, Captain M informed Grievant that security staff working Mondays through Fridays would have to work one weekend per month and one weekday Holiday per year. On January 25, 2006, Captain M informed Grievant that the weekend and holiday coverage had been change [sic] from every month to every other month with discretion to staff regarding how to cover the weekends.

On January 26, 2006, Captain M informed Grievant that Grievant would be reassigned from the sally port post to work inside the facility in a "floater" position.

On February 1, 2006, Grievant wrote a memorandum to the Major describing some security breaches at the sally port post.

On February 2, 2006, the Major wrote a memo to his immediate subordinates informing them that effective February 6, 2006 the sally port post would no longer be a Monday through Friday post, but that it would change to a 12 hour day shift post. He indicated the day shift Watch Commander would be responsible for staffing the post. The Major instructed Captain M or Lieutenant S to inform Grievant on February 3, 2006 of the change and to report to work on the following Monday at 6:45 a.m.

On Friday, February 3, 2006, Lieutenant S informed Grievant that he would begin 12 hours shifts instead of eight hour shifts effective Monday, February 6, 2006.

On February 6, 2006, the sally port post was changed from eight hours per day to a twelve hour shift. Grievant remained at the sally port post but had to adjust his work hours. The Agency changed the hours of the post based on the needs of the Facility.

On February 7, 2006, Grievant asked to speak with the Major concerning how the change in schedule affected Grievant financially. Grievant had not scheduled an appointment with the Major. The Major told Grievant he was busy and would meet with Grievant at a later time. The Major never met with Grievant regarding Grievant's concerns.

On February 10, 2006, Grievant met with the Assistant Superintendent regarding the schedule change and the financial hardship the change caused Grievant.

> Grievant worked the sally port post for the last time on March 1, 2006.
>
> On March 2, 2006, Grievant received in the mail a notification from the Department of Human Resource Management ruling on a prior grievance and conclusion of the grievance. DHRM mailed the ruling on February 28, 2006. A copy of the ruling was sent to the Facility Superintendent.
>
> On March, 2, 2006, Captain P assigned Grievant to work in the Behavior Management Unit.
>
> Grievant asked Captain P why he could not work the sally port post. Captain P responded that Grievant should "take that up with administration" because the decision to move Grievant was made by employees higher in Captain P's chain of command.
>
> Grievant attempted to ask the Major why he was moved from the sally port post, but the Major was too busy to meet with him. [1]

Following a November 28, 2006 hearing, the hearing officer issued his December 21, 2006 decision, concluding that "[t]he Agency did not retaliate against Grievant by changing the work hours of the sally port position from eight hours per day to 12 hours per day," [2] but that the "Grievant has established that the Agency retaliated against him by moving him from the sally port post to the Behavior Management Unit post."[3] Accordingly, the hearing officer ordered the agency to return the grievant to his former sally port post, stipulating that he could only be moved from that position for "legitimate business needs." [4]

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions…on all matters related to procedural compliance with the grievance procedure."[5] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[6]

---

[1] Footnotes from the Fact section of the decision have been omitted here.
[2] Hearing Decision, p. 4.
[3] *Id.* at 5.
[4] *Id.*
[5] Va. Code § 2.2-1001(2), (3), and (5).
[6] *See Grievance Procedure Manual* § 6.4(3).

Retaliation Standard

The agency asserts that the hearing officer used an incorrect standard for determining whether the agency retaliated against the grievant. Citing to Va. Code § 2.2-3004(A),[7] the agency asserts that the hearing officer was required to find that the grievant suffered an adverse employment action before he could find that the agency retaliated against the grievant.

As an initial point, this Department notes that the Virginia Code section to which the agency cites relates to the types of grievances that can proceed to hearing, not the standard by which a hearing officer is bound when deciding a case. Accordingly, § 2.2-3004(A) is not controlling authority in an appeal relating to a hearing decision. For the following reasons, however, this Department concludes that the hearing officer used the appropriate retaliation standard in this case. In establishing EDR precedent, this Department has long looked to federal and Virginia legal precedent as instructive—although not dispositive—authority.[8] As the law evolves, so do this Department's rulings[9]. In previous retaliation qualification rulings,

---

[7] Section 2.2-3004(A) states that: "

> A grievance qualifying for a hearing shall involve a complaint or dispute by an employee relating to the following adverse employment actions in which the employee is personally involved, including but not limited to (i) formal disciplinary actions, including suspensions, demotions, transfers and assignments, and dismissals resulting from formal discipline or unsatisfactory job performance; (ii) the application of all written personnel policies, procedures, rules and regulations where it can be shown that policy was misapplied or unfairly applied; (iii) discrimination on the basis of race, color, religion, political affiliation, age, disability, national origin or sex; (iv) arbitrary or capricious performance evaluations; (v) acts of retaliation as the result of the use of or participation in the grievance procedure or because the employee has complied with any law of the United States or of the Commonwealth, has reported any violation of such law to a governmental authority, has sought any change in law before the Congress of the United States or the General Assembly, or has reported an incidence of fraud, abuse, or gross mismanagement; and (vi) retaliation for exercising any right otherwise protected by law.

[8] *See* Rulings 2006-1174, 2006-1175.

[9] For example, as a general rule this Department has held that a reasonable reading of Va. Code § 2.2-3004(A) is that the legislature intended to preclude qualification of grievances that do not involve an "adverse employment action." Accordingly, we have held that "for a claim to qualify for hearing, a grievant must show that he suffered an adverse action affecting the terms and conditions of his employment." EDR Ruling No. 2004-932. *See also Grievance Procedure Manual* § 9 (defining an adverse employment action as "[a]ny employment action resulting in an adverse effect on the terms, conditions or benefits of employment)." We have recognized, however, that it is sometimes appropriate to send grievances to hearing when the grievant may not have suffered an "adverse employment action." For example, this Department recently 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 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

this Department had required, as an element of the grievant's burden, a showing of an "adverse employment action."[10] This requirement was adopted long ago and stemmed primarily from Title VII jurisprudence. 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.[11] We found the *Burlington Northern* Court's reasoning and conclusions persuasive, and therefore adopted the materially adverse standard for all qualification rulings asserting claims of retaliation.[12] Furthermore, we believe that the materially adverse standard adopted for EDR qualification rulings and used by the hearing officer in this case, is the appropriate standard for hearing officers to implement when deciding retaliation cases.

The Propriety of the Relief Ordered by the Hearing Officer

The agency asserts that the hearing officer's order to the agency to return the grievant to his former position "interferes with the agency's ability to establish staffing and operating procedures."

Under the *Rules for Conducting Grievance Hearings (Rules)*, "[i]f the issue of retaliation or discrimination is qualified for hearing and the hearing officer finds that it occurred, the hearing officer may order the agency to create an environment free from discrimination and/or retaliation, and to take appropriate corrective actions necessary to cure the violation and/or minimize its reoccurrence."[13] The *Rules* further state that "[t]he hearing officer should avoid providing specific remedies that would unduly interfere with management's prerogatives to manage the agency (e.g., ordering the discipline of the manager for discriminatory supervisory practices)."[14]

---

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."

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.

[10] *See, e.g.*, EDR Ruling No. 2006-1284.

[11] Burlington N. & Santa Fe Ry. Co. v. White, 126 S.Ct. 2405 (2006).

[12] In Burlington N. & Santa Fe Ry. Co. , 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 (DC Cir. 2006)).
In adopting the "materially adverse" standard the Court noted that the requirement of "materiality" is critical to "separate significant from trivial harms." *Id.* 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.

[13] *Rules for Conducting Grievance Hearings,* § VI (C)(3).

[14] *Id.*

In this case, after finding that the agency transferred the grievant from his sally port position in retaliation for his prior grievance activity, the hearing officer ordered the agency to return the grievant to his former sally post position. The agency asserts that the hearing officer exceeded the scope of his authority by ordering the grievant returned to his former position. This Department disagrees. When a hearing officer finds that an employee has been transferred for retaliatory reasons, the hearing officer may order the return of the employee to his or her former position, just as a hearing officer can order the reinstatement of a wrongfully discharged employee.[15] The relief in this case was particularly appropriate in that it expressly stated that "[t]he Agency may move Grievant from the sally port post [but] only for legitimate business needs with due regard given to his seniority."[16] In other words, the agency is free to move the grievant so long as any such move is based on legitimate non-retaliatory reasons. Accordingly, this Department cannot conclude that the grievant's return to the sally port "interferes with the agency's ability to establish staffing and operating procedures."

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, this Department will not disturb the decision of the hearing officer.

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.[17] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[18] (However, an agency must request and receive approval from the EDR Director before filing a notice of appeal). Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[19]

____
Claudia T. Farr
Director

[15] This would be in addition to a general order for the agency to cease all retaliation.
[16] Hearing Decision, p. 5.
[17] *Grievance Procedure Manual* § 7.2(d).
[18] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[19] *Id.; see also* Virginia Dep't of State Police vs. Barton, 39 Va. App. 439, 445, 573 S.E. 2d 319 (2002).