Issues: Qualification and Consolidation – Management Actions (assignment of duties), and Retaliation (waste/fraud/abuse and whistle-blowing); Ruling Date: November 19, 2007; Ruling #2008-1775, 2008-1831; Agency: Department of Labor and Industry; Outcome: Qualified; Consolidation granted.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION and CONSOLIDATION RULING OF DIRECTOR

In the matter of the Department of Labor and Industry
Ruling Nos. 2008-1755; 2008-1831
November 19, 2007

The grievant has requested qualification rulings in her June 8, 2007 and August 10, 2007 grievances against the Department of Labor and Industry (DOLI or the agency). For the reasons discussed below, these grievances are qualified and consolidated for hearing.

FACTS

The grievant is employed as a Program Support Technician with the agency. The grievant asserts that on February 9, 2007, she ran a report which listed 41 files with overdue abatements. She states that her former supervisor (the Consultation Program Manager) began calling the companies identified in the report the week of February 12, 2007. The grievant reports discovering a file on February 15, 2007 containing 23 serious overdue hazards closed without documentation, except a handwritten note from the Consultation Program Manager indicating that the business had been sold. The grievant claims she called the company to verify that the business had been sold, and that the individual who answered her call informed her that the business had not been sold and no one had offered to buy the company.

The grievant asserts that she was so alarmed by her discovery that she contacted a staff attorney who purportedly recommended that the grievant show the file to the Deputy Commissioner. When it turned out that the Deputy Commissioner was unavailable, the grievant sent the Commissioner an e-mail describing the file and informing him that she had provided the Human Resource Manager with a package of copied reports containing serious violation of abatement procedures. The grievant states that on February 20, 2007, at the request of the Commissioner, she met with him and discussed her allegations of record alterations and falsifications.

The grievant asserts that she has been a victim of retaliation for reporting the Consultation Program Manager's actions. For example, the grievant asserts that as of May 15,

2007, all of her job duties were transferred to the Consultation Program Manager and she was left with no substantial job responsibilities. Along with the change of duties, the grievant was to report to a new supervisor. In response to the removal of her job functions, the grievant initiated a grievance on June 8, 2007, challenging the agency's actions (Grievance 1).

On August 10, 2007, the grievant initiated a second grievance (Grievance 2), this one challenging the agency's decision to physically move the Consultation Program Manager from the central office to another location along with all consultation files, which the grievant asserts constitutes the abolition of her job. She asserts that this move was also an act of retaliation.

DISCUSSION

Qualification

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[1] 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 applied. In Grievance 1, the grievant claims that the agency has retaliated against her for reporting the closing of files containing significant unresolved safety violations to the Commissioner.

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;[2] (2) the employee suffered a materially adverse action;[3] 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.[4] Evidence establishing a causal connection

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[1] *See* Va. Code § 2.2-3004(B).

[2] *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 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).

[3] Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2414-15 (2006). For a grievance to qualify for hearing, the action taken against the grievant must have been materially adverse such that a reasonable employee in the grievant's position might be dissuaded from participating in protected conduct. *Id.* at 2415.

[4] *See* EEOC v. Navy Fed Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).

and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[5]

The grievant's complaint to the Commissioner regarding workplace safety would appear to constitute a protected activity.[6] Furthermore, the agency's purported action of removing the majority of the grievant's job duties and leaving her with only marginal tasks[7] would seem to constitute a "materially adverse" action.[8] Thus, the final issue is whether there is a sufficient question as to whether a causal link exists between the grievant's protected activity and the removal of her job functions, such as to warrant qualifying this grievance for hearing.

The agency denies that the grievant has been retaliated against and has articulated a legitimate, non-retaliatory reason for its actions. Specifically, the agency asserts that the changes were initiated because of a long history of conflict and mistrust between the grievant and the Consultation Program Manager. The agency states that minimizing the daily interactions between them reduced the potential for conflict while the agency was investigating the grievant's claims regarding the Consultation Program Manager's actions. In addition, the agency asserts that its actions were proactive steps taken to prevent the potential for retaliation.

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

[6] OSHA protects from retaliation employees who report unsafe working conditions to their employers. 29 U.S.C. § 660(c)(1). Likewise, under the Virginia Occupation Safety and Health (VOSH) Protection of Employee statutes (Va. Code § 40.1-22 et. seq.), employees who report a safety issue shall not be discharged or discriminated against because of such a complaint. *See* Va. Code § 40.1-51.2:1. ("No person shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or otherwise acted to exercise rights under the safety and health provisions of this title for themselves or others.") Thus, under VOSH it would appear that the grievant engaged in a protected activity when she reported the Consultation Program Manager's alleged actions to the Commissioner. In addition, the grievant asserts that she also reported the same concerns to the Fraud, Waste, and Abuse Hotline, which would also constitute a protected activity. Further, the grievant's actions could possibly be viewed as a report of "gross mismanagement," also a protected activity.

[7] In her July 20, 2007 revised Response to the Third Step Respondent the grievant asserts that previously she:

> developed [her] skills as a Consultation Program Tech for 14 years by providing guidance and assistance for the consultants and hours of training for new consultants, working to keep [the compliance] program in compliance with CPPM and the 1908 Regulation Standards, maintaining accurate form data, assisting clients and the public with their needs, assisting the Program Manager with reports, special assignments, required files assimilation and for the first four years of his arrival, [the grievant] closed hazards with documented abatements, made extensions with documentation, wrote the extension letters and signed for [grievant's supervisor], made survey assignments and wrote the letters and signed for [grievant's supervisor], all under his direction.

The grievant asserts that as a result of the reassignment of duties she was relegated to performing entry level assignments and "girl Friday" tasks, when she was assigned any work at all. *Id*.; July 24, 2007 Response to the Agency Head's Qualification Decision; and grievant's Attachment to her August 10, 2007 grievance.

[8] *See* EDR Ruling 2007-1511; 2007-1548. *See also*, Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2416-17 (2006) ("Almost every job category involves some responsibilities and duties that are less desirable than others. Common sense suggests that one good way to discourage an employee such as White from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable. That is presumably why the EEOC has consistently found '[r]etaliatory work assignments' to be a classic and 'widely recognized' example of 'forbidden retaliation'." 2 EEOC 1991 Manual § 614.7, pp 614-31 to 614-32; see also 1972 Reference Manual § 495.2 (noting Commission decision involving an employer's ordering an employee 'to do an unpleasant work assignment in retaliation' for filing racial discrimination complaint); EEOC Dec. No. 74-77, 1974 WL 3847, *4 (Jan. 18, 1974) ('Employers have been enjoined' under Title VII 'from imposing unpleasant work assignments upon an employee for filing charges').").

Based on a totality of the circumstances, however, including but not limited to (1) the antagonism between the grievant and members of agency management;[9] and (2) the proximity in time between the grievant's protected acts and the change in her duties,[10] Grievance 1 is qualified for hearing, because the evidence it presents raises a sufficient question as to (1) whether a causal connection exists between her protected acts and the change of report and duties; and (2) whether the agency's stated reason for these changes was a pretext for retaliation.

We note that this qualification ruling in no way determines that the agency's actions with respect to the grievant were retaliatory or otherwise improper. Rather, 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.

Further, in a case like this, where the grievant will be afforded a hearing on Grievance 1, it simply makes sense to send Grievance 2, which also asserts a retaliatory intent by the agency, to hearing as well. The two grievances share common factual questions relating to her treatment by management regarding her allegations of falsification of documents. Furthermore, sending these related claims to a single hearing (see consolidation discussion below) will provide an opportunity for the fullest development of what may be interrelated facts and issues.

Consolidation

This Department has long held that it may consolidate grievances with or without a request from either party whenever more than one grievance is pending involving the same parties, legal issues, and/or factual background.[11] EDR strongly favors consolidation and will grant consolidation unless there is a persuasive reason to process the grievances individually.[12]

Grievance 1 and Grievance 2 share a common factual basis, involve the same parties, potentially many of the same witnesses, and a common theme of retaliation. Thus, this Department deems it appropriate to send both grievances for adjudication by a single hearing officer to help ensure a full exploration of what could be interrelated facts and issues.

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[9] The grievant asserts that she senses hostility from her new supervisor as well, as indicated in a March 7, 2007 e-mail from grievant to the second step respondent, and grievant's response to the first step response in Grievance 2. This Department recognizes that while evidence of conflict between the grievant and her supervisors could be probative of a retaliatory intent, any conflict between them may also exist for a myriad of non-retaliatory reasons.

[10] *See* Tinsley v. First Union National Bank, 155 F.3d 435, 443 (4th Cir. 1998) (noting that merely the closeness in time between a protected act and an adverse employment action is sufficient to make a prima facie case of causality). *See also* Jaudon v. Elder Health, Inc., 125 F. Supp. 2d 153, 165 (D. Md. 2000) (indicating that temporal proximity and ongoing antagonism can be a sufficient basis to establish a causal link.)

[11] *Grievance Procedure Manual* § 8.5.

[12] *Id.*

CONCLUSION

For the reasons discussed above, this Department concludes that Grievances 1 and 2 are qualified and shall be consolidated for hearing to be heard by a single hearing officer. 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 Farr
Director