Issues: Qualification – Work Conditions: Violence in the Workplace, Retaliation: Other Protected Right; Ruling Date: September 21, 2007; Ruling #2008-1779; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Mental Health, Mental Retardation
and Substance Abuse Services
Ruling No. 2008-1779
September 21, 2007

The grievant has requested a qualification ruling in his August 17, 2006 grievance against the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency). For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Trades Technician III with the agency. On July 14, 2006, the grievant was allegedly verbally and physically assaulted by his supervisor. The grievant complained about his supervisor's behavior and an agency investigation of the July 14th incidents immediately ensued. After interviewing witnesses and reviewing the facts, on July 21, 2006, the agency determined that the grievant's supervisor did indeed violate the workplace violence policy and took corrective measures.

Thereafter, on July 26, 2006, the grievant received a counseling memorandum for his alleged inappropriate complaints to staff about the condition of chairs and for failure to conduct himself in a professional manner.[1] The incidents at issue in the July 26, 2006 counseling memorandum occurred on June 19, 2006 and July 14, 2006.

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[1] The agency received two complaints regarding the grievant's behavior and actions toward staff. Specifically, on June 20, 2006, a nurse complained to the grievant's supervisor's supervisor that the grievant "verbalized aloud on the unit unprofessional and inappropriate comments" and accused the staff of intentionally destroying chairs. Likewise, on July 14, 2006, a nurse sent a memorandum to the grievant's supervisor stating that the grievant accused staff of intentionally allowing chairs to be broken and, as punishment, threatened to provide them with only old chairs.

On August 17, 2006, the grievant initiated a grievance challenging the agency's response to his supervisor's alleged violent behavior on July 14, 2006. In addition, the grievant challenges the July 26th counseling memorandum as retaliatory.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] 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 this case, the grievant claims that the agency has "failed to provide a workplace free of threats, retaliation, coercion, [and] verbal and physical assault" and as such, has violated policy as well as federal and state law. Additionally, the grievant claims that he has been retaliated against for his complaints of workplace violence. The grievant's claims will be discussed below.

Misapplication of Policy

The applicable policies in this case are Department of Human Resource Management (DHRM) Policy 1.80, *Workplace Violence* and internal agency policy EC 021-14. Both Policy 1.80 and EC 021-14 require that the grievant's employing agency provide a safe working environment for its employees.[3] Federal and state laws also require employers to provide safe workplaces.[4] Thus, an act or omission by an employer resulting in actual or threatened workplace violence against an employee, or an unreasonably unsafe work environment for that employee, can reasonably be viewed as having an adverse effect on the terms, conditions, or benefits of his employment.[5]

"Workplace violence" is defined as "[a]ny physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties."[6] Prohibited conduct

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[2] *See* Va. Code § 2.2-3004(B).

[3] DHRM Policy No. 1.80 and Policy Number EC 021-14.

[4] Under the Occupational Safety and Health Act of 1970 (OSHA), an employer must establish "place[s] of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. 654(a)(1). Virginia state employees are covered by the Virginia Occupational Safety and Health Program (VOSH) which also requires "every employer to furnish to each of his employees safe employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious harm to his employees." VA. Code 40.1-51.1 (A); 16 VAC 25-60-30.

[5] *See* Herrnreiter v. Chi. Hous. Auth., 315 F.3d 742 (7th Cir. 2002), describing a "materially adverse employment action" or "tangible employment action" as including the circumstance where "the employee is not moved to a different job or the skill requirements of his present job altered, but the *conditions* in which he works are changed in a way that subjects him to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in his workplace environment…."315 F.3d at 744 (emphasis in original).

[6] DHRM Policy 1.80.

includes, but is not limited to the following: engaging in behavior which subjects another individual to extreme emotional distress and includes shouting and "an intimidating presence."[7]

In this case, it appears to be undisputed that the grievant's supervisor violated state and agency workplace violence policies. And while this Department certainly does not condone the supervisor's behavior, there are some cases where qualification is inappropriate even if policy has been violated or misapplied. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate where the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

In the present case, the grievant seeks: "[a]n order that the agency comply with applicable law and policy, and take immediate and appropriate action as defined by law and policy." In addition, the grievant appears to want to know exactly what disciplinary action(s) have been taken against his supervisor as a result of the events of July 14, 2006[8] and wants an apology for the supervisor's actions.[9] In response to the July 14, 2006 events, the agency has provided this Department with documentation demonstrating that it conducted a prompt and thorough investigation into the matter and took significant corrective measures.[10] Moreover, the grievant asserts that he has not been subjected to further incidents of workplace violence by his supervisor.

This is a case where much of the requested relief has been provided and the requested relief that has not been provided is not relief that a hearing officer could order. Thus, further effectual relief is unavailable. When there has been a misapplication of policy, a hearing officer could order that the agency reapply policy correctly. However, as a practical matter, "reapplying policy" would have little effect on a prior incident of workplace violence where, as in this case, the incident has been properly investigated, measures have been taken to remedy such behavior, and no further incidents of workplace violence have occurred.

In light of the foregoing, the grievant's misapplication of policy claim does not qualify for a hearing.

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[7] *Id.*

[8] In a letter to this Department from the grievant, he states, "[t]he issue is that I was verbally and physically assaulted by my supervisor and no action has been taken. [The agency head] in his response states that 'administrative actions were taken against your supervisor.' Unfortunately [the agency head] does not confirm that any <u>disciplinary</u> actions were taken. Nor does he specify that these administrative actions were taken due to the verbal and physical assault that I received."

[9] In an attachment to his grievance, the grievant states: "[e]ven though I have been assured that appropriate actions were taken to reprimand [my supervisor], I feel that one of the most important has been disregarded. I feel the incident has been down played to the point of unimportance so that no one has to offer me an apology for their actions."

[10] While the grievant's interest in the action taken against his supervisor is understandable, the agency was not required to provide this identifiable personal information to the grievant: in fact, state policy mandates that an agency may not disclose personal information of an employee, such as corrective measures, without the employee's consent of the disciplined employee. *See* DHRM Policy No. 6.05, *Personnel Records Disclosure*.

Retaliation

The grievant also claims that the counseling memorandum he received on July 26, 2006 was given in retaliation for his workplace violence complaint on July 14, 2006. 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;[11] (2) the employee suffered a materially adverse action;[12] 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.[13] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[14]

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[11] *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).

[12] *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414-15 (2006). Based on this Department's construction of the grievance statutes, a grievance must involve a non-trivial harm to qualify for hearing. *E.g.,* EDR Ruling No. 2004-932. Frequently, the non-trivial harm constitutes an "adverse employment action," (defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"). However, we have recognized that in some circumstances it is appropriate to send grievances to hearing when the grievant may not have suffered an "adverse employment action." For example, this Department 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 and duties 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 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." Thus, consistent with developments in Title VII law (*Burlington Northern*), 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. We note that in the *Burlington Northern* decision the Court observed that the requirement of "materiality" is critical to "separate significant from trivial harms." *Burlington N.*, 126 S. Ct. at 2415. 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. Moreover, to establish a consistent standard for retaliation cases, this Department has construed the grievance statutes and the *Grievance Procedure Manual* and adopted the materially adverse action standard for all claims of retaliation, whether they arise under a Title VII analog or not.

[13] *See* EEOC v. Navy Fed Credit Union, 424 F.3d 397, 405 (4th Cir. 2005); Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000).

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

The grievant's complaint of workplace violence constitutes protected activity.[15] However, under the circumstances of this case, this Department concludes that the grievant has failed to raise a sufficient question as to whether the single July 26th counseling memorandum for inappropriate conduct was "materially adverse." More specifically, the grievant admits that the July 26th counseling memorandum was not used to support a negative performance rating for the relevant performance cycle and has not been used to support any kind of formal discipline against him.[16] In addition, with regard to the allegation in the July 26th counseling memorandum that the grievant accused staff of intentionally tearing up the geriatric chairs by slamming them into walls, the grievant admits that he did ask the staff if they were throwing the chairs against the wall. Moreover, with regard to the allegation in the July 26th counseling memorandum that the grievant stated that all he was going to provide to the staff were old chairs, the grievant admits that he told the staff that he was going to replace the chairs with old ones.[17]

Based on the particular facts of this case, the July 26th counseling memorandum would not appear to rise to the level of a materially adverse employment action that would dissuade a reasonable person for engaging in protected activity.[18] Because the grievant has failed to

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[15] OSHA protects from retaliation employees who report unsafe working conditions to their employers. 29 U.S.C. § 660(c)(1). Likewise, under VOSH, 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. Moreover, DHRM Policy 1.80 prohibits agencies from "retaliating against any employee, who, in good faith, reports a violation of this policy." Therefore, under VOSH and state policy, it would appear that the grievant engaged in a protected activity when he reported the July 14, 2006 incident.

[16] 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. *See generally* DHRM Policy 1.60, *Standards of Conduct*; *see also Grievance Procedure Manual* § 4.1(a). Therefore, should the informal counseling in this case later serve to support an adverse employment action against the grievant, such as a Written Notice, this ruling does not prevent the grievant from attempting to contest the merits of the performance counseling through a subsequent grievance challenging the related adverse employment action.

[17] The grievant asserts that his supervisor told him to inform the staff that only old chairs would be available as replacements. The Agency, on the other hand, appears to have counseled the grievant for the manner in which he conveyed this information, which it deemed inappropriate and punitive. The counseling memorandum concludes by instructing the grievant to report damaged property to his supervisor and not to attempt to resolve such matters himself.

[18] *Cf.* Martin v. Merck & Co., Inc., 446 F. Supp. 2d 615, 638 (W.D. Va. 2006) (a written warning for violating policy by wearing safety goggles on the head is "mild discipline" and "would not dissuade a reasonable employee from engaging in a protected activity."); Gordon v. Gutierrez, Case No. 1:06cv861, 2007 U.S. Dist. LEXIS 253 (E.D. Va. 2007) (a verbal counseling that is deserved, properly conducted, and resulted in no further disciplinary action against the plaintiff is not a materially adverse action); Allen, et.al. v. National Railroad Passenger Corporation (AMTRAK), 2007 U.S. App. LEXIS 2216, *11-12 (3rd Cir. 2007) (a written reprimand for improperly communicating with a co-worker during a rest period was not materially adverse as it the plaintiff did not deny its allegations and the reprimand did not appear to affect the plaintiff's employment in any material way.); Breech v. Scioto County Regional Water District # 1, 2006 U.S. Dist. LEXIS 58545, *24 (S.D. Oh. 2006) ("a reasonable person would not be dissuaded by a reprimand given for not completing an assigned task."); and Dehart v. Baker Hughes Oilfield Operations, Inc., 2007 U.S. App. LEXIS 1362, *11 (5th Cir. 2007) (unpublished opinion) (a written warning for insubordination, for being argumentative and for excessive absenteeism is not a materially adverse action as there were "colorable grounds for the warning and a reasonable employee would have understood a warning under these circumstances was not necessarily indicative of a retaliatory mind-set.").

demonstrate that the July 26th counseling memorandum is a "materially adverse action," his claim of retaliation does not qualify for a hearing.[19]

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 this Department's 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 notifies the agency that he wishes to conclude the grievance.

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Claudia Farr
Director

[19] 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 he wishes to challenge, correct or explain information contained in his 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).