Issues: Qualification – two counseling memoranda (abuse of State time, unsatisfactory performance, disruptive behavior) and retaliation; Ruling Date: September 21, 2007; Ruling #2008-1801; Agency: College of William & Mary; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the College of William and Mary
Ruling No. 2008-1801
September 21, 2007

The grievant has requested a ruling on whether her June 22, 2007 grievance against the College of William and Mary (the agency) qualifies for hearing. She asserts that she has been subjected to retaliation.

FACTS

The grievant initiated this grievance to challenge and have removed from her "record" two counseling memoranda dated May 23, 2007 and June 19, 2007. The first of these memoranda addresses claims that the grievant left her assigned work area and failed to notify her supervisor properly of her intent to take annual leave. The second addresses the grievant's alleged unsatisfactory work performance and disruptive behavior. The grievant alleges that her supervisor issued these memoranda in retaliation for the grievant's previous grievance activity and because the supervisor was unable to assign the grievant to a particular building.

After the parties failed to resolve the June 22nd grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. The agency head denied the grievant's request, and she has appealed to this Department.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[1] 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.[2]

[1] Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(b)-(c).

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;[3] (2) the employee suffered a materially adverse action;[4] 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.[5] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[6]

In this case, even assuming that the grievant has engaged in a protected activity,[7] 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 employee, such that he or she might be dissuaded from making or supporting a grievance against the employer.[8] While this determination will depend on the particular circumstances of each case, placing two counseling memoranda in an employee's file does not generally rise to the level of being materially adverse.[9] The grievant has presented no additional facts as to why these informal memoranda were materially adverse in this case. Accordingly, this grievance is not qualified for hearing.

We note, however, that while the counseling memoranda 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.[10] Moreover, according to DHRM Policy 1.40, Performance Planning and Evaluation,

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[3] *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).

[4] 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.

[5] *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).

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

[7] *See* Va. Code 2.2-3004(A) and *Grievance Procedure Manual* §4.1(b)(4).

[8] *See* Burlington N., 126 S.Ct. at 2415.

[9] 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, 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).

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

a supervisor may consider informal documentation of perceived performance problems when completing an employee's performance evaluation.[11] Therefore, should the counseling memoranda 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.

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

[11] DHRM Policy 1.40, Performance Planning and Evaluation, "Documentation During the Performance Cycle."