Issues: Qualification – Discrimination (other), and Retaliation (grievance activity participation); Ruling Date: December 28, 2007; Ruling #2008-1854; 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 Department of Mental Health, Mental Retardation
and Substance Abuse Services
Ruling Number 2008-1854
December 28, 2007

The grievant has requested a ruling on whether her July 3, 2007 grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant initiated her grievance on July 3, 2007, alleging that she has been subjected to retaliation by her supervisor's supervisor, Manager G. The grievant's supervisor, Supervisor M, has filed his own grievance against Manager G. As a result, Manager G allegedly has retaliated against the grievant and various members of her shift (under Supervisor M). The grievant's allegations of retaliation include: 1) delays in receiving appropriate patches and badges for her uniform, while other employees received them promptly; 2) delays in being sworn in by the City as a Police Law Enforcement Officer, while others were sworn in promptly; 3) delays in receiving her uniform and required training; and 4) that communication between Manager G and Supervisor M's staff has been minimal, while Manager G speaks frequently with other employees.

The grievant has also alleged that she has endured a hostile work environment and sexual harassment based on her gender and sexual orientation. In addition to the conduct described above, the grievant alleges that Manager G attempted to inject hostility into her working relationship with Supervisor M. According to the grievant, Manager G falsely insinuated that Supervisor M did not like the grievant and had a problem with the grievant because of her sexual orientation. Manager G denies that he made any such comments.

DISCUSSION

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

The grievant's retaliation claim fails to qualify for hearing because she has not presented sufficient evidence of a causal link between any alleged protected activity and any materially adverse action.[5] The grievant's allegations mainly concern the delays in obtaining proper patches, badges, uniforms, certifications, and training. Based on a discussion with the agency during an investigation for this ruling, it was the responsibility of Supervisor M to approve these items for the grievant. The agency admits that the delays also resulted from confusion about these responsibilities because of recent policy changes. However, even if there was confusion, because it was not Manager G's duty to provide these items that were allegedly withheld from the grievant, it cannot be inferred that Manager G caused the alleged retaliatory delays.

The grievant has also alleged that she and other members of her shift under Supervisor M have endured retaliatory treatment by Manager G and that communication with him is limited. Even if this conduct was in some way caused by a retaliatory intent, the general treatment described does not rise to the level of a materially adverse action sufficient to qualify for hearing. It appears that the grievant was caught in the middle of an ongoing dispute between Manager G and Supervisor M and the poor communication resulted. Though this situation appears problematic, the grievant has not raised a sufficient

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[1] *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).

[2] Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2414-15 (2006); *see, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

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

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

[5] A materially adverse action is one that might dissuade a reasonable employee in the grievant's position from participating in protected conduct. In *Burlington Northern*, 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 (D.C. Cir. 2006)).

question as to the elements of a claim of retaliation. As such, the claim does not qualify for hearing.

Hostile Work Environment/Harassment

For a claim of hostile work environment or harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status or prior protected activity;[6] (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[7] "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[8]

Even if it is assumed that the grievant's allegations satisfy the other elements of this claim, she has not presented evidence raising a sufficient question that the treatment she endured was severe or pervasive. The only evidence injecting issues of protected status into this case was the alleged comments of Manager G.[9] Unless extremely serious, isolated incidents do not amount to discriminatory changes in the terms and conditions of employment.[10] It cannot be said that this single comment regarding the grievant's sexual orientation was so severe as to alter the conditions of her employment. In addition, the isolated nature of this comment does not indicate that any hostility based on the grievant's protected status pervaded the workplace. The grievant has not raised a sufficient question that the conduct of either Manager G or Supervisor M was so severe or pervasive to create a hostile work environment. As such, the grievant's claims of hostile work environment and sexual harassment do not qualify for hearing.

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[6] The grievant states that she has been subject to a hostile work environment and harassment because of her gender and her sexual orientation. Pursuant to the Governor's Executive Order 1 and DHRM Policies 2.05 and 2.30, discrimination and harassment against employees on the basis of sexual orientation and gender is prohibited.

[7] *See generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).

[8] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

[9] Although the grievant has alleged numerous other acts purportedly taken against her, such as the delays in receiving her badges, patches, uniforms, and training, there is no indication that these acts were related in any way to her protected status. Indeed, other members of the grievant's shift appear to have experienced similar conduct. As discussed above, the situation appears to have arisen out of a conflict between Manager G and Supervisor M. Therefore, because there is no evidence that appears to link these additional acts to the grievant's protected status, they are not considered here in determining whether the grievant endured severe or pervasive conduct based on her protected status. The only incident arguably related to the grievant's protected status was the conversation with Manager G discussed in this section.

[10] Farragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

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 Farr
Director