Issues: Qualification – Discipline (suspension pending investigation) and Management Actions (non-disciplinary transfer), and Compliance – Grievance Procedure (30-Day Rule); Ruling Date: April 7, 2008; Ruling #2008-1868, 2008-1965; Agency: Department of Corrections: Outcome: Qualified for Hearing, Grievant Not In Compliance.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

QUALIFICATION AND COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2008-1868, 2008-1965
April 7, 2008

The grievant has requested a qualification ruling in her June 19, 2007 and October 11, 2007 grievances with the Department of Corrections (the agency). For the reasons set forth below, the June 19, 2007 grievance qualifies for hearing, but the October 11, 2007 grievance does not.

FACTS

On March 14, 2007, the grievant states she was transferred to work in the mail room pending the outcome of an investigation regarding an allegation of misconduct. Prior to her transfer, the grievant was an institutional hearing officer. When the grievant initiated her grievance, on June 19, 2007 (Grievance 1), she had allegedly received no information about the status of the investigation. The grievant initiated the grievance to challenge an alleged "violation of due process" because of the delay in the investigation without information forthcoming. Moreover, she has asserted claims of misapplication of policy, unfair treatment and practices, workplace harassment, and retaliation regarding how she has been treated in the mail room and because she was "in limbo" while the investigation was pending.

The grievant's retaliation claim further alleges that her transfer and the delay in the investigation into her conduct were related to a grievance she filed in December 2005. That grievance allegedly resulted in the Regional Director placing her in the institutional hearing officer position. According to the grievant, her supervisor had wanted a different candidate for the position. The grievant states that this other candidate was placed in the institutional hearing officer position while the grievant was working in the mail room.

After the completion and approval of the investigation, the grievant received a Group II Written Notice on September 10, 2007, which demoted her, decreased her salary, and transferred her to a different facility. The grievant has challenged the Written Notice in a grievance dated October 11, 2007 (Grievance 2). The grievant asserts that she mailed this grievance on October 10, 2007, and dated the Form A in error because she was in a "state of shock" and experiencing stress during this period. The grievant has provided no documentation to support her contention that she mailed the Form A on October 10, 2007. The agency head has denied qualification of Grievance 2 because the grievant allegedly failed to initiate the grievance in a timely manner. The grievant has appealed that determination to this Department.

DISCUSSION

Timeliness (Grievance 2)

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he or she knew or should have known of the event or action that is the basis of the grievance.[1] When an employee initiates a grievance beyond the 30 calendar-day period without just cause, the grievance is not in compliance with the grievance procedure and may be administratively closed.

Here, the event that forms the basis of the grievance is the agency's issuance of the Written Notice. This Department has long held that in a grievance challenging a disciplinary action, the 30 calendar-day timeframe begins on the date that management presents or delivers the Written Notice to the employee.[2] The grievant received the Group II Written Notice on September 10, 2007, and, thus, should have initiated this grievance within 30 days, i.e., no later than October 10, 2007.[3]

The Form A was dated October 11, 2007 by the grievant. She states that she dated the document in error and that she actually mailed the grievance to the agency on October 10, 2007. The grievant has provided no documentation to support her contention and explain the discrepancy with the date on the Form A. She asserts merely that she was in a "state of shock" and under stress at the time. The grievant bears the burden of establishing that the grievance was timely initiated.[4] Based on the evidence in this case, this Department cannot conclude that the grievant initiated her grievance on October 10, 2007. As such, it will be presumed that the grievant initiated Grievance 2 on October 11, 2007, consistent with the date on the Form A. Because the grievant did not initiate the grievance until October 11, 2007, 31 days after the Written Notice was issued, Grievance 2 is untimely. The only remaining issue is whether there was just cause for the delay.

The grievant states she was in a "state of shock" and under stress following her demotion and transfer because of having to change shifts and work location. It is unclear whether the grievant is asserting that a medical condition prevented her from timely initiating Grievance 2. However, this Department has long held that illness or impairment does not automatically constitute "just cause" for failure to meet procedural requirements. To the contrary, in most cases it will not.[5] Illness may constitute just cause for delay only where there is evidence indicating that the physical or mental impairment was so debilitating that compliance with the

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[1] Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4.
[2] *E.g.,* EDR Ruling No. 2005-986; EDR Ruling No. 2003-147; EDR Ruling No. 2002-118.
[3] In support of her contention that Grievance 2 was filed timely, the grievant has also stated that she received the Written Notice after 3:00 p.m. However, the time of receipt has no bearing here because, as Section 8.3 of the *Grievance Procedure Manual* provides, "the day of the event from which the designated period of time begins to run shall not be included." As such, the day the grievant received the Written Notice, September 10, 2007, was not included in this Department's computation of the 30-day period in which the grievant had to initiate her grievance.
[4] *Grievance Procedure Manual* § 2.4.
[5] *See* EDR Ruling No. 2006-1201; EDR Ruling Nos. 2003-154, 155.

grievance procedure was virtually impossible.[6] There is no evidence that the grievant was incapacitated to the point that she was unable to protect her grievance rights at any time during the 30-day period following the issuance of the Written Notice. This Department, therefore, concludes that the grievant has failed to demonstrate just cause for her delay. Accordingly, because the grievance was not timely initiated, it may not proceed to a hearing consistent with the agency's denial of qualification.[7]

Transfer Pending Investigation (Grievance 1)

By statute and under the grievance procedure, management has the exclusive right to manage the affairs and operations of state government.[8] Inherent in this authority is the responsibility and discretion to transfer employees within the workplace if there is sufficient evidence that misconduct or criminal activity may have occurred. However, while employees may challenge a transfer pending investigation through the management steps of the grievance procedure, such a challenge does not qualify for a hearing absent sufficient evidence of discrimination, retaliation, or misapplication or unfair application of policy.[9]

The grievant has asserted that the delay in the investigation was in retaliation for a grievance she filed in December 2005. 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;[10] (2) the employee suffered a materially adverse action;[11] 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.[12] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[13]

The initiation of the December 2005 grievance is clearly a protected activity.[14] For Grievance 1 to qualify for hearing, however, the action taken against the grievant also must have been materially adverse, such that a reasonable employee might be dissuaded from participating

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[6] *Id.; see also* EDR Ruling No. 2005-1040.
[7] *See Grievance Procedure Manual* § 2.4 (permitting management to allow a grievance to proceed through the management steps but deny hearing due to noncompliance).
[8] Va. Code § 2.2-3004(B).
[9] *Grievance Procedure Manual* § 4.1(c).
[10] *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).
[11] 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.
[12] *See, e.g.,* EEOC v. Navy Fed Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).
[13] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).
[14] *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).

in protected conduct.[15] While it is true that the grievant experienced no loss of pay during her transfer to the mail room, the transfer itself and the length of time which she spent in "pending investigation" status could eventually amount to a materially adverse action.[16] Though state policy does not impose a time limit on investigations, six months is a lengthy time to be transferred pending an agency's internal investigation. While the grievant was in that status, her ability to seek another job was limited, she was unable to advance or develop in the normal progression of her job, and she was transferred to the mail room, an apparent further demotion from the position to which she was eventually demoted as a result of the Written Notice. Furthermore, an extended transfer could begin to appear to be a reassignment, rather than an action pending investigation. Taking all these considerations together, given the substantial delay of six months, there is a sufficient question whether the grievant experienced a materially adverse action to qualify for hearing.

The remaining issue is whether the grievant has raised a sufficient question of a causal link between the December 2005 grievance and the delay in the investigation. The grievant asserts that the two are related in that her December 2005 grievance concerned the selection for the institutional hearing officer position she eventually filled. However, according to the grievant, she did not obtain the position until, after filing the December 2005 grievance, the Regional Director awarded her the position. The grievant alleges that her supervisor had wanted to select a different candidate for the institutional hearing officer position. The grievant states that the agency placed that candidate in the institutional hearing officer position after the grievant was transferred pending investigation.

The agency admits that the investigation in this case took a long time. The agency has also provided no explanation why the investigator, over whom the agency states the facility has no control, took at least three months to complete the initial investigation. Once the investigation was completed, the report was then submitted through various agency approvals in Richmond before being sent to the warden of the facility. The agency states that the facility issued the Written Notice within a week of receiving the report. While the agency appears to argue that the nature of the process caused the delay, it is troubling to note the inexplicable and lengthy delay by the investigator in this case, especially considering the nature of the facts alleged in the Written Notice (failure to follow a supervisor's instruction, perform assigned work or otherwise comply with applicable policy). It does not appear that the misconduct at issue was overly complicated to the extent it would have taken months to interview witnesses, gather supporting documents, and be approved by agency management. Moreover, the grievant's

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

[16] *See, e.g.,* Joseph v. Leavitt, 465 F.3d 87, 92 (2d Cir. 2006); Velikonja v. Mueller, 362 F. Supp. 2d 1, 12 (D.D.C. 2004).

removal and alleged replacement with the previously sought after candidate raises questions of the agency's motive.[17]

In sum, there are competing assertions regarding the reasons for the delay in this investigation, and this grievance raises a sufficient question as to whether the transfer and pending investigation were retaliatory. Such questions are more properly resolved by a hearing officer, thus the grievant's retaliation claim must be qualified for a hearing. This ruling in no way determines that the agency's actions were retaliatory or otherwise improper, only that the grievance must be qualified for a hearing officer to explore the situation further.

Alternative Theories and Claims

The grievant asserts additional claims in Grievance 1. Because the grievant's retaliation claim regarding her transfer pending investigation qualifies for hearing, this Department deems it appropriate to send all alternative theories raised by Grievance 1 only for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

CONCLUSION AND APPEAL RIGHTS

For the reasons discussed above, this Department concludes that the grievant's June 19, 2007 grievance is qualified for hearing. 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. In addition, because it was not initiated in a timely manner, the October 11, 2007 grievance is administratively closed due to noncompliance. This Department's rulings on matters of compliance are final and nonappealable.[18]

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Claudia T. Farr
Director

[17] Furthermore, one explanation for the delay suggested by the agency was that the warden was out of work for an extended period of time in August or September 2007 because of a medical condition. However, this argument does not follow. The warden, according to the agency, had no control over the investigation until it was forwarded to the facility after review, whereupon the warden allegedly quickly acted upon it. Therefore, the warden's time out of work would appear to be irrelevant to the delay in the investigation.

[18] Va. Code § 2.2-1001(5).