Issues: Qualification – Performance Evaluation (Arbitrary/Capricious), Retaliation (Other Protected Right), Discrimination (Race); Ruling Date: May 28, 2008; Ruling #2008-1931; Agency: Virginia Commonwealth University; Outcome: All issues qualified for hearing.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia Commonwealth University
Ruling No. 2008-1931
May 28, 2008

The grievant has requested a ruling on whether her November 13, 2007 grievance with Virginia Commonwealth University (VCU or the University) qualifies for a hearing. The grievant claims that her unsatisfactory performance evaluation is retaliatory and discriminatory and that the workplace harassment policy has been misapplied and/or unfairly applied. For the reasons discussed below, this grievance qualifies for a hearing.

FACTS

Prior to her resignation,[1] the grievant was employed as a Business Manager with VCU. In November or December of 2006, the grievant's supervisor allegedly made the following statement: "It is a known fact in the University that blacks do not respect other blacks supervising them, especially females."[2] The grievant subsequently scheduled a meeting with her supervisor's supervisor, Dean A, to discuss the grievant's supervisor's alleged statement. Prior to this meeting taking place, the grievant's supervisor came to the grievant and discussed the alleged statement with her as well as the upcoming meeting with Dean A. At the conclusion of the meeting, the grievant's supervisor allegedly told the grievant, "Just remember your evaluation will be coming up." As a result, the grievant cancelled her meeting with Dean A for fear of retaliation by her supervisor. Thereafter, the grievant claims that her supervisor retaliated against her culminating in her receiving an overall "Unsatisfactory Performer" rating on her annual performance evaluation in October of 2007. The grievant challenged her performance evaluation by initiating a grievance on November 13, 2007.

DISCUSSION

Misapplication of Workplace Harassment Policy

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether

[1] In lieu of termination, the grievant resigned from her position with VCU effective January 18, 2008.
[2] The grievant's supervisor admits that he made a statement regarding dissatisfaction among minority student staff, but disputes the quote ascribed to him by the grievant.

management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

Moreover, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[3] Thus, typically, the threshold question is whether or not the grievant has suffered an adverse employment action.[4] An adverse employment action is 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."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6] The overall "Unsatisfactory Performance" rating on her performance evaluation, coupled with her failure to receive a raise as a result of that rating, raises a sufficient question that the grievant suffered an adverse employment action.[7]

DHRM Policy 2.30, *Workplace Harassment*, specifically protects those employees who complain about possible workplace harassment by stating: "[t]he Commonwealth will not tolerate any form of retaliation directed against an employee or third party who either complains about harassment or who participates in any investigation concerning harassment." Policy 2.30 goes on to state that: "[e]mployees and third parties who make complaints of workplace harassment, or provide information related to such complaints, **will be** protected against retaliation."[8]

In this case, the grievant has raised a sufficient question that the workplace harassment policy may have been misapplied and/or unfairly applied. More specifically, according to the grievant, after her supervisor allegedly commented on the "inability of blacks to supervise other blacks," she scheduled a meeting with Dean A. However, before this meeting actually took place, the grievant's supervisor, who had allegedly found out about the impending meeting, came to her and discussed his alleged statement with her. At that time, the grievant purportedly told her supervisor that she was concerned about his comment. As he was leaving this meeting with the grievant, the grievant's supervisor allegedly stated, "Just remember your evaluation will be coming up." From this point on, the grievant claims that her supervisor engaged in retaliatory

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[3] *See Grievance Procedure Manual* § 4.1(b).

[4] While evidence suggesting that the grievant suffered an "adverse employment action" is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an "adverse employment action." For example, consistent with recent developments in Title VII law, this Department substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. *See, e.g.*, EDR Ruling No. 2007-1538.

[5] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

[6] Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

[7] *See* Boone v. Goldin, 178 F.3d 253, 255-257 (4th Cir. 1999) (under Title VII, "adverse employment action" typically requires discharge, demotion, or reduction in grade, salary, benefits, level of responsibility, title, or opportunities for future reassignments or promotions).

[8] DHRM Policy 2.30, "Assurance Against Retaliation" (emphasis added).

behavior, including but not limited to, impeding her from performing her job duties and blocking her from pursuing professional development opportunities. The alleged retaliatory behavior culminated in the grievant receiving an overall "Unsatisfactory Performance" rating on her annual performance evaluation in October 2007. The agency asserts that the grievant's poor performance rating was not retaliatory and was "a fair and accurate assessment" of the grievant's performance.

As noted above, DHRM policy prohibits "any form of retaliation" resulting from a complaint of workplace harassment and assures employees that they will protected against retaliation for making any such complaints. Based on the foregoing facts and circumstance, this Department concludes that the grievant has raised a sufficient question of fact as to whether DHRM Policy 2.30 has been misapplied and/or unfairly applied and more specifically, whether she has been retaliated against as a result of her complaint of workplace harassment. Accordingly, this issue qualifies for a hearing. We note, however, that this qualification ruling in no way determines that the agency's actions with respect to the grievant were retaliatory or otherwise improper. By qualifying the grievant's claim for hearing, 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.

Alternative Theories and Claims

The grievant has also asserted additional claims in her grievance. Because the grievant's claim of misapplication of the workplace harassment policy qualifies for hearing, this Department deems it appropriate to send all alternative theories and claims raised by the grievance for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues. Again, qualification in no way determines that the agency's actions were improper, only that further development of the facts is warranted.

CONCLUSION

For the reasons set forth above, the grievant's November 13, 2007 grievance is qualified for hearing. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer using the Grievance Form B.

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Claudia Farr
Director