Issues: Qualification – Retaliation (Grievance Activity Participation) and Consolidation; Ruling Date: January 22, 2009; Ruling #2008-1968, 2008-1969, 2009-2104, 2009-2205; Agency: Department of Juvenile Justice; Outcome: Qualified for Hearing, Consolidation Granted.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND CONSOLIDATION RULING OF DIRECTOR

In the matter of the Department of Juvenile Justice
Ruling Nos. 2008-1968, 2008-1969, 2009-2104, 2009-2205
January 22, 2009

The grievant has requested rulings on whether his October 19, 2007, November 1, 2007, April 22, 2008, and September 11, 2008 grievances with the Department of Juvenile Justice ("the agency") qualify for hearing. For the reasons set forth below, the grievances are qualified and consolidated for hearing.

FACTS

The grievant claims a long history of retaliation by the agency. In November 2003 and March 2005, the grievant filed grievances with the agency. For approximately two and one-half years prior to February 2006, the grievant had worked at a post in the vehicle sally port. In January 2006, one of the grievant's supervisors purportedly told the grievant that he was going to be brought "back inside" the facility from his usual post. The following day, another supervisor informed the grievant that he was being reassigned from the vehicle sally port to work inside the facility as a "floater."

On February 1, 2006, the grievant presented two letters to his superiors. The first described alleged unprofessional and harassing conduct that the grievant felt he had endured, which culminated in his reassignment. The second letter set out various issues that the grievant believed were "breaches of security" at the vehicle sally port. On Friday, February 3rd, the grievant's supervisor allegedly informed him that he would no longer be working 8-hour shifts Monday through Friday, but would instead be on 12-hour shifts on a particular break schedule.

The grievant met with the facility's assistant superintendent on February 10, 2006, and, according to the grievant, discussed the "financial hardship" he had incurred because of the schedule changes. Over the next few weeks, the grievant worked at the vehicle sally port a number of days. The remainder of the time, the grievant worked inside the facility. During this period, the grievant allegedly worked 12-hour days. The grievant asserts that he last worked at the vehicle sally port on March 1, 2006. The following day, the grievant states he received by mail a ruling from the Department of Human Resources Management (DHRM) regarding a prior grievance. Later that day, the grievant was allegedly assigned to permanently work inside the facility.

On March 15, 2006, the grievant presented another letter to a higher-level supervisor discussing his concerns with the reassignment. The grievant reportedly had a meeting that day to discuss various issues, including the reassignment and a recent written notice that the agency had issued him. During the meeting, the grievant's supervisors allegedly questioned him about a discussion they believed the grievant had with members of the human resources staff concerning fraternization at the facility.[1] According to the grievant, his "report" of fraternization was the main topic of the meeting. The grievant's supervisors allegedly questioned him about why he made the "report."

The grievant initiated a grievance on March 15, 2006. The grievant alleged that the changes to his schedule were the result of retaliation for his prior grievance activity. The March 15, 2006 grievance was qualified for hearing, and in a December 21, 2006 hearing decision, the hearing officer found that the agency had retaliated against the grievant. The hearing officer returned the grievant to his original post and ordered the agency to cease the retaliation against the grievant.[2]

Meanwhile, on September 19, 2006, the agency presented the grievant with a Group II Written Notice, which he grieved on October 16, 2006. The second management step respondent subsequently removed the Written Notice on December 1, 2006.

On February 20, 2007, the grievant was suspended without pay pending an investigation into alleged misconduct. The agency informed the grievant that he could use accrued leave to avoid an interruption in pay. According to the grievant, he was never disciplined for the purported misconduct and all leave used to cover the period of suspension was ultimately reinstated.

The grievant asserts that on May 18, 2007, he was issued a Notice of Improvement Needed (NIN) and, later, on August 9, 2007, a second NIN. On September 21, 2007, the grievant requested removal of the two NINs. According to the grievant, the NINs were subsequently shredded in his presence.

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[1] According to the grievant, a member of the human resources office had asked the grievant about another employee at the facility. The human resources employee allegedly asked the grievant if he thought this other agency employee was assigned to her post because of a purported relationship with a supervisor. The grievant apparently stated that he did not know.

[2] The hearing decision stated that:

> The testimony of the Major and Captain P cannot be reconciled. Because the Agency has presented directly conflicting accounts of the reason why Grievant was moved from a favorable to an unfavorable post, the Hearing Officer concludes that the Agency's decision was a pretext or excuse for retaliation. Accordingly, Grievant has established that the Agency retaliated against him by moving him from the sally port post to the Behavior Management Unit post. In order to restore Grievant to the circumstance he was in prior to the Agency's retaliation, the Agency must return Grievant to the sally port post.

Hearing Decision Case #8460, issued on December 21, 2006, p. 5. This decision was subsequently overturned on May 4, 2007 by the Circuit Court of Powhatan County as contradictory to law. The order reversing the hearing decision did not explain how the decision was contradictory to law.

On October 19, 2007, the grievant initiated the first of the four grievances that are the subject of this ruling (Grievance 1) asserting that he felt the reason that he had not been promoted was retaliation for having previously used the grievance process. In the attachment to his Grievance Form A, the grievant expressly clarified that he was "not challenging non-selection for a Sergeant Position," rather he was "challenging the retaliation that continues." He asserts that a senior member of management allegedly stated that "[The grievant] will never get a Sergeant Position as long as I'm here."

On November 1, 2007, the grievant initiated a grievance challenging a denial of an in-band pay adjustment to his salary (Grievance 2). The grievant asserts that the pay denial was retaliatory as well.

On April 9, 2008, the grievant received a Group II Written Notice for an incident in which the grievant purportedly failed to follow security protocol. The grievant initiated a grievance on April 22, 2008 (Grievance 3) to challenge the discipline. The third management step respondent rescinded the Written Notice on July 18, 2008.

On September 11, 2008, the grievant initiated the final of the four grievances that are the subject of this ruling. In his September 11th grievance (Grievance 4), the grievant asserts that the agency continues to retaliate against him, including apparently, by moving him to another post.

DISCUSSION

Retaliation

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[3] 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.[4]

In this case, the grievant alleges that after filing past grievances the agency has retaliated against him for this protected conduct. 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;[5] (2) the employee suffered a materially adverse action;[6] and

[3] Va. Code § 2.2-3004(B).
[4] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(b)-(c).
[5] *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).

(3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the materially 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.[7] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[8]

The initiation of a grievance is clearly a protected activity.[9] In addition, these grievances raise a sufficient question as to whether management's actions were "materially adverse," such that a reasonable employee might be dissuaded from participating in protected conduct.[10] While this standard is objective, it may also take into account the particular circumstances of the employee.[11] The United States Supreme Court held in the *Burlington Northern* decision that the anti-retaliation provisions of Title VII, which are comparable with those under the grievance procedure and state policy, are "not limited to discriminatory actions that affect the terms and conditions of employment."[12] The Supreme Court noted that "an act that would be immaterial in some situations is material in others."[13] In this case, the grievant has presented sufficient evidence that the change in assignment, the denial of in-band pay adjustment, and the issuance of discipline and NINs only to have them later rescinded, could be viewed as materially adverse acts.

Finally, the grievance raises a sufficient question as to whether the actions taken by the agency had a nexus with the protected conduct. Although the agency denies that it has engaged in retaliation against the grievant, the circumstances described above, including the previous finding of retaliation and the "[ir]reconcile[able]" nature of the prior testimony of a Major and Captain in Case No. 8460, the ultimately rescinded Witten Notices and NINs, and the alleged comment from a senior member of management that "[grievant] will never get a Sergeant Position as long as I'm here," collectively raise a sufficient question of whether the grieved actions may have been prompted by a retaliatory animus.

Because the grievant has raised sufficient questions as to his claims of retaliation, Grievances 1-4 qualify for hearing.[14] In addition, the grievant has advanced alternative

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[6] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); S*ee e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706, and 2007-1633.
[7] *See e.g.*, EEOC v. Navy Fed. Credit Union, 424 F. 3d 397, 405 (4th Cir. 2005).
[8] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).
[9] *See* Va. Code 2.2-3004(A) and *Grievance Procedure Manual* § 4.1(b)(4).
[10] *See* Burlington N., 548 U.S. at 68.
[11] *Id.* at 68-69.
[12] *Id.* at 64.
[13] *Id.* at 69 (internal quotation omitted).
[14] These grievances would also be qualified using a retaliatory harassment/hostile work environment analysis. To qualify under that standard, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a prior protected activity (e.g., grievance activity); (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. *See generally* White v. BFI Waste

theories related to agency actions, for example, asserting that the decision to deny him an in-band adjustment was a misapplication of policy. Because the issue (theory) of retaliation qualifies for hearing, this Department deems it appropriate to send all alternative theories advanced for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues. However, this qualification ruling in no way determines that the agency's actions were retaliatory or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate.

Consolidation

This Department has long held that it may consolidate grievances with or without a request from either party whenever more than one grievance is pending involving the same parties, legal issues, and/or factual background.[15] EDR strongly favors consolidation and will grant consolidation unless there is a persuasive reason to process the grievances individually.[16]

Here, each of the four grievances shares a common theme of retaliation. Because the grievances involve the same parties, potentially many of the same witnesses, and are often intertwined, this Department deems it appropriate to send all grievances for adjudication by a common hearing officer to help ensure a full exploration of what could be interrelated facts and issues.

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, Grievances 1-4 are all qualified for hearing. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

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Claudia T. Farr
Director

Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004). "[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." Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

[15] *Grievance Procedure Manual* § 8.5.

[16] *Id.*