Issues: Qualification – Management Actions (Recruitment/Selection) and Retaliation (Other Protected Right); Ruling Date: May 5, 2009; Ruling #2008-2053; Agency: Department of Corrections; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2008-2053
May 5, 2009

The grievant has requested a ruling on whether his January 15, 2008 grievance alleging retaliation by the Department of Corrections (DOC or the agency) qualifies for a hearing. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant is employed by the agency as a Corrections Lieutenant at Correctional Center A. The grievant asserts that on July 29, 2007, he reported an incident of workplace violence involving a subordinate. After the agency failed to take what the grievant considered to be adequate action in response to his report, the grievant complained to the Regional Director on August 29, 2007.[1]

In December 2007, the grievant applied for a vacant captain's position at Correctional Center A. The grievant states that because he was worried about possible retaliation in the hiring process for his August complaint, he explained his concerns to the Regional Director. According to the grievant, the Regional Director indicated he understood the grievant's concerns and assured the grievant that he would "take a look at" the interview panel before interviews occurred.

The grievant was interviewed by the Assistant Warden and Chief of Security on December 28, 2007. The grievant asserts that both of the interviewers were named in his complaint to the Regional Director, and he alleges that the interview appeared to have been "'hurriedly' put together." After the grievant learned on January 2, 2008, that he had not been selected for the position, he apparently contacted the Regional Director to express his concerns over the interview process. According to the grievant, the Regional Director "seemed shocked" that the interviews had already taken place and immediately set up a meeting between the grievant and the Assistant Warden. The grievant met with the Assistant Warden but was unsatisfied with the Assistant Warden's explanation of the hiring decision. The grievant then

[1] The grievant's January 15th grievance does not challenge the agency's response to his complaint of workplace violence, and in any event, such a challenge would have been untimely. *Grievance Procedure Manual* § 2.4 (a grievance must "[b]e presented to management within 30 calendar days of the date the employee knew or should have known of the event that forms the basis of the grievance.")

met with the Regional Director, who allegedly told the grievant that "Management had made their decision."

On January 15, 2008, the grievant initiated a grievance alleging that he was denied the captain's position in retaliation for his August 2007 complaints to the Regional Director about the response to his July 2007 report of workplace violence. After the parties failed to resolve the 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 he has appeal to this Department.

DISCUSSION

By statute and under the grievance procedure, complaints relating solely to issues such as the methods, means, and personnel by which work activities are to be carried out, as well as hiring, promotion, transfer, assignment, and retention of employees within the agency "shall not proceed to hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.[2] In this case, the grievant claims that the agency's decision not to select him for the vacant captain's position was retaliatory.

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 materiallly 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, it appears undisputed that the grievant engaged in protected activity when he complained to the Regional Director in August 2007 of the agency's response to his report of

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

[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] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); *see, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. 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." 548 U.S. at 69. "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* at 68. (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

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

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

workplace violence.[7] Further, the denial of a promotion in early 2008 could constitute a materially adverse action. However, the grievant's retaliation claim fails to qualify for hearing because he has not presented sufficient evidence of a causal link between the alleged protected activity and the materially adverse action. While it appears to be undisputed that the appointing authority was a subject of the grievant's August 2007 complaint, there is no evidence that the selection decision was made as a result of that complaint.[8] Rather, the agency's selection of the successful candidate appears to have been based upon a reasonable evaluation of the knowledge, skills, and abilities of the applicants. In making this determination, we have reviewed the selected candidate's educational background, work experience, particularly with DOC, his military experience, as well as the interview notes of the grievant and the selected candidate. While the grievant's concerns about possible bias in the selection process are understandable, he has not presented sufficient evidence to show that retaliation in fact played a role in the selection decision. As such, the grievant's retaliation claim does not qualify for hearing.

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 this 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 notifies the agency that he does not wish to proceed.

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Claudia Farr
Director

[7] *See* Va. Code § 2.2-3000(A) ("employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management").

[8] The grievant has also alleged that he was subjected to further retaliation when he was denied two sergeants' positions at another facility in August 2008. The grievant did not grieve these selection decisions, however, and they do not provide evidence of a retaliatory motive for the January 2008 selection decision that is the subject of this grievance, particularly as they involve different facilities and different interviewers, and the grievant has offered no evidence for his conjecture that he was "highly recommended" for the positions in question.