Issue: Qualification – Performance (Notice of Improvement Needed/Substandard Performance); Ruling Date: September 4, 2008; Ruling #2009-2088; Agency: Virginia Department of Health; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Health
Ruling Number 2009-2088
September 4, 2008

The grievant has requested a ruling on whether her challenge to a May 23, 2008[1] Notice of Improvement Needed/Substandard Performance (NIN/SP), as raised in her June 9, 2008 grievance with the Department of Health (the agency), qualifies for a hearing. For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Healthcare Compliance Specialist I with the agency. On May 23, 2008, the grievant was issued a NIN/SP. The grievant challenged the basis for the NIN/SP by initiating her June 9, 2008 grievance. The grievant asserts that the performance standard that she allegedly failed to meet is not set forth in her Employee Work Profile (EWP). She further asserts that the deadlines set forth in the NIN/SP's improvement plan are in direct conflict with her current EWP. In her Grievance Form A, the grievant checked the box that indicated she desired to skip her immediate supervisor as a step respondent because of retaliation or discrimination. The grievant explained to the investigating EDR Consultant that she believed that the retaliation may relate to her being vocal about the distribution of workloads or a prior discrimination complaint she brought in 2001.

DISCUSSION

Where a grievant asserts that a NIN/SP *was retaliatory*, as is the case here, to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[2] (2) the employee suffered a *materially adverse action*;[3] and (3)

[1] The NIN/SP was dated May 23, 2008, but the grievant did not actually receive the document until June 3, 2008. Because the date of the NIN/SP is irrelevant to this ruling, it will be referred to as the May 23, 2008 NIN/SP.
[2] *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).
[3] Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2414-15 (2006); s*ee, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. Under Burlington Northern, a lesser showing of harm is required than,

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.[4] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[5]

Reporting and/or opposing alleged prohibited discriminatory practices and discussing workplace concerns with an immediate supervisor are protected actions.[6] Without more, however, a single NIN/SP is generally not "materially adverse."[7] Here, the grievant has not presented evidence raising a sufficient question of fact as to whether the single NIN/SP in this case rises to the level of a materially adverse action.[8] We note, however, that while the NIN/SP

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for instance, cases of unlawful discrimination where the "adverse employment action" is used. Retaliation claimants need only show the existence of a "materially adverse" action, rather than an "adverse employment action." 126 S. Ct. 2405, 2414-15 At least one court has applied the holding of Burlington Northern to find that a lesser showing of severity and/or pervasiveness is required in cases of retaliatory harassment, as compared to cases of gender or racial harassment. *See* Hare v. Potter, No. 05-5238, 2007 U.S. App. LEXIS 6731, at *28-33 (3d Cir. Mar. 21, 2007) (altering analysis of traditional "severe and pervasive" element of a claim of retaliatory harassment to apply the materially adverse standard following Burlington Northern); Moore v. City of Philadelphia, 461 F.3d 331, 341 (3d Cir. 2006) (same).

[4] *See* EEOC v. Navy Fed Credit Union, 424 F.3d 397, 405 (4th Cir. 2005); Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000).

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

[6] *See* Peters v. Jenney, 327 F.3d 307, 320 (4th Cir. 2003) (a plaintiff need not demonstrate that the employer has actually violated Title VII; rather, the plaintiff must show that "he opposed an unlawful employment practice which he reasonably believed had occurred or was occurring") (internal quotation marks omitted). *See also* Virginia Code § 2.2.-3000, "[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management."

[7] *See* Allen v. American Signature Inc., No. 07-3698, 2008 U.S. App. LEXIS 7714, at *8 (7th Cir March 26, 2008) (unpublished opinion) (written reprimand and criticism from co-workers not materially adverse); Chang v. Horizons, 254 Fed. Appx. 838, 839 (2nd Cir. 2007) (unpublished opinion) (oral and written warnings do not amount to materially adverse conduct); Martin v. Merck & Co., Inc., 446 F. Supp. 2d 615, 638 (W.D. Va. 2006) (a written warning for violating policy by wearing safety goggles on the head is "mild discipline" and "would not dissuade a reasonable employee from engaging in a protected activity."); Gordon v. Gutierrez, Case No. 1:06cv861, 2007 U.S. Dist. LEXIS 253, at *32 (E.D. Va. January 4, 2007) (a verbal counseling that is deserved, properly conducted, and resulted in no further disciplinary action against the plaintiff is not a materially adverse action); and Allen, et.al. v. National Railroad Passenger Corporation (AMTRAK), 228 Fed. Appx. 144, 149 (3rd Cir. 2007) (unpublished opinion) (a written reprimand for improperly communicating with a co-worker during a rest period was not materially adverse as it the plaintiff did not deny its allegations and the reprimand did not appear to affect the plaintiff's employment in any material way.).

[8] The grievant asserts that deadlines in the NIN/SP are in conflict with those set forth in her Employee Work Profile (EWP) and place an excessive burden on her. A substantial increase in workload or significant shortening of deadlines could potentially rise to the level of a materially adverse action. Williams v. Board of Education of City of Chicago, Case No. 05 C 4268, 2006 U.S. Dist. LEXIS 73808, at *10 (N.D. Ill, September 21, 2006)(increased workload and onerous job assignments could be considered adverse actions.) *See also* Minor v. Centocor, Inc. 457 F.3d 632, 634 (7th Cir. 2006)(extra work can be a material difference in the terms and conditions of employment.) *But see* Philips-Clark v. Philadelphia Hous. Auth., Civil Action No. 04-2474, 2007 U.S. Dist. LEXIS 12710, at *29 (E.D. Pa. February 22, 2007)(charging an employee with being absent without leave and setting unrealistic deadlines

has not had an adverse impact on the grievant's employment, it potentially could be used later to support an adverse employment action against the grievant, such as an overall "Below Contributor" rating on her annual performance evaluation,[9] or a performance-related formal disciplinary action (Written Notice).[10] Therefore, should the NIN/SP in this case later serve to support an adverse employment action against the grievant, such as a Below Contributor rating or Written Notice, this ruling does not prevent the grievant from attempting to contest the merits of her performance rating or Written Notice through a subsequent grievance challenging the related adverse employment action.[11]

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 T. Farr
Director

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to complete projects do not meet the standard for a materially adverse action.) Here, however, the NIN/SP does not appear to have altered deadlines significantly, if at all. The May 23, 2008, NIN/SP primarily instructs the grievant to follow guidelines previously set forth in her EWP. The only new deadline appears to be an instruction that the grievant identify, by June 5, 2008, four operating procedures that she will develop and their projected due dates.

[9] DHRM Policy 1.40, Performance Planning and Evaluation, "Documentation During the Performance Cycle."

[10] DHRM Policy 1.60, Standards of Conduct.

[11] Also, although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the Act). Under the Act, if the grievant gives notice that she wishes to challenge, correct or explain information contained in her personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth her position regarding the information. Va. Code § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. Va. Code § 2.2-3806(A)(5).