Issues: Qualification – Compensation (Worker's Compensation) and Retaliation (Grievance Activity); Ruling Date: May 26, 2010; Ruling #2009-2153; Agency: Department of Behavioral Health and Developmental Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Behavioral Health and Developmental Services
Ruling No. 2009-2153
May 26, 2010

The grievant has requested a ruling on whether his February 14, 2008 grievance with the Department of Behavioral Health and Developmental Services (the agency) qualifies for a hearing.[1] For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

The primary issue raised by the February 14, 2008 grievance is "retaliation." The grievant asserts that many things have occurred to him during a period of over two years, including assignment to third shift, having his state service truck taken away, being forced to take a drug test, being forced to winterize cabins upon his return to work from an injury, and having a workplace violence complaint filed against him. The grievant appears to be asserting that all these actions were in retaliation for prior grievance activity. The grievant filed grievances in December 2005, January 2006, and December 2007.[2] The grievant also claims that the agency has failed to properly reimburse his leave in relation to a workers' compensation claim.

DISCUSSION

Retaliation

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

[1] This ruling was previously on hold pending the outcome of certain claims with the Virginia Workers' Compensation Commission (VWCC).

[2] These facts are stated in EDR Ruling No. 2008-1984, which addressed various compliance issues with the grievant's February 14, 2008 grievance. In that ruling, this Department determined that some of the grievant's claims in this grievance would not need to be addressed. The claims analyzed in this ruling are, therefore, based on the limitations established in EDR Ruling No. 2008-1984. Further, any alleged incidents that took place since the initiation of this grievance cannot be challenged in this grievance. *See Grievance Procedure Manual* § 2.4. Any management actions that occurred after this grievance was initiated would have to be raised as part of a new grievance.

[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

employee suffered a materially 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]

Although the grievant's prior grievances were past protected activities, his retaliation claim nevertheless fails to qualify for hearing. As this Department held in EDR Ruling No. 2008-1984, there is only one alleged act of retaliation challenged by the grievant that occurred within the 30-day period preceding the initiation of this grievance: the agency's alleged failure to process and/or credit the grievant's leave after receiving a workers' compensation reimbursement check on January 15, 2008. Even if it is assumed for purposes of this ruling only that the agency's alleged failure to act after receiving the January 15, 2008 check was a materially adverse action, the grievant has not raised a sufficient question as to whether a causal link exists between the agency's alleged failure to act in this instance and his prior grievances. While proximity in time between a grievant's protected activities and a challenged management action could in some cases imply retaliation, any such proximity in this case does not raise a sufficient question of retaliation in light of the fact that the agency processed this payment on or about February 13, 2008, apparently well within any established deadlines. There is simply no evidence that points to a causal link of retaliatory animus with respect to the processing of this check. Because there is insufficient evidence of retaliation within the 30 calendar days preceding the initiation of this grievance, the grievant's claim of an ongoing course of retaliatory actions occurring *prior to* those 30 days cannot qualify for a hearing due to untimeliness.[7]

---

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.

[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).

[7] *See* Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4. We note that if there had been sufficient evidence that the agency's failure to act following the January 15 check was retaliatory, and thus could have been part of an ongoing course of retaliatory conduct, the grievance would have been timely to challenge the alleged ongoing conduct, even that which occurred prior to the 30 calendar days preceding the initiation of the grievance. *See, e.g.*, Nat'l R.R. Pass. Corp. v. Morgan, 536 U.S. 101, 115-18 (2002) (ruling similarly in a Title VII hostile work environment harassment case); *see also* Graham v. Gonzales, No. 03-1951, 2005 U.S. Dist. LEXIS 36014, at *23-25 (D.D.C. Sept. 30, 2005) (applying *Morgan* to claim of retaliatory hostile work environment/harassment).

Leave Reimbursement[8]

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[9] Thus, by statute and under the grievance procedure, complaints relating solely to the establishment and revision of general benefits "shall not proceed to hearing"[10] unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.[11] By challenging the loss of his leave in connection with a workers' compensation injury, the grievant is effectively arguing that the agency has misapplied or unfairly applied 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 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. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[12] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.[13] 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."[14] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[15] For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action in that he potentially asserts issues with his leave balances.

Based on EDR Ruling No. 2008-1984, the only absences still the subject of this grievance are those that occurred between the filing of the grievant's December 12, 2007 grievance and the filing of this grievance on February 14, 2008. Information provided to this Department for that period indicates the VWCC awarded compensation benefits for the grievant's absences on only

[8] As discussed in EDR Ruling No. 2008-1971 and 2008-1984, compensation due for a workers' compensation claim is a determination for the VWCC, not the grievance procedure. *See, e.g.*, Va. Code §§ 65.2-700, 65.2-702. The only issue in this case that is properly the subject for a grievance is the associated reimbursement or accounting for the grievant's leave time. *See, e.g.*, Epps v. Inova Fair Oaks Hosp., VWC File No. 213-55-21, 2007 VA Wrk. Comp. LEXIS 219, at *14-15 (Mar. 23, 2007) (noting that the VWCC is without jurisdiction to restore or reinstate an employee's leave). Many (but not all) of the grievant's claims about the handling of his leave were addressed as part of a prior grievance and in EDR Ruling No. 2008-1971.
[9] Va. Code § 2.2-3004(B).
[10] Va. Code § 2.2-3004(C).
[11] *Grievance Procedure Manual* § 4.1(c).
[12] *See Grievance Procedure Manual* § 4.1(b).
[13] 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* EDR Ruling No. 2007-1538.
[14] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[15] *E.g.*, Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

three days (January 2, 2008 – January 4, 2008).[16] The relevant Department of Human Resource Management (DHRM) policy discusses such circumstances of non-chronic, work-related "intermittent disability."[17]

> If the absence is accepted as compensable [as workers' compensation] and the employee is eligible to receive indemnity benefits for the period under a Workers' Compensation VWCC award time will be reinstated to the employee based on the amount paid under the VWCC award. Employee may use appropriate accrued leave to receive 100% pay.[18]

For the three days in question, the grievant was awarded $385.28 as a workers' compensation benefit. Based on the grievant's rate of pay at the time, that award equated to approximately 60% of the grievant's full salary. As such, the agency attributed 60% of the grievant's leave time for January 2, 2008 – January 4, 2008 to workers' compensation. The remaining 40% was covered by the grievant's personal leave to reach his full salary so he would not have to be on leave without pay. Consequently, it cannot be said that the agency has misapplied policy in this case. This Department can find no indication that the grievant was not reimbursed leave to which he was entitled in connection with his workers' compensation claim for the time period covered by this grievance. Therefore, this grievance 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 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 and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). 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.

Claudia T. Farr
Director

[16] It does not appear that the grievant would have been entitled to short-term disability benefits for any of this time because he was not absent for the required seven calendar day waiting period. DHRM Policy 4.57, *VSDP* ("A 7 calendar day waiting period must be served to be eligible to receive STD benefits.").
[17] *Id.*
[18] *Id.*