Issues: Qualification – Discrimination, Retaliation and Arbitrary/Capricious Performance Evaluation; Ruling Date: March 19, 2009; Ruling #2009-2154, 2009-2230; Agency: Department of Social Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling No. 2009-2154, 2009-2230
March 19, 2009

The grievant has requested a ruling on whether her July 22, 2008 and November 10, 2008 grievances with the Department of Social Services (the agency) qualify for a hearing. For the reasons discussed below, these grievances do not qualify for a hearing.

FACTS

In both of her grievances, the grievant has raised numerous issues regarding her work environment and the conflict she has experienced with her supervisor and other co-workers.[1] Her allegations include "unprofessional office protocol," "false accusations regarding behavior," "unfair work practices," "uneven workflow," "unfair work load," and "unfair work ethics." She also alleges that she experienced a hostile work environment, discrimination, and retaliation. In her November 10, 2008 grievance, the grievant additionally challenges as retaliatory and unwarranted the "Below Contributor" ratings she received for certain areas of her 2008 performance evaluation, for which she received an overall rating of "Contributor." The grievant now requests qualification of these grievances for hearing.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as the method, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have influenced management's decision, or whether state policy may have been misapplied or unfairly applied. In this case, the grievant has asserted claims regarding discrimination, retaliation, and a general challenge to her 2008 performance evaluation.

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[1] Around the time the grievant initiated her November 10, 2008 grievance, she had accepted transfer to a position in a different division within the agency. In this ruling, discussions about the grievant's supervisor and work environment refer to the grievant's work unit prior to her transfer in November 2008.
[2] Va. Code § 2.2-3004(B).

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 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]

Assuming without deciding, for the purposes of this ruling only, that the grievant engaged in protected activity, her retaliation claim nevertheless fails to qualify for hearing. The grievant's allegations regarding the work environment created by her supervisor, even taken together,[7] do not rise to the level of being materially adverse.[8] As

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[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 schoolage 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* 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] The same result is reached even if the grievant's claim is analyzed as one for retaliatory harassment. *See* EDR Ruling Nos. 2007-1577, 2008-1957 (discussing retaliatory harassment claim in relation to materially adverse action standard).

[8] *See, e.g.*, Borrero v. Am. Express Bank Ltd., 533 F. Supp. 2d 429, 437-38 (S.D.N.Y. 2008) (stating that "public criticism, overbearing scrutiny, and other less than civil behavior on the part of [the employer] do not rise to the level of a materially adverse action"); Gomez v. Laidlaw Transit, Inc., 455 F. Supp. 2d 81, 89-90 (D. Conn. 2006) (noting that "criticizing [the employee's] work, standing over her, not letting her leave, or leaving her a stack of papers, or [a] comment about being sick and tired of [the employee] being sick" were "minor annoyances" and not "materially adverse"); *cf.* Monk v. Stuart M. Perry, Inc., No. 5:07cv00020, 2008 U.S. Dist. LEXIS 62028, *7-8 (W.D. Va. July 18, 2008) (Title VII of the Civil Rights Act "protects plaintiffs from retaliation that produces an injury or harm and does not serve to shield employees from trivial harms, petty slights, minor annoyances, the ordinary tribulations of the workplace,

noted by the Supreme Court, "normally petty slights, minor annoyances, and simple lack of good manners" do not establish "materially adverse actions" that are necessary to establish a retaliation claim.[9] Although the grievant has described a stressful, non-collaborative work environment, it does not appear the conduct the grievant has experienced rises beyond this level to establish materially adverse action by the agency. Similarly, the "Below Contributor" ratings on one core responsibility and one agency/department factor in an overall "Contributor" performance evaluation do not appear to be materially adverse actions in this case.[10] Because the grievant has not presented evidence raising a sufficient question as to the elements of a claim of retaliation, this grievance does not qualify for hearing.

Discrimination/Hostile Work Environment

For a claim of discrimination or hostile work environment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status; (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.[11] "[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."[12]

Further, the grievant must raise more than a mere allegation of harassment or hostile work environment – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited

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or simple lack of good manners" and "does not set forth a general civility code for the American workplace.") (citations and internal quotations omitted).

[9] *Burlington N.*, 548 U.S. at 68.

[10] *See, e.g.*, Fox v. Nicholson, No. 08-7034, 2008 U.S. App. LEXIS 26136, at *12 (10th Cir. Dec. 23, 2008) (noting that "negative comments and lower scores on [plaintiff's] performance review" were not materially adverse "because he was ultimately rated 'Fully Successful'"); Vaughn v. Louisville Water Co., No. 07-6234, 2008 U.S. App. LEXIS 24224, at *27 (6th Cir. Nov. 24, 2008) (holding that lower performance evaluation scores are not materially adverse unless they "significantly impact an employee's wages or professional advancement"); Cain v. Green, 261 F. App'x 215, 217 (11th Cir. 2008) (stating that "'[a] lower score on [a] performance evaluation, by itself, is not actionable under Title VII unless [the employee] can establish that the lower score led to a more tangible form of adverse action, such as ineligibility for promotional opportunities'") (quoting Brown v. Snow, 440 F.3d 1259, 1265 (11th Cir. 2006)) (alterations in original); Weger v. City of Ladue, 500 F.3d 710, 727 (8th Cir. 2007) (holding that "evaluations were not adverse where the Plaintiffs received primarily 'superior' or 'above standard' ratings, and neither asserted any negative impact from these evaluations"). There may be occasions when negative comments in a performance evaluation could be materially adverse. However, the facts as raised in this case do not evince a sufficient negative impact on the grievant necessary to meet that standard.

[11] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).

[12] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

discrimination based on a protected status. The grievant has not presented any indication that the alleged hostile work environment was based on a protected status. Consequently, this claim does not qualify for a hearing.[13]

Arbitrary & Capricious Performance Evaluation

The grievant also argues that a "Below Contributor" rating on one core responsibility and one agency/department factor in her performance evaluation were unwarranted. However, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[14] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action. 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."[15] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[16]

A satisfactory performance evaluation is not an adverse employment action where the employee presents no evidence of an adverse action relating to the evaluation.[17] In this case, although the grievant disagrees with some of the individual factor ratings, the overall rating was "Contributor" and generally satisfactory.[18] Most importantly, the grievant has presented no evidence that the 2008 performance evaluation has detrimentally altered the terms or conditions of her employment. Accordingly, the claim related to the performance evaluation does not qualify for hearing.[19] We note, however,

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[13] This ruling does not mean that EDR deems the alleged workplace behavior, if true, to be appropriate, only that the claim of hostile work environment on the basis of a protected status does not qualify for a hearing. Moreover, this ruling in no way prevents the grievant from raising either the retaliation or hostile work environment matters again at a later time if the alleged conduct continues or worsens.

[14] *See Grievance Procedure Manual* § 4.1(b). However, as discussed above, claims of retaliation are analyzed under the "materially adverse" standard. *See supra.*

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

[16] *See, e.g.*, Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

[17] Rennard v. Woodworker's Supply, Inc., 101 Fed. Appx. 296, 307 (10th Cir. 2004) (citing Meredith v. Beech Aircraft Corp., 18 F.3d 890, 896 (10th Cir. 1994)); *see also* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 377-378 (4th Cir. 2004) (The court held that although the plaintiff's performance rating was lower than the previous yearly evaluation, there was no adverse employment action as the plaintiff failed to show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment, the evaluation was generally positive, and he received both a pay-raise and a bonus for the year.). "[A] similarly thick body of precedent . . . refutes the notion that formal criticism or poor performance evaluations are necessarily adverse actions." Brown v. Brody, 199 F.3d 446, 458 (D.C. Cir. 1999); EDR Ruling No. 2008-1986; EDR Ruling No. 2007-1612.

[18] The grievant also received "Extraordinary Contributor" ratings on some factors.

[19] Although this claim 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

that should the 2008 performance evaluation somehow later serve to support an adverse employment action against the grievant (e.g., demotion, termination, suspension and/or other discipline), the grievant may address the underlying merits of the evaluation through a subsequent grievance challenging any related adverse employment action.

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.

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Claudia T. Farr
Director

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).