Issue: Qualification – Retaliation (Other Protected Right); Ruling Date: June 3, 2009; Ruling #2009-2172; Agency: Department of Professional and Occupational Regulation; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Professional and Occupational Regulation
Ruling No. 2009-2172
June 3, 2009

The grievant has requested a ruling on whether her August 4, 2008 grievance with the Department of Professional and Occupational Regulation (DPOR or the agency) qualifies for a hearing. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant is employed as an Administrative Office Specialist III with DPOR. The grievant asserts that she has to do the work of her supervisor (training co-workers and reviewing their work) as well as correct his mistakes. She also objects to language in her Interim Performance Assessment requesting that she exercise patience when training new employees. The grievant further states that she has to "deal with issues of licensing not being issued" because she does not have the proper documentation to perform her job. She asserts that she is subject to complaints from training providers and license applicants about her supervisor's lack of timeliness and helpfulness when returning calls. Finally, she asserts that her work schedule was modified in retaliation for challenging the statement in her Interim Performance Assessment about needing to exercise patience with trainees.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[1] 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.[2] Here, the grievant is essentially asserting that she

[1] *See* Va. Code § 2.2-3004(B).
[2] *See Grievance Procedure Manual* § 4.1(c).

has been treated in an unfair and retaliatory manner by her supervisor. Each of her claims is discussed below.

Interim Performance Assessment

As a general rule, the General Assembly has limited issues that may be qualified for a hearing to those that involve "adverse employment actions."[3] The threshold question then becomes whether or not the grievant has suffered an adverse employment action. Claims relating solely to the issuance of an Interim Performance Assessment (IPA) generally do not qualify for a grievance hearing because receipt of an IPA does not rise to the level of an "adverse employment action." An adverse employment action is defined as a "tangible employment action [that] constitutes 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."[4] Thus, for a grievance to qualify for a hearing, the actions taken against the grievant must result in an adverse effect on the terms, conditions, or benefits of one's employment.[5]

In this case, the grievant has presented no evidence that she has suffered an adverse employment action in conjunction with the issuance of the IPA. The IPA does not constitute an adverse employment action, because such an assessment, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[6] Because the grievant has failed to show the existence of an adverse employment action, this claim does not qualify for a hearing.[7]

We note, however, that while the IPA has not had an adverse impact on the grievant's employment, as a general rule, such documents can be used to support adverse employment actions, such as a formal disciplinary action or a below contributor annual performance evaluation rating.[8] Therefore, to the extent that policy would allow the use

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[3] Va. Code § 2.2-3004(A). An exception to the adverse employment action requirement is associated with retaliation claims and is discussed below.

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

[5] *See e.g.*, Holland v. Washington Homes, Inc., 487 F.3d. 208, 219 (4th Cir. 2007). *See also*, EDR Ruling No. 2008-2031.

[6] *See* Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999).

[7] 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).

[8] As a general rule, a supervisor may consider informal documentation of perceived performance problems when completing an employee's performance evaluation. DHRM Policy 1.40, Performance Planning and

of the IPA in this case to later support an adverse employment action against the grievant, this ruling does not prevent the grievant from attempting to contest the merits of the IPA through a subsequent grievance challenging the related adverse employment action.

Issues Related to Having to Perform Supervisor's Work

The grievant asserts that she does her supervisor's work (training co-workers and reviewing their work), corrects his mistakes, and is subjected to complaints about the timeliness and quality of her supervisor's responses to inquiries. These actions, even collectively, do not constitute an adverse employment action, thus they cannot serve as the basis for qualification for hearing.[9] Accordingly, these issues are not qualified.

Not Having Proper Documentation to Perform Duties

The grievant claims that she is hindered by not having documents that she needs to do her job. However, the grievant has provided no evidence that the lack of documentation has caused her to suffer an adverse employment action. Therefore, this issue cannot be qualified for hearing. Again, while this concern standing alone does not constitute an adverse employment action, if in the future, lack of documentation causes the grievant to suffer an adverse employment action, this ruling does not prevent the grievant from contesting this concern through a subsequent grievance challenging the related adverse employment action.

Retaliation

The grievant asserts that she has been retaliated against because she challenged a statement in her Interim Performance Assessment. The grievant claims that as a result of the challenge, her hours of work were modified from a constant 7:45 a.m. to 4:30 p.m. daily schedule to an alternating schedule under which every two weeks she works a two-week long stint with 8:15 a.m. to 5:00 p.m. hours.

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;[10] (2)

Evaluation, "Documentation During the Performance Cycle." However, here the grievant has already received her annual performance evaluation for which she received a "Contributor" rating.

[9] It should be noted that a number of courts have held that an increased workload alone does not constitute an adverse employment action. *See* Buttron v. Sheehan, No. 00 C 4451, 2003 U.S. Dist. LEXIS 13496, at *53 (N.D. Ill. Aug. 4, 2003); Maclean v. City of St. Petersburg, 194 F. Supp 2d 1290, 1299 (M.D. Fla. 2002); Williamson v. Tom Thumb, Civil Action No. 3:01-CV-0159-BC, 2001 U.S. Dist LEXIS 18811, at *10-12 (N.D. Tex. Nov. 13, 2001).

[10] *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).

the employee suffered a materially adverse action;[11] 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.[12] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[13]

Even assuming, for the purposes of this Ruling only, that the grievant had engaged in a protected activity when she challenged a statement in her Interim Performance Assessment, and had suffered a materially adverse action when her hours were adjusted,[14] her retaliation claim nevertheless fails to qualify for hearing because she has not presented sufficient evidence of a causal link between the alleged protected activity and materially adverse action. Moreover, the agency has proffered a non-retaliatory reason for changing the grievant's hours of work. The agency has explained that the only other licensing specialist requested to have her hours adjusted so that she could work the same hours as the grievant (7:45 a.m. to 4:30 p.m). The agency explained that it would be impossible for both employees to work the same shift as phone coverage would be unfulfilled. In an effort to be fair, the agency settled on a compromise in which the two employees alternate schedules every two weeks with each employee working from 8:15 a.m. to 5:00 p.m., thus ensuring phone coverage during business hours. The grievant has provided no evidence to suggest that the agency's stated reason for the schedule change was pretextual. Accordingly, the issue of retaliation does not qualify for a hearing.

We note, however, that although this grievance does not qualify for a hearing, mediation may be a viable option for the parties to pursue. EDR's mediation program is a voluntary and confidential process in which one or more mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work unit

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[11] 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.

[12] *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).

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

[14] 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)).

involved. For more information on this Department's Workplace Mediation program, the parties should call 888-232-3842 (toll free) or 804-786-7994.

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