Issues: Qualification – Management Actions (Outside Employment) and Retaliation (Grievance Activity Participation); Ruling Date: April 16, 2009; Ruling #2009-2270; Agency: Virginia Department of Health; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Health
EDR Ruling No. 2009-2270
April 16, 2009

The grievant has requested a ruling on whether his December 5, 2008 grievance with the Virginia Department of Health (VDH or the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant initiated his December 5, 2008 grievance to challenge what he describes as his supervisor's "[i]ntrusion into [his] personal activities after work." Specifically, the grievant asserts that because he has initiated grievances and participated in a co-worker's hearing, his supervisor has retaliated against and harassed him by adding the following conditions to the grievant's "Request for Outside Employment form": (1) "[Grievant] may have to cancel outside work in response to an emergency (food borne outbreak, etc.) or on call responsibilities"; and (2) "If requested, [Grievant] will authorize the release of work records in the event questions should arise as to the hours worked."

After the parties failed to resolve the dispute during the management resolution steps, the grievant asked the agency head to qualify his grievance for hearing. The agency head denied the grievant's request, and the grievant has appealed to this Department.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[1] Thus, by statute and under the grievance procedure, complaints relating solely to the means, methods and personnel by which work activities are undertaken "shall not proceed to hearing"[2] unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.[3] In this case, the grievant claims that he has been subjected to retaliation and harassment because of his previous participation in the grievance process.

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

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;[4] (2) the employee suffered a materially adverse action;[5] 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.[6] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[7]

Participation in the grievance procedure is clearly a protected activity.[8] However, the grievant has not presented sufficient evidence that his supervisor's conduct regarding his outside employment request constitutes a materially adverse action. For an action to be "materially adverse," it must be of such a nature that "it well might have dissuaded a reasonable worker" from engaging in a protected activity.[9] While it is possible that denying the grievant approval for outside employment would constitute a materially adverse action, in this case, the grievant received the requested permission. Further, while we cannot categorically rule out the possibility that actually requiring the grievant to cancel his outside work because of his VDH responsibilities or to produce documentation showing his hours of outside employment would constitute a materially adverse action, in this case, no such demands have yet been made. Rather, the grievant has only been advised that such actions may be taken by the agency in the future. Under these circumstances, we cannot conclude the grievant has presented sufficient evidence of a materially adverse action for his grievance to qualify for hearing.

Retaliatory Harassment

For a claim of retaliatory harassment/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 prior protected activity; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work

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[4] *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).

[5] 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.

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

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

[8] *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).

[9] See *Burlington Northern*, 548 U.S. at 68. (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

environment[10]; 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]

In this case, there is no question that the alleged management actions were unwelcome, as it forms the basis of his grievance. The grievant has also presented evidence of prior protected activity—specifically, the initiation of earlier grievances and participation in a co-worker's grievance hearing. We cannot find, however, that the grievant has shown sufficient evidence of an abusive or hostile work environment to warrant a hearing. As noted previously, the grievant has in fact not been denied outside employment, required to cancel outside work, or to produce documentation of hours worked at his outside job. Rather, his outside employment has been approved, with the condition that the agency *may, in the future*, require him to cancel his outside work to satisfy his VDH duties or authorize the release of records showing the hours of his outside employment . Accordingly, the grievant's claim of retaliatory harassment 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 appeal to the circuit court in the jurisdiction in which the grievance arose 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

[10] Under *Burlington Northern*, a lesser showing of harm is required in cases of retaliation than in cases of gender or racial discrimination: retaliation claimants need only show the existence of a "materially adverse" action, rather than an "adverse employment action." *Burlington Northern*, 548 U.S. at 67-68. 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, 220 Fed Appx. 120, 131-133 (3rd Cir. 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).

[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).