Issue: Qualification – Retaliation (Grievance Participation); Ruling Date: February 2, 2010; Ruling #2010-2472; Agency: Department of Behavioral Health and Developmental Services; Outcome: Qualified for Hearing.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Behavioral Health and Developmental Services
Ruling Number 2010-2472
February 2, 2010

The grievant has requested a ruling on whether the issues raised in her October 13, 2009 grievance that were not qualified by the Commissioner of Departmental of Behavioral Health and Developmental Services ("agency") qualify for a hearing.

FACTS

On or about October 13, 2009, the grievant initiated a grievance in which she listed a variety of issues pertaining to agency management including: (1) communications difficulties; (2) lack of counseling prior to the issuance of discipline; (3) the agency's failure to follow doctor recommendations; (4) a negative fitness for duty form; (5) adverse employment actions and environment; (6) retaliation; (7) Group II Written Notice; (8) discrimination; and (9) that HR and her supervisor broadcast personal and confidential information about her. The grievance advanced through the management resolution steps, and on or about November 14, 2009, the Commissioner qualified the Written Notice for hearing.[1]

The grievance was forwarded to this Department for the appointment of a hearing officer. Because it was not entirely evident whether the Commissioner had intended to qualify the entire grievance or the Written Notice only, this Department sought (1) clarification from the agency as to whether it intended to qualify the entire grievance; and (2) clarification from the grievant as to whether she desired to challenge any potentially unqualified issues. The agency clarified that it intended to qualify only the Written Notice and the employee clarified that she sought qualification of all issues not qualified.

DISCUSSION

This grievance challenges a Written Notice and several other alleged management acts, at least some of which the grievant asserts were retaliatory and/or discriminatory. The agency has qualified the Written Notice for hearing but not the other grieved alleged management actions.

[1] The Grievance Form A indicated that "formal disciplinary action (Group II Written Notice) qualifies for hearing."

For a claim of retaliation to qualify for a hearing independently of formal discipline,[2] the grievance must present evidence raising a sufficient question as to whether: (1) the grievant engaged in a protected act; (2) the grievant suffered a materially adverse action or was subjected to severe or pervasive harassment; and (3) the protected activity and the adverse action or harassment were causally connected, in other words, management took the action or harassed the employee because he or she had engaged in the protected activity.[3]

During the investigation for this ruling, the grievant stated that she believed that the agency has retaliated against her for her previous successful grievance.[4] The initiation of a grievance is clearly a protected activity.[5] In addition, the grieved actions raise a sufficient question as to whether management's actions were "materially adverse," and/or severe or pervasive, such that they could dissuade a reasonable employee from participating in protected conduct.[6] As to the final element, because the Written Notice is already proceeding to hearing, we deem it appropriate to allow the hearing officer to determine whether the grievant has proffered sufficient evidence of a retaliatory link between her past grievance activity and any materially adverse actions or any severe or pervasive retaliatory harassment. In claims regarding discrimination or retaliation where intent is critical to the outcome, the hearing officer, as fact finder, is simply better positioned to determine whether retaliatory intent played a role in management's action.[7]

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[2] Where formal discipline is challenged, there is no need to independently "qualify" a claim that retaliation was the motivation for the discipline. *See* EDR Ruling No. 2010-2404 ("[W]hile retaliation was not expressly stated on the Form A as filed, the management action being grieved (the Group III Written Notice), over which the hearing officer undoubtedly has subject matter jurisdiction, was." Accordingly, "[i]n raising the issue of retaliation, the grievant was merely asserting one of the many "theories" as to why the Group III Written Notice was allegedly improper." Therefore, the issue of retaliation was properly before the hearing officer.)

[3] *C.f.* Martin v. Merck Co., Inc. 446 F. Supp. 2d 615 (W.D. Va. 2006). In a case where the agency presents a nonretaliatory business reason for any adverse action(s), 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. *See e.g.,* EEOC v. Navy Fed. Credit Union, 424 F. 3d 397, 405 (4th Cir. 2005). Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case). Where an employee asserts that he or she has been subjected to a hostile work environment, such an environment generally results only after an accumulation of discrete instances of harassment. *See* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002) ("Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct.... Such claims are based on the cumulative effect of individual acts"); Spriggs v. Diamond Auto Glass, 242 F.3d 179, 184 (4th Cir. 2001).

[4] During the investigation for this ruling, the grievant pointed to the agency's decision to assign her to a location designated as #5 Cluster, an allegedly undesirable post, as a retaliatory act.

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

[6] *See* Burlington Northern and Santa Fe Ry. v. White, 548 U.S. 53, at 68-69. While this standard is objective, it may also take into account the particular circumstances of the employee.

[7] *See* Ross v. Communications Satellite Corp., 759 F.2d 355, 364-365 (4th Cir. 1985), abrogated on other grounds, quoting Morrison v. Nissan Motor Co., Ltd., 601 F.2d 139, 141 (4th Cir. 1979) ("[r]esolution of questions of intent often depends upon the 'credibility of the witnesses, which can best be determined by the trier of facts after observation of the demeanor of the witnesses during direct and cross-examination.'"). *See also* EDR Ruling 2007-1727 ("A hearing officer, as a fact finder, is in a better position to determine questions of fact, motive and credibility and decide whether retaliatory intent contributed to the grievant's reassignment.")

The grievant has raised another theory in her grievance: discrimination.[8] Because the Written Notice and the other alleged retaliatory management acts have been qualified for hearing, this Department deems it appropriate to send the discrimination theory raised by the grievance for adjudication by a hearing officer as well, to help assure a full exploration of what could be interrelated facts and issues.[9] Accordingly, the grievance is qualified in full.

CONCLUSION

For the reasons set forth above, the grievant's October 13, 2009 grievance is qualified in full for hearing. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer using the Grievance Form B.

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Claudia T. Farr
Director

[8] During the investigation into the facts surrounding this grievance, the grievant asserted that she believes she has been a victim of disability discrimination.

[9] Qualification of the entire grievance is consistent with EDR's view that "issues" grieved are appropriately viewed as the management action under challenge and any theories of how such actions may have been deficient or improper. *See* EDR Ruling No. 2010-2388.