Issues: Qualification – Discipline (warning letter) and Retaliation (Other Protected Right); Ruling Date: August 12, 2010; Ruling #2011-2698; Agency: College of William and Mary; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the College of William and Mary
Ruling No. 2011-2698
August 12, 2010

The grievant has requested a ruling on whether his May 12, 2010 grievance with the College of William and Mary (the agency) qualifies for hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Housekeeper with the agency. The grievant initiated his May 12, 2010 grievance contending that his receipt of a warning letter for allegedly taking an unauthorized break was a misapplication of policy and retaliatory. The grievant also challenges other alleged retaliatory actions by management. More specifically, the grievant asserts that a few days after he "went to human resources" to report alleged management abuses, he was subjected to the following retaliatory actions: he and his co-workers were forced to walk from building to building as a crew with their cleaning supplies while their supervisor followed behind them like they were a "group of slaves" and they were allegedly told they had to ask permission to use the restroom. The grievant describes the experience of being followed by his supervisor as "humiliating" because others on campus were "pointing…and laughing." As relief, the grievant seeks to have the warning letter removed from his file and to be transferred to a different department.

At the first management resolution step, the first step-respondent determined that the warning letter would be removed from the grievant's supervisory file. The first step-respondent further indicated that she would ask the grievant's supervisor, Ms. W., who did not issue the warning letter, to meet with the grievant to discuss the incident that prompted the warning letter and give the grievant an opportunity to defend himself as to this incident. Ms. W. would then have the option of verbally counseling the grievant or issuing him another written counseling. During this Department's investigation, the agency indicated that warning letter was in fact removed from the grievant's supervisory files and that the grievant has not been further counseled regarding this incident.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[1] Thus, all claims relating to issues such as the methods, means, and personnel by which work activities are to be carried out generally do not qualify for hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or applied unfairly.[2] Here, the grievant asserts that the agency has misapplied policy by failing to "follow [a] course of progressive discipline" as outlined in the Standards of Conduct Policy when issuing the warning letter. Additionally, the grievant asserts that management has retaliated against him for voicing his concerns to human resources. The grievant's claims are discussed below.

Misapplication of Policy

For a claim of policy misapplication or unfair application of policy to qualify for a hearing, there must be evidence raising a sufficient question as to whether management violated a mandatory policy provision, or evidence that management's actions, in their totality, are so unfair as to amount to a disregard of the intent of the applicable policy.

However, there are some cases where qualification is inappropriate even if a grievant raises a sufficient question of misapplication of policy. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate where the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

In this case, the warning letter at issue and alleged by the grievant to be out of compliance with the Standards of Conduct Policy was removed from the grievant's supervisory file at the first management resolution step. Accordingly, the grievant's claim that policy was misapplied in issuing the warning letter is now moot and no other effectual relief is available. As such, this issue does not qualify for a hearing.[3]

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[1] Va. Code § 2.2-3004(B).

[2] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(b)-(c).

[3] This Department notes that even if the warning letter had not been removed from the grievant's supervisory file at the first management resolution step of the grievance process, this issue would not qualify for hearing because to qualify a misapplication of policy claim for hearing, the grievant must demonstrate that the action taken by management was an adverse employment action. *See Grievance Procedure Manual* 4.1(b). 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." Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998). Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment. *See, e.g.*, Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007). A warning letter like the one at issue in this case does not constitute an adverse employment action because such a document, in

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]

The grievant argues that because he raised concerns with human resources about how he and his co-workers were being treated by management, the agency retaliated against him. Raising concerns about employment matters with agency management or human resources can be viewed as protected activity.[8] However, this Department has no basis to qualify the grievance because there is insufficient evidence of a materially adverse action. For the grievance to qualify for hearing, the action taken against the grievant must have been materially adverse to a reasonable employee, such that he or she might be dissuaded from engaging in the protected activity.[9] While this determination will depend on the particular circumstances of each case, a counseling memoranda or written warning that was later removed does not generally rise to the level of being materially adverse.[10] Likewise, the other alleged actions, i.e., following the grievant around campus and telling him he has to ask permission to use the restroom, even if true, are not materially adverse under the particular facts present in this case.[11] Accordingly, this issue is not qualified for hearing. [12]

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and of itself, does not have a significant detrimental effect on the terms, conditions of benefits of employment. *See* Boone v. Goldin, 178 F.3d 253, 255-56 (4th Cir. 1999).

[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)(4).

[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* 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 (Title VII discrimination case).

[8] Va. Code § 2.2-3000(A) ("It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management.").

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

[10] *See, e.g.* EDR Ruling No. 2009-2090, at n.6.

[11] Another employee had admittedly taken an unauthorized break. Attempting to monitor the whereabouts of employees under such circumstances cannot be viewed as a materially adverse action.

[12] The parties should note that this ruling does not mean that EDR deems the alleged actions by the agency, if true, to be appropriate. It means only that the actions involved in this case did not rise to the level of an "adverse

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

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employment action" or a "materially adverse action" such as to warrant a hearing. Also, this ruling in no way prevents the grievant from raising his concerns again at a later time if the alleged conduct continues or worsens.