Issues: Qualification – Discipline (Other) and Retaliation (Grievance Activity); Ruling Date: December 9, 2010; Ruling No. 2011-2714, 2011-2753; Agency: Department of Juvenile Justice; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Juvenile Justice
Ruling No. 2010-2714; 2011-2753
December 9, 2010

The grievant has requested a ruling on whether his April 14, 2010 and May 27, 2010 grievances with the Department of Juvenile Justice ("DJJ" or "the agency") qualify for a hearing. For the reasons discussed below, the grievances do not qualify for a hearing.

FACTS

The grievant was employed as a Corrections Lieutenant with the agency. On or about April 11, 2010, the grievant was questioned by the Superintendent about an alleged conversation regarding an incident with a staff member. The grievant found the questioning by the Superintendant intimidating and harassing. On April 14, 2010, he initiated a grievance challenging the interaction with the Superintendant ("Grievance 1").

On May 26, 2010, the grievant received a letter of intent to discipline (a due process letter) for alleged falsification of documents. The grievant alleges that the due process letter was retaliatory in nature, and he grieved it on May 27, 2010 ("Grievance 2"). Like Grievance 1, Grievance 2 was not qualified for hearing by the agency head. Accordingly, the grievant has asked this Department to qualify the grievances.

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 alleges that he has been a victim of retaliation by his supervisor for his participation in prior grievances.

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

The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[3] But while evidence suggesting that the grievant suffered an "adverse employment action" is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an "adverse employment action." For example, consistent with developments in Title VII law, this Department substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances.[4] Thus, 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;[5] (2) the employee suffered a materially adverse action;[6] 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.[7] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[8]

Neither of the actions cited by the grievant—the Superintendent's questioning in an allegedly intimidating manner nor the due process letter, even considered together, appear to rise to the less stringent "materially adverse action" standard required to establish a retaliation claim.[9] As 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

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

[4] *See* EDR Ruling Nos. 2010-2672; 2009-2248; 2008-1882; and 2007-1669.

[5] *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).

[6] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); s*ee also* EDR Ruling Nos. 2010-2672; 2009-2248; 2008-1882; and 2007-1669.

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

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

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

retaliation claim.[10] Based on the forgoing, it does not appear that the supervisor's conduct rises beyond the level to establish materially adverse action by the agency.[11] Consequently, Grievance 1 and Grievance 2 do not qualify for a hearing.[12]

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 this Department's 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 one or both of these grievances, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant notifies the agency that he wishes to conclude the grievance(s).

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Claudia Farr
Director

[10] *Burlington N.* , 548 U.S. at 68.
[11] 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).
[12] This ruling in no way prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens.