Issues: Qualification – Management Actions (Recruitment/Selection), Discrimination (Race), and Retaliation (Other Protected Right); Ruling Date: August 13, 2010; Ruling # 2011-2719; Agency: College of William & 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 Number 2011-2719
August 13, 2010

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

FACTS

The grievant alleges that a supervisor "disrespected and verbally abused" the grievant and her co-workers during a meeting. The grievant and other co-workers reportedly raised concerns about the supervisor's conduct to human resources. Thereafter, the grievant alleges she has received retaliatory treatment. For instance, the grievant states that instead of being assigned to her individual work area, she and her co-workers were required to work as a group and go from building to building together under the close supervision of a supervisor.[1] The grievant also received a written warning (counseling memo) on April 15, 2010 for being on an unauthorized break on April 14, 2010. Although the written warning was rescinded, according to the College, the grievant admitted that she was in the break room when it was not an official break time.

Around this same time, the College was seeking to fill a lead worker position within the grievant's department. The grievant applied and was selected for an interview. During the interview, the grievant alleges, the interviewer, a manager, allegedly informed the grievant that she "could go far in the department if only [she] would stop involving [herself] in helping the other workers with workplace issues." However, according to the interviewer, this discussion took place after the interview had been concluded and was an effort to provide feedback about work-related issues given the opportunity that both were meeting face-to-face at the time. In addition, the interviewer states that she was providing the grievant information about how the manner in which she has raised these concerns recently has potentially impacted her reputation amongst her co-workers. Ultimately, the grievant was not selected for the lead worker position. The grievant challenges the College's actions as misapplications and/or unfair applications of policy, discrimination, and retaliation.[2]

[1] This direction was later rescinded.

[2] The grievant has also raised issues about how the second step meeting in this grievance was conducted. She asserts that she was denied her request to have witnesses come to the meeting. Generally speaking, a grievant is permitted to present witness testimony at a second step meeting. *Grievance Procedure Manual* § 3.2. Therefore, absent additional material facts, the College may have inappropriately prevented the grievant from presenting these witnesses. However, this is an issue of party noncompliance that has been waived because it was not raised prior to

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[3] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[4] Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out, as well as hiring, promotion, transfer, assignment, and retention of employees within the agency, 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 improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[5]

Threshold Inquiries

The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[6] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.[7] 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."[8] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[9]

This Department has reviewed the materials submitted and finds that, other than the selection process, none of the other alleged management actions described in this grievance pass this threshold requirement.[10] For instance, a counseling memo does not generally constitute an adverse employment action, because such an action, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[11] Neither does this type

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the grievance proceeding to this stage. *See Grievance Procedure Manual* § 6.3 ("All claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one may forfeit the right to challenge the noncompliance at a later time."). Therefore, this allegation of noncompliance will be addressed no further in this ruling.

[3] *See Grievance Procedure Manual* § 4.1 (a) and (b).

[4] *See* Va. Code § 2.2-3004(B).

[5] Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1(c).

[6] *See Grievance Procedure Manual* § 4.1(b).

[7] 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 recent developments in Title VII law, this Department substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. *See* EDR Ruling No. 2007-1538.

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

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

[10] Similarly, the grievant's bare allegations of discrimination, do not raise a sufficient question that "severe or pervasive" harassment based on a protected status has occurred to establish a claim of a hostile work environment in this case. *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007). As courts have noted, prohibitions against harassment, such as those in Title VII, do not provide a "general civility code," Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998), or remedy all offensive or insensitive conduct in the workplace. *See, e.g.*, Beall v. Abbott Labs., 130 F.3d 614, 620-21 (4th Cir. 1997); Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).

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

of action constitute a "materially adverse action"[12] required to establish a retaliation claim.[13] Therefore, the grievant's claims relating to the counseling memo, which was later rescinded, do not qualify for a hearing.

In addition, the grievant's allegations regarding any other allegedly retaliatory incidents, even taken together,[14] do not rise to the level of being materially adverse.[15] 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 retaliation claim.[16] It does not appear that the conduct the grievant has experienced rises beyond this level to establish materially adverse action by the College. Because the grievant has not presented evidence raising a sufficient question as to the elements of a claim of retaliation, this issue does not qualify for hearing.

Selection – Lead Worker: Misapplication and/or Unfair Application of Policy

State hiring policy is designed to ascertain which candidate is best suited for the position, not just to determine who might be qualified to perform the duties of the position.[17] However, the grievance procedure accords much deference to management's exercise of judgment, including management's assessment of applicants during a selection process. Thus, a grievance that challenges an agency's action like the selection in this case does not qualify for a hearing unless there is sufficient evidence that the resulting determination was plainly inconsistent with other similar decisions by the agency or that the assessment was otherwise arbitrary or capricious.[18]

According to the College, the successful candidate had prior experience in the role of a lead worker and better demonstrated through her past performance the skills and abilities of that position. While the grievant has had good work performance in the past, the College determined that the successful candidate was the better choice to serve as a lead and be followed by subordinates. In addition, according to the College, the incident in which the grievant was allegedly on break at an inappropriate time occurred two days after the grievant's interview for the position. It appears that the College took this conduct into account in determining whether

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[12] 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.

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

[14] 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).

[15] *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, *7-8 (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).

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

[17] *See* DHRM Policy No. 2.10, *Hiring*.

[18] *See Grievance Procedure Manual* § 9. Arbitrary or capricious is defined as a decision made "[i]n disregard of the facts or without a reasoned basis."

the grievant was the best choice for a lead worker role. Though the grievant may disagree with the College's assessment, she has presented insufficient evidence that might suggest the College's selection disregarded the facts or was otherwise arbitrary or capricious. It appears the College based its decision on a good faith assessment of the relative qualities of the candidates. This grievance does not raise a sufficient question as to whether a misapplication and/or unfair application of policy tainted the selection process to qualify for a hearing.

Selection – Lead Worker: 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;[19] (2) the employee suffered a materially adverse action;[20] 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.[21] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[22]

Assuming without deciding, for the purposes of this ruling only, that the grievant engaged in protected activity,[23] this grievance does not raise a sufficient question as to any causal link between such protected activity and the selection decision. The grievant identifies a conversation between herself and the interviewer, a manager in her department, at the time of the interview in which the interviewer allegedly criticized her speaking up about work-related issues. While the grievant appears to assert that the timing of this conversation, at the time of the interview, somehow indicates retaliatory intent that affected the selection, her argument is not persuasive. It appears the interviewer had concluded the interview, but wanted to meet with the grievant afterwards as a manager to offer her feedback and discuss issues related to the workplace. Indeed, the interviewer's statements to the grievant did not appear to be intended to curtail or sanction allegedly protected activity, i.e., raising issues with management. Rather, the

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[19] *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).

[20] *Burlington N.*, 548 U.S. at 67-68. 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 schoolage children." *Id.* The Court determined that a "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)).

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

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

[23] The grievant asserts that she was retaliated against for raising issues about a supervisor with human resources. The Code of Virginia provides that "employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Va. Code § 2.2-3000. Therefore, reporting such work-related issues to human resources could arguably be considered protected activity.

interviewer appears to have been offering the grievant advice and information about the *manner* in which she has raised her concerns in the recent past and the negative impact that could have on the grievant's reputation amongst her co-workers.

In addition, as discussed above, the College has provided evidence of how the selection decision was based on a reasonable evaluation of the knowledge, skills, and abilities of the applicants. This Department cannot infer from these facts presented, or the timing of the selection decision in relation to the grievant's apparent protected activity, that retaliation tainted the selection process. As such, the grievant's retaliation claim does not qualify for hearing.

Mediation

Finally, although this grievance does not qualify for a hearing, mediation may be a viable option for the parties to pursue as to some of the issues that could be ongoing. 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 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 and file a notice of appeal with the circuit court 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 College will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the College of that desire.

Claudia T. Farr
Director