Issues: Qualification – Retaliation (Other Protected Right) and Consolidation of Grievances for a Single Hearing; Ruling Date: September 27, 2010; Ruling #2011-2740; Agency: Virginia Department of Health; Outcome: Qualified for Hearing, Consolidation Granted.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION and CONSOLIDATION RULING OF DIRECTOR

In the matter of Department of Health
Ruling No. 2011-2740
September 27, 2010

The grievant has requested a ruling on whether her May 14, 2010 grievance with the Department of Health (VDH or the agency) qualifies for a hearing. For the reasons discussed below, the May 14th grievance is qualified and consolidated with the grievant's pending May 17, 2010 grievance for a single hearing.

FACTS

On April 29, 2010, the grievant was issued a Group II Written Notice as a result of her alleged inappropriate behavior and communications with management in early April 2010. The grievant challenged the Group II Written Notice by initiating a grievance on May 17, 2010. In her grievance, the grievant asserts, in part, that she was issued the Group II Written Notice as a result of her complaint to management that a co-worker had violated a patient's confidentiality rights under the Health Insurance Portability and Accountability Act (HIPAA).[1] The grievance proceeded through the management resolution steps without resolution,[2] and was qualified for hearing by the agency head.[3] The agency has requested the appointment of a hearing officer and the May 17, 2010 grievance is currently pending with this Department for that appointment.

Also effective April 29, 2010, the grievant was reassigned from a Supportive Case Manager to a Nursing Assistant. Although the reassignment did not result in a change to her pay, benefits or hours of work, the grievant asserts that her duties have drastically changed and that her promotional opportunities have been negatively affected. The grievant challenged her reassignment by initiating a grievance on May 14, 2010. Like her May 17, 2010 grievance, the

[1] Although the grievant's claim of retaliation is not immediately ascertained by looking at the Form A as initiated, the attachments to the Form A make it clear that the grievant is claiming that the Written Notice was issued as a result of retaliation. More specifically, in conjunction with her request for qualification, the grievant wrote the following in a letter to the agency head: "It was only when I accused [a co-worker] of an [sic] HIPAA violation that I have been attacked viciously by [the manager who issued the Written Notice]."
[2] The Group II Written Notice was reduced to a Group I Written Notice at the second management resolution step of the grievance process.
[3] Formal disciplinary action automatically qualifies for a hearing. *Grievance Procedure Manual* § 4.1(a).

grievant asserts in her May 14, 2010 grievance that management took action against her (i.e., reassigned her) as a result of her complaint that a co-worker had violated a patient's rights under HIPAA. The May 14, 2010 grievance proceeded through the management steps of the grievance process without resolution and the agency head denied the grievant's request for hearing. The grievant now seeks a qualification determination from this Department.

DISCUSSION

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 and the reassignment or transfer 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]

Informal Discipline[6]

For state employees subject to the Virginia Personnel Act, appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the policies and procedures promulgated by DHRM.[7] For example, when a disciplinary action is taken against an employee, certain policy provisions must be followed.[8] These safeguards are in place to ensure that disciplinary actions are appropriate and warranted.

Where an agency has taken informal disciplinary action against an employee, a hearing cannot be avoided for the sole reason that a Written Notice did not accompany the disciplinary action. Rather, even in the absence of a Written Notice, a hearing is required where the grieved management action resulted in an adverse employment action[9] against the grievant and the

[4] *See* Va. Code § 2.2-3004(B).
[5] Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1(c).
[6] Although a claim of informal discipline is not expressly stated on the grievant's Form A, the Form A read in conjunction with the management resolution step responses fairly raises an issue of informal discipline. More specifically, the second resolution step respondent states "[t]he decision to reassign [the grievant] to alternate duties within the District was made for business purposes in the best interests of the Virginia Department of Health. Specifically, during your period of increased duty assignment in the [ ] program, the District began to receive verbal complaints from clients relative to failure to provide appropriate interpreter services pursuant to Title VI and resulting errors in administration of services." Moreover, on her Form A, the grievant states: "I have taken action to correct and improve any work performance issues and believe I can continue to effectively serve the [program] clients."
[7] Va. Code § 2.2-2900 *et seq.*
[8] *See* DHRM Policy No. 1.60, *Standards of Conduct*.
[9] The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions." *See Grievance Procedure Manual* § 4.1(b).

primary intent of the management action was disciplinary (i.e., taken primarily to correct or punish perceived poor performance).[10]

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."[11] Adverse employment actions include any agency actions that have an adverse effect on the terms, conditions, or benefits of one's employment.[12]

Here, the agency asserts that the grievant was reassigned as a result of client complaints, errors in administration of services, as well as inappropriate client contacts and conversations. As such, the grievance raises a sufficient question as to whether the grievant's reassignment was effectuated, at least in part, as a means of disciplining the grievant for her alleged poor performance. Moreover, in light of the grievant's assertions that her duties have changed dramatically and her opportunities for promotion have been negatively affected, there is a sufficient question as to whether the reassignment from Supportive Case Manager to Nursing Assistant was an adverse employment action.[13]

However, whether the grievant's reassignment was primarily to punish or correct the grievant's behavior is a factual determination that a hearing officer, not this Department, should make. At the hearing, the grievant will have the burden of proving that the reassignment was adverse and disciplinary. If the hearing officer finds that it was, the agency will have the burden of proving that the action was nevertheless warranted and appropriate. Should the hearing officer find that the reassignment was adverse, disciplinary and unwarranted and/or inappropriate, he or she may rescind the transfer, just as he or she may rescind any formal disciplinary action.[14]

Alternative Theories and Claims

As noted above, the grievant has also alleged that her reassignment was retaliatory. Because the grievant's informal discipline claim qualifies for hearing, this Department deems it appropriate to send alternative theories and claims regarding her reassignment that were raised by the grievance for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues. Therefore, the grievant's claim of retaliation also qualifies

---

[10] *See, e.g.*, EDR Ruling No. 2007-1516, 2007-1517; EDR Ruling Nos. 2002-227 & 230; *see also* Va. Code § 2.2-3004(A) (indicating that grievances involving "transfers and assignments … resulting from formal discipline or unsatisfactory job performance" can qualify for hearing).

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

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

[13] *See* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 376 (4th Cir. 2004); Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999); *see also* Edmonson v. Potter, 118 Fed. Appx. 726, 729 (4th Cir. 2004) (unpublished opinion) (reassignment or transfer with significantly different responsibilities, or one providing reduced opportunities for promotion can constitute an adverse employment action, depending on all the facts and circumstances). Such a reassignment or transfer could also constitute a "materially adverse action" needed to show retaliation, depending on all surrounding facts and circumstances. *See* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

[14] *See, e.g.*, EDR Ruling No. 2002-127.

for hearing.[15] Should the hearing officer in this case find that the reassignment was not retaliatory in nature, he or she must still assess whether the reassignment was disciplinary.[16]

---

[15] In addition, in this case, the grievant asserts that the reassignment contested in her May 14th grievance is part of the same alleged pattern of retaliation that led to the disciplinary action she challenged in her May 17th grievance. The May 17h grievance has been qualified. In light of the shared claim of retaliation for the same protected activity (i.e., reporting an alleged HIPAA violation) it simply makes sense to qualify the May 14th grievance and send both grievances to a single hearing.

[16] To prevail on a claim of retaliation, the employee must demonstrate that he or she has suffered the requisite harm. Over the years, the courts have cited a number of ways to assess whether employer action(s) reach this threshold determination which, in turn, has led to more than one way to look at a claim of retaliation. Historically, courts, and in turn this Department, said that the employee had to suffer an "adverse employment action" to establish the requisite harm. 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). However, the 2006 Supreme Court case of *Burlington Northern & Santa Fe Ry. Co. v. White,* 548 U.S. 53 (2006) articulated the lesser "materially adverse action" standard required to prevail on a claim of retaliation. The materially adverse action standard is an objective one: an action is materially adverse if it "well might have dissuaded a reasonable worker" from engaging in protected activity. *Burlington N.*, 548 U.S. at 68. With the holding in *Burlington Northern*, this Department likewise abandoned the "adverse employment action" approach to retaliation claims and began to apply the lesser "materially adverse action" standard. *See* EDR Ruling Nos. 2005-1064, 2006-1169 and 2006-1283. Regardless of whether the analysis is one of whether the employee suffered an "adverse employment action" or a "materially adverse action," courts have indicated that alleged retaliatory acts can be considered in the aggregate for purposes of meeting the threshold showing of harm. *See e.g.*, Somoza v. Univ. of Denver, 513 F.3d 1206 (10th Cir. 2008); Devin v. Schwan's Home Serv., 491 F.3d 778, 787-788 (8th Cir. 2007); Caldwell v. Jackson, No. 1:03CV707; 2009 U.S. Dist. LEXIS 70918, at *32-34 (M.D.N.C. Aug. 11, 2009); Hyde v. K.B. Home, Inc., 355 Fed. Appx. 266, 269 (11th Cir. 2009); Olsen v. County of Nassau, CV 05-3623 (ETB); 2009 U.S. Dist. LEXIS 38938 at *16-17 (E.D. N.Y. May 7, 2009); Martin v. Gates, CIVIL NO. 07-00513 JMS/BMK, 2008 U.S. Dist. LEXIS 84481 at *20 (D.C. Hi. Oct. 20, 2008); and Mascone v. American Physical Society, Inc., Case number: RWT 07-966, 2009 U.S. Dist. LEXIS 88487, at *18-19 (D.C. Md. Sept. 25, 2009). This Department has likewise held that retaliatory acts may be considered in the aggregate for purposes of establishing the requisite level of harm. *See e.g.*, EDR Ruling No. 2007-1669.

In addition, some courts, as well as this Department, have recognized that a claim of retaliation can be predicated upon a hostile work environment claim. With this retaliatory harassment approach, it must be determined whether collectively the alleged retaliatory acts were sufficiently severe or pervasive so as to alter the employee's conditions of employment and to create an abusive or hostile work environment. *See generally* Morris v. Oldham County Fiscal Court, 201 F.3d 784, 791-92 (6th Cir. 2000); Ray v. Henderson, 217 F.3d 1234, 1245-46 (9th Cir. 2000); Gunnell v. Utah Valley State College, 152 F.3d 1253, 1264 (10th Cir. 1998). "[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." Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993). Moreover, 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. *See* Hare v. Potter, No. 05-5238, 2007 U.S. App. LEXIS 6731, at *28-33 (3d Cir. Mar. 21, 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). *See also* EDR Ruling 2007-1669.

Based on the foregoing body of legal precedent, when assessing a retaliation claim, a hearing officer should consider first whether the retaliatory act (or acts in the aggregate) at issue (i) are sufficiently severe or pervasive enough so as to alter the employees conditions of employment or (ii) constitute an "adverse employment action." If the action(s) do not rise to this level of harm, then it should be determined whether the act (or acts in the aggregate) could have

In light of the foregoing, the May 14th grievance is qualified for hearing. We note, however, that this qualification ruling in no way determines that the actions challenged by the May 14th grievance were disciplinary, retaliatory or otherwise improper, but rather only determines that further exploration of the facts by a hearing officer is appropriate.

Consolidation

EDR strongly favors consolidation of grievances for hearing and will grant consolidation when grievances involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.[17] This Department finds that consolidation of the May 14, 2010 grievance with the pending May 17, 2010 grievance is appropriate. The grievances share common themes and claims and, moreover, consolidation is not impracticable in this instance. Therefore, these grievances will be consolidated for a single hearing for adjudication by a hearing officer to help ensure a full exploration of what could be interrelated facts and issues.

CONCLUSION

Based on the foregoing, the grievant's May 14, 2010 grievance is qualified for hearing and consolidated with the grievant's May 17, 2010 grievance for a single hearing. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear the May 14th grievance, using the Grievance Form B. This Department's rulings on compliance are final and nonappealable.[18]

_____
Claudia T. Farr
Director

---

dissuaded a reasonable worker from engaging in protected activity; in other words whether the action(s) constitute a "materially adverse action."

[17] *Grievance Procedure Manual* § 8.5.

[18] *See* Va. Code § 2.2-1001(5), 2.2-3003(G).