Issue: Qualification – Retaliation (grievance activity); Ruling Date: September 28, 2010; Ruling # 2011-2778; Agency: Department of Labor and Industry; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Labor and Industry
Ruling Number 2011-2778
September 28, 2010

The grievant has requested a ruling on whether her July 21, 2010 grievance with the Department of Labor and Industry (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant's July 21, 2010 grievance alleges retaliation for previous grievance activity. She asserts that, on or about June 21, 2010, a supervisor exaggerated facts and "made accusations of an employee spending an extended period of time at my desk." The grievant states that this supervisor is "using 'shunning, bullying and polarization' tactics" against her. In addition to the alleged incident on or about June 21, 2010, the grievant has described other examples of alleged conduct by this supervisor that occurred both before and after she initiated her grievance on July 21, 2010, including: 1) making general statements about poor work performance by the grievant, but not answering the grievant's questions when asking for details; 2) standing at the entrance of the grievant's cubicle and staring at her; 3) saying "good morning" to the grievant in her left ear while her back was turned "in an eerie tone" and then "giggling" as she walked away; and 4) denying grievant's request for a schedule change.

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.[1] Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] 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.

[1] *See Grievance Procedure Manual* § 4.1 (a) and (b).
[2] Va. Code § 2.2-3004(B).

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[3] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.[4] 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."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6]

This Department has reviewed the written materials submitted and finds that none of the grievant's allegations amount to an adverse employment action. It does not appear that the agency has taken any action that has adversely affected the terms, conditions, or benefits of the grievant's employment.[7] Further, the challenged management actions, even taken together,[8] do not appear to constitute "materially adverse action" 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 retaliation claim.[10] Although the grievant has described what could be considered some unsettling behavior by her supervisor, if true, it does not appear that this conduct rises beyond the

---

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

[4] 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. The grievant's retaliation allegations are discussed below.

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

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

[7] In addition, the grievant's allegations do not amount to "severe or pervasive" harassment for a claim of hostile work environment or harassment to qualify for a hearing, to the extent the grievant has asserted such a claim in her grievance. *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).

[8] 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).

[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).

[10] Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006).

level to establish materially adverse action by the agency. Consequently, this grievance does not qualify for a hearing.[11]

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 agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

_____
Claudia T. Farr
Director

[11] This ruling in no way prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens.