Issues: Qualification – Compensation (salary dispute), Retaliation (other protected right) and Consolidation of Grievances for a Single Hearing; Ruling No. 2011-2830, 2011-2893; Agency: Department of Corrections; Outcome: Qualified for Hearing, Consolidation Granted.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND CONSOLIDATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling Numbers 2011-2830 and 2011-2893
March 10, 2011

The grievant has requested a ruling on whether her March 24, 2010 and March 30, 2010 grievances with the Department of Corrections (DOC or agency) qualify for a hearing. For the reasons set forth below, the grievances are qualified and consolidated for hearing.

FACTS

On February 16, 2010, the grievant was notified by the Assistant Warden that she was required to reimburse the Commonwealth 131.3 hours of leave paid to her in error. On March 24, 2010, the grievant filed a grievance (Grievance 1) challenging the agency's determination as a misapplication of policy and retaliatory.[1] Grievance 1 proceeded through the management resolution steps without resolution and the grievant was denied a hearing by the agency head. The grievant now seeks a qualification determination from this Department in Grievance 1.

On March 30, 2010, the grievant filed a second grievance (Grievance 2) challenging various actions by the Assistant Warden as harassing, retaliatory and further alleges that she has been the victim of workplace violence. More specifically, the grievant alleges that she went to the Warden on September 8, 2009 regarding some concerns regarding the actions of the Assistant Warden and as a result, on September 11, 2009, the Assistant Warden took the following actions: (1) he told her that she was to copy him on all e-mails she sends to the Warden; (2) in his absence, she is to report to the Major, not the Warden; (3) he limited her authority in determining the outcome of potential discipline on inmates and told her that he makes the decision in this regard and she is not to question his decision; and (4) accused her of leaving work early on a prior day.

In addition, from October 2009 through March 2010, the grievant alleges the following retaliatory acts were taken by the Assistant Warden: (1) he denied her request to teach other staff despite a requirement in her employee work profile (EWP) that she do so; (2) he moved her

[1] While the theory of retaliation was not expressly stated on the Form A as filed, the management action (i.e., reimbursement as a result of leave taken in error) being grieved was. As such, the grievant's theories, including retaliation, as to *why* the management actions were improper will be addressed in this ruling. *See, e.g.*, EDR Ruling No. 2007-1444.

secretary to a different department and provided her with a secretary that had not been adequately trained; (3) he told the grievant that she cannot dismiss any charges dealing with staff without coming to him first; (4) he threatened her and spoke to her in a hostile tone; (5) he approved her for leave and then later told her that she was not allowed to use the time and that she is required to reimburse the Commonwealth for such time; and (6) while passing her in the hallway, he stated, "I'm gonna get your black ass." Grievance 2 proceeded through the management resolution steps without resolution and the grievant was denied a hearing by the agency head. The grievant now seeks a qualification determination from this Department in Grievance 2.

Finally, on April 20, 2010, the grievant initiated a third grievance (Grievance 3) challenging a Group I Written Notice for unsatisfactory job performance that she received on March 23, 2010. In Grievance 3, the grievant challenges the written notice as retaliatory. Grievance 3 was qualified for a hearing by the agency head and is currently at this Department awaiting the appointment of a hearing officer.

DISCUSSION

I. EDR Qualification Analysis in Retaliation Claims

In Grievances 1, 2, and 3, the grievant alleges that she has been the victim of retaliation for prior protected activity. Where a grievant seeks qualification of a *single* allegedly retaliatory act, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[2] (2) the employee suffered a materially adverse action *or* an adverse employment action[3]; and (3) a causal link exists between the materially adverse action *or*

[2] *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).

[3] 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, held 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 less stringent "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 "materially adverse action" standard. *See* EDR Ruling Nos. 2006-1169, 2006-1283, and 2009-2324. In the absence of a precedent-setting decision on the issue by the Virginia Court of Appeals, this Department has more recently directed hearing officers to assess claims under both the "adverse employment action" and "materially adverse action." See EDR Ruling No. 2011-2740, footnote 16.

adverse employment action and the protected activity; in other words, whether management took a materially adverse action *or* adverse employment action with respect to the employee for having engaged in the protected activity.[4] If the agency presents a nonretaliatory business reason for the 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.[5] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[6] If the grievant raises a sufficient question as to each of these three elements, the grievance is qualified for hearing.

Where a grievant seeks qualification of *multiple* allegedly retaliatory acts, a different analysis is used. A protected activity is still required. Likewise, the grievant must raise a sufficient question as to whether he or she suffered the requisite level of harm. That is, the grievant must show that the acts collectively created a hostile work environment.[7] Furthermore, this Department believes that it should be immaterial whether an employee has used a single Grievance Form A to challenge the acts or has elected to use multiple Grievance Forms to challenge the acts. In either case, this Department will first review each act individually and exclude all acts that with certainty cannot be predicated upon retaliatory intent, such as acts that predate the protected activity. All remaining acts will be assessed collectively to determine whether they, as a whole, raise a sufficient question as to whether the acts in the aggregate created a hostile work environment – regardless of the severity of the acts if assessed individually.

If the grievance raises a sufficient question as to whether the combined acts collectively constitute a hostile work environment, this Department will then review the available evidence to determine if a sufficient question of causation (i.e., a sufficient question of retaliatory intent) exists. Depending on the strength of the evidence, and for the initial threshold determination of qualification only, it is conceivable that a sufficient question of causation could arise from what would appear to be particularly compelling evidence of retaliatory intent as to just one of the

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[4] *See generally*, Martin v. Merck & Co., 446 F. Supp. 2d 615, 636-637 (W.D. Va. 2006) for an example of the retaliation analysis framework.

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

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

[7] Some courts, as well as this Department, have recognized that a charge of retaliation may be predicated upon a "hostile work environment" claim. With this 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 hostile work environment. *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 hostile work environment to apply the materially adverse action standard following *Burlington Northern*); Moore v. City of Philadelphia, 461 F.3d 331, 341 (3d Cir. 2006) (same). *See also* EDR Ruling 2007-1669.

acts.[8] If the grievant raises a sufficient question as to whether: (1) the employee engaged in a protected activity; (2) the employee was subjected to a hostile work environment, and (3) a causal link exists between the hostile work environment and the protected activity, the grievance(s) will be qualified for hearing.

II. Hearing Officer Retaliation Analysis

The standards this Department uses at the qualification stage are less stringent than those used by a hearing officer. Qualification requires only that a grievance raise a sufficient question as to whether retaliation occurred. For a grievant to prevail at hearing, however, a hearing officer must find that the grievant met his or her burden of proving, by a preponderance of the evidence, all the elements of a retaliation claim. With any claim of retaliation the grievant must first establish that he or she engaged in a protected activity. Next, the grievant must establish the requisite level of harm. If the grievant is challenging a single act, then the grievant must establish that the act was either an "adverse employment action" or "materially adverse action." As previously noted, while this Department has adopted the materially adverse standard, in the absence of a precedent-setting decision on the issue by the Virginia Court of Appeals, this Department has directed hearing officers to assess claims under both the "adverse employment action" and "materially adverse action." If the grievant meets this burden, then the hearing officer must decide whether the grievant has met his or her burden of establishing that the act was causally linked to the protected activity. If the agency presents a nonretaliatory business reason for the action, the grievant must present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation in order to prevail.[9]

Where an aggregated collection of alleged retaliatory acts has been qualified for hearing, the hearing officer must, as always, determine whether the employee engaged in a protected activity. Next, the hearing officer must determine (1) which, if any, of the alleged retaliatory acts, standing alone, constitute an "adverse employment action" and (2) whether the acts in the aggregate constitute a "hostile work environment" under an adverse employment action standard (that is, are sufficiently severe or pervasive so as to alter the grievant's conditions of employment). If the acts do not rise to the adverse employment action level of harm, the hearing officer should determine (1) which, if any, of the alleged retaliatory acts, standing alone, constitute an "materially adverse action" and (2) whether the acts in the aggregate constitute a "hostile work environment" under a materially adverse action standard (that is, could have dissuaded a reasonable worker from engaging in protected activity). The hearing decision should identify the level of the harm of acts found to be retaliatory, that is, whether individually or collectively, they met the adverse employment action or materially adverse standards.

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[8] Should the challenged acts not raise a sufficient question of a hostile work environment such that the grievance(s) does not qualify for hearing, any of the unqualified acts complained of in the grievance(s) may nevertheless be raised for consideration at hearing, as background evidence only, in any other grievance(s) independently qualified for hearing, such as a grievance challenging an automatically qualified Written Notice. Furthermore, when EDR fails to qualify an aggregated collection of alleged retaliatory acts based on an insufficient question of a causal link, nothing precludes the grievant from attempting to raise at hearing and establish as retaliatory any actions within that aggregate that have been independently qualified (e.g., Written Notices).

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

If the hearing officer finds that any single act would constitute an adverse employment action or a materially adverse action, the hearing officer must then determine for each such act whether there is a causal link to the protected act. If the grievant is able to met this burden as to any individual act, the hearing officer can order relief as described below. Should none of the acts by itself rise to the level of an adverse employment action or materially adverse action, but collectively the acts meet the hostile workplace standard (under either an adverse employment action or materially adverse standard), then the grievant must prove retaliatory causation as to the *aggregate* claim, not necessarily as to just one of the acts that makes up the aggregate.[10] If the grievant is able to met this burden as to the aggregate claim, the hearing officer can order relief as described below.

III. Relief

If the hearing officer finds that any act alone constitutes a materially adverse action or an adverse employment action, and the grievant has proven all other necessary elements for a retaliation claim as to that individual act, the hearing officer can provide relief in the form of a general order that the retaliation end along with an order that corrective measures be taken to cure that specific act. Importantly, the hearing officer can only order such specific relief if the challenged act would alone constitute a materially adverse action or adverse employment action.

On the other hand, if the hearing officer finds that none of the acts alone meet the elements of a retaliation claim, but that collectively the acts constitute a hostile work environment under either a materially adverse action or an adverse employment action standard, the relief a hearing officer may grant is limited to ordering that the retaliation end. Because the hearing officer is assessing the acts collectively, his or her order also must be collective in nature, and is thus limited to a general order that retaliation cease. In other words, the hearing officer has no authority to provide specific relief as to any one act because no one act could have been met the retaliation standard on its own.

Whether to Qualify Grievant's Claims for Hearing

In this case, the grievant argues that ever since she raised concerns with the Warden on September 8, 2009 regarding the actions of the Assistant Warden, the Assistant Warden has retaliated against her in a number of ways. Raising concerns about employment matters with agency management can be viewed as protected activity.[11] In addition, these grievances raise a sufficient question as to whether management's actions were collectively "materially adverse," such that a reasonable employee might be dissuaded from participating in protected conduct.[12]

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[10] This is not to say that strong evidence of causation as to a single act within the aggregate would never be enough for a hearing officer to infer retaliatory causation as to the entire aggregate, only that the grievant must prove, by a preponderance of the evidence, retaliatory causation as to that entire aggregate.

[11] 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.").

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

(Indeed, some of the alleged retaliatory acts, for instance, the Written Notice, would standing alone constitute not only a materially adverse act but an adverse employment action as well.) Finally, the grievances raise a sufficient question as to whether a causal link existed between the actions taken and the protected conduct. Although the agency denies that it has engaged in retaliation against the grievant, the circumstances described above, including the close proximity in time between the protected activity and some of the alleged retaliatory acts, as well as the alleged statement by the Assistant Warden that he was going to "get [the grievant's] black ass,"[13] raise a sufficient question of whether the grieved actions may have been prompted by a retaliatory animus.

Based on the totality of the circumstances, this Department concludes that the grievant has demonstrated that sufficient questions of fact exist with respect to her claim of retaliation such as to warrant additional consideration by a hearing officer. A hearing officer, as a fact finder, is in a better position to determine questions of fact, motive and credibility. We note, however, that this qualification ruling in no way determines that the agency's actions with respect to the grievant were retaliatory or otherwise improper. Rather, we merely recognize that, in light of the evidence presented, further exploration of the facts by a hearing officer is appropriate. Accordingly, Grievance 1 and Grievance 2 are qualified for a hearing.

Alternative Theories and Claims

Because the issue of retaliation qualifies for a hearing, this Department deems it appropriate to send the grievant's other claims in Grievance 1 and 2 including workplace violence, workplace harassment, and misapplication and/or unfair application of policy for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

Consolidation

Written approval by the Director of this Department or her designee in the form of a compliance ruling is required before two or more grievances are permitted to be consolidated in a single hearing. EDR strongly favors consolidation and will generally consolidate grievances involving the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.[14]

This Department finds that consolidation of Grievance 1, Grievance 2 and Grievance 3 is appropriate. The grievances involve the same parties, potential witnesses, and share common themes. Furthermore, consolidation is not impracticable in this instance. This Department's rulings on compliance are final and nonappealable.[15]

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[13] This Department makes no determination regarding whether this statement was made or not. Rather, this ruling merely determines that if said, such a statement could be potential evidence in support of the grievant's claims of retaliation. The hearing officer determines questions of fact and assesses credibility and as such, is in a better position to determine the veracity of this statement and what was intended by such a statement, if made.
[14] *Grievance Procedure Manual*, § 8.5.
[15] *See* Va. Code § 2.2-1001 (5); 2.2-3003(G).

CONCLUSION

Grievance 1 and Grievance 2 are qualified and consolidated for hearing with Grievance 3. We again note that this ruling in no way determines that the agency's actions were retaliatory or otherwise improper, but rather only that further exploration of the facts by a hearing officer is appropriate. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

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Claudia T. Farr
Director