Issue: Qualification – Retaliation (Grievance Activity Participation); Ruling Date: December 29, 2010; Ruling No. 2011-2839; Agency: Virginia Community College System; Outcome: Not Qualified.

*COMMONWEALTH of VIRGINIA*
***Department of Employment Dispute Resolution***

# QUALIFICATION RULING OF DIRECTOR

In the matter of the Virginia Community College System
Ruling No. 2011-2839
December 29, 2010

The grievant has requested a ruling on whether his April 15, 2010, grievance with the Virginia Community College System ("the agency") qualifies for hearing. For the reasons discussed below, this Department determines this grievance does not qualify for hearing.

## FACTS

The grievant initiated this grievance on April 15, 2010, alleging retaliation for actively participating in the grievance process. The grievant had filed an earlier grievance on or about December 10, 2009, but he officially withdrew that grievance on April 15, 2010. On March 22, 2010, while the December 10, 2009 grievance was still pending, the grievant noticed that his colleague had omitted an important detail in the police log. Subsequently, the grievant emailed his supervisor to alert him of the omission. In that same email, the grievant also expressed concerns of being treated differently than all the other officers. The supervisor responded by email that he found the police log entry suitable and the claim of differential treatment to have "no merit" and to be "baseless in nature." Furthermore, the supervisor informed the grievant he was reviewing the grievant's "on-going actions over the last several weeks" and stated the grievant's conduct towards his colleague was "extremely unwarranted and could be deemed as a hostile work environment."

Shocked by the supervisor's response, the grievant met with his supervisor the next day. He allegedly asked his supervisor what "on-going actions" the supervisor was referencing in the email. According to the grievant, the supervisor responded that many officers were not happy about the current grievance process and that he was personally upset about some emails that had been sent in reference to that initial December 2009 grievance. According to the supervisor, the "on-going actions" referenced in the email were concerns raised by several co-workers to the supervisor about the "continual litany of grievances, complaints, and harassment [from the grievant] which was negatively impacting the overall cohesiveness and morale of the unit." The supervisor states he was not personally accusing the grievant of creating a hostile work environment, but was merely informing the grievant that some of his co-workers had raised questions as to whether the grievant was in fact creating a hostile work environment.

The April 15, 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

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 methods, 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 improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[3] Here, the grievant alleges his supervisor acted in retaliation as a result of his December 10, 2009 grievance.

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;[4] (2) the employee suffered a materially adverse action;[5] and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the materially 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.[6] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[7]

In this case, the grievant challenges his supervisor's statements as retaliatory, alleging they were made because his supervisor and other officers were upset that the grievant was actively participating in the grievance process. The initiation of a grievance is clearly a protected activity.[8] For this grievance to qualify for hearing, however, the action taken against the grievant

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[1] *See Grievance Procedure Manual* § 4.1 (a) and (b).
[2] *See* Va. Code § 2.2-3004(B).
[3] Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1(c).
[4] *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 the 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).
[5] 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.
[6] *E.g.,* EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005); Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000).
[7] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).
[8] *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).

must also have been materially adverse, such that a reasonable employee might be dissuaded from participating in the protected conduct.[9] In determining whether the agency's actions rise to the materially adverse action level, this Department must consider the totality of the circumstances and assess whether the agency's actions were harmful to the point that they could well dissuade a reasonable employee from participating in the protected conduct.[10] 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.[11] Although the grievant has described what may be considered inappropriate comments by his supervisor, if true, we find the supervisor's statements and conduct do not rise to the level of establishing a materially adverse action taken by the agency, nor are they enough to dissuade a reasonable employee from still participating the grievance process. Therefore, this retaliation claim fails to qualify for hearing because the grievant has not presented sufficient evidence that he suffered a materially adverse action.[12]

*Mediation*

Finally, although this grievance does not qualify for a hearing, mediation may be a viable option for the parties to pursue. 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

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[9] *See Burlington N.*, 548 U.S. at 68. 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 school age children." *Id.* The Court determined that "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)).

[10] It is appropriate to consider the totality of the circumstances when assessing whether the agency's actions might well have dissuaded a reasonable employee from participating in protected conduct. *Cf.* Rizzo v. Niagara Mohawk Power Corp., No. 1:04-c-1507, 2006 U.S. Dist. LEXIS 41987, at *18-20 (N.D.N.Y. June 22, 2006) (applying the materially adverse standard and noting that "a jury could consider the evidence in its totality and conclude that Defendants were engaged in a pattern of retaliation against Plaintiff"). Moreover, such an approach is consistent with an analysis of a claim of retaliatory harassment, which focuses not on individual incidents, but the overall scenario, in light of the new standard provided in the *Burlington Northern* decision. *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).

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

[12] The grievant had also asserted that he had been the victim of reverse race discrimination. Because he has not suffered an adverse employment action, a required element of a discrimination claim, the grievant's discrimination claim must fail. *Cf.* Foodland v. Daley, 2000 U.S. App. LEXIS 26632 (4th Cir. 2000) (unpublished decision). 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).

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 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 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 notifies the agency that he wishes to conclude the grievance.

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Claudia T. Farr
Director