Issues: Qualification – Performance Evaluation (Arbitrary/Capricious), Retaliation (Other Protected Right), Discrimination (Race); Ruling Date: June 2, 2011; Ruling No. 2011-2876; Agency: Department of State Police; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of State Police
Ruling No. 2011-2876
June 2, 2011

The grievant has requested a ruling on whether his October 20, 2010 grievance with the Department of State Policy (VSP or the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as a First Sergeant. In his October 20, 2010 grievance, the grievant challenges his 2009-2010 performance evaluation as arbitrary and capricious and the most recent example of retaliation and/or discriminatory harassment based on race by his immediate supervisor. The grievant was rated a "Contributor" in five elements of his performance evaluation and a "Major Contributor" in the remaining two elements. The performance evaluation rated the grievant as an overall "Contributor." Employees who received an overall performance rating of "Major Contributor" or "Extraordinary Contributor" received 20 or 40 hours of recognition leave respectively. Because the grievant received an overall rating of "Contributor" and not "Major Contributor" or "Extraordinary Contributor," he did not receive the recognition leave afforded other employees that received such ratings.

After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify his grievance for hearing. The agency head denied the grievant's request, and he has appealed to this Department.

DISCUSSION

Arbitrary and Capricious Performance Evaluation

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[1] Accordingly, for this grievance to qualify for a hearing, there must be facts raising a sufficient question as to whether the grievant's performance rating, or a material element thereof, was "arbitrary or capricious."[2]

"Arbitrary or capricious" means that management determined the rating without regard to the facts, by pure will or whim. An arbitrary or capricious performance evaluation is one that no

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

reasonable person could make after considering all available evidence. If an evaluation is fairly debatable (meaning that reasonable persons could draw different conclusions), it is not arbitrary or capricious. Thus, mere disagreement with the evaluation or with the reasons assigned for the ratings is insufficient to qualify an arbitrary or capricious performance evaluation claim for a hearing when there is adequate documentation in the record to support the conclusion that the evaluation had a reasoned basis related to established expectations. However, if the grievance raises a sufficient question as to whether a performance evaluation resulted merely from personal animosity or some other improper motive--rather than a reasonable basis--a further exploration of the facts by a hearing officer may be warranted.

In addition, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[3] Thus, typically, a 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] Here, we will presume for purposes of this ruling only that the failure to receive recognition leave as a result of his "Contributor" rating constituted an adverse employment action.

In support of his assertion that the performance rating was arbitrary and capricious, and/or based on an improper retaliatory or discriminatory motive, the grievant offers the following information and facts. First, the grievant claims that his 2009-2010 performance evaluation is not a fair assessment of his overall performance because his immediate supervisor failed to take into account his exceptional performance on various projects and assignments during the performance cycle and failed to address the success of his unit as a whole. More specifically, the grievant asserts that the success of a unit is measured by statistics and in his unit there was a 67% increase in cases opened, a 32% increase in cases closed, a 47% increase in arrests and an 11% increase in search warrants executed. As a result of the success achieved by his unit, the grievant claims that seven of the eight individuals he supervises received ratings of "Major Contributor" and as such, the grievant should have received a similar rating because the success of his subordinates is directly related to the success of the unit he commands.

Additionally, the grievant claims that his performance evaluation failed to recognize a Certificate of Appreciation he received for his work on a case with the federal Drug Enforcement Agency (DEA) and a letter of commendation from a citizen to the Governor regarding the grievant's assistance and performance of his duties. The grievant also states that his supervisor has falsified the performance evaluation and other documents related to the grievant's performance. In particular**,** the grievant claims that his supervisor fabricated two counseling

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[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.

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

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

memoranda dated February 2010 to support the overall rating and that he did not see these documents until after initiating his October grievance. Finally, the grievant claims that he was rated a "Major Contributor" the year prior and that this is the worst performance evaluation he has ever received.

This Department concludes that the grievant has not presented evidence that the agency was arbitrary or capricious in rating him a "Contributor." More specifically, while the grievant challenges two February 2010 counseling memoranda used in support of his performance evaluation as being fabricated;[7] he readily admits that he received other counseling memoranda and numerous "letters of written instructions" during the performance cycle. These counseling memoranda and letters of instruction appear to be directly related to some of the negative comments he received on his 2009-2010 performance evaluation. For instance, in an April 29, 2010 and a June 24, 2010 counseling memorandum, the grievant's lack of compliance in the maintenance of case files is addressed. Correspondingly, Section B of the grievant's performance evaluation states in part:

> [The grievant] is also responsible for correct creation and documentation of the CSI files. A review of these files revealed many files not up to date, documents not submitted by Agents and other CSI documents filed inappropriately in criminal case files that had been previously review by [the grievant]. [The grievant] has had numerous [forms] returned for corrections during this performance cycle. These matters and instruction on this attention to detail have been discussed with him and later in the performance cycle his correction and review of these reports have improved; however he still needs significant improvement in this area.

Similarly, the agency has provided this Department with documentation indicating that many of the case files maintained by those under the grievant's supervision were also lacking.

With regard to the grievant's argument that he should have received a rating similar to his subordinates, we note that the grievant is a supervisor and as such, is presumably held to a different standard than those he supervises. In fact, many of the negative comments on his performance evaluation relate to these supervisory responsibilities. For instance, Section C of his performance evaluation corresponds to the grievant's review of cases investigated by those under his supervision and reads, in part:

> [The grievant] conducts case reviews in a timely manner; however, a review of his case reviews for this performance cycle revealed a lack of action and follow up by [the grievant] to his Agents during these reviews. This has resulted in numerous [ ] cases sitting stagnant and agents not understanding their role and responsibility of maintaining their case files. [The grievant] regularly reviews

[7] The agency's position appears to be that there may have been a mistake as to the date the grievant and his supervisor met to discuss the issues contained in the two February 11, 2010 counseling memoranda, but what is important is that the grievant admitted during the management resolution steps that the issues contained therein were discussed. Moreover, this Department notes that the two counseling memoranda do not say that a meeting with the grievant actually took place on February 11th, but rather just discuss the alleged behavior in need of improvement and are dated February 11th. Accordingly, this Department cannot conclude that these two counseling memoranda were "fabricated" as alleged by the grievant.

> Agent's cases but specific instructions for case progression during each review is often lacking.

Based on the foregoing, it appears that the agency's assessment of the grievant's performance was neither arbitrary nor capricious. However, despite the agency's apparent documentation to support the overall "Contributor" rating, as noted above, the grievant alleges that this documentation, like the performance evaluation, resulted from an improper motive. In particular, the grievant claims that he has been subjected to retaliation and/or discrimination on the basis of race. These issues will be discussed in turn below.

Retaliation

Where a grievant seeks qualification of *multiple* allegedly retaliatory acts,[8] for the grievances to qualify for hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[9] (2) the acts collectively created a hostile work environment;[10] and (3) a causal link exists between the hostile work environment and the protected activity. If the grievant raises a sufficient question as to each of these three elements, the grievance is qualified for hearing.

In this case, the grievant asserts that in February 2010, his immediate supervisor initiated an internal affairs investigation against him, and the result of this internal affairs investigation was a counseling memorandum. According to the grievant, his prior exceptional work performance and evaluations were used as a basis to mitigate the action taken against him to a counseling memorandum. After this, the grievant claims that the "mistreatment" by his immediate supervisor intensified and in particular, his immediate supervisor began to attack the grievant's work performance through the issuance of counseling memoranda and written letters of instruction so that the grievant's prior exceptional work performance could not be used as a basis to mitigate an internal affairs complaint in the future.

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[8] This Department notes that it is 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.

[9] *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).

[10] 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 & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) 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.

As an initial note, being the subject of an internal affairs investigation and prevailing in that investigation does not appear to constitute protected activity. However, to the extent that the grievant is claiming that his statements and complaints about his supervisor during the course of that investigation were the catalyst for the alleged "mistreatment" he received during and after the investigation; such statements and complaints could arguably constitute protected activity.[11] Moreover, we will presume for purposes of this ruling only that management's actions were collectively "materially adverse," such that a reasonable employee might be dissuaded from participating in protected conduct.[12]

However, the grievant has failed to raise a sufficient question of a causal link between any prior protected activity and his supervisor's assessment of his performance during the performance cycle. Of particular significance is the fact that in his grievance and during this Department's investigation the grievant seemed to contradict his own belief that the overall performance rating was based on some improper motive. That is, the grievant stated that the letters of instruction he received coincide with the hiring of a new Division Commander and it is possible that his supervisor could have been trying to impress the new Division Commander and/or acting in accordance with the desires of new management. Similarly, when asked what had changed from the prior year when he received a rating of "Major Contributor" from this same supervisor to the current year, the grievant stated that a new Division Commander with a different management style may have had something to do with it. Based on the foregoing, this Department concludes that the grievant has failed to raise a sufficient question of a causal link to warrant sending his claim of retaliation to hearing. Accordingly, the issue of retaliation does not qualify for a hearing.

Discrimination Based on Race

Grievances that may be qualified for a hearing include actions related to discrimination on the basis of race.[13] To qualify such a grievance for hearing, there must be more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status, in other words, that because of the grievant's race, he was treated differently than other "similarly-situated" employees.

Here, the grievant is African American and his supervisor is Caucasian. However, the grievant has failed to provide, nor has this Department found, any evidence to support his claim that the grievant's race played a factor in his 2009-2010 performance evaluation.[14] In fact, during

[11] According to the grievant, he provided information to the internal affairs investigator which demonstrated that his supervisor had fabricated information related to the internal affairs complaint. In addition, the grievant asserts that he told the Division Commander that his supervisor had falsified the complaint. 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.

[12] 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.

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

[14] Of particular note is the fact that the grievant received a rating of "Major Contributor" from this same supervisor the year prior.

this Department's investigation, the grievant stated that he is "speculating" on the discrimination issue. Further, as discussed in detail above, the agency's rating of the grievant's performance appears to be related to established performance expectations. Accordingly, this issue does not qualify for a hearing.[15]

CONCLUSION, APPEAL RIGHTS AND OTHER INFORMATION

In light of the foregoing, this Department concludes that there is insufficient evidence to support the grievant's assertion that his 2009-2010 performance evaluation was without a basis in fact or resulted from anything other than management's reasoned evaluation of his performance in relation to established performance expectations. Accordingly, this grievance does not qualify for a hearing.

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.

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Claudia T. Farr
Director

[15] It should be noted that the agency conducted an internal investigation into the grievant's claim of discrimination based on race and the outcome was "unfounded inquiry," which means there was no substantial evidence to validate the claim.