Issues: Qualification – Performance Evaluation (Arbitrary/Capricious), Retaliation (Other Protected Right), Discipline (Counseling Memo), and Work Conditions (Employee/Supervisor Conflict); Ruling Date: May 26, 2011; Ruling No. 2011-2894, 2011-2974; Agency: Virginia Tech; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia Polytechnic Institute and State University
Ruling No. 2011-2894 and Ruling No. 2011-2974
May 26, 2011

The grievant has requested a ruling on whether his October 28, 2010 and his March 2, 2011 grievances with Virginia Polytechnic Institute and State University (the University) qualify for a hearing. In addition, the grievant seeks consolidation of his grievances for a single hearing. For the reasons discussed below, these grievances do not qualify for a hearing.

FACTS

The grievant is employed as a Prepress Technician at the University. On October 13, 2010, the grievant received his performance evaluation for the 2009-2010 performance year. The evaluation rated the grievant's overall performance as "unacceptable." The grievant challenged the performance evaluation by initiating a grievance on October 28, 2010. In his October 28th grievance, the grievant asserts that the performance evaluation is "completely incorrect and uncalled for" and the most recent evidence of retaliation and/or harassment he has endured by management at the University.[1] More specifically, the grievant asserts that "I have been singled out for over a year now starting three months after Ms. [C] was appointed the manager of [the grievant's department]. I think this started with my first evaluation that was changed and the result has been constant retaliation." Additionally, the grievant asks management to "put a stop to me being singled out and harassed any further and do what you can to ensure that [the grievant's department] not be a hostile work environment."

Other acts of retaliation and/or harassment alleged by the grievant in his October 28th grievance include: being yelled at, called names and met with hostility when trying to bring problems or concerns to management's attention and the department manager's refusal to attend

[1] The management action challenged by this grievance is the grievant's unacceptable performance evaluation. In response to the second step respondent's conclusion that the rating was warranted, the grievant challenged the performance evaluation as retaliatory and/or harassing in an attachment to his Form A. While the theory of retaliation and/or harassment was not expressly stated on the Form A as filed, the management action being grieved (the poor performance evaluation) was. For that reason the grievant's theories as to *why* that management action was improper will be addressed in this ruling. *See* EDR Ruling # 2007-1444. Further, it does not appear that any prejudice will adversely affect the agency's position at hearing, as it has had notice of these issues since early December 2010.

a mediation session with the grievant. The grievant further asserts that he is hyperscrutinized, accused of mistakes he did not make and that his coworkers were told not to assist him if he asked for help. In addition, during the 2009-2010 performance cycle the grievant was given two Notices of Improvement Needed/Unsatisfactory Performance and a Group I Written Notice for failure to follow instructions and/or policy.

Finally, on February 17, 2011, the grievant received a counseling memorandum for wasting University time, failing to follow instructions and inappropriate interpersonal behavior. On March 2, 2011, the grievant initiated a grievance challenging the counseling memorandum as false and harassing.

After the parties failed to resolve the October 28, 2010 and March 2, 2011 grievances during the management resolution steps, the grievant asked the agency head to qualify his two grievances for hearing. The agency head denied the grievant request for qualification of these two grievances, and the grievant has appealed to this Department.[2]

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[3] 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. In the two grievances at issue here, the grievant claims that his 2009-2010 performance evaluation and the Februrary 17, 2011 counseling memorandum are retaliatory and/or harassing. Additionally, the grievant claims that his performance evaluation is arbitrary and capricious.

Retaliation/Hostile Work Environment

Where a grievant seeks qualification of *multiple* allegedly retaliatory acts,[4] as is the case here, 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;[5] (2) the acts collectively

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[2] Shortly after the grievant's receipt of the February 17, 2011 counseling memorandum, the grievant was issued a Group I Written Notice for disruptive behavior. The grievant has challenged this disciplinary action through a third grievance initiated on March 2, 2011. This March 2, 2011 grievance was qualified for a hearing by the agency head and a hearing officer has been appointed. The grievant seeks to consolidate all three grievances into a single hearing. However, because this ruling determines that the October 28th and March 2nd grievances do not qualify for a hearing, the grievant's request for consolidation is moot.

[3] Va. Code § 2.2-3004(B).

[4] 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.

[5] *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

created a hostile work environment;[6] 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 believes that his supervisor and the department manager may be harassing him, in part, because he successfully challenged an earlier performance evaluation. It would appear that such a challenge could constitute a protected activity.[7] In addition, this grievance raises 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.[8] However, the grievant has presented no evidence, other than mere speculation, that the alleged hostile work environment is related to his prior protected activity. In particular, during this Department's investigation of the grievant's requests for qualification, the grievant stated that he does not know "what they have against me."[9] Because the grievant has

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incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

[6]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.

[7] Under Virginia Code § 2.2.-3000, "[i]t 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." Thus, bringing a concern about an annual performance evaluation would appear to be an act "otherwise protected by law."

[8] 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.

[9] To the extent the grievant, to prove a causal link, is relying upon any proximity in time between his successful challenge to a prior performance evaluation and the alleged harassing acts, this Department notes that the only management act that has a close proximity in time to the successful performance evaluation challenge is the grievant's receipt, following his successful challenge, of a Notice of Needs Improvement/Substandard Performance on November 18, 2009. According to the grievant, he was given this Notice of Needs Improvement/Substandard Performance one week after his performance evaluation was changed. However, the grievant goes on to state that the language of the Notice of Needs Improvement/Substandard Performance that he received was identical to that of the performance evaluation that he successfully challenged. If the language of the Notice of Needs Improvement/Substandard Performance that the grievant received after his successful challenge to the performance evaluation was identical to that of the performance evaluation, then the alleged retaliatory act, i.e., the negative performance feedback, actually predated the protected activity. In other words, the grievant's supervisor gave him

failed to present a sufficient question that the alleged harassing acts at issue in his October 28, 2010 and February 17, 2011 grievances were related to his complaints about his prior year performance evaluation, the issue of retaliatory harassment does not qualify for a hearing.

Further, to the extent the grievant is claiming hostile work environment based on his membership in a protected class, the grievant has not provided any indication of such, nor has this Department found evidence of such through the course of its investigation. More specifically, during this Department's investigation of the grievant's requests for qualification, the grievant told the investigating EDR Consultant that, while he believes he is being harassed, he cannot tie the harassment to his membership in a protected class and stated that he "[does not] know what all of this is about." Rather, the facts cited in support of the grievant's claim can best be summarized as describing general work-related conflict between the grievant, his supervisor and the manager of his department.[10] Claims of general work-related conflict such as those at issue in this case are not among the issues identified by the General Assembly that may qualify for a hearing.[11] As such, this Department concludes that the grievant has failed to present sufficient evidence that he has been subjected to workplace harassment based on his protected status.

Arbitrary and Capricious Performance Evaluation

The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[12] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action. 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."[13] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[14]

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the identical poor evaluation *before* the grievant engaged in a protected act; thus, one cannot conclude that the protected act was the cause of the negative performance evaluation. The adverse action(s) must follow the protected act, rather than predate it, in order to create an inference of retaliation. *See* Durkin v. City of Chicago, 341 F.3d 606, 615 (7th Cir. 2003) ("An employer cannot retaliate if there is nothing for it to retaliate against."); Duncan v. Washington Metropolitan Area Transit Authority, 425 F.Supp.2d 121, 127-28 (D.D.C. 2006) ("[T]he employer decided on a course of action before it could possibly have known about the employee's protected activities. Consequently….the employee cannot establish a causal link between the end result of that decision and the protected activities in which he engaged in the interim."); s*ee also* Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1234-35 (10th Cir. 2000) (finding that employer's decision to discharge truck driver not retaliatory because employer's decision pre-dated truck driver's filing of a union grievance).

[10] As courts have noted, prohibitions against harassment, such as those in Title VII, do not provide a "general civility code" or remedy all offensive or insensitive conduct in the workplace. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998); 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).

[11] *See* Va. Code § 2.2-3004(A).

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

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

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

A poor performance evaluation in and of itself is not an adverse employment action where, as here, the employee presents no evidence that the performance evaluation detrimentally altered the terms or conditions of his employment.[15] More specifically, during this Department's investigation, the grievant confirmed that his poor performance rating has not affected his pay or responsibilities, or resulted in a demotion.[16] Accordingly, the grievant's claim that his performance evaluation is arbitrary and capricious does not qualify for hearing.[17] We note, however, that should his 2009-2010 performance evaluation somehow later serve to support an adverse employment action against the grievant (e.g., demotion, termination, suspension and/or other discipline), the grievant may address the underlying merits of the evaluation through a subsequent grievance challenging any related adverse employment action.

Accordingly, the grievant's October 28, 2010 and March 2, 2011 grievances do not qualify for a hearing. However, as noted above, the grievant has challenged the Group I Written Notice he received and this grievance has been qualified for a hearing. As such, while the grievant cannot be granted relief with regard to his October 28th and March 2nd grievances at issue in this ruling, the alleged management acts complained of in the October 28th and March 2nd grievances may nevertheless be raised for consideration at hearing, as background evidence only, in the hearing of the grievance challenging the Group I Written Notice.

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,

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[15] Rennard v. Woodworker's Supply, Inc., 101 Fed. Appx. 296, 307 (10th Cir. 2004) (citing Meredith v. Beech Aircraft Corp., 18 F.3d 890, 896 (10th Cir. 1994)); *see also* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 377-378 (4th Cir. 2004) (The court held that although the plaintiff's performance rating was lower than the previous yearly evaluation, there was no adverse employment action as the plaintiff failed to show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment, the evaluation was generally positive, and he received both a pay-raise and a bonus for the year.). EDR Ruling No. 2008-1986; EDR Ruling No. 2007-1612.

[16] The grievant asserts that the unacceptable performance rating and other alleged harassing acts have affected him "physically and mentally". While this Department does not doubt that the grievant has been significantly impacted by his work environment, the personal impacts at issue here do not appear to have affected the terms, conditions or benefits of the grievant's employment and as such, are insufficient to meet the threshold showing of an adverse employment action in this case.

[17] Although this claim does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the Act). Under the Act, if the grievant gives notice that he wishes to challenge, correct or explain information contained in his personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth his position regarding the information. Va. Code § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. Va. Code § 2.2-3806(A)(5).

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 Farr
Director