Issue: Qualification – Retaliation (Grievance Activity); Ruling Date: July 21, 2011; Ruling No. 2012-3030; Agency: Department of Social Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Social Services
Ruling Numbers 2012-3030
July 21, 2011

The grievant has requested a ruling on whether her May 5, 2011 grievance with the Department of Social Services (the agency) qualifies for a hearing in full. For the reasons set forth below, the additional issues not already qualified in the grievance do not qualify for a hearing.

FACTS

In her May 5, 2011 grievance, the grievant has challenged a Written Notice received on or about April 6, 2011. In addition, she has challenged three other confidential memoranda issued to her: 1) an April 11, 2011 counseling memorandum, 2) a due process notice of intent to take disciplinary action, dated April 11, 2011, and 3) an April 29, 2011 counseling memorandum regarding the allegations listed in the April 11, 2011 due process notice. The grievance proceeded through the management resolution steps and was partially qualified for hearing by the agency head. In short, the grievant's claims concerning the Written Notice were qualified, but all other claims, as they related to the other confidential memoranda were denied qualification. The grievant appeals the agency head's determination and requests qualification of her claims that were not qualified for a hearing. The grievant alleges that all the incidents described in her grievance, including the three confidential memoranda, were the result of retaliatory harassment for her filing of a February 3, 2011 grievance to challenge a previous January 10, 2011 counseling.

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, the grievance statutes and procedure reserve to management 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

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

whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[3]

Adverse Employment Action

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

The management actions challenged in this grievance that have not been qualified primarily concern two counseling memoranda and one due process notice. Such memoranda do not generally constitute adverse employment actions, because such actions, in and of themselves, do not have a significant detrimental effect on the terms, conditions, or benefits of employment.[7] In addition, none of the grievant's other disputes with agency management, even taken together, rise to the level of adverse employment actions. As such, a grievance raising such issues does not qualify for a hearing.[8] However, such actions, taken together with the Written Notice, may constitute "materially adverse action" required to establish a retaliation claim.[9] Therefore, the grievant's claims may only qualify for a hearing if they raise a sufficient question of a claim of retaliation.

Retaliation - Harassment

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;[10] (2) the

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[3] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).
[4] *See Grievance Procedure Manual* § 4.1(b).
[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] *See* Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999).
[8] We note that while the counseling memoranda have not had an adverse impact on the grievant's employment, they could be used later to support an adverse employment action against the grievant. Therefore, should the counseling memoranda grieved in this case later serve to support an adverse employment action against the grievant, such as a formal Written Notice or a "Below Contributor" annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits of these allegations through a subsequent grievance challenging the related adverse employment action.
[9] 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. 2011-2740; EDR Ruling No. 2007-1538.
[10] *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

employee suffered a materially adverse action;[11] and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the 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.[12] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[13]

Here, the grievant has engaged in protected activity by filing her February 3, 2011 grievance. However, assuming for purposes of this ruling only that the alleged management actions could amount to a hostile work environment,[14] there is no indication of any causal link between the filing of her February 3, 2011 grievance and the confidential memoranda challenged in the May 5, 2011 grievance. Beyond the fact that the confidential memoranda were issued a little over two months after the grievant's previous grievance, there is no other evidence demonstrating retaliation. Management's counseling of the grievant for her allegedly poor performance, as well as many of the other alleged management actions described in the grievant's May 5, 2011 grievance began in January 2011, prior to the grievant's protected activity, thus could not have been caused by that protected activity. Further, management chose to issue the grievant the most recent counseling memorandum even though potential disciplinary action could have been appropriate for the type of misconduct alleged. The agency asserts that the confidential memoranda are based on reasonable reviews of the grievant's performance and conduct. There is no evidence that these stated reasons for the memoranda were merely a pretext for retaliation. Consequently, the grievance does not raise a sufficient question of a causal link to establish a claim of retaliation.[15] The grievant's claims do not qualify for a hearing.[16]

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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).

[11] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); *see, e.g*., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. For a claim of retaliatory harassment involving multiple alleged actions by management, this factor will be assessed as to whether the grievant was subjected to a hostile work environment. *E.g.,* EDR Ruling Nos. 2011-2830, 2011-2893.

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

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

[14] For purposes of such an analysis, all the actions challenged by the grievant, including the Written Notice, would be considered collectively. *See* EDR Ruling Nos. 2011-2830, 2011-2893.

[15] This determination has no bearing on the grievant's claim of retaliation as it relates to the management action that has been qualified (i.e., the Written Notice), or on whether the Written Notice was ultimately warranted or appropriate. A hearing officer is not bound by any factual assumptions or determinations made in this ruling.

[16] Although this grievance 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 she wishes to challenge, correct or explain information contained in her 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).

CONCLUSION

The grievant's May 5, 2011 grievance remains qualified for hearing to the extent previously qualified by the agency head (i.e., all claims related to the April 6, 2011 Written Notice are qualified). If the grievant wishes to appeal this qualification determination to the circuit court, as discussed below, the grievant must additionally notify this Department of her intent to do so within five workdays of receipt of this ruling. If no such notification is received, EDR will assume that the grievant is not appealing the partial qualification further. In that case, the agency's request for the appointment of a hearing officer will be processed and a hearing officer appointed in a forthcoming letter to hear the claims that are qualified (i.e., those concerning the April 6, 2011 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 any remaining issues not qualified in this ruling, 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