Issues: Qualification – Work Conditions (violence in the workplace), Discrimination (other), and Retaliation (grievance activity); Ruling Date: November 8, 2011; Ruling No. 2012-3121; Agency: Department of Juvenile Justice; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Juvenile Justice
Ruling Number 2012-3121
November 8, 2011

The grievant has requested a ruling on whether his July 5, 2011 grievance with the Department of Juvenile Justice (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant initiated his July 5, 2011 grievance to challenge various issues involving how he has been treated in the workplace. His allegations involve disrespectful interactions, the inclusion of a statement on his evaluation, a delayed response to a pay request, and informal supervisory counseling. In addition, on or about June 7, 2011, the grievant was involved in an incident of alleged workplace violence. Although it appears that the witnesses differ as to the context of how the events transpired, the result was that two agency employees picked the grievant up and threw him into a bin used to collect meal trash. The two agency employees were disciplined by the agency once the incident came to be known by other members of management who were not present at the time.[1] The grievant has challenged these issues, and the work environment created, as violative of law, policy (including the agency's code of ethics), and as discriminatory and retaliatory.

DISCUSSION

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 whether discrimination, retaliation, or discipline may have improperly influenced management's

[1] The grievant did not initially report the incident, principally, he states, because supervisors were present and already knew about the incident. However, according to the agency, he specifically raised it once the agency began investigating his conduct in relation to another instance of alleged misconduct by the grievant. That investigation was eventually dropped and did not result in any disciplinary action against the grievant.
[2] *See* Va. Code § 2.2-3004(B).

decision, or whether policy may have been misapplied or unfairly applied.[3] In this case, the grievant has alleged discrimination (harassment), retaliation, and, misapplication and/or unfair application of policy.

Adverse Employment Action; Discrimination/Harassment/Hostile Work Environment

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.[5] 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."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7]

With the possible exception of the incident of alleged workplace violence, which is discussed separately below, none of the issues raised in this grievance involve adverse employment actions. To the extent the grievance raises a claim of hostile work environment or harassment, the "adverse employment action" requirement can be met by the grievant presenting evidence raising a sufficient question as to whether the conduct at issue was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment.[8] "[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."[9]

This Department cannot find that the grieved issues rose to a "sufficiently severe or pervasive" level such that an unlawfully abusive or hostile work environment was created. The allegedly hostile work environment challenged by the grievant, for example, involves supervisory counseling, which would not be considered an adverse employment action,[10] a delayed response to a pay request, a statement placed in the grievant's evaluation, and other instances of alleged disrespectful interactions. These actions do not rise to the level of severe or

[3] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).
[4] *See Grievance Procedure Manual* § 4.1(b).
[5] 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.
[6] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[8] *See generally* Gilliam v. S.C. Dep't. of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[9] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).
[10] *See, e.g.*, EDR Ruling No. 2011-2891.

pervasive conduct.[11] Because the grievance fails to raise a sufficient question as to the elements of discriminatory hostile work environment or harassment,[12] the grievance does not qualify for a hearing.

Retaliation

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;[13] (2) the employee suffered a materially adverse action;[14] 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.[15] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[16]

Again with the possible exception of the incident of alleged workplace violence, the grievant's allegations, even taken together,[17] do not rise to the level of being materially adverse. 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.[18] Although the grievant has described potentially problematic issues, it does not appear the conduct the grievant has experienced rises beyond this level to establish materially adverse action by the agency. Because the grievance does not raise a sufficient question as to the elements of a claim of retaliation, this grievance does not qualify for a hearing on that basis.

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[11] *See Gilliam* at 142. As courts have noted, prohibitions against harassment, such as those in Title VII, do not provide a "general civility code," Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998), or remedy all offensive or insensitive conduct in the workplace. *See, e.g.*, 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).

[12] It is additionally noteworthy that the grievant has failed to demonstrate any evidence that suggests any of the conduct he has experienced has been based on a protected status, such as those listed in DHRM Policy 2.30. The grievant has essentially asserted that the events could have been caused by such issues as race, color, religion, political affiliation, age, disability, national origin, or sex, but he does not know. These mere allegations do not raise a sufficient question of discrimination to qualify for a hearing.

[13] *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).

[14] 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.

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

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

[17] The same result is reached even if the grievant's claim is analyzed as one for retaliatory harassment. *See* EDR Ruling Nos. 2007-1577, 2008-1957 (discussing retaliatory harassment claim in relation to materially adverse action standard).

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

Alleged Workplace Violence

The grievant's allegations regarding being thrown into a bin are serious matters. However, this Department has recognized that even if a grievant's allegations are true there are still some cases when qualification is inappropriate even if law and/or policy has been violated or misapplied. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

It appears that this is a case in which the relief that might be available is not relief that a hearing officer has the authority to order. For instance, hearing officers cannot order agencies to take corrective action against employees.[19] Importantly in this case, the agency has already taken significant disciplinary action against the individuals who threw the grievant into the bin. A hearing officer could order an agency to cease founded harassment and/or retaliation, or when there has been a misapplication of policy order that the agency reapply policy correctly. However, such orders would have little practical effect to remedy a prior instance of alleged workplace violence. In addition, although such an order would direct the agency not to engage in similar conduct again, the agency has already essentially done so by disciplining the perpetrators of the incident. Consequently, there is little need for a hearing to adjudicate a matter the agency has already substantially addressed. The grievance does not qualify for a hearing.

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 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.

Claudia T. Farr
Director

[19] *See Grievance Procedure Manual* § 5.9(b).