Issue: Qualification – Retaliation (Grievance Activity); Ruling Date: April 12, 2012; Ruling No. 2012-3264; Agency: Department of Corrections; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2012-3264
April 12, 2012

The grievant has requested a ruling on whether his September 14, 2011 grievance with the Department of Corrections (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In his September 14, 2011 grievance, the grievant describes various incidents with certain members of management, primarily two Lieutenants, that he alleges are the result of retaliation for initiating a grievance in February 2011. Such incidents include counseling by supervisors, verbal exchanges, reassignment of work locations, and a dispute over the requirement to bring physician documentation to support absences. In addition, the precipitating event of the grievance concerns the grievant's illness-related absences on August 17 and 18, 2011. The grievant did not have sick leave to cover the absences and one of the Lieutenants recommended that grievant receive a "Double-X" for those days, meaning his pay would be docked.[1] The same Lieutenant also issued the grievant a Notice of Improvement Needed on August 23, 2011 regarding his absences, noting that he had exhausted his sick leave, and placed the grievant on leave restriction.

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 decision, or whether policy may have been misapplied or unfairly applied.[3] In this case, the grievant has alleged retaliation.[4]

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[1] The grievant's pay was ultimately not docked for those days as he was permitted to utilize compensatory leave to cover the absences.
[2] *See* Va. Code § 2.2-3004(B).
[3] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).
[4] The grievant also states that he has been subject to a hostile work environment. However, the grievant does not assert that the treatment he has experienced has been based on a protected status, such as those listed in DHRM

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;[5] (2) the employee suffered a materially adverse action;[6] 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.[7] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[8]

Although the grievant's prior grievance was a past protected activity, his retaliation claim nevertheless fails to qualify for hearing. The only alleged acts of retaliation challenged by the grievant that occurred within the 30-day period preceding the initiation of this grievance concern the Lieutenant's recommendation to "Double-X" the grievant for his absences on August 17 and 18, 2011, and the Notice of Improvement Needed he received on August 23, 2011, counseling him for his absences, noting that he had exhausted his sick leave for the year, and placing him on leave restriction. However, the grievant has not raised a sufficient question as to whether a causal link exists between these actions and his prior grievance. Rather, these actions appear to be based on the reasonable exercise of managerial discretion.

The grievant did not have sick or personal/family leave to cover his illness-related absences on August 17 and 18, 2011. Consequently, absences on those days without adequate leave would necessarily be without pay.[9] Thus, a threatened "Double-X" would appear to be a not unsurprising result under policy and does not raise any indication of retaliation. Further, providing formal counseling in the manner of the August 23, 2011 Notice of Improvement Needed appears to be similarly reasonable. The grievant was given formal written notice that he was out of sick leave and placed on leave restriction. The Lieutenant additionally noted the pattern of the grievant's absences that were a concern to management. In reviewing the grievance materials, we are unable to discern a reasonable basis on which retaliatory intent could be inferred as to these particular actions.

The grievance does not raise a sufficient question of a causal link between the grievant's prior grievance and these actions in August 2011. Thus, the grievance does not a raise a

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Policy 2.30. Consequently, the grievance will be analyzed only as a claim of a retaliatory hostile work environment, rather than one arising from discrimination based on an unidentified protected status.

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

[6] 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.

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

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

[9] *See* DHRM Policy 4.30, *Leave Policies – General Provisions*.

sufficient question of retaliation for these actions to qualify for a hearing. Because there is insufficient evidence of retaliation within the 30 calendar days preceding the initiation of this grievance, the grievant's claim of an ongoing course of retaliatory actions, i.e., retaliatory hostile work environment, occurring *prior to* those 30 days cannot qualify for a hearing due to untimeliness.[10]

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.

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Claudia T. Farr
Director

[10] *See* Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4. We note that if there had been sufficient evidence that the agency's actions in August 2011 were retaliatory, and thus could have been part of an ongoing course of retaliatory conduct, the grievance would have been timely to challenge the alleged ongoing conduct, even that which occurred prior to the 30 calendar days preceding the initiation of the grievance. *See, e.g.*, Nat'l R.R. Pass. Corp. v. Morgan, 536 U.S. 101, 115-18 (2002) (ruling similarly in a Title VII hostile work environment harassment case); *see also* Graham v. Gonzales, No. 03-1951, 2005 U.S. Dist. LEXIS 36014, at *23-25 (D.D.C. Sept. 30, 2005) (applying *Morgan* to claim of retaliatory hostile work environment/harassment).