Issue: Qualification – Work Conditions (Supervisor/Employee Conflict); Ruling Date: August 9, 2012; Ruling No. 2013-3395; Agency: Department of Corrections; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of Department of Corrections
Ruling Number 2013-3395
August 9, 2012

The grievant has requested a ruling on whether his March 19, 2012 grievance with the Virginia Department of Corrections (the agency) qualifies for a hearing. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Senior Correctional Officer with the agency. The grievant alleges the agency facility's warden, human resource officer, and investigator are retaliating against him because he filed a prior grievance against the agency on September 14, 2011, which he asserts "contain a lot of negative, but true statements" in reference to these three individuals. Moreover, the grievant alleges agency management provided false information to EDR in regards to his September 14, 2011 grievance, and further states that the agency's alleged "cover up" has caused a hostile work environment for him.

The March 19, 2012 grievance proceeded through the management steps of the grievance process without resolution and the agency head denied the grievant's request for hearing. The grievant now seeks a qualification determination from EDR.

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, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as to 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 state policy may have been misapplied or unfairly

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

applied.[3] Here, the grievant alleges agency management acted in retaliation and created a hostile work environment when it allegedly provided "false information" to EDR in regards to the grievant's September 14, 2011 grievance.

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;[4] (2) the employee suffered a materially adverse action;[5] and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the materially 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.[6] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[7]

In this case, the grievant alleges the information provided by agency management to EDR with regards to the grievant's September 14, 2011 grievance was not only false, but was given "in an act of retaliation" against the grievant because the agency facility warden, human resource officer, and investigator were upset that the grievant was actively participating in the grievance process. The initiation of a grievance is clearly a protected activity.[8] For this grievance to qualify for hearing, however, the action taken against the grievant must also have been materially adverse, such that a reasonable employee might be dissuaded from participating in the protected conduct.[9]

In determining whether the agency's actions rise to the materially adverse action level, EDR must consider the totality of the circumstances and assess whether the agency's actions

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[3] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

[4] *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 the 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).

[5] 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.

[6] *E.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005); Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000).

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

[8] *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).

[9] *See Burlington N.*, 548 U.S. at 68. In *Burlington Northern*, the Court noted that "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." 548 U.S. at 69. "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children." *Id.* The Court determined that "plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 68 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

were harmful to the point that they could well dissuade a reasonable employee from participating in the protected conduct.[10] 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.[11] The grievant continues to allege that he was not provided the correct written statement from the agency regarding Sgt. B, and he insists the agency should have obtained written statements from Lt. G and C/O T. However, even if the grievant's allegations were true, we find the agency management conduct does not rise to the level of establishing a materially adverse action taken by the agency, nor is it enough to dissuade a reasonable employee from still participating in the grievance process.[12] Moreover, to the extent the grievant was not satisfied with the written statements he did or did not receive from the agency with regards to his September 14, 2011 grievance, the time and place to address that alleged procedural noncompliance was during the pendency of the September 14, 2011 grievance, and not through a subsequently filed grievance as the grievant has attempted to do so here.[13] Therefore, this retaliation claim fails to qualify for hearing because the grievant has not presented sufficient evidence as to the elements of such a claim.

Hostile Work Environment

For a claim of hostile work environment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[14] "[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."[15]

However, the grievant must raise more than a mere allegation of a hostile work environment – 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

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[10] It is appropriate to consider the totality of the circumstances when assessing whether the agency's actions might well have dissuaded a reasonable employee from participating in protected conduct. *Cf.* Rizzo v. Niagara Mohawk Power Corp., No. 1:04-c-1507, 2006 U.S. Dist. LEXIS 41987, at *18-20 (N.D.N.Y. June 22, 2006) (applying the materially adverse standard and noting that "a jury could consider the evidence in its totality and conclude that Defendants were engaged in a pattern of retaliation against Plaintiff"). Moreover, such an approach is consistent with an analysis of a claim of retaliatory harassment, which focuses not on individual incidents, but the overall scenario, in light of the new standard provided in the *Burlington Northern* decision. *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 harassment to apply the materially adverse standard following *Burlington Northern*); Moore v. City of Philadelphia, 461 F.3d 331, 341 (3d Cir. 2006) (same).

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

[12] As noted in EDR Ruling No. 2012-3244, EDR verified Sgt. B's written statement was included in the November 23rd packet. The agency also indicated to EDR that written statements were not required from Lt. G or C/O T.

[13] *See Grievance Procedure Manual* §§ 6.3 and 8.2.

[14] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).

[15] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

status such as race, sex, color, national origin, religion, age, veteran status, political affiliation, or disability.[16] The grievant has neither claimed nor presented evidence raising a sufficient question that the work-related conduct by agency management was based on any such protected status. Consequently, this grievance does not qualify for a hearing.

APPEAL RIGHTS AND OTHER INFORMATION

EDR's qualification rulings are final and nonappealable.[17] The nonappealability of such rulings became effective on July 1, 2012. Because the instant grievance was initiated prior to that date, it is not EDR's role to foreclose any appeal rights that may still exist for the grievant under prior law. If the grievant wishes to attempt 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 former Va. Code § 2.2-3004(E). EDR makes no representations as to whether such an appeal is proper or can be accepted by the circuit court. Such matters are for the circuit court to decide. 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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Christopher M. Grab
Senior Consultant
Office of Employment Dispute Resolution

[16] *See* DHRM Policy 2.30, *Workplace Harassment* (defining "Workplace Harassment" as conduct that is based on "race, sex, color, national origin, religion, age, veteran status, political affiliation, or disability").
[17] Va. Code § 2.2-1202.1(5).