Issues: Qualification – Management Actions (assignment of duties), Discrimination (other), and Retaliation (grievance activity); Ruling Date: October 24, 2012; Ruling No. 2013-3446, 2013-3447; 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 Numbers 2013-3446, 2013-3447
October 24, 2012

The grievant has requested a ruling on whether his May 19, 2012 and August 1, 2012 grievances with the Department of Corrections (the agency) qualify for a hearing. For the following reasons, the grievances do not qualify for hearing.

FACTS

The grievant is employed as a Senior Correctional Officer with the agency. On May 19, 2012, the grievant initiated a grievance, challenging whether the agency discriminated and retaliated against him when it allegedly misapplied its overtime draft procedure and required the grievant to work overtime on April 23, 2012.[1] On August 1, 2012, the grievant initiated another grievance with the agency, alleging the warden discriminated and retaliated against him when she allegedly misinformed the agency head that one of the written statements provided in the documents relative to a prior grievance was Sergeant B's written statement.[2] The grievant argues that the agency facility warden intentionally presented false information to the agency head, and as such, retaliated, discriminated, and created a hostile work environment against the grievant.

The May 19, 2012 and August 1, 2012 grievances proceeded through the management steps of the grievance process without resolution and the agency head denied the grievant's request for hearing for both grievances. The grievant now seeks a qualification determination from EDR in both cases.

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.[3] Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[4] Thus, claims relating to issues such as to the methods, means, and personnel by which work activities are to be carried

[1] The agency labels the May 19, 2012 grievance as "Grievance #4." The grievant has initiated three prior grievances that are not at issue in this qualification ruling.
[2] The agency labels the August 1, 2012 grievance as "Grievance #5."
[3] *See Grievance Procedure Manual* § 4.1 (a) and (b).
[4] *See* Va. Code § 2.2-3004(B).

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 applied.[5] Here, the grievant alleges that agency management misapplied its overtime draft procedure on April 23, 2012, and as a result of its misapplication, agency management discriminated and retaliated against him. In addition, the grievant alleges the warden acted in retaliation, created a hostile work environment, and discriminated against him when she allegedly provided "false information" to the agency head with regards to the grievant's September 14, 2011 grievance.

Management's Alleged Abuse of Authority - Misapplication and/or Unfair Application of Policy

Fairly read, the grievant's claim asserts in part a claim of misapplication or unfair application of the overtime draft procedure by agency management. For such a claim to qualify for hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[6] 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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8]

The facility's overtime draft procedure ("Facility Draft Procedure") outlines a specific process its facility management must follow when drafting officers to work overtime.[9] The Facility Draft Procedure requires each Watch Commander to maintain an updated roster of all correctional officers assigned to his or her shift.[10] The names of the correctional officers assigned to that shift are then placed in numerical order based upon the date of his or her last draft on the agency facility's overtime draft list. The officer with the longest length of time since his or her last draft is placed at the top of the draft list. When the agency requires overtime during a certain shift, the first named officer on the draft list is then drafted to work.[11] Because the facility requires an officer to request his or her vacation days one year in advance, a Watch Commander will not draft an officer who is on a pre-scheduled vacation day, but instead will build that officer's absence into his or her daily master roster and skip that officer for the draft in lieu of an officer who is present. In such a case, the officer skipped will remain at the top of the overtime draft list in order to be the first officer called for the agency's subsequent draft.[12] The

[5] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).
[6] *See Grievance Procedure Manual* § 4.1(b).
[7] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[8] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[9] *See* Virginia Department of Corrections Operating Procedure 110.2, Overtime and Schedule Adjustments, Implementation Memorandum for [Named Facility], effective Jan. 1, 2010.
[10] *Id.*
[11] *Id.*
[12] *Id.*

only exception to this draft procedure is when an officer volunteers to work overtime.[13] In that case, the volunteer officer will be utilized prior to resorting to the Facility Draft Procedure.[14]

In this particular case, the agency needed to draft four officers to work overtime during the week of April 23, 2012: two officers were required on April 23, 2012 and two officers on April 24, 2012. Two officers volunteered to take the April 24, 2012 overtime shift. One of the volunteer officers was the first named officer on the overtime draft list and the second volunteer officer was the third named officer on the overtime draft list. According to the agency, the second named officer on the overtime draft list was subpoenaed to attend court on April 23, 2012, the therefore was precluded from being drafted that day. The fourth named officer on the overtime draft list had pre-requested annual leave on April 23, 2012. As such, the Watch Commander skipped the fourth named officer on the overtime draft list for purposes of the April 23rd draft based on the facility's standard annual leave operating procedures. The fifth named officer on the overtime draft list was sick on April 23, 2012. Therefore, the Watch Commander required the sixth named officer to work overtime on April 23, 2012. Because the Watch Commander needed a second officer for April 23, 2012, he continued down the overtime draft list to the seventh named officer, but that officer was out sick on April 23, 2012 as well. As such, the agency asserts that the grievant, who was the eighth named officer of the overtime draft list, was required to work overtime on April 23, 2012 pursuant to its Facility Draft Procedure.

Management has significant discretion in the administration of its policies and its standard facility operating procedures.[15] Here, the agency appears to have followed its overtime draft procedure and its normal interpretation thereof. In such a case, EDR will not second-guess management's decisions regarding the administration of its procedures, absent evidence that the agency's actions are plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[16] The grievant has provided no such evidence with respect to the April 23, 2012 draft decisions. Accordingly, this grievance does not qualify for 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;[17] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity;[18] 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 adverse employment action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's

[13] *Id.*
[14] *Id.*
[15] *See e.g.* EDR Ruling No. 2011-2903.
[16] *See e.g.* EDR Ruling No. 2009-2090.
[17] *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).
[18] Although for the past six years EDR has used the "materially adverse action" standard for retaliation claims, we are returning to the "adverse employment action" standard for the assessment of all claims, including retaliation, as to whether they qualify for hearing. *See* Va. Code § 2.2-3004(A).

stated reason was a mere pretext or excuse for retaliation.[19] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[20]

In this case, the grievant alleges agency management retaliated against him when it drafted the grievant on April 23, 2012. In addition, he alleges the information provided by the warden to the agency head with regards to the grievant's September 14, 2011 grievance written statements was not only false, but was given "in an act of retaliation" against the grievant because the warden was upset that the grievant was actively participating in the grievance process. The initiation of a grievance is clearly a protected activity.[21] However, the grievance does not raise a sufficient question as to whether there was a causal link between the protected activity and the grieved actions.

Even assuming for purposes of this ruling only that the April 23, 2012 draft was an adverse employment action taken against the grievant, the agency has offered a reasonable explanation as to why it skipped the second and fourth named officers from the draft list and was required to draft the grievant for April 23, 2012. The grievant has not provided any indication that the agency's explanation is pretextual. Likewise, as previously noted in EDR Ruling No. 2012-3244, the agency provided a reasonable explanation about the written statements that were provided to EDR (which were the same written statements provided to the agency head) with regards to the grievant's prior grievance.[22] Moreover, EDR noted in EDR Ruling No. 2013-3395, the "time and place to address that alleged procedural noncompliance was during the pendency of the earlier grievance, and not through a subsequently filed grievance as the grievant has attempted to do." [23] Although the grievant continues to alleges that the agency's actions were retaliatory, he has not provided any indication that the agency's explanation for its actions was mere pretext or given as an excuse for retaliation. As such, the grievant's claims of retaliation do not qualify for a hearing.

Hostile Work Environment/Discrimination

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.[24] "[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

[19] *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).
[20] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).
[21] *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).
[22] *See* EDR Ruling No. 2012-3244, where 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.
[23] *See* EDR Ruling No. 2013-3395 (referring to grievance procedural rules in *Grievance Procedure Manual* §§ 6.3 and 8.2).
[24] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).

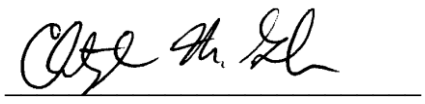
humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[25]

Grievances that may be qualified for a hearing include actions related to discrimination.[26] To qualify such a grievance for hearing, there must be more than a mere allegation of discrimination – 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 status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[27]

The grievant must raise more than a mere allegation of a hostile work environment or discrimination – 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 status such as race, sex, color, national origin, religion, age, veteran status, political affiliation, or disability.[28] The grievant has neither claimed nor presented evidence raising a sufficient question that the work-related conduct by agency management in either grievance was based on any such protected status. Consequently, this claim does not qualify for a hearing.

APPEAL RIGHTS AND OTHER INFORMATION

EDR's qualification rulings are final and nonappealable.[29] The nonappealability of such rulings became effective on July 1, 2012. Therefore, the August 1, 2012 grievance is nonappealable. However, because the May 19, 2012 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 with regards to the grievant's May 19, 2012 grievance, 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 the May 19, 2012 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.



Christopher M. Grab
Senior Consultant
Office of Employment Dispute Resolution

[25] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).
[26] *See Grievance Procedure Manual* § 4.1(b).
[27] *See* Hutchinson v. INOVA Health System, Inc., C.A. No. 97-293 A, 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. Apr. 8, 1998).
[28] *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").
[29] Va. Code § 2.2-1202.1(5).