

Issues: Retaliation (other protected right) and Counseling Memorandum; Hearing Date: 03/19/07; Decision Issued: 03/26/07; AHO: Carl Wilson Schmidt, Esq.; Case No. 8531/8532; Outcome: Retaliation – Full relief, agency ordered to refrain from retaliating against grievant; Counseling Memorandum – Full relief, counseling memorandum rescinded. **Administrative Review: DHRM Ruling Request received 04/06/07; Outcome: Appealed to wrong agency – forwarded to EDR; Administrative Review: EDR Ruling Request received 04/13/07; EDR Ruling #2007-1635 issued 05/09/07; Outcome: Remanded to HO; Reconsideration Decision issued 05/11/07; Outcome: Original decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8531 / 8532

Hearing Date: March 19, 2007
Decision Issued: March 26, 2007

PROCEDURAL HISTORY

Grievant filed grievances to allege retaliation and to challenge a counseling memorandum she received. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On December 28, 2006, the EDR Director issued Ruling Nos. 2007-1495 and 2007-1508. On February 12, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 19, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the counseling memorandum?

2. Whether the Agency retaliated against Grievant?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its counseling memorandum against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8. The burden of proof with respect to retaliation is on the Grievant to show by a preponderance of the evidence that the Agency retaliated against her. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Minority Business Enterprise employs Grievant as a Program Administration Specialist I. The purpose of her position is:

Review and analyze DBE/WBE and SWAM applications in accordance with established federal, state, and departmental guidelines. Manage processing and control of applications in accordance with management guidance and procedures. Provide information/assistance to firms seeking certification, perform on-site visits, schedule and conduct orientation Provide assistance to support the DBE Programs

Grievant’s national origin is British. She has taught English in England and in America. She has taught technical writing at a local school.

On June 16, 2006, Grievant filed a discrimination complaint with the Office of Equal Employment Services within the Department of Human Resource Management. She alleged discrimination based on race, gender, age, and national origin.

Grievant began reporting to the Supervisor sometime in August 2006.

Grievant applied for a position with the Department of Accounts. On her application for employment, she listed three people as references. One of the questions on the application was, “May we contact your present supervisor?” Grievant responded, “Only if being considered as finalist.”

Ms. S was the director of the unit at DOA of the position for which Grievant had applied. Ms. S called Grievant and told her that Grievant as the sole finalist. Ms. S said

she had already contacted Grievant's references but that before DOA could make a job offer, she had to contact Grievant's supervisor.¹ Ms. S told Grievant that she would hope to contact Grievant by the end of the day with a job offer. Ms. S was unable to contact the Supervisor that day.

On October 16, 2006, Ms. S spoke with the Supervisor regarding Grievant's work performance. Ms. S asked about Grievant's customer service skills. The Supervisor's response was favorable. Ms. S asked how the Supervisor would rate Grievant's analysis skills. The Supervisor said "very good." Ms. S asked how the Supervisor would rate Grievant's writing skills. The Supervisor responded, "some difference in English vocabulary to American." Ms. S asked, "[i]f the applicant applied for another job with your agency/company would you hire them?" The Supervisor responded, "No." The Supervisor said that Grievant was an "excellent employee" and "detail oriented" but that Grievant had "filed several EEO complaints". The Supervisor expressed concern about Grievant's interaction with coworkers because Grievant's use of words came across as very harsh and not proper and was counseled. Ms. S asked the Supervisor if she had any comments about Grievant that she would like to share. The Supervisor responded that she would not like to see Grievant leave; that Grievant was very technically capable; had a lot of good experience and initiative.

On October 29, 2006, Grievant filed a grievance with the Agency alleging the Supervisor gave Grievant a "defamatory evaluation of my performance" to Ms. S.

Grievant worked in a small office cube. Her desk formed an "L" shape and provided the boundaries for two side of her work space. When sitting at her desk as if working at the desk, there was a stack of three drawers and three shelves behind her to her right side. The entrance to the office cube was directly behind her and to her left side. Grievant placed a chair in the entrance way leaving only a narrow passage into her office.

On October 30, 2006, the Supervisor walked to Grievant's office cube and walked into Grievant's work area. The Supervisor asked that Grievant remove commas placed in the address line for letters to be mailed. Grievant had developed a template containing commas to enable the commas to be matched appropriately with text automatically generated from the addressee's contact information. To remove the two commas, Grievant would have to re-program the template. The Agency was short-staffed and Grievant had assumed the duties formerly performed by other employees and did not believe she had adequate time to address what she perceived as a minor concern. Grievant asked the Supervisor what Grievant's priorities should be. The Supervisor had handed the two letters to Grievant. Grievant turned towards the cabinet and extended her right arm and using her right hand tossed the two letters onto a shelf of the stack of cabinets and shelves in her office cube. The shelf was a little bit higher

¹ Ms. S contacted Grievant's three references on October 11, 2006. Each person gave Grievant a favorable reference.

than her eye level.² The Supervisor was not in Grievant's direct line of sight then Grievant tossed the letters on the shelf. Grievant placed the letters on the shelf because that was a location where she knew she could find them later.

On November 3, 2006, the Agency's Director sent Ms. S an email stating:

Please contact me ASAP re: grievance I received from [Grievant]. The crux of the grievance is that you told her she was the final candidate for a position in DOA, and that DMBE did something to change your mind. I need to know as soon as possible if she was ever told she was the sole candidate.

Ms. S forwarded the Agency's Director email to a DOA manager who replied on November 3, 2006:

[Grievant] was one of three final candidates of which all references were contacted. However, after [Ms. S] obtained referential information and we sat together and re-evaluated interview responses (both oral and written), experience, qualification, and an appropriate fit for the position. I asked that the position be reposted to determine if more qualified applicants would apply.

On November 6, 2006, the Supervisor presented Grievant with a written counseling memorandum regarding Grievant's behavior on October 30, 2006. The counseling memorandum alleged Grievant refused to make changes to two letters and "also hurled the 2 letters and envelopes towards my person, which landed in the cabinet located behind me."

Grievant received a letter dated November 8, 2006 notifying her that she had not been selected for the position with the Department of Accounts. The letter stated, "the panel selected an individual who they felt best met the requirements of the position."³

CONCLUSIONS OF POLICY

The Agency contends it was appropriate to counsel Grievant regarding her interaction with the Supervisor on October 30, 2006. The Supervisor testified that Grievant "hurled the 2 letters and envelopes towards my person, which landed in the cabinet located behind me." Grievant did not throw the letters towards the Supervisor. The cabinet was not located behind the Supervisor, it was located to the Supervisor's right. To the extent Grievant threw the letters it was only a short distance. Grievant

² The Supervisor did not testify that she had to move in order to avoid Grievant's movement.

³ It is unclear why DOA would tell the Agency Director that the position was being reposted but tell Grievant that the position had been given to another applicant.

tossed the letters onto a shelf of the cabinet rather than rolling her chair close enough to enable her to place the letters on the cabinet.

The Agency has not presented sufficient evidence to justify its issuance to Grievant of a counseling memorandum. Accordingly, the counseling memorandum must be reversed.

An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual as: "Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. 'whistleblowing')." To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁴ (2) suffered a materially adverse action; and (3) a causal link exists between the adverse action and the protected activity; in other words, 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 action, retaliation is not established unless the Grievant's evidence raises a sufficient question as to whether the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.

On June 16, 2006, Grievant filed a complaint of discrimination with the Department of Human Resource Management. Discrimination based on race, gender, age, and national origin is unlawful and contrary to State policy. When Grievant filed a complaint alleging unlawful behavior by the Agency, her action was a protected activity. A materially adverse action is, "an action which 'well might have dissuaded a reasonable worker from [engaging in a protected activity].'"⁵ A reasonable worker would be dissuaded from filing a discrimination complaint if that worker expected his or her employer to discuss the discrimination complaint in a job reference. Grievant suffered a materially adverse action when the Supervisor mentioned her filing of an EEO complaint as part of a job reference. Grievant has established a causal link between her protected activity and a materially adverse action.

The Agency has not presented a nonretaliatory business reason for the adverse action. There was no legitimate business reason for the Supervisor to mention Grievant having filed an EEO complaint. Filing an EEO complaint did not relate to Grievant's work performance and should not have been mentioned as part of a reference regarding Grievant's work performance. In addition, the Supervisor's comment revealed

⁴ See Va. Code § 2.2-3004(A)(v). 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.

⁵ *Burlington Northern and Santa Fe Railway Co. v. White*, 126 S.Ct. 2405, ___ U.S. ___, 2006 U.S. LEXIS 4895 (June 22, 2006).

retaliatory intent. If Grievant left the Agency and then reapplied for a position and the Agency refused to re-hire her because she had filed an EEO complaint, that decision not to re-hire would be contrary to State policy. DHRM Policy 2.05 states:

The Governor's Executive Order on Equal Opportunity includes the following provisions:

Prohibits employment discrimination on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or against otherwise qualified persons with disabilities. ***

Prohibits all employees, including agency heads, managers, and supervisors from taking retaliatory action against **any person making allegations of violations** of the Executive Order. (Emphasis added).

The Agency disputes whether the Supervisor mentioned EEO complaints to Ms. S. The weight of the evidence shows that the Supervisor, in fact, mentioned Grievant's EEO complaint to Ms. S. When asked if she made such a statement, the Supervisor testified she did not recall saying anything about an EEO complaint and that it was unlikely she would have made such a comment given she had run an agency before and was a licensed attorney who knew the law with respect to the issue. If the Supervisor had not mentioned Grievant's EEO complaint, the Hearing Officer would have expected the Supervisor to be adamant in her denial. Instead, the Supervisor's response was less than certain. In any event, the Agency has not presented any logical explanation as to why Ms. S would have written down incorrectly "filed several EEO complaints" as being the Supervisor's comments.

The Hearing Officer finds that the Agency retaliated against Grievant by mentioning her EEO complaint during a job reference.

DECISION

The Agency is ordered to refrain from retaliating against Grievant for having filed an EEO complaint.

The Agency's counseling memorandum presented to Grievant is rescinded.⁶ The Agency is ordered to destroy the November 6, 2006 written counseling memorandum along with any copies of that memorandum and to refrain any taking any further action with respect to that memorandum or the counseling allegations contained therein.

⁶ Grievant asks that the Agency issue a letter of apology. The Hearing Officer lacks the authority to order an Agency to apologize. Grievant also seeks an award of salary equal to what she would have received had she obtained the new position. The Hearing Officer lacks the authority to award damages. Thus, the Hearing Officer will not issue such relief.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁷

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8531 / 8532-R

Reconsideration Decision Issued: May 11, 2007

RECONSIDERATION DECISION

On May 9, 2007, the EDR Director issued Ruling No. 2007-1635 returning this case to the Hearing Officer for further consideration.

On November 6, 2006 Grievant received a written counseling memorandum from the Supervisor. The counseling memorandum stated:

This memorandum is to address your behavior on Monday, October 30, 2006 at approximately 2:45 pm wherein you were asked to make a minor change to 2 DBE letters (remove the comma after the addressee's name) and you refused As we discussed on Tuesday, October 31, 2006 during your informal counseling session, this behavior is not acceptable and will not be tolerated by you or anyone employed by the Virginia Department of Minority Business Enterprise.

During our informal counseling session, I asked whether you were going to make the changes to the letters. After two inquiries, you finally stated, "Yes." You also objected to [Mr. M] being present and indicated that you did not have any comments to make with [Mr. M] being in the room. We also discussed your workload and the backlog of files left by a former employee as well as administrative tasks, such as filing and hole-punching, that needed to be complete.

Please know that we are making every effort to create a safe, learning, and productive working environment in the office. Behavior described above is not conducive to this environment and will not be tolerated. This memorandum will be retained in your file that is within my possession.

The Agency contends Grievant should be counseled for refusing on October 30, 2006 to remove commas from letters. However, Grievant did not refuse to remove the commas on October 30, 2006. Grievant was performing additional duties because another employee left the Agency and she received part of that employee's responsibilities. Grievant questioned the Supervisor regarding what the Supervisor wanted Grievant to do first – change commas or address other duties. Changing the commas would require revision to a template that the Supervisor had approved several weeks earlier. Grievant was frustrated and irritated with the Supervisor. Grievant did not see the need for the change and questioned why the Supervisor had not addressed the need for the change when the Supervisor reviewed the template. Grievant was irritated because she suspected that the Supervisor had undermined her chance to obtain employment with another State agency. As it turned out, Grievant's irritation was understandable because the Supervisor had in fact retaliated against Grievant.

The Supervisor interpreted Grievant's questioning regarding priorities and Grievant's irritation as being a refusal to make the changes. The Supervisor's interpretation was mistaken. This conclusion is confirmed by the Supervisor's actions on the following day, October 31, 2006.

The Supervisor asserted that she held a counseling session with Grievant on October 31, 2006. Grievant, the Supervisor, and Mr. M were present during the meeting. In a note to the file written by the Supervisor on November 6, 2006, the Supervisor wrote, "During our information counseling session, I asked her if she was going to make the changes. She initially said no. At that point, I asked her again, and she said that she would make the changes."⁸ If Grievant had refused to make the changes to the letters on October 30, 2006 and the Supervisor intended to counsel Grievant on October 31, 2006, there would be no reason for the Supervisor to ask Grievant if she intended to make the changes. The Supervisor would have already concluded and known that Grievant did not intend to make the changes. The Supervisor's counseling would have consisted of telling Grievant that Grievant should not have refused to follow the Supervisor's instructions on October 30, 2006 without discussion of what Grievant intended to do in the future. By asking on October 31, 2006 if Grievant intended to make changes, the Supervisor revealed that she did not know whether Grievant had refused on the prior day to make the changes.

Grievant testified that she did not refuse to make the changes. Her testimony was credible.

Upon consideration of the weakness of the Agency's evidence showing that Grievant refused to make the changes and Grievant's credible testimony that she never refused to make the changes, the Hearing Officer concludes that the Agency's oral and written counseling was without merit. Accordingly, the Agency is ordered to destroy the November 6, 2006 written counseling memorandum along with any copies of that

⁸ Agency Exhibit 7.

memorandum and to refrain any taking any further action with respect to that memorandum or the counseling allegations contained therein.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer