

Issue: Retaliation (grievance activity participation and hostile work environment;
Hearing Date: 09/17/07; Decision Issued: 10/02/07; Agency: State Board of
Elections; AHO: William S. Davidson, Esq.; Case No. 8658; Outcome: Full Relief;
Administrative Review: EDR Ruling Request received 10/15/07; Outcome
pending; Administrative Review: DHRM Ruling Request received 10/15/07;
Outcome pending

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 8658

Hearing Date: September 17, 2007
Decision Issued: October 2, 2007

PROCEDURAL HISTORY

On December 8, 2005, the Grievant filed a grievance alleging an arbitrary or capricious performance evaluation. On December 9, 2005, the Grievant filed a grievance alleging race discrimination, failure to receive the same opportunities to provide input as other employees, preferential treatment for certain employees and a request that the Agency's organizational structure be reviewed by an outside entity. The Grievant's position in these grievances was substantially upheld.

On April 9, 2007, the Grievant filed a grievance alleging that, since the prior two (2) grievances, she has been subject to a hostile work environment and also subject to retaliation. Subsequent to filing this grievance, the Grievant requested that the Director of EDR issue a ruling that her grievance qualified for a hearing. Such a ruling was issued by the Director of EDR on July 2, 2007 and the issue of hostile work environment and retaliation was qualified for a hearing. On August 10, 2007, EDR assigned this appeal to a Hearing Officer. On September 17, 2007 a hearing was held at the Agency's location.

APPEARANCES

Grievant
Grievant Representative
Agency Party Designee
Agency Representative
Witnesses

ISSUE

Whether the Agency, since an earlier grievance filing by the Grievant, has subjected the Grievant to a hostile work environment and retaliation.

BURDEN OF PROOF

In claims of hostile work environment or retaliation, the burden of proof is upon the Grievant to present her evidence first and prove her claim by a preponderance of the evidence. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not.¹

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 Grievant filed a timely grievance asserting that she had endured a hostile work environment and that, because of the filing of prior grievances on her behalf, she was subject to retaliatory treatment from management.² The Agency declined to qualify the grievance for a hearing and the Grievant requested a compliance ruling from EDR. On July 2, 2007, the EDR Director ruled that the grievance was qualified for a hearing.

The State Board of Elections (“The Agency”) has employed the Grievant for approximately twenty (20) years. Her current position is that of the Virginia Election and Registration Information System (“VERIS”) Operational Manager.

On December 8, 2005 and December 9, 2005, the Grievant filed grievances alleging race discrimination, failure to receive the same opportunities to provide input as other employees, preferential treatment for certain employees, a request that the Agency’s organizational structure be reviewed by an outside entity and the issuance of an arbitrary or capricious performance evaluation.³ The Grievant’s allegations and position in these grievances were substantially upheld. It is of particular importance that in one (1) of these grievances, the phrase “As recently as late July, she was still clinging to the familiar VVRS” was deemed by the reviewer to be inaccurate and was, pursuant to the grievance, removed from the Grievant’s performance evaluation.

The Hearing Officer heard testimony from many witnesses and all indicated that the Agency had difficulties as it transferred from the Virginia Voter Registration System (“VVRS”) to the new VERIS program. The Hearing Officer heard testimony from the Deputy Project Manager for the implementation of the VERIS program that she had been told by various employees of the Agency that the Grievant was difficult to work with, and that she did not want to implement the changeover from the VVRS program to the VERIS program. In point of fact, she found her to be a wealth of information and very easy to work with and what the Grievant wanted was to not lose already existing functionality in this conversion.

¹ Grievance Procedure Manual (“GPM”) Section 5.8 and Section 9

² Agency Exhibit 1, Tab 1

³ Grievant Exhibit 1, Tab 4 and Tab 1

The Hearing Officer heard testimony from witnesses called by the Agency that the relocation of the Grievant's office from the ninth floor to the first floor was to bring a greater degree of efficiency to the operation and to place the Grievant closer to her immediate supervisor as the Grievant worked best when closely supervised. The Hearing Officer heard evidence from the Administrative Assistant of the Agency, who would have been responsible for the move of any personnel of the Agency, that she was not contacted nor made a part of setting up or directing the move of the Grievant.⁴ The Hearing Officer heard testimony from several Agency employees that reference was made to the Grievant's prior grievance filings and that those filings were causing the Agency to be reviewed. Indeed, an Agency-wide memo was sent out indicating that the review was caused by "a request of a member of the SBE staff."⁵ Several employees testified that they were told by a Senior Agency Manager that an employee had filed a grievance and "You need to be careful what you ask for. You might get it." This quote was in direct reference to the Agency review and the extra work that it was causing Agency employees.

The Hearing Officer heard testimony from the Grievant that her job duties were increased, she was moved from her existing office to a smaller office that was too small to properly perform her duties, her staff was arbitrarily reassigned without any input from her and her prior grievances were publicly commented on by Agency management.

The Hearing Officer heard testimony from a witness called by the Agency that the Agency was in complete disarray regarding the changeover in computer programs, from VVRS to VERIS. This disarray was so complete that the Governor's Office felt compelled to send an outside advisor to the Agency with the authority to force the changeover. The outside advisor testified that senior management in this Agency was quite simply clueless as to what it would take to implement this change and what needed to be done to have it completed on a timely basis. The outside advisor also testified that she did not direct the movement from one office to another of any employee of the Agency.

The Hearing Officer heard testimony from a Senior Manager of the Agency that it appears that the Grievant was given extraordinarily short notice, only days, that she was to move and she was moved into a space that is substantially smaller than the space that she had previously occupied. Other Agency employees testified that the space was not large enough for the materials that the Grievant needs to properly perform the functions of her job.

⁴ Grievant Exhibit 1, Tab 16

⁵ Grievant Exhibit 1, Tab 19

The Hearing Officer heard testimony from a former Deputy Secretary of the Agency. This was the Deputy Secretary who made the initial rulings on the Grievant's prior grievance filings. This person testified that the Grievant was a very good and meticulous employee. A significant amount of the Agency's evidence was that the Grievant was "clinging" to the VVRS program and did not want to make the changeover to the VERIS program. In a memorandum filed on January 27, 2006, this Deputy Secretary found that the statement regarding "clinging to the old system" was without merit. In that memorandum, the Deputy Secretary found that the Grievant was considered the subject matter expert at the Agency on VVRS and that there was no indication that the Grievant was "clinging" to the VVRS program. Furthermore, this Deputy Secretary found that the person who was the Project Sponsor for the VERIS project stated that she had never logged onto the VVRS program. This person, who was in charge of the changeover from one system to the next, was hesitant in answering questions regarding her utilization of the old system. She apparently did not see any correlation between her lack of knowledge in the old system and the implementation in the new system and stated that she had great experience in developing systems during her employment with the Democratic Party. This is the person with whom the Grievant had disagreements in the transfer from VVRS to VERIS, a person who had never even logged into the old system and who, perhaps because of her total lack of use of the old system, did not fully understand what anyone from the Agency was saying to her regarding the fear of losing already functional systems.⁶

This Deputy Secretary ordered that the Grievant, pursuant to her December 9, 2005 grievance, report to the Deputy Secretary, not the person who was in charge of the implementation of the VERIS project.⁷ The Agency head overruled the decision of the reporting structure, indicating that she thought such a change would be detrimental to the VERIS project, and further indicated that she would find other means to resolve that issue.⁸

The Hearing Officer heard from another Deputy Secretary of this Agency who commenced her employment in June of 2006. The Agency justified the move of the Grievant's office from the ninth floor to the first floor, based on the fact that she worked best under more direct supervision. This Deputy Director testified to the exact contrary that the Grievant did not need to be directly supervised.⁹ The Deputy Secretary stated that the Grievant's new office is, in point of fact, too small for her to properly perform her job duties.

⁶ Grievant Exhibit 1, Tab 5

⁷ Agency Exhibit 1, Tab 2

⁸ Grievant Exhibit 1, Tab 4

⁹ Agency Exhibit 1, Tab 2, Page 58

The Agency introduced several documents which purported to show the organizational chart of the State Board of Elections.¹⁰ As introduced, those charts showed that the VERIS operations would be reporting to the Deputy Secretary. In testimony, the Agency indicated that the charts were inaccurate and that the VERIS operations employees were now reporting to a Confidential Policy Advisor. No significant reason was given for why the exhibit proffered was inaccurate or for the change.

Finally, the Hearing Officer heard testimony from the former head of this Agency. She was the head of the Agency when the 2005 grievances were filed and she was there through the events that led up to this current grievance. She acknowledged that she had sent a memo to her Agency indicating that a person on the staff asked for a review by the Department of Human Resource Management (“DHRM”). The Agency head confirmed that she had commented at a management meeting that, pursuant to a grievance being filed, this review was taking place and that “You should be careful what you ask for. You may get it.” Most importantly, when asked about the 2005 grievances, there was a visceral reaction by this witness that was surprising to the Hearing Officer in its magnitude. There appeared to be an active disgust that someone would have the audacity to file those grievances, much less prevail in those grievances. This person testified that the outside advisor from the Governor’s Office was the person who suggested that the Grievant be moved from the ninth floor to the first floor. It is of interest to the Hearing Officer that the person that was sent to be in charge of this project testified that she made no such suggestion. Indeed, upon cross-examination, the former Agency head testified that she also was surprised that the prior witness had denied making such a suggestion to move the Grievant.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq. establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training State employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of State employment and personnel practices with the preservation of the employee’s ability to protect his rights and to pursue legitimate grievances. The dual goals reflect a valid governmental interest in and responsibility to its employees in the workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Va. Code § 2.2-3000 sets forth the Commonwealth’s grievance procedure and provides in part:

It shall be the policy of the Commonwealth, as an Employer, to encourage the resolution of employee problems and complaints...To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between State Agencies and those employees that have access to the procedure under Section 2.2-3001.

The Grievant states that a Senior Manager commented on her prior grievances and stated in several staff meetings that the reason the Agency was undergoing certain hardships was the result of a grievance that the Grievant filed. Additionally, the Grievant alleges that the Senior

¹⁰ Agency Exhibit 1, Tab 3, Pages 1-4

Manager influenced other Agency staff to deal with the Grievant in an unfair and harsh manner. The Grievant stated that she was approached by co-workers who told her that they were told to stay away from the Grievant and not to ask her questions. One of the Grievant's immediate subordinates was transferred to another department without any prior consultation with the Grievant. Finally, the Grievant was given extraordinarily short notice to move her office from the ninth floor to the first floor, with the reason being given that the Grievant would be closer to her Supervisor and that the Grievant worked better when she was closely supervised.

By statute, management reserves the exclusive right to manage the affairs and operations of State government.¹¹ For a Grievant to be successful in a claim of retaliation, there must be evidence that, (i) the employee engaged in a protected activity¹²; (ii) the employee suffered a materially adverse reaction¹³ and (iii) a causal link exists between the materially adverse reaction and the protected activity. If the Agency presents a non-retaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the Grievant presents sufficient evidence that the Agency's stated reason was a mere pretext or excuse for retaliation.¹⁴

Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.¹⁵

¹¹ Va. Code §2.2-3004(B)

¹²Va. Code §2.2-3004(A)

¹³ Burlington N. & Santa Fe Ry Co. v. White, 126 S.Ct. 2405, 2414-15 (2006)

¹⁴ See EEOC v. Navy Fed Credit Union, 424 F. 3d 397, 405 (4th Cir. 2005)

¹⁵ See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n. 10 (1981)

Here, the Grievant filed previous grievances, which is a protected activity.¹⁶ The Grievant was moved from a larger office to a smaller office, fellow employees were told by management at the Agency to not work with the Grievant, a member of the Grievant's staff was moved with no input from the Grievant, she was given additional duties, the organizational chart was changed for no apparent reason to have the Grievant report to a Confidential Policy Advisor and management told other employees that some of their problems were caused by the filing of the Grievant's prior grievances. All of this resulted in a materially adverse reaction.¹⁷ The Hearing Officer finds that there is a causal link between these two (2) when considering the testimony of the former Agency head and her apparent disgust that the Grievant would have the audacity to file a grievance and, when comparing the conflict in the testimony between the Agency witnesses, indicating that the move was justified because it put the Grievant closer to her Supervisor and that would improve her performance as she worked better with close supervision, with the Grievant's witness testimony that indicated this was simply not true. The Hearing Officer was impressed that the second ranking person in this Agency disputed the Agency's position regarding this issue.¹⁸ Further, the Agency admits that it negatively commented on the Grievant's prior grievances in staff meetings and in Agency e-mail.

DECISION

For reasons stated herein, the Agency's actions are deemed to be harassing and retaliatory. Accordingly, the Hearing Officer orders that the Agency provide the Grievant with either her old office or sufficient office space to properly perform the duties that have been assigned to her. Further, the Hearing Officer orders that the Grievant, for purposes of the overall organizational structure of the State Board of Elections, report directly to the Deputy Secretary and not to the Confidential Policy Advisor. Finally, the Hearing Officer orders that the Agency create an environment free from discrimination and/or retaliation and to take appropriate corrective actions necessary to cure the violations that have been set forth in this finding.

¹⁶ See Va. Code § 2.2-3004(A); GPM § 4.1(b)(4)

¹⁷ See Qualification Ruling of Director in the matter of the State Board of Elections, ruling number 2007-1669, July 2, 2007, wherein the Director stated that consistent with developments in Title VII Law (Burlington Northern) on July 19, 2006, in ruling nos., 2005-1064, 2006-1169, and 2006-1283, this Department adopted the "materially adverse" standard for qualification decisions based on retaliation... Moreover, to establish a consistent standard for retaliation cases, this Department has construed the grievance statutes and the Grievance Procedure Manual and adopted the materially adverse action standard for all claims of retaliation, whether they arise under a Title VII analogue or not.

¹⁸ See Qualification Ruling of Director in the matter of the State Board of Elections, ruling number 2007-1669, July 2, 2007, wherein the Director stated that consistent with developments in Title VII Law (Burlington Northern) on July 19, 2006, in ruling nos., 2005-1064, 2006-1169, and 2006-1283, this Department adopted the "materially adverse" standard for qualification decisions based on retaliation... Moreover, to establish a consistent standard for retaliation cases, this Department has construed the grievance statutes and the Grievance Procedure Manual and adopted the materially adverse action standard for all claims of retaliation, whether they arise under a Title VII analogue or not.

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 Street, 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 Street, Suite 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 your appeal 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.¹⁹ 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.²⁰

¹⁹An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

²⁰Agencies must request and receive prior approval from the Director of EDR before

[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]

William S. Davidson
Hearing Officer

filing a notice of appeal.