

Issue: Qualification – Discrimination (Race) and Retaliation (Other Protected Right);
Ruling Date: March 6, 2013; Ruling No. 2013-3470; Agency: Department of Juvenile
Justice; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of Juvenile Justice
Ruling Number 2013-3470
March 6, 2013

The grievant has requested a ruling on whether his July 9, 2012 grievance with the Department of Juvenile Justice (the agency) qualifies for a hearing. For the reasons discussed below, the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management finds that this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Security Officer with the agency. On July 9, 2012, he initiated a grievance, challenging whether the agency retaliated and/or discriminated against him in reassigning his duties, specifically, removing him from a particular transportation shift assignment.¹ After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination.

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.² Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.³ 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 state policy may have been misapplied or unfairly applied, or whether a performance evaluation was arbitrary or capricious.⁴

¹ The Grievance Form A completed by the grievant contains a mark in the box to indicate that he is grieving a "disciplinary action issued by someone other than Immediate Supervisor." However, this reassignment was not in actuality a transfer pursuant to formal discipline issued.

² See *Grievance Procedure Manual* § 4.1 (a) and (b).

³ See Va. Code § 2.2-3004(B).

⁴ Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

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;⁵ (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity;⁶ 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 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

Here, the grievant has not alleged that he engaged in any protected activity, and EDR is unable to find such protected activity upon a review of the relevant documentation. Thus, we do not reach the question of whether an adverse employment action was suffered by this grievant. The grievant's retaliation claim does not qualify for a hearing on this basis.

Discrimination

The grievant asserts that he has been discriminated against on the basis of race. Grievances that may be qualified for a hearing include actions related to discrimination.⁹ 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.¹⁰

In this case, the grievant has asserted race as a ground for his discrimination claim. The grievant points to the fact that there were no Caucasian officers left on a particular unit. This

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 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).

⁶ 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).

⁷ 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).

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

⁹ See *Grievance Procedure Manual* § 4.1(b).

¹⁰ 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).

fact alone could raise a question as to whether his reassignment was in some way related to race. However, the agency counters that the other officers who were transferred along with the grievant were not all of the same race, and asserts that the reassignments were based on a legitimate business need, including the nature of the duties needed on each particular schedule. The agency states that those employees reassigned from the grievant's shift were moved because they had primarily been performing administrative duties, and the agency needed more personnel on security posts. Because there is no indication that the agency's non-discriminatory reasons for the grievant's reassignment were pretextual, the grievant's claims of discrimination do not qualify for a hearing.

To the extent that the grievant argues that the agency did not consider seniority when reassigning the employees on his shift, and should have transferred more junior employees to the security posts, we cannot find that this contention supports a claim of discrimination. The agency admits that seniority was not a consideration in making decisions about which employees to reassign and indicates that the only factor considered when doing so was the nature of the job duties that were being performed by each employee at the time. While the consideration of seniority in carrying out reassignments of staff may be a better management practice, nevertheless, the failure to do so does not indicate discrimination. Nor does the grievant raise a policy provision which may have been violated by the failure to consider seniority and we are unaware of any mandate in law or policy requiring such.

Finally, the grievant also asserts that all of the employees reassigned by the agency, including himself, had "medical issues." Upon investigation of this matter, EDR can find no evidence that would raise a question as to whether the grievant's use of FMLA leave was casually related to his reassignment. We have likewise been unable to find, nor has the grievant specifically alleged, that discrimination has occurred on the basis of a disability as defined by the Americans with Disabilities Amendments Act.¹¹ Thus, the grievant's claim of discrimination does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.¹²



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¹¹ 42 U.S.C. §§ 12101 *et seq.* Cf. EDR Ruling No. 2011-2998.

¹² Va. Code § 2.2-1202.1(5).