Issue: Qualification – Retaliation (Fraud, Waste & Abuse); Ruling Date: May 6, 2013; Ruling No. 2013-3555; 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 Virginia Department of Juvenile Justice
Ruling Number 2013-3555
May 6, 2013

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) on whether her December 21, 2012 grievance with the Department of Juvenile Justice ("DJJ" or "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

The grievant is employed as a Culinary Arts/Fast Foods Instructor with DJJ.[1] Effective December 15, 2012, the Director of DJJ approved Standard Operating Procedure ("SOP") 104, Emergency Closings. This policy defines a "designated employee" as an employee whose position is designated as essential to agency operations during emergencies. The policy further mandates that

> "[a]ll [Juvenile Correctional Center] employees (e.g., security, educational, BSU, food services, medical, etc.) are designated employees and required to report to work during authorized closings except for the following positions:
>
> - Clerical staff
> - Business office staff
> - Human resources staff."

Thus, the grievant alleges that she became designated as an "essential" employee and required to report to work during emergency closings as a result of the implementation of this policy. . She subsequently challenged the policy by initiating a grievance on December 21, 2012. The grievance advanced through the management resolution steps and to the agency head for qualification. On February 25, 2013, the agency head denied qualification and the grievant now seeks a qualification determination from EDR.

[1] Effective July 1, 2012, the former Department of Correctional Education ("DCE") merged with the DJJ. The grievant had been an employee of DCE prior to the merger.

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, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[3] 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 applied.[4] In this case, the grievant has alleged retaliation for complaints made to agency management and to the Fraud, Waste, and Abuse hotline improperly influenced management's decision to implement SOP 104.[5]

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;[6] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity;[7] 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.[8] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[9]

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[2] *See Grievance Procedure Manual* § 4.1 (a), (b).

[3] *See* Va. Code § 2.2-3004(B).

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

[5] To the extent that the grievant alleges a misapplication of policy, we are unable to conclude that any policy violation has occurred under the facts presented. DHRM policy grants management broad authority in designating employees as essential with respect to a variety of situations. *See* Department of Human Resource Management Policy No. 1.35, *Emergency Closings*. Accordingly, EDR can find no violation of any mandatory policy provision.

[6] *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).

[7] 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).

[8] *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).

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

In this case, the grievant's voicing of concerns regarding the proposed change in policy could be a protected activity.[10] The grievant states that she contacted several different levels of management regarding her concern over the proposed changes that were ultimately put into place by SOP 104. Additionally, the Fraud, Waste, and Abuse hotline received multiple complaints about the issue, though the grievant admits she did not herself place such a call. 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 implementation of SOP 104 was an adverse employment action taken against the grievant, we cannot find that sufficient evidence exists to support the grievant's claim that retaliation improperly influenced management's decision to implement SOP 104. As support for her allegation of retaliation, the grievant provides an email from a member of management of the Division of Education that was apparently distributed to various facility principals. In relevant part, this email states "[b]ecause of the extensive number of phone calls to the DJJ Central Office, the hot line calls, and other variables from the field, DJJ made the decision" to implement SOP 104 applicable to all agency employees but clerical, business office, and human resources staff. However, the agency disputes the accuracy of this statement and categorically denies that retaliation influenced the decision to implement SOP 104. The agency asserts that it has a legitimate business need to maintain daily structure for its residents, including classroom instruction, even in the case of an emergency closing. The agency indicates that this decision was made by the agency's Director and executive team, which does not include the employee who wrote the email in question. EDR's investigation into this matter reveals nothing further that would indicate that retaliatory motives influenced this management decision, and we are unable to conclude that this single email raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation. Thus, the grievant's claim of retaliation does not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.[11]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[10] *See* Va. Code § 2.2-3004(A)(v) (stating that reporting allegations of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law is protected from retaliation); *see also* EDR Ruling No. 2003-179; EDR Ruling No. 2002-204.

[11] Va. Code § 2.2-1202.1(5).